No. 03-433

# In the Supreme Court of the United States

ALCAN ALUMINUM CORPORATION, PETITIONER

*v.*

UNITED STATES OF AMERICA AND
STATE OF NEW YORK

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*

THOMAS L. SANSONETTI
*Assistant Attorney General*

GREER S. GOLDMAN
LISA E. JONES
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Petitioner was found jointly and severally liable under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a), for the federal and state governments' unreimbursed costs in responding to the release of hazardous substances at two waste sites. The question presented is:

Whether the court of appeals properly affirmed the district court's finding that the harm caused by petitioner's waste oil emulsion was not divisible from the harm caused by other hazardous substances at the same sites.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-17a) is reported at 315 F.3d 179. The opinion of the district court (Pet. App. 18a-64a) is reported at 97 F. Supp. 2d 248.

### JURISDICTION

The judgment of the court of appeals was entered on January 7, 2003. The court of appeals denied a petition for rehearing on April 21, 2003. On June 12, 2003, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 18, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the United States to protect the public and the environment from the harm caused by the release or threat of release of hazardous substances and to recover the government's cleanup expenses from the parties responsible for the contamination. The United States brought a CERCLA action against petitioner Alcan Aluminum Corporation (Alcan) and 82 other responsible parties to recover the costs of responding to releases of hazardous substances at two waste disposal sites, the Pollution Abatement Services (PAS) site in Oswego, New York, and the Fulton Terminals (Fulton) site in Fulton, New York. The State of New York brought a parallel action against petitioner respecting the PAS site. All viable responsible parties other than petitioner reached settlements with the federal and state governments. The federal and state governments thereafter sought cost recovery from petitioner for the remaining unreimbursed costs.

In the case of the PAS site, the district court held petitioner jointly and severally liable for the governments' remaining response costs. *United States* v. *Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991). The court of appeals affirmed petitioner's liability as a responsible party under CERCLA, but vacated the imposition of joint and several liability and remanded the action to give petitioner an opportunity to prove that it contributed at most only to a divisible portion of the harm. *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (*Alcan (PAS)*). On remand, the district court consolidated the PAS action with the United States' cost recovery action for

the Fulton site and granted summary judgment in favor of the United States on the issue of petitioner's liability for response costs at that site. After a five-day bench trial, the district court concluded that petitioner failed to satisfy its burden of proof on divisibility and apportionment and held petitioner jointly and severally liable for approximately $13.6 million, which reflected those federal and state response costs not recovered from other responsible parties at the sites. Pet. App. 5a, 64a. The court of appeals affirmed. *Id.* at 17a.

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, as amended and expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); *Bestfoods*, 524 U.S. at 55-56 n.1.

CERCLA focuses on the release or threatened release of "hazardous substances" into the environment, 42 U.S.C. 9601(14). It defines "hazardous substance" to include "any element, compound, mixture, solution, or substances designated pursuant to" CERCLA Section 102, 42 U.S.C. 9602, or five other environmental statutes. "[W]hen a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability." *B.F. Goodrich* v. *Betoski*, 99 F.3d 505, 515 (2d

Cir. 1996) (quoting *B.F. Goodrich* v. *Murtha*, 958 F.2d 1192, 1201 (2d Cir. 1992)). Courts have consistently held that CERCLA's definition of hazardous substance does not include a "[q]uantity or concentration" requirement. *Alcan (PAS)*, 990 F.2d at 720; *B.F. Goodrich* v. *Murtha*, 958 F.2d at 1202; *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 261 (3d Cir. 1992) (*Alcan (Butler)*).[1]

CERCLA provides the President (acting primarily through the Environmental Protection Agency (EPA), see Exec. Order No. 12,580, 3 C.F.R. 193 (1987)), with alternatives for cleaning up hazardous substance sites. Under Section 104, EPA can itself undertake response actions, using the Hazardous Substance Superfund. See 42 U.S.C. 9604; see also *Bestfoods*, 524 U.S. at 55. Alternatively, under Section 106(a) EPA can seek, through an administrative order or a request for judicial relief, to compel the responsible parties to undertake response actions, which the government then monitors. See 42 U.S.C. 9606(a). Whichever route is followed, the United States may recover response costs it incurs from responsible parties through a cost recovery action under Section 107(a). 42 U.S.C. 9607(a).

