No. 05-1323

In the Supreme Court of the United States

UGI UTILITIES, INC., PETITIONER

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a).

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Like the government's petition for a writ of certiorari in *United States* v. *Atlantic Research Corp.*, No. 06-562 (filed Oct. 24, 2006), and the petition in *E.I. du Pont de Nemours & Co.* v. *United States*, No. 06-726 (filed Nov. 21, 2006) (*DuPont*), the petition in this case presents the principal question left open by the Court two Terms ago in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004): Whether a party that is potentially responsible for the cleanup of property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but is not eligible to

bring an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may nevertheless bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a). In this case, the court of appeals erroneously held that a potentially responsible party could bring such an action under Section 107(a). Because this case would constitute a less suitable vehicle than *Atlantic Research* or *DuPont* for resolution of that question, however, the petition for a writ of certiorari should be held pending the Court's disposition of those cases.

1. The relevant statutory provisions are discussed in greater detail in the government's petition in *Atlantic Research*. Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). As amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, CERCLA provides the President, acting primarily through the Environmental Protection Agency (EPA), with several alternative means for cleaning up contaminated property. Most important for present purposes, Section 106(a) permits EPA to compel, by means of an administrative order or a request for judicial relief, other persons to undertake response actions, which EPA then monitors. See 42 U.S.C. 9606(a). Section 107(a) imposes liability for cleanup costs on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs)—associated with the release or threatened release of hazardous substances. See 42 U.S.C. 9607(a). Unless they can invoke a statutory defense or exclusion, persons who qualify as PRPs are liable for, *inter alia*, "all costs of removal or

remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(A), and "any other necessary costs of response incurred by any other person consistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(B).

Before CERCLA was amended by SARA in 1986, lower courts disagreed as to whether one PRP could bring an action against another PRP for contribution or cost recovery, and, if so, the source of authority for such an action. See 06-562 Pet. at 4 (citing cases). With the enactment of SARA, however, Congress added Section 113(f), which provides PRPs with an express cause of action against other PRPs in two specific circumstances. First, Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. 9613(f)(1). Second, Section 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement." 42 U.S.C. 9613(f)(3)(B).

In *Cooper Industries*, *supra*, this Court held that, in order to pursue an action for contribution against another PRP under Section 113(f)(1), a PRP must itself have been sued under either Section 106 or Section 107(a). See 543 U.S. at 165-168. The Court expressly left open the principal question presented here —namely, whether a PRP could bring an action against another PRP for cost recovery under Section 107(a), see *id.* at 168-170—but it noted that "numerous decisions of

the Courts of Appeals" had held that an action for cost recovery under Section 107(a), on a theory of joint and several liability, was unavailable, *id.* at 169.

2. In 2001, respondent filed suit against petitioner in the United States District Court for the Southern District of New York. As is relevant here, respondent brought a claim under Section 113(f) of CERCLA, seeking to recover costs that respondent incurred (or expected to incur) in cleaning up contamination from manufactured gas plants at ten sites it owned in Westchester County, New York. Respondent contended that petitioner was a potentially responsible party because it (or its corporate predecessor) operated the gas plants between 1887 and 1904. Pet. App. 2a-3a, 25a-26a; First Amended Compl. ¶¶ 23-33, at 5-6.

The district court granted petitioner's motion for summary judgment. Pet. App. 30a-57a, 93a-95a. With regard to three of the sites (the Yonkers sites), which petitioner had leased from respondent, the district court held, in an oral ruling, that any liability petitioner had as a PRP was discharged by the terms of releases provided by respondent when petitioner terminated its leases. *Id.* at 95a. With regard to the remaining seven sites (the non-Yonkers sites), the district court subsequently held, in a written opinion, that respondent had presented insufficient evidence to create a disputed issue of fact as to whether petitioner (or its corporate predecessor) was an "operator" of the relevant plants for purposes of CERCLA. *Id.* at 44a-57a.

