No. 11-30

IN THE

Supreme Court of the United States

MORRISON ENTERPRISES, LLC,
Petitioner,

v.

DRAVO CORPORATION,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held, in conformity with the reasoning in *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007) and unanimous decisions from the Federal Courts of Appeals, that a party who has incurred response costs pursuant to administrative or judicially-approved settlements or following an enforcement action under §§ 106 or 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") must bring its contribution claim under CERCLA § 113(f).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Dravo Corporation is a Delaware corporation. The stock of Dravo Corporation is not publicly traded.

The parent of Dravo Corporation is Carmeuse Lime, Inc., a Delaware corporation. Carmeuse Lime, Inc. is owned by Carmeuse North America BV, a Dutch corporation and CNA Lux S.A.R.L., a Luxemburg corporation.

The stock of Dravo Corporation's parent corporations is not publicly traded.

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STATEMENT OF THE CASE

I. Statutory Framework

"As its name implies, CERCLA is a comprehensive statute that 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 " 'two ... main purposes of CERCLA' are 'prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.' " *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (citation omitted).

When faced with the need to clean up a hazardous waste site, § 104(a) provides the federal government with the option either of (1) cleaning up the site itself or (2) requiring the cleanup to be financed and performed by certain enumerated entities that are subject to liability under CERCLA. 42 U.S.C. § 9604(a). Those entities, often referred to as "potentially responsible parties" or "PRPs," are set forth in four categories in § 107. 42 U.S.C. § 9607(a)(1)-(4). Regardless of whether the government performs the cleanup itself or compels a PRP to do it, the government is authorized to recover all costs associated with the cleanup from the PRPs, either through a civil action under § 107(a)(4)(A), or through an administrative settlement under § 122(g) or § 122(h). 42 U.S.C. §§ 9607(a)(4)(A), 9622(g) & (h).

In addition to providing for the government's cost recovery, CERCLA includes two mechanisms for private parties to recover costs incurred in cleaning up a contaminated site: §§ 107 and 113. Section 107(a) provides a cost recovery claim for a party who voluntarily incurs cleanup costs, *i.e.*, for a party who

has incurred cleanup costs in the absence of an enforcement action or government settlement. 42 U.S.C. § 9607(a); *United States v. Atlantic Research*, 551 U.S. 128, 139 n.6 (2007). Section 113, by comparison, provides a cost recovery claim for PRPs, *i.e.*, for a party who has incurred cleanup costs as a result of an enforcement action or a government settlement.

Specifically, § 113(f)(1) gives a right of contribution to PRPs during or after the filing of an enforcement action under § 106 or 107:

> Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)]. . . , during or following any civil action under section [§ 106] . . . or under section [§ 107(a)]. . . . 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 [§ 106 or 107]. . . .

42 U.S.C. § 9613(f)(1).

And § 113(f)(3)(B), in turn, gives the right of contribution to PRPs that have settled with a state or the United States:

> 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 [§ 113(f)(2)].

Id. § 9613(f)(3)(B).

This Court examined the relationship between §§ 107(a) and 113(f) in its decisions in *Cooper Industries* and *Atlantic Research.* In both cases, a party who had contributed to contamination at a site had cleaned up the site without having been sued under § 106 or § 107 or otherwise subject to a government settlement. That party then sued alleged PRPs to recoup its cleanup costs. *E.g.*, *Cooper Indus., Inc. v. Aviall Serv.,, Inc*, 543 U.S. 157, 163-64 (2004); *Atlantic Research*, 551 U.S. at 133-34. In resolving the cases, this Court noted that "§§ 107(a) and 113(f) provide two 'clearly distinct' remedies," *Atlantic Research*, 551 U.S. at 138 (quoting *Cooper Indus.*, 543 U.S. at 163 n. 3), that "complement each other by providing causes of action 'to persons in different procedural circumstances.' " *Id.* at 139 (citation omitted).

In *Cooper Industries*, this Court held that a PRP could seek contribution under § 113(f)(1) only during or following a civil action under §§ 106 or 107(a). 543 U.S. at 166. In *Atlantic Research*, this Court held that a PRP that has "voluntarily" incurred cleanup costs (*i.e.*, it had not been sued under §§ 106 or 107 or settled and thus is not provided a right to contribution under § 113) may, in certain circumstances, sue other PRPs under § 107(a). 551 U.S. at 135.

