No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated with 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 for cost recovery under Section 107(a), 42 U.S.C. 9607(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 459 F.3d 827. The order and opinion of the district court (Pet. App. 20a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2006. The petition for a writ of certiorari was filed on October 24, 2006, and granted on January 19, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Sections 101, 106, 107, and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, 9606, 9607, and 9613, are set forth in an appendix to this brief.

STATEMENT

The question presented in this case is 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 for cost recovery under Section 107(a), 42 U.S.C. 9607(a). Respondent sued the United States in the United States District Court for the District of Arkansas, seeking to recover expenses that respondent had incurred in cleaning up property that it had leased and used for retrofitting rocket motors under contract with the government. The district court dismissed respondent's claim under Section 107(a), ruling that respondent, as a potentially responsible party, was not entitled to bring suit under that provision. Pet. App. 20a-28a. The court of appeals reversed. *Id.* at 1a-19a.

A. The CERCLA Liability Scheme

1. 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). The "two goals" of CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, are "to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened" and "to hold responsible parties liable for the costs of these clean-ups." H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 15 (1985).

CERCLA "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). The President has delegated most of his authority under CERCLA to the Environmental Protection Agency (EPA). See Exec. Order No. 12,580, 3 C.F.R. 193 (1988). CERCLA provides EPA with two primary mechanisms for cleaning up contaminated property. First, Section 104 of CERCLA authorizes EPA to undertake a "response action" (*i.e.*, a "removal action" or a "remedial action"), using monies from the Hazardous Substances Superfund. See 42 U.S.C. 9604; *Bestfoods*, 524 U.S. at 55. Second, Section 106 of CERCLA authorizes EPA to compel, by means of an administrative order or a request for judicial relief, a private party to undertake a response action, which EPA then monitors. 42 U.S.C. 9606.[1]

2. This case concerns Section 107(a) of CERCLA, which imposes liability for response costs on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs). 42 U.S.C. 9607(a). PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons who arranged for disposal or treatment of hazardous

[1] Section 122(a), added to CERCLA by SARA, authorizes EPA to enter into an agreement with a private party to perform a response action if EPA "determines that such action will be done properly by such person." 42 U.S.C. 9622(a). Section 122(d), also added by SARA, provides that, when EPA enters into an agreement with a private party with respect to remedial action under Section 106, the agreement ordinarily shall be entered in the appropriate United States district court as a consent decree. 42 U.S.C. 9622(d); see 42 U.S.C. 9622(g) and (h).

substances; and (4) certain transporters of hazardous substances. See 42 U.S.C. 9607(a)(1)-(4). Congress has defined the pertinent statutory terms to reach a wide range of entities. See CERCLA § 101(9), (14), (20)-(22), (26) and (29), 42 U.S.C. 9601(9), (14), (20)-(22), (26) and (29); see also *Bestfoods*, 524 U.S. at 56 n.1 (noting that "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup") (quoting *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion)).

Under Section 107(a)(1)-(4)(A), persons who qualify as PRPs are liable for "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).[2] Since the enactment of CERCLA, courts have consistently held that this language authorizes the enumerated governmental entities to bring suit against PRPs to recover their response costs, and to proceed on a theory of joint and several liability (except to the extent that PRPs can show that the alleged harm is divisible). See, *e.g.*, *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997).[3]

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[2] The national contingency plan consists of regulations prescribing the procedure for conducting cleanups under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300.

[3] At a substantial number of contaminated sites, States have primary responsibility for cleanup or monitoring. States may seek to recover their costs through actions under Section 107(a)(1)-(4)(A), and may also undertake cleanups and seek to recover their costs under any applicable state law. See, *e.g.*, Tex. Health & Safety Code Ann. §§ 361.181 *et seq.* (Vernon 2001 & Supp. 2006).

Under Section 107(a)(1)-(4)(B), persons who qualify as PRPs are also liable for "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). In the immediate aftermath of CERCLA's enactment, lower courts disagreed on whether one PRP could bring suit against another PRP, what types of costs a PRP could recover in such an action, and whether Section 107(a)(1)-(4)(B) constituted the source of such a cause of action. Compare, *e.g.*, *City of Philadelphia* v. *Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-1143 (E.D. Pa. 1982) (holding that PRP had right to cost recovery under Section 107(a)(1)-(4)(B)), and *United States* v. *New Castle County*, 642 F. Supp. 1258, 1261-1269 (D. Del. 1986) (holding that PRP had right to contribution under federal common law), with *United States* v. *Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587, at *3-*4 (S.D. Ind. June 29, 1983) (holding that PRP had no right to contribution).

3. With the enactment of SARA in 1986, Congress added Section 113(f), which expressly supplies one PRP with a cause of action against another PRP in two specified 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 referred to in [Section 113(f)(2)]." 42 U.S.C.

9613(f)(3)(B).[4] After SARA's enactment, numerous courts of appeals held that Section 113(f) provided the exclusive mechanisms by which one PRP could bring suit against another—and that a PRP thus could not sue another for cost recovery, on a theory of joint and several liability, under Section 107(a).[5]

4. In *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), this Court held that, in order to bring suit against another PRP for contribution under Section 113(f)(1), a PRP must first be sued itself under either Section 106 or Section 107(a). See *id.* at 165-168. The Court left open the question presented here—namely, whether one PRP could sue another for cost recovery under Section 107(a), see *id.* at 168-170—but it noted the "numerous decisions of the Courts of Appeals * * * holding that a private party that is itself a PRP

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[4] Section 113(f)(2) provides that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. 9613(f)(2).

[5] See, *e.g.*, *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Service Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *New Castle County*, 111 F.3d at 1121-1124; *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Technologies Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

may not pursue a § 107(a) action against other PRPs for joint and several liability." *Id.* at 169.[6]

B. The Facts and Proceedings Below

1. As alleged in the complaint, respondent leased property in an industrial park in Camden, Arkansas, from approximately 1979 to 2003. From 1981 to 1986, respondent retrofitted rocket motors under contract with the United States. In doing so, respondent used a high-pressure water-spray system to remove propellant from the motors. Wastewater containing the propellant contaminated soil and groundwater at the site. Respondent also burned quantities of propellant, further contaminating the soil and groundwater. Respondent addressed the contamination without EPA supervision, incurring various cleanup costs. J.A. 10-13.

2. In 2002, respondent filed suit against the United States in the Western District of Arkansas, contending that the United States was a potentially responsible party for purposes of CERCLA (as an owner or operator

[6] In 2002, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (Brownfields Act). The Brownfields Act encourages cleanup and reuse of contaminated property by expanding protection from CERCLA liability in certain circumstances, see CERCLA § 107(*o*)-(r), 42 U.S.C. 9607(*o*)-(r) (Supp. III 2003), and authorizing EPA to establish and administer grant programs for site assessment and reuse, see CERCLA §§ 104(k), 128(a), 42 U.S.C. 9604(k), 9628(a) (Supp. III 2003). The Brownfields Act also places heightened reliance on state response programs by, for example, restricting the ability of the federal government to take enforcement action when "a person is conducting or has completed a response action * * * that is in compliance with the State program that specifically governs response actions for the protection of public health and the environment." CERCLA § 128(b)(1)(A)(ii), 42 U.S.C. 9628(b)(1)(A)(ii) (Supp. III 2003). Those statutory provisions are not at issue in this case.

of the Camden facility or a person who arranged for disposal or treatment of hazardous substances) and bringing claims for cost recovery under Section 107(a) and contribution under Section 113(f)(1). In the wake of this Court's decision in *Cooper Industries*, respondent amended its complaint to drop its Section 113(f)(1) claim. J.A. 34-37. The government then moved to dismiss the amended complaint for failure to state a claim on the ground that, because respondent was a PRP, it was not entitled to bring suit under Section 107(a). J.A. 38-41.

The district court granted the motion to dismiss. Pet. App. 21a-28a. Relying on an Eighth Circuit decision that preceded *Cooper Industries*, the district court concluded that "a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f), unless the PRP qualifies for one of three defenses." *Id.* at 25a. The court rejected respondent's contention that *Cooper Industries* had "undermined the fundamental support for [the Eighth Circuit's decision] and other circuits' decisions that Section 113(f) limits PRPs' claims for contribution and precludes actions between PRPs for direct recovery under Section 107(a)." *Id.* at 26a.