3. Respondent appealed, challenging both of those holdings. After briefing was complete, this Court held in *Cooper Industries* that, in order to pursue an action for contribution against another PRP under Section 113(f)(1), a PRP must itself be sued under Section 106

or Section 107(a). The court of appeals ordered the parties to submit supplemental briefs addressing the impact of *Cooper Industries*. In its supplemental brief, respondent conceded that *Cooper Industries* foreclosed it from bringing suit against petitioner for contribution under Section 113(f)(1), see Resp. C.A. Supp. Br. 1-4, but instead argued that, because it had entered into a "Voluntary Cleanup Agreement" with the New York State Department of Environmental Conservation (NYSDEC) with regard to the sites at issue, it could bring suit under Section 113(f)(3)(B), see *id.* at 4-6.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-23a, 24a-29a.

a. In its principal opinion, the court of appeals held that respondent had a cause of action against petitioner under CERCLA. Pet. App. 1a-23a. The court first rejected respondent's contention that it could bring suit under Section 113(f)(3)(B). *Id.* at 7a-10a. It reasoned that Section 113(f)(3)(B) "create[d] a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved." *Id.* at 7a. The court determined that the agreement with NYSDEC at most resolved respondent's liability for claims based on state law, not claims under CERCLA. *Id.* at 9a. The court acknowledged that the agreement "refer[red] to CERCLA"—specifically, by providing that NYSDEC "shall not take any enforcement action * * * under CERCLA * * * with respect to the Existing Contamination, to the extent that such contamination is being addressed by the Agreement." *Id.* at 9a-10a. But the court concluded that "this language cannot be construed to have resolved [respondent's CERCLA] liability." *Id.* at 10a. The court reasoned that the quoted language was applicable only as

long as respondent's cleanup efforts were still ongoing, *ibid.*, and that other language in the agreement left open the possibility that NYSDEC could take action against respondent under CERCLA, *ibid.*

The court of appeals, however, proceeded to hold *sua sponte* that respondent could bring suit under Section 107(a)—notwithstanding the fact that respondent had not asserted that it could sue under Section 107(a) and indeed had "appear[ed] willing to accept * * * that section 107(a) may never provide a right of action for a [PRP]." Pet. App. 13a. The court recognized that it, like other courts of appeals, had previously held that a PRP could not bring an action against another PRP for cost recovery under Section 107(a), but was instead limited to an action for contribution under Section 113(f). *Id.* at 12a-13a (citing *Bedford Affiliates* v. *Sills*, 156 F.3d 416 (2d Cir. 1998)). But the court distinguished its earlier decision on the factual grounds that (1) the plaintiff PRP "ha[d] incurred * * * expenditures under a consent order with a government agency" and (2) the plaintiff PRP "ha[d] been found partially liable under section 113(f)(1)." *Id.* at 19a.

The court of appeals ultimately concluded that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily." Pet. App. 16a-17a. According to the court, "determining whether [such] a party * * * may sue under section 107(a) is easily resolved based on that section's plain language." *Id.* at 14a. The court reasoned that, under Section 107(a), "[t]he only questions we must answer are whether [the PRP] is a 'person' and whether it has incurred 'costs of response.'" *Id.* at 15a. "Unlike

some other courts," the court continued, "we find no basis for reading into [Section 107(a)] a distinction between so-called 'innocent' parties and [PRPs]." *Ibid.* The court stated that "Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing." *Ibid.* The court added that, in its view, a contrary reading of Section 107(a) would "impermissibly discourag[e] voluntary cleanup." *Id.* at 16a. According to the court, "[t]his would undercut one of CERCLA's main goals." *Ibid.*

b. In an accompanying unpublished order, the court of appeals then held that the district court had partially erred by granting petitioner's motion for summary judgment. Pet. App. 24a-29a. With regard to the non-Yonkers sites, the court of appeals agreed with the district court that respondent had "pointed to no evidence that would allow a reasonable jury to conclude that [petitioner] 'manage[d], direct[ed], or conduct[ed] operations specifically related to pollution'" at any of those sites. *Id.* at 28a (quoting *Bestfoods*, 524 U.S. at 66). With regard to the Yonkers sites, however, the court of appeals rejected the district court's conclusion that the relevant language in the releases provided by respondent to petitioner "was an explicit, unequivocal statement releasing *all* liability, or *contingent* liability, or *environmental* liability." *Id.* at 29a. For that reason, the court of appeals concluded, summary judgment was improper. *Ibid.*

DISCUSSION

In the wake of this Court's decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), there is a clear conflict among the courts of appeals on the principal question left open in that case: *i.e.*, whether a potentially responsible party can pursue an action against another PRP under Section 107(a). The government has filed a petition for a writ of certiorari in *United States* v. *Atlantic Research Corp.*, No. 06-562 (filed Oct. 24, 2006), and is filing, contemporaneously with this brief, a brief in response to the petition in *E.I. du Pont de Nemours and Co.* v. *United States*, No. 06-726 (filed Nov. 21, 2006); in both cases, the government has asked the Court to grant review to address that issue and resolve the circuit conflict. Although the court of appeals here incorrectly held that a PRP could bring suit against another PRP under Section 107(a), this case would constitute a less suitable vehicle than either *Atlantic Research* or *DuPont* for resolution of the circuit conflict. The petition for a writ of certiorari should therefore be held pending the Court's disposition of those cases.