II. Hastings Groundwater Contamination Site

This case involves historical contamination of groundwater by multiple parties from multiple sources in parts of the city of Hastings, Nebraska. In 1983, the City attempted to restore a long-closed water production well but immediately received

complaints about the water's foul taste and odor. Pet. App. 3. Federal and state agencies investigated. In 1986, EPA designated the contamination the Hastings Groundwater Contamination Site ("HGWCS" or "Site") and added the Site to the National Priorities List, thereby bringing the Site within CERCLA's scope. Pet. App. 3-4.

Since the 1980s, PRPs have made comprehensive efforts to clean up the Site. The net result is that after 25 years, EPA, in addition to requiring the PRPs to provide area-wide protection from the contaminated water, also has required them to implement source and groundwater controls for seven subareas or subsites. Those subsites include the Colorado Avenue Subsite, the FAR-MAR-CO Subsite, and the North Landfill Subsite. Pet. App. 4. A groundwater extraction well, designated as Well-D, is located down-gradient of these three subsites. Well-D has been operating since 1997. Pet. App. 5. It pumps and treats the groundwater to remove hazardous substances. Pet. App. 4.

The Colorado Avenue Subsite was home to Dravo's predecessor, Hasting Industries, an air conditioning manufacturing plant. It is close to the center of Hastings and is hydrogeologically upgradient from Well-D. EPA discovered that groundwater at the Subsite was contaminated by chlorinated solvents, including trichloroethylene ("TCE"), and issued Unilateral Administrative Orders ("UAOs") to Dravo in 1990 and 1993, requiring Dravo to remediate the soil and groundwater. Pet. App. 8. Dravo has spent over $20 million on cleanup at the HGWCS (mostly at Colorado Avenue), reducing TCE concentrations below EPA's target level. The UAOs have been

superseded by a consent decree (entered in 2006), and remediation continues pursuant to that decree.

The FAR-MAR-CO Subsite was operated by Morrison's predecessor, Morrison Quirk, as a grain storage facility. It is hydrogeologically downgradient from the Colorado Avenue Subsite. EPA discovered that groundwater at the Subsite was contaminated by TCE, carbon tetrachloride ("CT"), and ethylene dibromide ("EDB"). Pet. App. 5.

In 1991, Morrison entered into the first of several administrative settlements with EPA, known as administrative orders on consent ("AOC"), under which Morrison agreed to perform designated clean-up activities at the FAR-MAR-CO Subsite. Pet. App. 5. The 1991 administrative settlement was modified in 1995 and, in 1996, Morrison entered into a second AOC, pursuant to which Morrison agreed to operate Well-D to extract and treat groundwater at the FAR-MAR-CO Subsite and reimburse EPA for response costs incurred at the subsite. Pet. App. 5. One stated purpose of the 1996 AOC was to reduce three specific contaminants of concern found in groundwater at the FAR-MAR-CO Subsite at concentrations hazardous to human health and the environment – TCE, CT, and EDB. Pet. App. 5. Having been found a "liable party" by EPA within the meaning of § 107(a), Morrison agreed to finance and operate Well-D to remove each of those contaminants of concern.

In September 2007, EPA issued a record of decision for the FAR-MAR-CO Subsite, requiring the extraction of contaminated groundwater at Well-D. Pet. App. 6. Roughly two years later, on July 29, 2008, EPA filed a civil action against Morrison under

§§ 106 and 107, seeking an order compelling Morrison to operate Well-D and to reimburse EPA for response costs incurred at the FAR-MAR-CO Subsite. Pet. App. 6. In a consent decree filed October 8, 2008, EPA and Morrison resolved Morrison's potential liability for contamination at the Site under §§ 106 and 107. The 2008 consent decree continued to rely on Well-D as the primary method of cleaning groundwater. Pet. App. 6.

In addition to contaminants originating at the FAR-MAR-CO Subsite, groundwater extracted and treated at Well-D contains TCE and other contaminants originating from the Colorado Avenue and North Landfill. Pet. App. 7. In private party agreements dated 1995 and 1997, Morrison, the City, and another entity agreed to coordinate efforts and allocate certain costs associated with operating Well-D. Dravo and several other entities likewise entered into a 2007 consent decree with EPA related to the North Landfill Subsite under which Dravo pays for part of Well-D's operation. Pet. App. 8.