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[1] See also *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989) (the "plain statutory language fails to impose any quantitative requirement"); *City of New York* v. *Exxon Corp.*, 744 F. Supp. 474, 483 (S.D.N.Y. 1990) (liability "attaches regardless of the concentration of the hazardous substances present in a defendant's waste so long as the defendant's waste and/or the contaminants in it are 'listed hazardous substances' "); *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 922, 927 (D.C. Cir. 1985); *United States* v. *Western Processing Co.*, 734 F. Supp. 930, 936 (W.D. Wash. 1990); *United States* v. *Conservation Chem. Co.*, 619 F. Supp. 162, 238 (W.D. Mo. 1985); *United States* v. *Wade*, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983).

CERCLA accordingly "places the ultimate responsibility for cleanup on those responsible for problems caused by the disposal of chemical poisons." *United States* v. *Aceto Agr. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (quoting *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (internal quotation marks omitted)). "The remedy that Congress felt it needed * * * is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Bestfoods*, 524 U.S. at 56 n.1 (quoting *Union Gas*, 491 U.S. at 21 (plurality opinion of Brennan, J.)).

Courts have consistently ruled that, once the United States has established the elements of CERCLA liability, the responsible party is strictly liable for the government's response costs and is jointly and severally liable for the entire harm if the harm from the release of hazardous substances is not divisible. *E.g.*, *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Co.*, 153 F.3d 344 (6th Cir. 1998); *Alcan (PAS)*, 990 F.2d at 721-722; *Alcan (Butler)*, 964 F.2d at 268-269; *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). In analyzing divisibility of harm, courts have followed common law principles, which provide that damages may be apportioned where: (1) "there are distinct harms," or (2) "there is a reasonable basis for determining the contribution of each cause to a single harm." *Alcan (Butler)*, 964 F.2d at 268. The burden of proving divisibility rests upon the responsible party and in-

volves an "intensely factual determination." *Alcan (PAS)*, 990 F.2d at 722.

2. The United States and the State of New York sued petitioner and 82 other responsible parties to recover federal and state response costs associated with the remediation of surface water, groundwater, and soils at the PAS site. The United States brought a parallel suit respecting contamination at the Fulton site. All of the financially solvent parties responsible for contamination at the sites, except petitioner, entered into settlements providing for remediation of conditions at the PAS and Fulton sites and reimbursement of the federal and state governments for most of their response costs. Petitioner, which had disposed of more than 4.6 million gallons of waste oil emulsion at the PAS site and approximately 70,000 gallons of the emulsion at the Fulton site, declined to settle on terms comparable to the other settling parties. Pet. App. 3a-4a.

In the case of the PAS site, the district court granted summary judgment in favor of the United States and New York, finding petitioner jointly and severally liable for their response costs. Pet. App. 4a; see *Alcan*, 755 F. Supp. 531 (N.D.N.Y. 1991). The court of appeals affirmed that judgment with respect to petitioner's liability as a responsible party under CERCLA. Pet. App. 4a, 7a; see *Alcan (PAS)*, 990 F.2d at 722. The court of appeals specifically rejected petitioner's argument that a polluter should not be held liable unless the concentration of hazardous substances exceeds some minimum threshold. *Id.* at 720-721. That court, however, vacated the district court's imposition of joint and several liability and remanded the action to give petitioner an opportunity to prove either "that its oil emulsion, when mixed with other hazardous [substances],

did not contribute to the release and clean-up costs that followed" or that it "contributed at most only to a divisible portion of the harm." Pet. App. 8a (quoting *Alcan (PAS)*, 990 F.2d at 722).