1. As the government explained in its petition in *Atlantic Research* (at 9-14), the decision of the court of appeals in this case, while consistent with the decision of the Eighth Circuit in *Atlantic Research*, 459 F.3d 827 (2006), is in direct conflict with the decision of the Third Circuit in *DuPont*, 460 F.3d 515 (2006). In *Atlantic Research*, the Eighth Circuit, relying on the decision of the court of appeals in this case, held that Section 107(a) provides a PRP with an express right of cost recovery against another PRP. 459 F.3d at 834-835. Unlike the court of appeals in this case, the Eighth Circuit also

held, in the alternative, that "a right to contribution may be fairly implied from the text of [Section 107(a)]." *Id.* at 835. On the other hand, in *DuPont*, the Third Circuit held both that "a PRP seeking to offset its cleanup costs must invoke contribution under § 113" and that "no implied cause of action for contribution for PRPs—under either § 107 or the common law—survived the passage of § 113." 460 F.3d at 528-529. The decision of the court of appeals in this case not only conflicts with *DuPont*, but also is inconsistent with numerous pre-*Cooper Industries* decisions from other courts of appeals, which held that one PRP could not bring an action against another under Section 107(a) in various circumstances in which the plaintiff PRP could not avail itself of Section 113(f). See 06-562 Pet. at 5 n.2 (citing cases).

2. For the reasons discussed in greater detail in the *Atlantic Research* petition (at 15-23), the court of appeals in this case erred by holding that one PRP could bring an action against another under Section 107(a). The relevant language in that section provides that PRPs shall be liable for "any other necessary costs of response incurred *by any other person* consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B) (emphasis added). The most natural reading of the phrase "any *other* person" is that it excludes the persons who are the subject of the sentence: *i.e.*, PRPs.

Even assuming, moreover, that Section 107(a), standing on its own, could be construed to confer on a PRP a cause of action against another PRP for cost recovery, that provision must be read in light of Section 113(f), which provides a PRP with an express cause of action against another PRP in two enumerated circumstances. See CERCLA § 113(f)(1) and (3)(B), 42 U.S.C.

9613(f)(1) and (3)(B). The better view is that the subsequently enacted Section 113(f) specifies the exclusive circumstances in which one PRP may bring suit against another under CERCLA. Allowing a PRP to bring suit under Section 107(a) would render Section 113(f) effectively superfluous and undermine CERCLA's settlement scheme, because a PRP that has not yet been sued under Section 106 or Section 107(a) might refuse to settle with the government in order to preserve its right to sue under Section 107(a) (and thereby take advantage of the substantially more generous provisions applicable to such an action).

3. Although the court of appeals in this case incorrectly held that one PRP could bring an action against another under Section 107(a), this case would constitute a less suitable vehicle than either *Atlantic Research* or *DuPont* for resolution of the circuit conflict on that question. Before holding *sua sponte* that respondent was entitled to bring suit against petitioner under Section 107(a), the court of appeals held that respondent was *not* entitled to bring suit against petitioner under Section 113(f)(3)(B), on the ground that respondent had not settled its liability for CERCLA claims in its "Voluntary Cleanup Agreement" with the New York State Department of Environmental Conservation (and therefore had not "resolved its liability to * * * a State for some or all of a response action * * * in an administrative * * * settlement" for purposes of Section 113(f)(3)(B)). Pet. App. 7a-10a.