III. District Court Proceedings

Morrison and the City filed a § 107 suit against Dravo, seeking to recover the costs incurred in response to the releases or threatened releases of hazardous substances emanating from the Colorado Avenue Subsite and, specifically, the costs associated with Well-D. Pet. App. 8. Morrison and the City did not assert a claim for contribution under § 113(f) or even state it as an alternative basis for relief. In its answer, Dravo filed a counterclaim for § 113 contribution from both parties. Also, as its second affirmative defense, Dravo pled that Morrison and the City could not recover under § 107 because "their

claims [were] for contribution." Pet. App. 9. Morrison and the City responded with a motion to strike, arguing that Dravo's assertion of this defense would only confuse the issues. The district court denied the motion, noting that there were material disputed factual issues regarding the source of TCE at Well-D. The court also stated that Morrison and the City had failed to establish Dravo's defense was insufficient as a matter of law. Pet. App. 9.

After the pleadings were settled, the parties made an exhaustive pretrial evaluation of the contamination at the various sites and the history of the respective clean-up efforts. This evaluation included expert reports and the depositions of multiple lay and expert witnesses. The parties also identified exhibits for use at trial, those witnesses who would testify, designated various deposition transcripts for trial, and filed motions related to the proposed expert testimony.

With this extensive factual record in hand, Dravo and Morrison filed cross-motions for summary judgment. The City joined Morrison's motion. After review of that same detailed record, the district court granted Dravo's motion, finding that § 113(f) was Morrison and the City's exclusive remedy.[1] Pet. App. 10-11. With respect to Morrison, the court determined that it could not recover costs from Dravo associated with Well D under § 107(a) because it had entered into administrative settlements and a consent decree with EPA that required Well-D's operation. Pet. App. 54-55. Because of that

[1] The City has not filed a petition for certiorari.

government and administrative compulsion, Morrison plainly could not be labeled a volunteer and thus was left to seek contribution from other PRPs under § 113(f). Although it had ample opportunity to invoke that section in its complaint and throughout the lengthy pretrial proceedings, Morrison refused to do so. After resolving Morrison's § 107 claim, the court further found that Dravo's § 113 counterclaim was moot.

Once its § 107 claim was dismissed, Morrison, for the first time, sought leave to amend its complaint to assert a claim under § 113. The district court denied the motion, explaining that Morrison's delay was inexplicable and there was no good cause to allow leave after the matter had been resolved. Pet. App. 11.

IV. Circuit Court Proceedings

The Court of Appeals for the Eighth Circuit affirmed the dismissal. *Morrison Enter., LLC v. Dravo Corp.*, 638 F.3d 594 (8th Cir. April 5, 2011). The court held that "§ 113(f) provides the exclusive remedy for a liable party compelled to incur response costs pursuant to an administrative or judicially approved settlement under §§ 106 or 107." Pet. App. 14-15.

In agreeing with the district court that § 113 provided Morrison's exclusive avenue for cost recovery, the Eighth Circuit examined the statutory scheme and relevant precedents, including *Atlantic Research*, all of which supported the conclusion that Morrison – given the factual record in this case – could not pursue its claim for cost recovery under § 107(a). In reaching that result, the court also had the benefit of an amicus brief filed by the United

States supporting affirmance and identifying legal requirements and public policy concerns related to limiting liable parties to § 113. In particular, the United States urged affirmance to uphold the district court's ruling restricting PRPs that have been sued under §§ 106 or 107 or have entered into an administrative or judicially approved settlement to § 113(f) contribution claims. As the United States emphasized, affirmance was necessary to prevent circumvention of the interlocking statutory rights and limitations Congress enacted in § 113.

Consistent with the views of the United States, the Eighth Circuit found that the administrative settlements and the consent decree that Morrison entered into with EPA obligated Morrison to operate Well-D to remove CT, EDB and TCE from contaminated groundwater. Pet. App. 15-16. In particular, the court focused on the 1996 AOC that specifically obligates Morrison to operate Well-D to remove TCE from contaminated groundwater as a "liable party" under § 107(a). Citing *Atlantic Research*, the Eighth Circuit held that response costs incurred pursuant to administrative settlements or following a suit under § 106 or § 107(a) are not incurred voluntarily. Pet. App. 15-16. Accordingly, Morrison could not maintain a cost-recovery action under Section 107(a). Pet. App. 15-16.