In reaching that disposition, the court of appeals recognized a "special exception" that would allow petitioner to escape liability for naturally-occurring substances if petitioner could prove that "its pollutants did not contribute more than background contamination and also cannot concentrate." Pet. App. 8a (quoting *Alcan (PAS)*, 990 F.2d at 722). In the event petitioner could not prove that it qualified for the special exception, the court of appeals ruled, petitioner could present "evidence relevant to establishing divisibility of harm," *ibid.*, including proof disclosing the relative "toxicity, migratory potential, and synergistic capacities of the hazardous substances at the site." *Id.* at 8a-9a (quoting *Alcan (PAS)*, 990 F.2d at 722). The court of appeals made clear that, because petitioner had been found liable as a responsible party under CERCLA, it bore "the ultimate burden of establishing a reasonable basis for apportioning liability," while the federal and state governments bore no burden on that "intensely factual" issue. *Id.* at 9a.

Following the consolidation of the PAS and Fulton actions, the district court granted summary judgment in favor of the United States on the issue of petitioner's liability for releases at the Fulton site, but denied summary judgment on the issue of divisibility of harm. Pet. App. 4a-6a. The district court then conducted a five-day bench trial to allow petitioner to prove that the harm from release of its waste oil emulsion mixture was divisible. *Id.* at 5a. Based on the resulting record, the district court entered findings of fact and conclusions of law holding petitioner jointly and severally liable for

the governments' response costs at the PAS and Fulton sites. *Id.* at 18a-64a.

In finding petitioner jointly and severally liable, the district court concluded that petitioner failed to satisfy its burden of proof on divisibility and apportionment. Pet. App. 61a, 64a. Petitioner presented only one fact witness, an Alcan employee, who was not qualified as an expert in any critical areas including concrete technology (which related to the presence of polychlorinated biphenyls (PCBs) in the emulsion), risk assessments, remedial measures taken at the sites, and whether petitioner's emulsion caused or contributed to the response costs or remedies at the PAS and Fulton sites or at other sites where petitioner disposed of its emulsion. C.A. App. 289, 329-330, 348-351, 358, 396-399, 404. Petitioner presented no evidence whatsoever with respect to certain factors found relevant by the court of appeals in its 1993 *Alcan (PAS)* decision—namely, relative toxicity, migratory potential, degree of migration, and synergistic capacities of the waste oil emulsion mixture. See Pet. App. 23a, 50a-51a, 52a-53a, 55a.

Although not required to do so, the federal and state governments presented affirmative scientific and factual evidence respecting the contamination of petitioner's waste oil emulsion mixture with PCBs and nickel. Pet. App. 35a-45a. They also presented evidence showing the migratory potential and synergistic capacities of the waste oil emulsion mixture. *Id.* at 48a-49a. The federal and state governments additionally presented evidence showing that petitioner's waste oil emulsion as a whole contributed to releases and response costs at the sites and was not divisible. *Id.* 48a-49a, 53a, 55a. The district court based its ruling on the extensive scientific evidence that the federal and

state governments presented at trial. See, *e.g.*, *id.* at 49a-56a.

With respect to PCBs, the district court's findings of fact describe petitioner's use of PCBs at its Oswego plant and resulting contamination of petitioner's plant and of its waste oil emulsion, and the scientific evidence linking the disposal of petitioner's waste oil emulsion at the PAS and Fulton sites with the PCB contamination at those sites. Pet. App. 36a-45a. Based on those findings, the district court concluded that PCBs contaminated the emulsion petitioner sent to PAS and Fulton and led to the incurrence of response costs at the sites. *Id.* at 45a. The court also found that it was more likely than not that petitioner's waste oil emulsion contained nickel. *Id.* at 35a-36a.