3. The court of appeals reversed. Pet. App. 1a-19a. The court noted that, while *Cooper Industries* had left open the question whether a PRP could proceed under Section 107(a), it had indicated that Sections 107(a) and 113(f) provided "distinct" remedies. *Id.* at 13a. Accordingly, the court reasoned, "it is no longer appropriate to view § 107's remedies exclusively through a § 113 prism." *Id.* at 13a-14a. The court thus concluded that, in light of *Cooper Industries*, it was free to revisit the

availability of a cause of action under Section 107(a). *Id.* at 14a.

The court of appeals proceeded to hold that Section 107(a)(1)-(4)(B) provided a PRP with a right of cost recovery against another PRP. Pet. App. 14a-15a. The court "reject[ed] an approach which categorically deprives a liable party of a § 107 remedy," on the ground that there was "no such limitation in Congress's words." *Id.* at 14a. Reasoning that "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe'" and that respondent "is such a 'person,'" the court concluded that "[o]n its face § 107 applies." *Ibid.* The court recognized that "§ 107 allows 100% cost recovery"—*i.e.*, that Section 107(a) allows for cost recovery on a theory of joint and several liability. *Ibid.* But the court asserted that, "[i]f a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f)." *Id.* at 15a. The court noted, without elaboration, that the right to bring suit under Section 107(a)(1)-(4)(B) "is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107." *Id.* at 14a; see *id.* at 17a (asserting that "liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality").

The court of appeals held, in the alternative, that "a right to contribution may be fairly implied" from Section 107(a). Pet. App. 15a. "Unlike some other statutes," the court reasoned, "CERCLA reflects Congress's unmistakable intent to create a private right of contribution." *Ibid.* The court explained that, "[a]t first, Congress left

some CERCLA liability issues, such as joint-and-several liability and contribution, to be developed by the federal courts under traditional and evolving principles of common law." *Id.* at 16a (internal quotation marks and citation omitted). The court rejected the argument that, "in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107." *Ibid.* The court noted that Section 113(f) contained a savings clause for other contribution actions and that the legislative history "reflect[ed] Congress's intention to clarify and confirm, not to supplant or extinguish, the existing right to contribution." *Ibid.* The court concluded that, "if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would have done so explicitly." *Id.* at 16a-17a.[7]

In the court of appeals' view, the opposite holding not only would be "contrary to CERCLA's purpose," but would "result[] in an absurd and unjust outcome." Pet. App. 18a. The court reasoned that, while the United States is often a potentially responsible party itself, "[i]t is, simultaneously, CERCLA's primary enforcer." *Ibid.* Under a contrary reading of Section 107(a), the court suggested, "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Ibid.* Congress, the court concluded, "did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power." *Id.* at 19a.

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[7] The court of appeals reserved the question whether federal common law likewise supplied a right to contribution. Pet. App. 17a n.9.

SUMMARY OF ARGUMENT

The court of appeals erred in this case by holding that, under CERCLA, a potentially responsible party (PRP) that is not eligible to bring an action for contribution under Section 113(f) may nevertheless bring an action against another PRP for cost recovery under Section 107(a).

A. Section 107(a)(1)-(4)(B) of CERCLA does not authorize one PRP to bring an action against another PRP for cost recovery. Section 107(a)(1)-(4)(B) provides that PRPs shall be liable for certain government-incurred costs and for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." The most natural reading of the phrase "any other person" is that the word "other" refers to, and thereby excludes, the "persons" that are the subject of the sentence: *i.e.*, PRPs. Section 107(a)(1)-(4)(B) thus supplies a cause of action only for "innocent" private parties, such as neighboring landowners or bona fide purchasers, that incur the requisite costs in cleaning up contaminated property. There is no warrant for construing what this Court has described as an implied cause of action in Section 107(a)(1)-(4)(B) more broadly. That interpretation is consistent with the legislative history of Section 107(a)(1)-(4)(B), and the broader reading proposed by the court of appeals—which would allow any person aside from certain enumerated governmental entities to bring suit—would render the phrase "any other person" entirely superfluous.

B. Section 107(a) should not be read to contain an implied right to contribution, distinct from the cause of action for cost recovery contained in Section 107(a)(1)-(4)(B). Congress considered, but ultimately did not

adopt, an express contribution provision when it enacted CERCLA, strongly suggesting that no implied right to contribution was intended. Even if Section 107(a) were construed to contain an implied contribution right, moreover, it would not entitle PRPs to bring suit in the circumstances presented in this case. "Contribution" in its traditional sense is limited to a claim by one party to recover an amount from a jointly liable party *after* the first party has extinguished a disproportionate share of the parties' common liability to a third party. What respondent would need the Court to infer is not a true right to contribution (which would not avail it), but a broader right to recover costs from a cleanup undertaken without settlement or suit (and hence without any discharge of common liability).

C. In considering whether Section 107(a) should 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 supplies a PRP with an express cause of action against another PRP in specific circumstances. Section 113(f) delineates the exclusive circumstances under which a private PRP may bring suit against another PRP under CERCLA.

Congress added Section 113(f) to CERCLA in SARA, at a time when it was unclear whether CERCLA afforded PRPs either a right to contribution or a broader right to cost recovery. It would have been peculiar for Congress in SARA to supply PRPs with an express cause of action for *contribution*, but not a broader express cause of action for *cost recovery in general*, if it intended to permit the latter as well as the former type of action. The legislative history of SARA, moreover, suggests that Congress was operating on the assumption that a private PRP could *not* sue another PRP for cost

recovery under Section 107(a). A contrary interpretation would potentially allow a PRP to circumvent various limitations on an action under Section 113(f): *i.e.*, the typically more stringent limitations period applicable to actions under that provision, the bar on seeking contribution from a PRP that has settled with the government, the prohibition on recovering more than an equitable share of the costs, and (as here) the requirement that a PRP first be sued (or reach a settlement) before seeking to recover from another PRP. Neither this Court's decision in *Cooper Industries* nor the savings clause in Section 113(f) supports such an interpretation.

D. A reading of Section 107(a) that allowed PRPs to bring suit under that provision would undermine Congress's goal, in enacting CERCLA and SARA, of encouraging PRPs promptly to settle their liability with the government. Such a reading would create considerable incentives for PRPs *not* to settle with the government, so as to take advantage of the substantially more generous remedies available in a Section 107(a) action. Although the court of appeals reasoned that permitting one PRP to sue another under Section 107(a) was consistent with CERCLA's goal of encouraging voluntary cleanup of contaminated sites, there is little evidence that, in enacting CERCLA and SARA, Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit. In fact, there is ample evidence that Congress did not so intend. Moreover, requiring private PRPs to bring suit only under Section 113(f) will leave those PRPs with considerable incentives to engage in voluntary cleanups. The court of appeals' suggestion that EPA would choose to forgo enforcement action or negotiated settlements simply in order to insulate a fed-

eral agency from liability when that agency is itself a PRP is wholly unfounded. In any event, the task of creating a new cause of action that is not specifically authorized in CERCLA's text falls not to the courts, but to Congress.

E. Because respondent is a PRP that has not yet been sued under Section 106 or Section 107(a) (or reached a settlement with the government), respondent is not entitled to bring suit under Section 113(f). There is no merit to respondent's argument that it could trigger a right to bring suit under Section 113(f) simply by seeking a declaration that the government was a PRP under Section 107(a)—and, in any event, that argument has been forfeited.

ARGUMENT

SECTION 107(a) OF CERCLA DOES NOT AUTHORIZE ONE POTENTIALLY RESPONSIBLE PARTY TO SUE ANOTHER FOR COST RECOVERY

Section 107(a) of CERCLA neither explicitly nor implicitly authorizes one private PRP to bring an action against another PRP for cost recovery. Section 113(f), which provides an express right of action for one PRP against another only in specified (and narrower) circumstances, confirms that understanding. The court of appeals erred by holding that a PRP that does not satisfy the requirements for bringing an action against another PRP under Section 113(f) may nevertheless bring an action against that same PRP under Section 107(a).