The Eighth Circuit also affirmed the lower court's rejection of Morrison's argument that, because it had never been subject to liability under § 107 for response costs related specifically to TCE, Morrison did not, as a matter of law, share "common liability"

with Dravo necessary to support a § 113 action.[2] Pet. App. 19. The court agreed with the United States that Morrison's interpretation of the statute "fundamentally misconstrues liability under CERCLA." Pet. App. 20. Section 107 requires that if a responsible party releases hazardous materials into the environment and that release causes the incurrence of response costs, then the party is liable for *any* other necessary cost of response incurred by any other person consistent with the national contingency plan. Pet. App. 20; *see also* 42 U.S.C. § 9607(a). Thus, the court determined that Morrison and Dravo share liability for operating Well-D to remove those contaminants and that this shared

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[2] Morrison contended that it could not proceed under § 113(f) because Morrison and Dravo released different contaminants at different facilities. Morrison argued that because it was never subject to liability under § 107 for response costs necessary to address TCE from the Colorado Avenue Subsite, it did not share "common liability" with Dravo. The Eighth Circuit affirmed the district court's allocation of response costs between the liable parties based, in part, on the relative toxicity of the distinct hazardous substances each released into the groundwater at different sites. Pet. App. 20-21; s*ee, e.g., Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 938 (8th Cir. 1995) (affirming decision to allocate responsibility between two PRPs based on the relative toxicity of the distinct substances that the PRPs were responsible for releasing). The court added that when multiple parties are liable for response costs, the focus then shifts to allocation, and allocation is a contribution claim controlled by § 113(f). Pet. App. 20-21 (citing *United States v. Hercules, Inc.*, 247 F.3d 706, 715 (8th Cir. 2001).

liability is sufficient to support a § 113 claim. Pet. App. 22.

REASONS FOR DENYING THE WRIT

Morrison has presented no "compelling reasons" for granting its petition. It claims that this Court should grant the petition because the Eighth Circuit's holding is (i) contrary to other circuit court decisions and (ii) contrary to CERCLA's structure and function. Neither claim withstands scrutiny.

There is, in fact, no conflict between the Eighth Circuit's holding and the relevant decisions from other circuit courts. Rather, the Eighth Circuit's holding that § 113 provides the exclusive remedy for a liable party compelled to incur response costs pursuant to an administrative or judicially approved settlement under a §§ 106 or 107 suit is consistent with all circuit courts that have addressed the issue after *Atlantic Research*.

The Eighth Circuit's reasoning and holding also align fully with CERCLA's text, its underlying policies, practicality and this Court's analysis in *Atlantic Research*. Further, the Eighth Circuit's construction of §§ 107 and 113 is easily administered, cost efficient, equitable and upholds the validity of agreements with the government. Finally, its construction also comports fully with EPA's views on how the statute should be construed to best achieve its critical functions. The Eighth Circuit's holding, in short, reflects controlling law and properly implements the statute. The petition should be denied.

I. There Is No Conflict Among The Federal Courts Of Appeals Regarding The Pursuit of CERCLA Contribution Claims.

Morrison principally argues that a grant of certiorari is warranted because the Eighth Circuit's holding "deepens a split of authority in the lower courts regarding the relationship between CERCLA § 107(a) and § 113(f)." Pet. 12-13. The petition, however, fails to identify a true conflict between the Eighth Circuit's holding here and the actual holding in any other Court of Appeals' opinion.

In *Atlantic Research*, this Court held that where a PRP "voluntarily" incurs cleanup costs – and is not subject to suit and has not entered into a settlement or consent decree with the United States or a state – the PRP can bring an action against other PRPs under § 107(a)(4)(B). *Atlantic Research*, 551 U.S. at 135. This Court noted the "potential for overlap" between §§ 107(a) and 113(f), but declined to decide whether a liable party who has entered into a settlement or is subject to suit under §§ 106 or 107(a) could recover such compelled costs under § 107(a), § 113(f), or both. *Id.* at 139 n.6. This Court explained "that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f)." *Id.* Although this Court did not address the "potential for overlap", it did emphasize that, for a PRP, the "choice of remedies simply does not exist." *Id.* at 140.

Consistent with this Court's reasoning in *Atlantic Research*, the Eighth Circuit held that § 113(f) provides the exclusive remedy for a liable party compelled to incur response costs pursuant to an

administrative or judicially approved settlement under §§ 106 or 107. Pet. App. 15.