Based on the evidence at trial, the district court described the physical characteristics and interaction of petitioner's emulsion with other wastes at the sites. Pet. App. 48a-49a. The court concluded that, after disposal, petitioner's emulsion remained in a single emulsified phase that was able to dissolve larger concentrations of substances than either oil or water alone and, therefore, "increase[d] the migratory potential of hazardous substances more than either water or oil." *Id.* at 48a-49a. Petitioner did not present evidence to negate the governments' scientific proof that the emulsion had a mobilizing effect on other hazardous substances and thus contributed to the breadth of contamination at the sites. *Id.* at 52a-53a.

Applying the court of appeals' divisibility standard to the facts before it, the district court concluded that "Alcan did not satisfy its burden of proof on divisibility or provide this Court with a reasonable basis of apportionment of costs." Pet. App. 64a. The court accordingly held petitioner jointly and severally liable

for response costs at the PAS and Fulton sites. *Ibid.* Based upon post-trial submissions, the court entered judgment in favor of the United States in the amount of $12,201,929.30 and in favor of New York in the amount of $1,422,155.39, and also provided declaratory relief for future costs. See *id.* at 5a.

3. The court of appeals affirmed the district court's rulings on joint and several liability in their entirety, Pet App. 2a-17a, unanimously rejecting all of petitioner's numerous challenges to the district court's decision. Only two of the court of appeals' rulings are relevant to the petition for writ of certiorari.

First, the court of appeals held, based upon the district court's factual findings regarding the presence of PCBs in petitioner's waste oil emulsion, that petitioner did not qualify for the "special exception" from CERCLA liability that the court created in its *Alcan (PAS)* decision. Pet. App. 9a-10a. The court of appeals explained that its exception was expressly created "based on an awareness that some CERCLA hazardous substances, like metals, occur in the environment naturally" and that the exception was not intended to encompass man-made substances such as PCBs. *Id.* at 10a.

Second, the court of appeals held that petitioner failed to demonstrate that the harm at the PAS and Fulton sites was divisible, rejecting petitioner's analysis of its waste oil emulsion which focused individually on each constituent of the waste without regard to the effects of the emulsion as a whole. Pet. App. 10a-13a. The court correctly found that "Alcan does not claim that the harm caused by its emulsion was somehow distinct from the harm caused by other hazardous substances at the site, nor does the company make any real effort to identify the extent to which its

waste contributed to a single harm," and it also specifically rejected petitioner's contention that its waste emulsion was benign and just like homogenized milk. *Id.* at 11a. The court concluded:

> Because Alcan, which carried the burden of proof, did not comprehensively and persuasively address the effects of its waste emulsion at PAS and Fulton, it cannot be said that the company either established that the harm caused by its emulsion was distinct or proffered a reasonable basis for dividing the harm and apportioning liability. Stated another way, [Alcan] did not satisfy its substantial burden with respect to divisibility because it failed to address the totality of the impact of its waste at each of the sites; it ignored the likelihood that the cumulative impact of its waste emulsion exceeded the impact of the emulsion's constituents considered individually, and neglected to account for the emulsion's chemical and physical interaction with other hazardous substances already at the site.

*Id.* at 12a. The court also noted that its conclusion was consistent with *United States* v. *Alcan Aluminum Corp.*, 892 F. Supp. 648, 651 (M.D. Pa. 1995), aff'd, *Alcan (Butler)*, 96 F.3d 1434 (3d Cir. 1996), cert. denied, 521 U.S. 1103 (1997), which "similarly found Alcan jointly and severally liable for cleanup costs incurred at a site where waste emulsion from the company's Oswego, New York facility was discharged." Pet. App. 13a.

**ARGUMENT**

The court of appeals correctly concluded that petitioner is subject to joint and several liability for unreimbursed costs that the United States and New York

incurred in responding to the release and threatened release of hazardous substances from the PAS and Fulton sites. That court properly affirmed the district court's determination that petitioner's disposal of millions of gallons of industrial waste at those sites contributed to the release and threatened release of hazardous substances and that petitioner's contribution to the harm was not divisible. The court of appeals' affirmance of the district court's "intensely factual determination" (Pet. App. 9a) does not conflict with any decision of this Court or any other court of appeals.[2]