A. Section 107(a)(1)-(4)(B) Permits Only A Person Who Is Not A Potentially Responsible Party To Sue A Potentially Responsible Party For Cost Recovery

Section 107(a)(1)-(4)(B) does not authorize one PRP to sue another, and the court of appeals' contrary conclusion was erroneous.

1. Section 107(a) provides that PRPs—*i.e.*, the universe of persons who fall into the four categories enumerated in Section 107(a)(1)-(4)—shall be liable for all government-incurred "costs of removal or remedial action" and for "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)(A) and (B) (emphasis added). As the court of appeals noted (Pet. App. 14a), a PRP unquestionably constitutes a "person" for purposes of CERCLA. See CERCLA § 101(21), 42 U.S.C. 9601(21). The most natural reading of the phrase "any *other* person," therefore, is that it excludes the "persons" that are the subject of the sentence: *i.e.*, PRPs. See, *e.g.*, *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."); cf. *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 342-343 & n.3 (2005) (holding that statutory phrase "another country" excluded countries listed in previous clauses, and, in doing so, explaining that "both 'other' and 'another' are just as likely to be words of *differentiation* as they are to be words of connection").

Under that reading, Section 107(a)(1)-(4)(B) has substantial operative effect, because it provides a cause of

action for all other persons who are not PRPs: namely, "innocent" private parties that have incurred the requisite costs. See *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997) (stating that "a section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups"); *United Technologies Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994) (noting that "it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures"), cert. denied, 513 U.S. 1183 (1995). For example, "a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands" can bring suit against PRPs to recover costs incurred in cleaning up its property under certain conditions. *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994). A person who qualifies as a "bona fide prospective purchaser" of property can also bring suit, because, by operation of statute, such a person does not constitute a PRP. See CERCLA §§ 101(40) and 107(r)(1), 42 U.S.C. 9601(40) and 9607(r)(1) (Supp. III 2003). Only persons who fall within the statutory definition of PRPs (and are unable to invoke a statutory defense or exclusion) are disabled from bringing suit against other PRPs under Section 107(a)(1)-(4)(B), and instead must satisfy the distinct (and more stringent) requirements for bringing suit under Section 113(f).

2. Such a reading of Section 107(a)(1)-(4)(B) is particularly justified because, as this Court has held, Section 107(a)(1)-(4)(B) does not "explicitly set out" a cause of action, but instead only "impliedly authorizes suit" by private parties against PRPs. *Key Tronic Corp.* v.

United States, 511 U.S. 809, 818 (1994); but see *id.* at 822 (Scalia, J., dissenting in part) (characterizing provision as creating an express cause of action on behalf of unspecified private parties). As the Court has explained, Section 107(a)(1)-(4)(B) thus stands in contrast to Section 113(f), which "expressly authorizes contribution claims." *Ibid.*[8]

This Court has repeatedly warned against judicial inference of private rights of action not specifically authorized by Congress. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275, 287-288 (2001). Just as courts should be reluctant to infer rights of action in the first place, so too should they be reluctant to construe such rights of action broadly. See, *e.g.*, *Malesko*, 534 U.S. at 74 (concluding that "[t]he caution toward extending * * * remedies [under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] into any new context" forecloses liability for private corporations); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191

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[8] In *Key Tronic*, the Court stated in passing that Section 107(a)(1)-(4)(B) impliedly authorizes "private parties" to recover cleanup costs from "other PRPs"—thereby suggesting that a PRP might have an implied right to contribution under that provision. 511 U.S. at 818; see *id.* at 818 n.11 ("That § 107 imposes liability on *A* for costs incurred 'by any other person' *implies*—but does not expressly command—that *A* may have a claim for contribution against those treated as joint tortfeasors."); *Union Gas*, 491 U.S. at 21-22 (plurality opinion). As the Court subsequently explained in *Cooper Industries*, however, that suggestion constituted dictum, because the ability of one PRP to sue another under Section 107(a) was not contested in *Key Tronic* and the Court "did not address the relevance, if any, of [the plaintiff's] status as a PRP." *Cooper Industries*, 543 U.S. at 170.

(1994) (declining to infer aiding-and-abetting liability under Section 10(b) of the Securities Exchange Act of 1934); *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988) (declining to permit *Bivens* action for denial of Social Security disability benefits). The practical consequence of the court of appeals' reading of Section 107(a)(1)-(4)(B) would be to confer upon an entire class of plaintiffs a cause of action that is not expressly authorized in CERCLA's text. To be sure, it is "unquestionably" true that Section 107(a)(1)-(4)(B) allows at least some private parties to sue PRPs, see *Key Tronic*, 511 U.S. at 818—just as it is unquestionably true that Section 107(a)(1)-(4)(A) allows enumerated governmental entities to bring suit. At a minimum, however, any implied right of action in Section 107(a)(1)-(4)(B) should be limited to those parties that are unambiguously entitled to invoke it.

3. Because the language and structure of Section 107(a)(1)-(4)(B) not only fail to authorize PRPs to bring suit, but in fact foreclose them from doing so, there is no need to consult the legislative history. See *Cooper Industries*, 543 U.S. at 167 (noting that, "[g]iven the clear meaning of the text, there is no need * * * to consult the purpose of CERCLA at all"). The legislative history, however, confirms that reading of the statutory text.

The language that would eventually become Section 107(a)(1)-(4) was drawn from language in the version of the bill that was reported out of the Senate Committee on the Environment and Public Works. See S. 1480, 96th Cong. § 4(a) (as reported, Nov. 18, 1980). That bill provided that PRPs "shall be jointly, severally, and strictly liable" for "all costs of removal or remedial action incurred by the United States Government or a State, and * * * any other costs incurred *by any per-*

son to remove a hazardous substance." *Ibid.* (emphasis added). Shortly before the bill was enacted, however, a substitute bill was introduced by Senators Stafford and Randolph that, *inter alia*, replaced the phrase "by any person" with the phrase "by any other person." See S. 1480, 96th Cong. § 107(a)(1)-(4)(B) (as amended, Nov. 21, 1980). Although the legislative history does not shed light on that particular change, the only plausible explanation for it was that Congress intended to exclude PRPs from bringing suit under what would become Section 107(a)(1)-(4)(B), since PRPs unambiguously would have been able to do so under the prior version of the bill. The fact that Congress considered, but chose not to enact, language that unquestionably would have allowed PRPs to bring suit for cost recovery counsels against giving the same reading to the language that Congress ultimately enacted. See, *e.g.*, *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 162-163 (2004).

4. The court of appeals in this case held that "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" Pet. App. 14a; see *Metropolitan Water Reclamation Dist.* v. *North Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 835 (7th Cir. 2007) (same). That alternative reading of Section 107(a)(1)-(4)(B) lacks merit.

Section 107(a)(1)-(4)(A), the preceding subparagraph, provides a cause of action for "the United States Government or a State or an Indian tribe" against PRPs. 42 U.S.C. 9607(a)(1)-(4)(A). It does not necessarily follow, however, that the phrase "any other person" in Section 107(a)(1)-(4)(B) was intended to refer to, and thereby exclude, only those enumerated governmental entities, rather than the persons who are the subject of

the sentence (*i.e.*, PRPs). In fact, other language in Section 107(a)(1)-(4)(B) definitively forecloses that interpretation. Section 107(a)(1)-(4)(B) permits recovery only for "any other necessary costs of response * * * consistent with the national contingency plan"—*i.e.*, costs *other* than the government's costs as specified in Section 107(a)(1)-(4)(A). See, *e.g.*, *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986).[9] Because that language already precludes governmental entities from recovering under Section 107(a)(1)-(4)(B), the court of appeals' interpretation of the phrase "any other person" as excluding governmental entities, far from giving that phrase meaning, would render it entirely superfluous—in contravention of the fundamental canon of statutory construction that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); see, *e.g.*, *Cooper Industries*, 543 U.S. at 166; *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004); *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Indeed, the court of appeals' interpretation would read out of the statute the very word—"other"—that was added to the bill shortly before its final passage. Section 107(a)(1)-

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[9] Section 107(a)(1)-(4)(A) allows the enumerated governmental entities to recover "all costs of removal or remedial action * * * *not inconsistent with the national contingency plan*." 42 U.S.C. 9607(a)(1)-(4)(A) (emphasis added). Lower courts have interpreted the emphasized language as shifting the burden to the defendant to show that the plaintiff's costs are inconsistent with the national contingency plan. See *Carson Harbor Village, Ltd.* v. *County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006); *United States* v. *E.I. du Pont de Nemours & Co.*, 432 F.3d 161, 178 (3d Cir. 2005) (en banc).