Although respondent has not argued in its brief in opposition that it could bring suit against petitioner under Section 113(f)(3)(B)—the sole argument that respondent actually advanced before the court of appeals—it may nevertheless argue, in the event that cer-

tiorari is granted, that the availability of an action under Section 113(f)(3)(B) effectively constitutes an alternative ground for affirmance of the court of appeals' decision. And even if respondent does not advance that argument in its brief on the merits, this Court may well conclude that the question whether respondent was entitled to bring suit against petitioner under Section 113(f)(3)(B) is a "predicate to an intelligent resolution" of the question on which there is a circuit conflict: *i.e.*, whether a PRP that does *not* satisfy the requirements for bringing an action for contribution under Section 113(f) may bring an action against another PRP under Section 107(a). See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 397 n.12 (1999); *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); cf. *United States* v. *Resendiz-Ponce*, 127 S. Ct. 433 (2006) (ordering supplemental briefing on question whether the indictment in that case was constitutionally valid, after Court initially granted review to decide whether the unconstitutional omission of an element from the indictment was structural error).[*]

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[*] Both of the courts of appeals that have held that a PRP could sue another PRP under Section 107(a) have seemingly suggested that a Section 107(a) action would be unavailable where the plaintiff PRP was eligible to bring an action for contribution under Section 113(f). See *Atlantic Research*, 459 F.3d at 836-837 (stating that "liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality"); Pet. App. 14a (stating that "[e]ach of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances"); but see *Schaefer* v. *Town of Victor*, 457 F.3d 188, 202 n.19 (2d Cir. 2006) (refusing to decide whether the plaintiff PRP could bring a claim under Section 113(f)(3)(B), and avail itself of the different limitations period applicable to such a claim, on the ground that the plaintiff PRP could bring a claim under Section 107(a)). Neither court offered any textual justification for that ap-

It is not clear, moreover, whether the court of appeals correctly held that respondent was not entitled to bring suit against petitioner under Section 113(f)(3)(B). In order to address that issue fully, the Court would potentially need to consider not only the case-specific question whether the agreement at issue actually settled respondent's liability for purposes of CERCLA, compare Pet. App. 9a-10a (determining that it did not), with Resp. C.A. Supp. Br. 4-6 (contending that it did), but also various legal questions concerning what constitutes a valid administrative settlement under Section 113(f)(3)(B). Compare, *e.g.*, *Seneca Meadows, Inc.* v. *ECI Liquidating, Inc.*, 427 F. Supp. 2d 279, 286-287 (W.D.N.Y. 2006) (holding that a settlement with a State would qualify as a Section 113(f)(3)(B) settlement where the settlement expressly resolved the PRP's liability for purposes of CERCLA, rejecting the defendant's contention that a "delegation" of CERCLA authority to the State was required), with *ASARCO, Inc.* v. *Union Pacific R.R.*, No. CV 04-2144-PHX-SRB, 2006 WL 173662, at *6 (D. Ariz. Jan. 24, 2006) (holding that a settlement with a State would not qualify as a Section 113(f)(3)(B) settlement where the settlement failed expressly to resolve the PRP's liability for claims under CERCLA, unless the State had EPA authorization and the settlement otherwise met the standards set forth in Section 122 of CERCLA, 42 U.S.C. 9622, for a settlement with EPA). Because those legal questions have not been addressed by any other court of appeals, they would not otherwise warrant this Court's review.

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parent view, however, nor did either court explain why Congress would have wanted to provide greater remedies to non-settling PRPs than to those who had discharged their liability to the United States or a State.

This case may also constitute a less suitable vehicle than *Atlantic Research* or *DuPont* on the ground that, unlike those cases, it does not present the subsidiary question of whether one PRP could bring an action against another on the theory that Section 107(a) contains an implied right to contribution. The court of appeals in this case held only that Section 107(a) *expressly* authorized one PRP to sue another. See, *e.g.*, Pet. App. 14a (stating that "determining whether [a PRP] * * * may sue under section 107(a) is easily resolved based on that section's plain language"). Although respondent could attempt to raise that argument as an alternative basis for affirmance, that argument was neither pressed in nor passed upon by the court of appeals, and accordingly has been waived. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7-8 (1993); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991). In *Atlantic Research* and *DuPont*, by contrast, that argument is squarely presented.

In any event, because this Court currently has before it two other cases in which it is clear that the principal question concerning the appropriate construction of Section 107(a) is cleanly presented (and was actually briefed before the respective courts of appeals), it is unnecessary for this Court to grant review in this case in lieu of, or in addition to, those cases. Instead, the better course would be to grant review in either or both of those cases and to hold the petition in this case pending their disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petitions in *United States* v. *Atlantic Research Corp.*, No. 06-562, and *E.I. du Pont de Nemours & Co.* v. *United States*, No. 06-726, and then disposed of accordingly.

Respectfully submitted.

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