1. Petitioner claims (Pet. 6-11) that the court of appeals erred by failing to impose a quantity requirement upon CERCLA's definition of a "hazardous substances." See CERCLA § 101(14), 42 U.S.C. 9601(14). According to petitioner (Pet. 7) it is "illogical" to define "hazardous substances" to include products which contain trace amounts of potentially harmful substances. The courts of appeals, however, have consistently held that CERCLA's definition of "hazardous substance" imposes no minimum-quantity requirement. Petitioner's contention provides no basis for further review.

a. As a result of CERCLA's carefully formulated definition, the identification of a "hazardous substance" depends primarily on the characteristics, rather than the concentration, of the substance at issue. See, *e.g.*, *Alcan (PAS)*, 990 F.2d at 720-721; *Alcan (Butler)*, 964 F.2d at 261. The "plain statutory language fails to impose any quantitative requirement." *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989). Con-

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[2] The court denid a prior petition for writ of certiorari in which petitioner presented essentially the same issues in the factually similar *Alcan (Butler)* litigation. See *Alcan Aluminum Corp.* v. *United States*, cert. denied, 521 U.S. 1103 (1997) (No. 96-1494).

gress properly recognized that even dilute concentrations of a dangerous substance can pose serious threats to public health and the environment, and it therefore defined the term "hazardous substance" through terms that encompassed that possibility. The courts have correspondingly concluded, without exception, that CERCLA liability may arise from the improper disposal of wastes containing small amounts of hazardous substances. See *B.F. Goodrich*, 958 F.2d at 1202; *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 922, 927 (D.C. Cir. 1985); *City of New York* v. *Exxon Corp.*, 744 F. Supp. 474, 483 (S.D.N.Y. 1990); *United States* v. *Western Processing Co.*, 734 F. Supp. 930, 936 (W.D. Wash. 1990); *United States* v. *Conservation Chem. Co.*, 619 F. Supp. 162, 238 (W.D. Mo. 1985); *United States* v. *Wade*, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983).

Petitioner nevertheless asserts (Pet. 6-8) that the courts should create an extra-textual concentration requirement to avoid the possibility of "absurd" impositions of liability. Notwithstanding petitioner's speculation and unsubstantiated anecdotes, such as "a reported threat to prosecute Girl Scouts for disposing of trash that included pizza boxes" (Pet. 6), this case presents no occasion for addressing that question. Petitioner cannot plausibly contend that the federal and state governments' response to the release or threatened release of hazardous substances *in this case* was unjustified. As the court below correctly recognized, the issue here, instead, is whether petitioner's contribution to *that* harm was divisible, and both courts below concluded, as a matter of fact, it was not. That "intensely factual determination" does not warrant further review.[3]

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[3] Significantly, Congress has been attentive to the theoretical breadth of CERCLA liability and has periodically amended

b. Petitioner additionally argues (Pet. 8-9) that the court of appeals erred in interpreting the "special exception" it created in the 1993 *Alcan (PAS)* decision, which permits a polluter to avoid liability altogether if it can prove that "its pollutants did not contribute more than background contamination and also cannot concentrate." 990 F.2d at 722. The court of appeals, which created the "special exception," affirmed the district court's application of its principle to the facts of this case. The court's affirmance of the district court's application of a narrow legal principle to particular facts plainly provides no basis for this Court's review. See Sup. Ct. R. 10.

Petitioner asserts (Pet. 8-9) that the court of appeals erred in refusing to extend its special exception for