(4)(B) therefore does not explicitly authorize one PRP to bring suit against another for cost recovery.[10]

B. Section 107(a) Does Not Implicitly Permit A Potentially Responsible Party Like Respondent To Sue Another Potentially Responsible Party To Recover Its Voluntary Cleanup Costs

The court of appeals held in the alternative that Section 107(a) contains an implied right to contribution, distinct from the cause of action for cost recovery contained in Section 107(a)(1)-(4)(B). Pet. App. 15a. That is incorrect. But even if Section 107(a) did contain an implied (or common-law) right to contribution, it would not entitle PRPs to bring suit in the circumstances presented here.

1. As a preliminary matter, Section 107(a) is best read as not giving rise to an implied right to contribution at all. This Court observed in *Cooper Industries* that the case for such an implied contribution right was at best "debatable." 543 U.S. at 162. As the Court has noted, the fact that a statute does not "expressly create[] a right to contribution" is itself "significant," because, in other instances, "when Congress intended to provide a right to contribution, it did so expressly." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91 & n.24 (1981). And the fact that Con-

[10] It could perhaps be argued that "any other person" should be understood to mean any person other than the PRP that is the defendant in the action. That reading would give at least some meaning to the phrase "any other person," even though the United States Code is replete with statutes authorizing "any person" to bring suit against a defendant. But, in all events, it cannot be reconciled with the text of the statute, which provides that *all* PRPs, in the conjunctive, "shall be liable for * * * costs * * * incurred by any *other* person." 42 U.S.C. 9607(a)(1)-(4) (emphasis added).

gress provided a cause of action for cost recovery in Section 107(a)(1)-(4) to governmental entities (and private parties other than PRPs) further undermines the conclusion that Congress implicitly provided a cause of action for contribution to PRPs at the same time. See, *e.g.*, *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 487-488 (1996) (stating that, "where Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, as Congress has done with * * * CERCLA, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute") (internal quotation marks omitted); cf. *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) (noting that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others"). Moreover, nothing in the text of Section 107(a) "indicates that [it] w[as] enacted for the special benefit of a class of which [the plaintiff] is a member." *Northwest Airlines*, 451 U.S. at 92. Using similar reasoning, this Court has refused to recognize implied (or common-law) rights to contribution in other federal statutes. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638-647 (1981); *Northwest Airlines*, 451 U.S. at 90-99.

Congress's enactment of an express, but limited, right to contribution in Section 113(f) shuts the door on any argument that Section 107(a) contains an implied right to contribution. If the statutory scheme contained two contribution rights—one implied and one express—numerous questions about their interaction would arise, and it would be hard to imagine that Congress would leave those questions unaddressed when it enacted Section 113(f)'s express contribution provision. Section

113(f) is thus best understood as occupying the field with respect to contribution claims under CERCLA. See pp. 26-36, *infra*.

The legislative history of Section 107(a) supports the conclusion that Section 107(a) does not contain an implied right to contribution. As noted above, the bill that was reported out of the Senate Environment and Public Works Committee provided that "any person"—unambiguously including PRPs—could bring suit for cost recovery under what would become Section 107(a)(1)-(4)(B). See S. 1480, 96th Cong. § 4(a) (as reported, Nov. 18, 1980). In a different subsection, that bill also provided that, "in any action brought under this section * * *, a person held jointly and severally liable with one or more other persons is entitled to seek contribution from such persons to the extent of the proportionate liability of such persons." *Id.* § 4(f). In the enacted version, Congress not only replaced the phrase "any person" with the phrase "any other person," as discussed above, but also deleted the subsection providing an express right to contribution. The fact that Congress considered, and evidently rejected, language that unquestionably would have created an express right to contribution counsels against finding an implied right to contribution in the language that Congress ultimately did enact.

2. Even if Section 107(a) did contain an implied right to contribution, moreover, it would not help respondent, because Section 107(a) would at most contain an implied right to "contribution" in its "traditional sense": *i.e.*, a claim by one party to recover an amount from a jointly liable party *after* the first party had extinguished a disproportionate share of their common liability to a third party. *United Technologies*, 33 F.3d at 99. What re-

spondent needs in order to prevail is not an implied right to contribution, but a much broader right to recover costs from a voluntary cleanup in the absence of an underlying suit or settlement. Section 107(a) cannot be understood to have conferred that broader right.

After Congress deleted language that would have provided an express right to contribution (and other language providing for joint and several liability in an action for cost recovery), various members of Congress suggested that common-law principles would govern any liability issues not expressly addressed by the statute. See, *e.g.*, 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph) (stating that "[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law," and citing joint and several liability as an example); *id.* at 31,965 (statement of Rep. Florio) (stating that "[i]ssues of joint and several liability not resolved by this [statute] shall be governed by traditional and evolving principles of common law"). Those statements, however, provide no support for the broad implied right recognized by the court of appeals, which goes well beyond the bounds of any historical notion of contribution.

Traditionally, "[a]t common law, there was no right to contribution among joint tortfeasors." *Northwest Airlines*, 451 U.S. at 86. By the time of CERCLA's enactment, however, a right to contribution was available in most States when (1) two (or more) persons were jointly liable to a third party for a debt or injury and (2) one of those persons had extinguished a disproportionate share of that liability. See, *e.g.*, *id.* at 87-88 (noting that, "[t]ypically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors

has paid more than his fair share of the common liability"). Indeed, EPA emphasized that precise point in a guidance document issued shortly before the enactment of the express contribution provision in Section 113(f). See 50 Fed. Reg. 5038 (1985) ("Contribution among responsible parties is based on the principle that a jointly and severally liable party who has paid all or a portion of a judgment or settlement may be entitled to reimbursement from other jointly or severally liable parties.").

In order to invoke the right to contribution, therefore, a party was generally required to resolve an underlying common liability to a third party. See, *e.g.*, Restatement (Second) of Torts § 886A(2) (1979) ("The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability").[11] Although a party could seek contribution in some jurisdictions while proceedings concerning the underlying liability were still underway, a party could not seek contribution when there was no final judgment or pending action that would determine and extinguish the joint liability, unless the party had entered into a settlement

[11] See also Restatement (Third) of Torts § 23 cmt. b, at 284 (2000) (explaining that "[a] person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment"); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) (1955 Revised Act) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability."); *Black's Law Dictionary* 297 (5th ed. 1979) ("Under principle of 'contribution,' a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.").

that discharged the liability. See, *e.g.*, *id.* § 886A cmt. *i*; Uniform Contribution Among Tortfeasors Act § 3(d), 12 U.L.A. 251 (1996) (1955 Revised Act).

In this case, respondent sought a recovery far outside the scope of contribution as that concept was traditionally understood. Instead, respondent sought to recover costs for which it *may* ultimately be responsible under CERCLA, but as to which no suit against it was underway (and no settlement had been reached). Section 107(a) does not contain an implied right to "contribution" in that broader sense.

C. Section 113(f) Provides The Exclusive Mechanisms By Which A Potentially Responsible Party Can Sue Another Under CERCLA

In considering whether Section 107(a) could be construed to confer on a private PRP a cause of action against another PRP for cost recovery, that provision must be read in light of Section 113(f), which supplies a PRP with an express cause of action against another in two specific circumstances: (1) when the PRP is seeking contribution "during or following [a] civil action" under Section 106 or Section 107(a), see CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1); or (2) when the PRP is seeking contribution following an administrative or judicially approved settlement with the federal or state government, see CERCLA § 113(f)(3)(B), 42 U.S.C. 9613(f)(3)(B).

Section 113(f) delineates the exclusive circumstances under which one private PRP may bring suit against another under CERCLA. That conclusion is supported by two canons of construction. First, "the implications of a statute may be altered by the implications of a later statute." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988); see *United States* v. *Estate of Romani*, 523 U.S.