Morrison nevertheless contends that the Eighth Circuit's "bright line" rule has "staked out the most harsh and formalistic position" among decisions interpreting *Atlantic Research*. Pet. 21. This assertion is not supportable based on relevant caselaw and certainly not by the cases Morrison selectively cites in its brief. Since *Atlantic Research*, including the Eighth Circuit, at least six decisions by federal courts of appeal, as well as numerous decisions by federal district courts, have concluded that § 113(f) provides the exclusive remedy for PRPs who have incurred costs under administrative or judicially-approved settlements or following an enforcement lawsuit:

Second Circuit

- *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010) (holding that allowing a liable party whose claims fit § 113(f) "to proceed under § 107(a) would in effect nullify [CERCLA] and abrogate the requirements Congress placed on contribution claims under § 113").

Third Circuit

- *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 227-29 (3d Cir. 2010) (holding that § 113(f) contribution claims were plaintiffs exclusive remedy based on costs incurred performing work under consent decrees that settled prior CERCLA actions brought by EPA and afforded plaintiffs' protection from contribution counterclaims).

Fifth Circuit

- *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 291 n. 19 (5th Cir. 2010) (recognizing that the district court below had implicitly held, on an issue that was not appealed, that expenses sustained pursuant to a CERCLA consent decree with EPA supported claims only under § 113(f), not § 107(a)).

Sixth Circuit

- *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007) ("To maintain the vitality of § 113(f), however, PRPs who have been subject to a civil action pursuant to §§ 106 or 107 or who have entered into a judicially or administratively approved settlement must seek contribution under § 113(f).").

Seventh Circuit

- *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1043 (E.D. Wis. 2008) ("[T]he operative principle appears to be that § 107(a) is available to recover payments only in cases where § 113(f) is not.").

Eighth Circuit

- *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), aff'd 551 U.S. 128 (2007) ("[L]iable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality.").

- *Morrison Enter., LLC v. Dravo Corp.*, 2009 WL 4330224, at *8 (D. Neb. Nov. 29, 2009) (unpublished) ("[A] PRP can bring a claim under § 107(a) if it foreclosed from bringing a claims under § 113(f), but that, conversely, a PRP *must* proceed under § 113(f) if §113(f) is available to it.") (emphasis in original).

Ninth Circuit

- *Kotrous v. Goss-Jewett Co.*, 523 F.3d 924, 932 (9th Cir. 2008) ("A PRP cannot choose remedies.").
- *Stimson Lumber Co. v. International Paper Co.*, 2011 WL 1532411, at *15-19 (D. Mont. Feb. 28, 2011 (finding that §§ 107 and 113 provide "two distinct remedies by which responsible private parties may recover some or all of their hazardous waste cleanup costs" and holding that PRP who had entered into an administrative settlement with the government could only bring § 113 contribution claim against other PRP).

Eleventh Circuit

- *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1342 (N.D. Ala. 2010) ("Congress intended § 113(f) contribution to serve as the exclusive remedy for a party to recoup its own costs incurred in performing a cleanup pursuant to a judgment, consent decree, or settlement that gives rise to contribution rights under § 113(f).").

Morrison claims, however, that four court of appeals' decisions provide for a different result and are in conflict with the Eighth Circuit's holding. Pet. 22-27 (citing *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 91-93 (2d Cir. 2009), *Schaefer v. Town of Victor*, 457 F.3d 188, 191-92, 201-2 (2d Cir. 2006), *Kotrous.*, 523 F.3d at 934, and *Agere Sys., Inc.*, 602 F.3d at 227-28.)[3] Properly analyzed, none of these decisions conflict because none of the plaintiffs in the cited cases had resolved its § 107 liability, nor entered into administrative or judicially approved settlements within the meaning of § 113(f). *See W.R. Grace*, 559 F.3d at 91-93 (finding that the consent order entered into by the plaintiff settled only state claims and left open the possibility that the government could assert CERCLA claims in the future) ; *Schaefer*, 457 F.3d at 202 (stating that it "need not decide whether [the New York Supreme Court's 1994 Consent Judgment approving a 1992 Consent Order between Schaefer and the state] constitutes a judicially approved settlement" within

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[3] Morrison makes an additional contention, just in passing, that the Eighth Circuit's holding is in conflict with other circuits on the grounds that there is a distinction between an AOCs and enforcement suits under §§ 106 or 107. Pet. 25. This argument is unfounded. To begin with, this distinction does not even exist in this case – in addition to three AOCs, Morrison also was sued by EPA under §§ 106 and 107. Moreover, this argument was not raised in the briefing below and likewise was not addressed by the Eighth Circuit. The issue accordingly is not borne out by the record and not properly before this Court.