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CERCLA to limit its application to situations that could conceivably reach more broadly than Congress intended. For example, in January 2002, Congress enacted carefully tailored revisions to CERCLA's liability provisions, including the de micromis provision, CERCLA § 107(*o*), which exempts from liability at National Priority List (NPL) sites those persons who sent less than 110 gallons of liquid materials or less than 200 pounds of solid materials to the site; the municipal solid waste (MSW) provision, CERCLA § 107(p), which exempts certain categories of persons from liability at NPL sites for disposing of MSW; CERCLA § 107(q), which provides a defense to liability for certain owners of property located contiguous to, and contaminated by, hazardous waste sites; and CERCLA § 107(r), which provides a defense to liability for bona fide prospective purchasers of contaminated property. Pub. L. No. 107-118, §§ 102(a), 221, 222(b), 115 Stat. 2356-2357, 2368, 2371-2372 (to be codified at 42 U.S.C. 9607(*o*)-(r)). In addition, those who do not qualify for the de micromis exemption, but who sent a relatively small amount of hazardous substances to a site, may enter into a de minimis settlement, under which they make a limited cash payment to EPA in exchange for an immediate release from past and future liability at the site. CERCLA § 122(g), 42 U.S.C. 9622(g).

naturally occurring hazardous substances to manmade pollutants, such as highly toxic PCBs. Petitioner argues that the exception should apply to manmade chemicals because they are also present, in small amounts, throughout the environment. The court refused to so hold, stating that "[w]e created this exception based on an awareness that some CERCLA hazardous substances, like metals, occur in the environment *naturally*." Pet. App. 10a (emphasis added).[4]

Petitioner's argument, in any event, is without factual foundation. Petitioner presented no evidence at trial on the pre-disposal background levels of PCBs at

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[4] Petitioner mistakenly suggests (Pet. 9) that an EPA internal guidance document on remediation supports extension of the court's extra-textual "special exception." See Office of Solid Waste and Emergency Response, EPA, *Role of Background in the CERCLA Cleanup Program*, OSWER 9285.6-07P (Apr. 26, 2002). The EPA document acknowledges that manmade pollutants may exist in trace amounts in soil or rainwater and indicates that EPA does not normally require cleanup for below-background levels of potentially harmful substances, even manmade ones. *Id.* at 7. The document, however, does not address the scope of CERCLA liability. It merely indicates, in the context of addressing remediation and risk assessment of hazardous sites, that EPA generally takes into account any background constituents (both natural and anthropogenic substances–*i.e.*, those which are present as a result of human activity but not specifically related to the CERCLA release in question) and may, where conditions warrant, clean up background constituents in the context of responding to a release or threatened release of hazardous substances. Petitioner's citation (Pet. 9) to a Food and Drug Administration (FDA) regulation (21 C.F.R. 109.30(a)) that establishes temporary tolerances for PCB residues in foods and characterizes PCBs as "a persistent and ubiquitous contaminant" also sheds no light here. The FDA regulation does not purport to establish permissible "background" levels of PCBs for purposes of CERCLA response actions.

the PAS or Fulton sites or in the general geographic vicinity of the sites, and petitioner failed to present any proof that the levels of PCBs in its waste emulsion fell below any alleged "background" levels for PCBs in the area. By contrast, the federal and state governments presented evidence, based on tests done by Alcan's own contractors when remediating the PCB contamination at Alcan's Oswego plant, that the concrete at Alcan's plant contained levels of PCBs from 1200 parts per million to 64,000 parts per million and that the PCB-contaminated concrete, in turn, contaminated the oil emulsion. See Pet. App. 38a-39a; C.A. App. 225-226, 228 (Stipulations ¶¶ 20-38, ¶ 61). The district court correspondingly found that "the government proved, by a preponderance of the evidence, that PCBs contaminated the emulsion Alcan sent to PAS and Fulton." Pet. App. 45a.[5]

c. Petitioner mistakenly argues (Pet. 9-10) that the court of appeals' decision is in tension with the First Circuit's decision in *Massachusetts* v. *Blackstone Valley Electric Co.*, 67 F.3d 981 (1995), and the Fifth Circuit's decision in *Licciardi* v. *Murphy Oil U.S.A., Inc.*, 111 F.3d 396 (1997). Those decisions, however, are plainly inapposite to the issue presented here.