517, 530 (1998) (explaining that, where the meaning of an earlier statute was "unresolved," the later statute should be treated as governing). Second, "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic* v. *United States*, 446 U.S. 398, 406 (1980). In the context of remedial statutes, this Court has repeatedly held that "a precisely drawn, detailed statute pre-empts more general remedies." *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983); see *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005); *Brown* v. *GSA*, 425 U.S. 820, 834-835 (1976); *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973) (explaining that a remedy that has been "explicitly * * * designed" for a specific situation "must be understood to be the exclusive remedy available in a situation" where it "clearly applies," notwithstanding the "broad language" of a general remedy and "the literal applicability of its terms").

1. As noted above, Congress added Section 113(f) to CERCLA in 1986 as part of SARA. In the immediate aftermath of CERCLA's enactment, lower courts had disagreed on whether one PRP could bring suit against another PRP for contribution as that concept was traditionally understood, and, if so, whether Section 107(a)(1)-(4)(B) constituted the source of that cause of action. Compare, *e.g.*, *United States* v. *New Castle County*, 642 F. Supp. 1258, 1261-1269 (D. Del. 1986) (holding that PRP had right to contribution under federal common law), with *United States* v. *Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587, at *3-*4 (S.D. Ind. June 29, 1983) (holding that PRP had no right to contribution); see also *Cooper Industries*, 543 U.S. at 162 (citing other cases). As the text of the statute reflects and the legislative history confirms, Section 113(f)

resolved the uncertainty over the availability and nature of a PRP's right to sue by supplying an express cause of action for contribution in the traditional sense. See, *e.g.*, H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 18 (1985) (explaining that Section 113(f) "clarifies and emphasizes that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties"); H.R. Rep. No. 253, *supra*, Pt. 1, at 79 (stating that Section 113(f) "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances"); S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985) (same).[12]

In the wake of CERCLA's enactment, it was similarly uncertain whether one PRP could bring suit against another PRP for cost recovery under Section 107(a) when the plaintiff PRP had not yet been sued (or reached a settlement with the government) for its underlying liability. We are aware of only two federal courts that had unambiguously held that a PRP was entitled to sue another PRP for costs under those circumstances. See *City of New York* v. *Exxon Corp.*, 633 F. Supp. 609, 615-618 (S.D.N.Y. 1986); *City of Philadelphia* v. *Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-1143 (E.D. Pa. 1982); cf. *Pinole Point Props., Inc.* v. *Bethlehem Steel Corp.*, 596 F. Supp. 283, 290-292 (N.D. Cal. 1984) (allowing suit for declaratory relief). In some other

[12] The specific cases cited in the legislative history all involved contribution in the traditional sense. See H.R. Rep. No. 253, *supra*, Pt. 1, at 74, 79; S. Rep. No. 11, *supra*, at 44.

cases, private PRPs were allowed to bring suit against other PRPs, but, to the extent that the availability of a cause of action was even disputed, it is unclear whether the plaintiffs had first been sued (or reached settlements), see, *e.g.*, *Wickland Oil Terminals*, 792 F.2d at 891, or whether the plaintiffs were even PRPs at all, see, *e.g.*, *Walls* v. *Waste Res. Corp.*, 761 F.2d 311, 313-314 (6th Cir. 1985). In light of the uncertainty over the question whether Section 107(a) afforded either a right to contribution in the traditional sense or a broader right to cost recovery on behalf of PRPs that had not first discharged their liability, it would have been peculiar for Congress in SARA to supply PRPs with an express cause of action for *contribution*, but not a broader express cause of action for *cost recovery*, if it intended to permit the latter as well as the former type of action.

Indeed, the legislative history of SARA suggests that Congress was operating on the assumption that a PRP could *not* pursue an action against another PRP for cost recovery under Section 107(a). For example, the House Energy and Commerce Committee stated that Section 113(f) "does not affect the right of the *United States* to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site" (and therefore a PRP). H.R. Rep. No. 253, *supra*, Pt. 1, at 79-80 (emphasis added). The necessary implication of that statement is that the Committee believed that a *private* PRP was not entitled to "maintain a cause of action for cost recovery under Section 107" in the first place—or, at most, that any such cause of action would not survive the enactment of Section 113(f).

2. After SARA's enactment, but before this Court's decision in *Cooper Industries*, the courts of appeals generally held that a PRP could not sue another for cost recovery, on a theory of joint and several liability, under Section 107(a). See p. 6, note 5, *supra* (citing cases). Those courts correctly reasoned, in various contexts, that recognizing a broader right to cost recovery under Section 107(a) would effectively allow a PRP to circumvent the specific limitations on an action under Section 113(f). See, *e.g.*, *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (reasoning that, if a PRP could sue under Section 107(a), "[a] recovering liable party would readily abandon a § 113(f)(1) suit in favor of the substantially more generous provisions of § 107(a)"); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (noting that, "were PRPs * * * allowed to recover expenditures incurred in cleanup and remediation from other PRPs under § 107's strict liability scheme, § 113(f) would be rendered meaningless").

Those cases identify three primary ways in which permitting PRPs to sue under Section 107(a) would undermine the express limitations that Congress incorporated in Section 113(f). First, courts refused to permit a PRP that was outside the three-year limitations period for an action under Section 113(f), see CERCLA § 113(g)(3), 42 U.S.C. 9613(g)(3), to take advantage of the potentially more generous limitations period for an action under Section 107(a), see CERCLA § 113(g)(2), 42 U.S.C. 9613(g)(2). See *New Castle County*, 111 F.3d at 1119-1124; *United Technologies*, 33 F.3d at 101. As the First Circuit explained, "carried to its logical extreme, such a reading would completely swallow [Section 113(g)(3)'s] three-year statute of limitations associated with actions for contribution" and thereby "ineluc-

tably produce[] judicial nullification of an entire SARA subsection." *Ibid.*[13]

Second, when one PRP had already settled with the government (and thus could not be sued under Section 113(f) because of the settlement bar in Section 113(f)(2)), courts refused to allow other PRPs to sue the settling PRP under Section 107(a), which contains no analogous settlement bar against an action for cost recovery. See *Colorado & E. R.R.*, 50 F.3d at 1536; *Akzo Coatings*, 30 F.3d at 764. Those courts explained that allowing such suits by PRPs under Section 107(a) would "emasculate the contribution protection component of CERCLA's settlement framework," *United Technologies*, 33 F.3d at 102, and "throw the proverbial monkey wrench into the works," because "[c]onsent agreements would no longer provide protection[] and settling parties would have to endure additional rounds of litigation to apportion their losses." *In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997).

Third, courts refused to permit a PRP to pursue an action against another PRP for joint and several liability under Section 107(a) in lieu of an action under Section 113(f), which permits recovery only for an equitable share of the costs. See *Centerior Service Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 347-356 (6th Cir. 1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301-1306 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). As one court explained, a contrary approach "is not supported by CERCLA's text,

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[13] This Court has repeatedly cited the existence of a shorter limitations period as evidence that Congress intended a specific remedial provision to be exclusive. See, *e.g.*, *City of Rancho Palos Verdes*, 544 U.S. at 122-123; *Block*, 461 U.S. at 285; *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447-448 (1941).

is inconsistent with the traditional doctrine of contribution, entails a significant risk of producing unfair results, and runs the risk of creating procedural chaos." *Id.* at 1303.

3. There is similarly no justification for allowing a PRP to bring suit under Section 107(a) and thereby circumvent a fourth limitation contained in Section 113(f): *viz.*, the limitation that a PRP may bring suit under Section 113(f) only "during or following [a] civil action" under Section 106 or Section 107(a) (or after a settlement has been reached). See *Cooper Industries*, 543 U.S. at 166-168 (construing and enforcing that restriction). In holding that a PRP could evade that limitation by bringing suit directly under Section 107(a), the court of appeals in this case attempted to mitigate the disruptive consequences of its decision by stating, without explanation, that a PRP would be foreclosed from bringing suit under Section 107(a) when it could have brought suit instead under Section 113(f)(1). See, *e.g.*, Pet. App. 17a (asserting that "liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality").