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[5] Furthermore, because petitioner presented no proof that the PCBs or nickel in its emulsion could not concentrate (through, for example, evaporation of water), petitioner could not, in any event, qualify for the court of appeals' "special exception." See 990 F.2d at 722 (holding that petitioner can escape liability "where its pollutants did not contribute more than background contamination *and* also cannot concentrate") (emphasis added); see also C.A. App. 191-192 n.5 (denying petitioner's motion under Rule 60(b) of the Federal Rules of Civil Procedure and explaining that "[t]he burden was on Alcan to prove that the metals in its emulsion could not concentrate and Alcan did not satisfy this burden").

In *Blackstone*, the First Circuit ruled that a particular substance—ferric ferrocyanide—is not a "hazardous substance" because it does not meet CERCLA's specific statutory definition of a hazardous substance. See CERCLA § 101(14), 42 U.S.C. 9601(14). The court ruled that it was not sufficient that the substance falls within a general category of "cyanides" listed under the Clean Water Act; rather, the court ruled, the substance must be more specifically identified in one of the lists of hazardous substances that Section 101(14) of CERCLA incorporates by reference. 67 F.3d at 984-985. Because each of the substances at issue in this case undeniably qualifies as a hazardous substance under CERCLA, the First Circuit's decision is irrelevant.

In *Licciardi*, the Fifth Circuit addressed whether a private party presented sufficient evidence to prove that the incurrence of response costs was actually caused by the release of hazardous substances. 111 F.3d at 398-399. That court reversed a district court's finding of CERCLA liability because the party presented "no evidence that the found 'release' justified the response costs." *Id.* at 399. By contrast, there is no question in this case that the federal and state governments incurred response costs at the PAS and Fulton sites on account of the release and threatened release of hazardous substances that included petitioner's contaminated waste oil emulsion. See Pet. App. 6a-7a. Contrary to petitioner's suggestion (Pet. 10), the Fifth Circuit did not hold that a company could not be liable under CERCLA for disposing of de minimis amounts of hazardous substances. *Licciardi* has no bearing here.

2. Petitioner challenges (Pet. 11-15) the court of appeals' divisibility ruling, but it does not contend that the court of appeals' standard conflicts with any decision of this Court or another court of appeals. Rather,

petitioner primarily contends (Pet. 12-13) that the court of appeals erred in ruling that, to prove divisibility, petitioner could not meet its burden by focusing individually on each constituent of the waste in isolation without analyzing the impact of the waste oil emulsion mixture as a whole.

a. The court of appeals correctly recognized that petitioner "failed to address the totality of the impact of its waste at each of the sites; it ignored the likelihood that the cumulative impact of its waste emulsion exceeded the impact of the emulsion's constituents considered individually, and neglected to account for the emulsion's chemical and physical interaction with other hazardous substances already at the site." Pet. App. 12a. Petitioner's fact-specific challenge to the court of appeals' conclusion that petitioner failed to meet its burden of proof plainly does not present an issue of general importance warranting review by this Court. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (This Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

The court of appeals' decision is consistent with the only other decision to address this issue, which squarely rejected petitioner's identical arguments regarding the disposal of the same waste oil emulsion at the Butler Tunnel site in Pennsylvania. See Pet. App. 13a. The district court in *Alcan (Butler)* rejected petitioner's attempts to "dissect its waste material into components regulated by CERCLA and those not regulated by CERCLA," and it expressly held that, to prove divisibility, "the focus of any effort must be on the emulsion itself, and not on the constituents of that emulsion." 892 F. Supp. at 654-655 & n.11.

b. Even if petitioner were correct in insisting that analyzing constituents of its waste oil emulsion, rather than its emulsion as a whole, may suffice to prove divisibility, petitioner has not accurately characterized the evidence it presented at trial. Petitioner asserts (Pet. 12) that the court of appeals ignored its "evidence as to the relative amount of pollutants contained in Alcan's waste emulsion." Specifically, petitioner contends that it presented "uncontested evidence" showing that any PCBs in its waste oil emulsion "constituted no more than 0.01% of all of the known PCBs sent to the PAS site, and that those known PCBs in turn, constituted only 0.24% of all the waste at the site." Pet. 12 (citing C.A. App. 1196). Neither the court of appeals nor the district court could have credited such an assertion, because petitioner did not introduce any evidence substantiating that claim. See Pet. App. 52a ("neither the parties nor the Court know exactly what was disposed of at either PAS or Fulton or what was in Alcan's emulsion").[6]

c. Petitioner also mistakenly faults the court of appeals (Pet. 13-14) for imposing joint and several liability based upon the mobilizing effect of the waste