Under the court of appeals' view, therefore, once a PRP had been sued under Section 106 or Section 107(a), the PRP would be permanently barred from bringing suit under Section 107(a), even if the PRP could satisfy the requirements for doing so, and would instead be permitted to bring suit only under Section 113(f). But that *ipse dixit*, under which a PRP may bring suit under Section 107(a) before, but not after, an action against the PRP under Section 106 or Section 107(a) has been commenced, finds no support even in the court of appeals' improbable reading of the statutory text. To the contrary, it requires the court to pile an entirely atextual

limit on its already strained interpretation of the text of Section 107(a) in an effort to allow its judicially fashioned remedy to coexist with the express remedial scheme created by Congress in SARA. The inevitable conflicts between Section 107(a) and Section 113(f) under the court of appeals' reading of Section 107(a) should have been a signal that its rejection of the government's reading of Section 107(a) was in error. Instead, the court of appeals saw it as an invitation to engage in further judicial lawmaking in reconciling its new Section 107(a) right with the textual provisions of Section 113(f). To make matters worse, the court of appeals' reading would still render some language from Section 113(f)—including the very language requiring a pending or completed Section 106 or Section 107 action that this Court construed in *Cooper Industries*—effectively inoperative, in contravention of the rule against superfluity.[14]

4. Nothing in this Court's decision in *Cooper Industries* undermines the settled understanding that a PRP cannot sue another for cost recovery, on a theory of joint and several liability, under Section 107(a). To the contrary, the Court's reasoning strongly suggests that no such right of action exists. To be sure, the Court expressly left open the question presented by this case. 543 U.S. at 168-171. But it noted, without disapproval,

[14] The court of appeals' reading cannot be justified on the ground that Section 113(f) provides the exclusive mechanisms for bringing suit for *contribution*—and thereby displaced Section 107(a) only to the extent that Section 107(a) had provided a right to contribution (as opposed to cost recovery). Contribution is merely a form of cost recovery, not a wholly independent type of relief. See, *e.g.*, *Centerior Service*, 153 F.3d at 350. For the reasons stated above, it would have been strange for Congress expressly to codify in Section 113(f) the right of PRPs to contribution in the traditional sense, and yet not do the same for an alleged broader right to cost recovery on behalf of the same parties.

the "numerous decisions of the Courts of Appeals" holding that PRPs could not bring suit under Section 107(a). *Id.* at 169. Moreover, in rejecting the PRP's claim in that case that it could bring suit under Section 113(f) without regard to the "during or following [a] civil action" requirement of Section 113(f)(1), the Court reasoned that allowing such a claim "would render part of the statute entirely superfluous." *Id.* at 166. The Court further explained that "[t]here is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions." *Id.* at 167. The same reasoning supports the conclusion that a PRP cannot circumvent the various limitations on an action under Section 113(f) simply by bringing suit under Section 107(a).

In revisiting its earlier precedent holding that a PRP could not bring suit under Section 107(a), the court of appeals in this case relied on the Court's statement, in a footnote in *Cooper Industries*, that the remedies provided by Section 107(a) and Section 113(f) are "clearly distinct." 543 U.S. at 163 n.3. That is unquestionably true, in that Section 107(a) and Section 113(f) have different prerequisites for bringing suit and provide different forms of relief for different categories of plaintiffs. It does not follow, however, that a PRP may bring suit under either provision.[15] The court of appeals implicitly

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[15] Indeed, before this Court's decision in *Cooper Industries*, many courts of appeals had noted that the remedies provided by Section 107(a) and Section 113(f) are distinct in holding that a PRP was *foreclosed* from bringing suit under Section 107(a). See, *e.g.*, *New Castle County*, 111 F.3d at 1120; *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 n.7 (11th Cir. 1996); *United Technologies*, 33 F.3d at 100.

recognized as much in its felt need to limit a PRP to its Section 113(f)(1) remedies, when they are available. If the remedies were fully distinct, there would be no need or justification for the court of appeals' atextual limits on the Section 107(a) action it bestowed upon PRPs. The salient point is not that Section 113(f) constitutes a *distinct* remedy, but rather that Congress intended Section 113(f) to constitute the *exclusive* remedy for PRPs under CERCLA.[16]

5. The savings clause in Section 113(f)(1) does not dictate a different result. That clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106 or Section 107]." That clause, however, saves only actions for "contribution"—and there is no reason to think that the savings clause uses the term "contribution" in anything other than its traditional sense: *i.e.*, a claim asserted by a jointly liable party that has already extinguished (or been sued for) a disproportionate share of a common liability. See, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (noting that, "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the estab-

[16] That is not to say that Section 113(f) should be read in a vacuum, without due regard for Section 107(a), which imposes the underlying liability that is a necessary predicate for a contribution claim. Section 113(f)(1) provides that contribution may be sought from "any other person who is liable or potentially liable under [Section 107(a)]," 42 U.S.C. 9613(f)(1), and, for that reason, courts have explained that Section 107(a) and Section 113(f) work "[t]ogether" to "provide and regulate a PRP's right to claim contribution from other PRPs." *Pinal Creek Group*, 118 F.3d at 1301.

lished meaning of these terms") (citations and internal quotation marks omitted). If the savings clause were read to apply even to actions by PRPs for broader relief under Section 107(a), it would enable a PRP, notwithstanding the language of Section 113(f)(1), to bring suit even *before* an action under Section 106 or Section 107(a) is commenced—in contravention of the rule that a savings clause should not be interpreted to nullify operative language in the same statute in which it is contained. See, *e.g.*, *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998). Instead, the savings clause merely preserves the ability of a PRP to bring an action for contribution (as traditionally defined) under any other provision of law, including state law. See, *e.g.*, *Atherton* v. *FDIC*, 519 U.S. 213, 227-228 (1997).

The argument based on the savings clause also fails as a textual matter. The savings clause cannot be read as saving an action by a PRP under Section 107(a), because the savings clause by its terms saves only "an action for contribution *in the absence of* a civil action under [Section 106] or [Section 107]." 42 U.S.C. 9613(f)(1) (emphasis added). The savings clause thus contemplates only actions for contribution that are based on provisions other than those two sections.

D. The Structure And Purpose Of CERCLA And SARA Do Not Permit A Potentially Responsible Party To Sue Another Potentially Responsible Party To Recover Cleanup Costs

In enacting CERCLA and SARA, Congress sought to promote government-supervised cleanups and to encourage PRPs promptly to settle their liability with the government. A reading of Section 107(a) that allowed PRPs to bring suit under that provision (instead of un-

der Section 113(f)) would undermine those undoubted and important congressional objectives.

1. By adding Section 113(f) to CERCLA in SARA, Congress gave the government "obvious and important leverage to encourage quick and effective resolution of environmental disputes." *Reading*, 115 F.3d at 1119. Under a proper construction of CERCLA, Section 113(f) provides considerable incentives for a PRP to enter into a settlement with the government. If a PRP settles, it will secure the ability to seek contribution itself from non-settling PRPs. See CERCLA § 113(f)(3)(B), 42 U.S.C. 9613(f)(3)(B). At the same time, it will enjoy protection from a contribution action by those PRPs. See CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2). On the other hand, if a PRP does not settle, it will be unable to seek contribution from other PRPs and may face the prospect of disproportionate liability.

Under the court of appeals' rule, however, a PRP that has not yet been sued under Section 106 or Section 107(a) may well have incentives *not* to settle with the government, in order to preserve its right to sue other PRPs under Section 107(a) and thereby take advantage of the substantially more generous remedies available in such an action. Most notably, a PRP suing another PRP for cost recovery under Section 107(a)(1)-(4)(B), like any other Section 107(a) plaintiff, could potentially proceed on a theory of joint and several liability to recover *all* of its costs, see Pet. App. 14a-15a; *Consolidated Edison Co. of New York, Inc.* v. *UGI Utils., Inc.*, 423 F.3d 90, 100 n.9 (2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006), whereas a PRP suing under Section 113(f), like any other plaintiff in a contribution action, is limited to recovering an equitable share of its costs, see,

e.g., *Elementis Chromium L.P.* v. *Coastal States Petroleum Co.*, 450 F.3d 607, 612-613 (5th Cir. 2006).[17]

As the court of appeals in this case recognized, if a PRP could sue another PRP for joint and several liability, it would place the burden on the defendant PRP to pursue a counterclaim against the plaintiff PRP, simply in order to avoid paying for the *plaintiff PRP's* share of the costs—and to pursue claims for contribution against other PRPs, in order to avoid paying for their shares as well. Pet. App. 15a; see *Consolidated Edison*, 423 F.3d at 100 n.9; *Amcast Indus. Corp.* v. *Detrex Corp.*, 2 F.3d 746, 748-749 (7th Cir. 1993), cert. denied, 510 U.S. 1044 (1994). To the extent that other PRPs either are not available as defendants (*e.g.*, because they are defunct or insolvent) or have entered into settlements themselves, the defendant PRP—and not the plaintiff PRP that had incurred the voluntary cleanup costs in the first place—would be left holding the bag for the absent PRPs' shares of the overall liability. As one court has noted, such a result would "strain[] logic." *New Castle County*, 111 F.3d at 1121 & n.4; see *Pinal Creek Group*, 118 F.3d at 1303 (noting that such a regime "would immunize the claimant-PRP from the risk of orphan-share liability and would restrict substantially the ability of courts to apportion costs equitably pursuant to § 113(f)"), cert. denied, 524 U.S. 937 (1998); *Town of New Windsor* v. *Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996) (explaining that such a regime would lead to "sequential, piecemeal litigation").

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[17] Where a PRP is merely seeking an equitable share of the costs rather than proceeding on a theory of joint and several liability, courts have characterized the PRP's claim as a "quintessential claim for contribution." *New Castle County*, 111 F.3d at 1122; *Colorado & E. R.R.*, 50 F.3d at 1536; *Akzo Coatings*, 30 F.3d at 764.

In addition, a PRP could potentially sue another PRP for cost recovery under Section 107(a)(1)-(4)(B) even when the defendant PRP had itself reached a settlement with the government, notwithstanding the protective shield that Congress adopted to encourage such settlements in SARA. See CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2) (providing protection only against claims for "contribution"). Such a regime would create incentives not only for would-be plaintiff PRPs not to settle with the government, insofar as a PRP that did not settle could bring suit against a PRP that did, but also for would-be *defendant* PRPs not to settle, insofar as a PRP that settled would not be protected from suit. In sum, allowing PRPs to bring actions for cost recovery under Section 107(a) would considerably weaken the effectiveness of Section 113(f)'s settlement provisions and thereby compromise the government's ability to supervise, and bring closure to, CERCLA cleanups.

2. The court of appeals in this case reasoned that permitting one PRP to sue another under Section 107(a) was "consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites." Pet. App. 18a; see *Consolidated Edison*, 423 F.3d at 100 (contending that a contrary reading of Section 107(a) would "impermissibly discourag[e] voluntary cleanup," in contravention of "one of CERCLA's main goals"). That reasoning is flawed, because there is little evidence that, in enacting CERCLA and SARA, Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit. In fact, there is ample evidence that Congress did not so intend.

a. The text and legislative history of SARA confirms that Congress enacted SARA in order to encourage

PRPs to enter into settlements with the government. Before the enactment of SARA, EPA had expressed concern about the inefficacy and insufficiency of voluntary cleanups that had occurred at National Priorities List sites without government supervision, and had also indicated its preference for negotiated settlements over litigation as a method for effectuating cleanups. 50 Fed. Reg. 5035 (1985) ("Negotiated private party [cleanup] actions are essential to an effective program for cleanup of the nation's hazardous waste sites. * * * [E]xpeditious cleanup reached through negotiated settlements is preferable to protracted litigation."); 48 Fed. Reg. 40,661 (1983) ("EPA studies have shown that many of the response actions taken outside the sanction of EPA consent agreements have not been successful. * * * Therefore, the Agency encourages any responsible parties who are undertaking voluntary response actions at [National Priorities List] sites to contact the Agency to negotiate consent agreements.").

Consistent with the foregoing statements, the legislative history of SARA "reveals an express bent toward encouraging settlement." *E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515, 536 (3d Cir. 2006) (*DuPont*), petition for cert. pending, No. 06-726 (filed Nov. 21, 2006). Thus, the House Judiciary Committee noted that "encouraging * * * *negotiated* clean-ups will accelerate the rate of clean-ups and reduce their expense by making maximum use of private sector resources," while asserting that "this emphasis on *negotiated* clean-ups should not replace or diminish a strong and aggressive enforcement policy." H.R. Rep. No. 253, *supra*, Pt. 3, at 29 (emphases added). Similarly, the House Energy and Commerce Committee explained that "[t]he settlement procedures now set forth are expected

to be a significant inducement for parties to come forth, to settle, to avoid wasteful litigation and thus to begin cleanup" and added that "[t]hese provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups." H.R. Rep. No. 253, *supra*, Pt. 1, at 58-59.

Indeed, Congress expressly stated in the text of SARA its desire to "facilitate" negotiated settlements leading to supervised cleanups. In Section 122(a), Congress made clear that EPA has the authority to enter into negotiated settlements providing for PRPs to perform cleanups if EPA "determines that such action will be done properly by such person." 42 U.S.C. 9622(a). Moreover, Congress emphasized that, "[w]henever practicable and in the public interest, [EPA] shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation." *Ibid.*

The legislative history of SARA does contain references to the desirability of "voluntary cleanups." As to most if not all of those references, however, it is clear that "the 'voluntary' nature of the cleanups Congress had in mind was a voluntary agreement to settle and enter into a consent decree, rather than a wholly voluntary, unsupervised, *sua sponte* cleanup operation." *DuPont*, 460 F.3d at 537. For example, the House Public Works and Transportation Committee stated that "[v]oluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution program," but immediately elaborated on that statement by explaining that SARA's settlement procedures were "intended to encourage and establish procedures and protections pertaining to *negotiated* private

party cleanup of hazardous substances where such cleanup is in the public interest." H.R. Rep. No. 253, *supra*, Pt. 5, at 58 (emphasis added). Similarly, the Senate Environment and Public Works Committee noted that SARA "should encourage private party settlements and cleanups," reasoning that "[p]arties who settle, or who pay judgments as a result of litigation, may attempt to recover some portion of their expenses and obligations in subsequent contribution litigation" and that "[p]rivate parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from others." S. Rep. No. 11, *supra*, at 44; see H.R. Rep. No. 253, *supra*, Pt. 1, at 80 (same).

To be sure, the history of the original CERCLA legislation in 1980 contains some less qualified statements about the desirability of voluntary cleanups. See, *e.g.*, H.R. Rep. No. 1016, 96th Cong., 2d Sess., Pt. 1, at 17 (1980) (noting Congress's desire to "induce * * * persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites"); 126 Cong. Rec. 26,787 (1980) (statement of Rep. Florio) (noting that "EPA is required not to act if the responsible party or parties will take appropriate action to cleanup and contain these sites"). Those statements, however, "do not * * * establish that Congress necessarily intended that PRPs engaged in voluntary cleanups be able to seek" cost recovery from other PRPs. *DuPont*, 430 F.3d at 534. CERCLA's legislative history does not specifically suggest that Congress intended to allow PRPs to bring suit under Section 107(a) as a way of encouraging voluntary cleanups—nor does it more generally suggest that Congress intended to promote voluntary cleanups without government super-

vision *at the expense of* government-supervised cleanups pursuant to settlement or suit. To the contrary, insofar as the legislative history indicates that Congress intended to allow common-law principles to govern any liability issues not addressed by the statute, it actually suggests that Congress did *not* intend to recognize a broad right of action for PRPs under Section 107(a). See pp. 23-26, *supra*.

b. Construing CERCLA to permit PRPs to bring suit only under Section 113(f) would leave PRPs with considerable incentives to engage in such cleanups. In some cases, a cleanup by a current property owner will enhance the value of a property to such an extent that the absence of an action for cost recovery will not be a meaningful deterrent. In other cases (as was apparently true in this case), a current property owner may need to engage in a cleanup as a condition of obtaining a permit to continue operations at a contaminated site, whether under the Resource Conservation and Recovery Act (RCRA), see 42 U.S.C. 6924(u), 6925(a), or state law. Moreover, to the extent that a property owner in either of those situations wishes to recover some of its costs from other PRPs, the property owner need only enter into a settlement with the federal or state government.[18]

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[18] In fact, since this Court's decision in *Cooper Industries*, EPA has confirmed that its administrative consent orders constitute qualifying "settlements" under Section 113(f)(3)(B), thereby allowing settling parties to bring suit against other PRPs. See Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, EPA, and Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, Department of Justice, at 2 (Aug. 3, 2005) <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>.

c. In holding that one PRP could sue another under Section 107(a), the court of appeals in this case suggested that, under a contrary rule, "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." Pet. App. 18a.