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[6] Petitioner's citation to C.A. App. 1196 refers to a pie chart purporting to show "alleged quantity of PCBs in Alcan waste vs. known quantities of PCBs sent to PAS." Petitioner's sole witness at trial, however, presented no relevant testimony or other direct evidence establishing the quantities of PCBs sent to the PAS site from other sources or the concentrations of these PCBs or otherwise substantiating the conclusions contained in the pie chart. Thus, contrary to its suggestion, petitioner presented no evidence regarding any quantities of PCBs disposed of at the PAS site, whether by petitioner or other sources. Petitioner's wholly unsupported and unexplained pie chart plainly does not provide a "more than sufficient basis on which to apportion liability" (Pet. 12).

oil emulsion as a whole. Petitioner essentially contends that the court should not have attributed any mobilizing effects to the waste oil emulsion because, in its view, only the water and oil components of the emulsion were responsible for spreading other hazardous substances present at the site. Petitioner overlooks the fact that it did not send a pure oil-water emulsion to the PAS and Fulton sites; rather, it sent a mixed industrial waste stream, consisting of water, oil, PCBs and other hazardous substances that, in itself, qualified as a hazardous substance. The court of appeals properly considered the characteristics of the mixed industrial waste stream the petitioner actually sent to the PAS and Fulton sites in affirming (Pet. App. 12a-13a) the district court's findings that the waste product "increased the migratory potential of hazardous substances at PAS and Fulton," "absorbed the contaminants at the sites and facilitated their transport," and "contributed to the breadth of contamination at both PAS and Fulton" (*id.* at 53a).

d. Petitioner challenges the lower court's assessment of the migratory potential of its waste product, but petitioner presented no affirmative evidence at trial to rebut the government showing that the waste oil emulsion interacted with other wastes at the sites and increased the migratory potential of other hazardous substances. Rather, petitioner argued at trial that rainfall caused migration of the wastes at the PAS site, and the only evidence petitioner presented on migration of its emulsion when mixed with other substances was testimony regarding the average rainfall in the Oswego area. Refuting that theory, the federal and state governments presented expert testimony establishing that petitioner's waste oil emulsion would dissolve and mobilize other hazardous substances and

facilitate the transport of those contaminants throughout the PAS and Fulton sites. The district court credited that testimony and the court of appeals properly affirmed the district court's factual findings. See Pet. App. 12a, 52a-53a.

e. Petitioner suggests (Pet. 14) that the court of appeals' decision unfairly holds petitioner "*entirely*" liable for the cleanup costs for two sites and all of the PCBs, while the settling defendants were permitted to pay a "disproportionately low share." That suggestion is inaccurate. Petitioner concedes that it disposed of 4.6 million gallons of its waste oil emulsion at the PAS site, which constitutes approximately 25 percent of the total volume of waste material sent to that location. C.A. App. 494. The federal and state governments recovered approximately 75 percent of the response costs from responsible parties that, unlike petitioner, agreed to a settlement of the dispute. See 990 F.2d at 717. The federal and state governments sought recovery of only their remaining unreimbursed costs, and the amount they sought from petitioner corresponds to petitioner's volumetric contribution. The federal and state governments have also sought interest on unreimbursed remediation costs and enforcement costs that have accrued, as a consequence of this litigation, since 1987. In short, petitioner has been assessed a fair share of the response costs at the PAS and Fulton sites.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

THOMAS L. SANSONETTI
*Assistant Attorney General*

GREER S. GOLDMAN
LISA E. JONES
*Attorneys*

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