There is no factual basis to support that suggestion. Although courts had widely held, before this Court's decision in *Cooper Industries*, that PRPs were barred from bringing suit against other PRPs under Section 107(a), the federal government nevertheless frequently brought suit under CERCLA even when federal PRPs were potentially subject to substantial liability, thereby triggering the right to seek contribution from those PRPs. See, *e.g.*, *United States* v. *Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), cert. denied, 537 U.S. 1147 (2003); *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir.), cert. denied, 515 U.S. 1158 (1995); *Coeur d'Alene Tribe* v. *Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003); *United States* v. *Hooker Chems. & Plastics Corp.*, 850 F. Supp. 993 (W.D.N.Y. 1994). The federal government also entered into numerous settlements in cases involving federal PRPs. See, *e.g.*, 69 Fed. Reg. 67,607 (2004); *id.* at 51,326; 67 Fed. Reg. 8557 (2002); 65 Fed. Reg. 32,123 (2000); 61 Fed. Reg. 54,215 (1996).[19] Even in the highly improbable event that EPA were to start

[19] Moreover, federal PRPs have engaged in substantial cleanup efforts of their own. For example, under the Defense Environmental Restoration Program, the Department of Defense spends some $2 billion per year to clean up contamination at active military installations and former defense properties throughout the United States. 10 U.S.C. 2701; see General Accounting Office, *Environmental Liabilities*, GAO-02-117, at 3, 7 (December 2001).

forgoing enforcement actions in cases involving federal PRPs, moreover, it would not necessarily be able to insulate those federal PRPs from liability for contribution, because enforcement actions by state or tribal authorities or "innocent" private parties (or settlement agreements with state authorities) could trigger a right to seek contribution from those PRPs under Section 113(f)(1) or (f)(3)(B).[20]

The court of appeals correctly noted that, "[w]hen [Congress] enacted SARA, it explicitly waived sovereign immunity." Pet. App. 18a; see CERCLA § 120(a)(1), 42 U.S.C. 9620(a)(1). It does not follow, however, that Congress thereby intended to allow PRPs to bring suit against other PRPs—whether governmental or non-governmental—under Section 107(a). By its terms, the waiver of sovereign immunity added to CERCLA by SARA merely provides that federal agencies "shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [Section 107]." *Ibid.* Congress thereby authorized *valid plaintiffs* to sue federal PRPs, like non-federal PRPs, either for cost recovery under Section 107(a) or for contribution under Section 113(f). Indeed, Congress made clear that it was not otherwise altering the terms of Section 107(a). See *ibid.* (providing that "[n]othing in this section shall be construed to

[20] In addition, to the extent that private PRPs in cases involving federal PRPs are government contractors (as is often the case), they may be able to recover some or all of their cleanup costs directly from the government under the terms of their contracts (*e.g.*, as allowable overhead), subject to any applicable legal limitations. See, *e.g.*, *E.I. du Pont de Nemours & Co.* v. *United States*, 365 F.3d 1367, 1372-1380 (Fed. Cir. 2004).

affect the liability of any person or entity under [Section 106 or Section 107]"). The hypothetical and implausible concern that the federal government could prevent private parties from availing themselves of SARA's waiver of sovereign immunity by refusing to pursue a settlement or suit does not justify reading into Section 107(a) a broad and disruptive right for PRPs to seek cost recovery against governmental and non-governmental PRPs alike.

The court of appeals' decision in this case effectively creates a new federal cause of action that is not specifically authorized in CERCLA's text. Some may argue that, as a policy matter, it would be preferable to have such a cause of action. Ultimately, however, the task of making that policy judgment should be left to Congress. Congress expressed its current policy through the text of Section 113(f), which allows one potentially responsible party to bring suit against another only if it is subject to suit itself (or has entered into a settlement). As this Court stated in another case construing CERCLA, expanding the scope of existing remedies "is a policy decision that must be made by Congress, not the courts." *Key Tronic*, 511 U.S. at 819 n.13 (citation omitted).

E. Respondent Is Not Entitled To Bring Suit Under Section 113(f)

In this case, respondent is a PRP that has not yet been sued under Section 106 or Section 107(a) (or reached a settlement). Respondent is therefore not entitled to bring suit against the federal government (or any other PRP) under either Section 107(a) or Section 113(f). In its brief supporting the petition for a writ of certiorari, respondent contended that it is nevertheless

eligible to bring suit under Section 113(f) on the theory that, even if respondent lacks a cause of action against the government under Section 107(a), it could seek a *declaration* that the government was a PRP under Section 107(a) (and thereby trigger the right to bring a claim under Section 113(f)). Br. 2-9. That contention lacks merit.

1. As a preliminary matter, respondent's argument has been forfeited because respondent failed properly to preserve it below. In the district court, respondent expressly dropped its claim under Section 113(f) in the wake of this Court's decision in *Cooper Industries*. See J.A. 35 (stating, in motion for leave to file amended complaint, that, "[u]nder [*Cooper Industries*], the Section 113(f)(1) claim may no longer be maintained"). Accordingly, the district court held only that respondent did not have a cause of action under Section 107(a). Pet. App. 21a-28a. In the court of appeals, moreover, respondent did not advance the instant argument until its reply brief, and the court of appeals did not address it. See, *e.g.*, *Navarijo-Barrios* v. *Ashcroft*, 322 F.3d 561, 564 n.1 (8th Cir. 2003) (stating that "[i]t is well settled that we do not consider arguments raised for the first time in a reply brief").

2. In any event, respondent's argument plainly lacks merit. If, as has been demonstrated, Section 107(a) does not afford a cause of action for one PRP to sue another PRP, it necessarily follows that a PRP cannot pursue a claim *for declaratory relief* against another PRP under that provision. The Declaratory Judgment Act is purely procedural and remedial in nature, see *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); it cannot supply a substantive cause of action where none exists. Thus, if PRPs are not within the class of parties

entitled to sue for the relief actually afforded by Section 107(a), they cannot overcome that fundamental flaw simply by seeking declaratory relief under the same provision. See *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27 (1983).

Even assuming *arguendo* that one PRP could request a declaration that another party was a PRP in some circumstances, therefore, such a request would not arise under Section 107(a) and thus could not constitute "[a] civil action under [Section 107(a)]" so as to trigger the right to bring suit under Section 113(f). *Franchise Tax Bd.*, 463 U.S. at 27; cf. *Cooper Industries*, 543 U.S. at 160-161 (stating question presented as "whether a private party who has not been sued under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties"). A contrary reading of Section 113(f) would effectively render superfluous the very statutory requirement construed in *Cooper Industries—viz.*, that a PRP may bring a claim for contribution only "during or following" an action under Section 106 or Section 107(a)—by enabling a PRP to manufacture a qualifying Section 107(a) action through the simple expedient of including a request for declaratory relief. Nothing in CERCLA supports such a bizarre result. Because respondent cannot meet the requirements for bringing suit against another PRP under Section 113(f), its Section 113(f) claim was without merit.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 9601 provides in pertinent part:

Definitions

* * * * *

(23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604 (b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].

(24) The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the

location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means remove, removal, remedy, and remedial action;, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

* * * * *

2. 42 U.S.C. 9606 provides:

Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates,or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such

action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2), 1318, 1319, and 1364(a) of title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j-4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of title 15.

3. 42 U.S.C. 9607 provides in pertinent part:

Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or 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 or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) 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;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or

threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

* * * * *

4. 42 U.S.C. 9613 provides in pertinent part:

Civil proceedings

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(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved

its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) 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 party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial

action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action

may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

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