the meaning of § 113(f) because Schaefer failed to satisfy the longer statute of limitations applicable under § 107(a)); *Kotrous*, 523 F.3d at 934 (holding that because the plaintiff had not been subject to a § 106 or § 107 action, it could not seek contribution under § 113); *Agere Sys., Inc.*, 602 F.3d at 224-25 (affirming a decision allowing two plaintiffs to bring a § 107 action to recoup costs plaintiffs had paid pursuant to private settlement agreements; plaintiffs had neither been sued under §§ 106 or 107 nor entered into administrative or judicially approved settlements with the government).

Morrison's cramped efforts to manufacture a circuit split are highlighted by its conspicuous reliance on *W.R. Grace*. Morrison goes so far as to claim the Second Circuit held that a plaintiff could bring a § 107(a) claim, even though its expenditures were made in compliance with a consent order. Pet. 22. This characterization fails to explain a key element of the court's holding – namely that a § 107(a) claim was available because the consent order settled *only state claims* against the plaintiff, leaving open the possibility that the government could assert federal CERCLA claims against the plaintiff in the future. *See W.R. Grace*, 559 F.3d at 91-93.

Thus, as the Second Circuit noted: "The relevant inquiry with respect to section 107(a) is whether the party undertook the remedial actions without the need for the type of administrative or judicial action that would give rise to a contribution claim under section 113(f)." *Id.* at 94. Because the plaintiff chose to resolve state claims in an agreement with the state to investigate and remediate a contaminated site thereby saving "the parties and the government litigation costs, and presumably also limited ongoing

contamination by promptly remediating the site," it was not precluded from bringing an action pursuant to § 107(a). *Id.* It is noteworthy, however, that in *W.R. Grace*, the plaintiff sought "to recover costs for remediation it performed itself; it [did] not seek to recoup expenses incurred in satisfying a settlement agreement or a court judgment." 559 F.3d at 93. The court also stated specifically that it was not called upon to determine whether a party that enters into a consent decree following a suit under CERCLA §§ 106 or 107(a) has a cause of action under § 107(a). *See* 559 F.3d at 93 n.7.

Morrison also identifies a purported conflict among the district courts. Pet. 24. But the only two decisions it identifies as allowing a party to bring a § 107 claim following an administrative settlement likewise are mischaracterized. In *Ford Motor Co. v. Michigan Consol. Gas Co.*, 2009 WL 3190418, at *9 (E.D. Mich. Sept. 29, 2009), the court in dicta mentioned that recoverable costs under § 107(a) are "not necessarily" limited to those voluntarily incurred. In denying defendant's motion to dismiss, however, the court did not provide further clarification. On the contrary, the facts remain unresolved and it was undetermined whether the costs were voluntarily incurred. In *Ashland, Inc. v. Gar Electroforming*, 729 F. Supp. 2d 526, 542-44 (D.R.I. 2010), the court simply found that because EPA had not brought civil or administrative proceedings against plaintiff, the plaintiff was precluded from bringing a contribution claim under § 113(f)). Neither of these opinions thus conflict, even arguably, with the Eighth Circuit's holding or the reasoning in the relevant cases that expose the lack of any conflict on the cost recovery issue in this case.

In sum, the decisions after *Atlantic Research* are uniform and in line with the Eighth Circuit's holding: § 113 is the only remedy for a liable party compelled to incur responses costs under an administrative or judicially approved settlement of following a §§ 106 or 107 suit. There is no conflict and the petition should be denied for this reason alone.

II. The Eighth Circuit's Holding Comports With CERCLA's Structure, Plain Language, And Its Underlying Policies.

Morrison argues that a grant of certiorari is warranted because the Eighth Circuit's holding would deter settlement and allow culpable parties to evade liability. Pet. 13. To the contrary, the holding aligns fully with CERCLA's structure, plain language, underlying policies and practicalities.

CERCLA's regime for cleaning up contaminated sites, including the promotion of settlement with the government, principally depends on the appropriate interpretation of the rights one PRP has against another under §§ 107 and 113. That is so because § 113, in significant part, provides an express bar against claims for contribution against those that settle with the United States, creating an incentive for PRPs to resolve their liability to the United States and agree to engage in cleanup activities. As the United States explained in its amicus brief below, allowing PRPs covered by § 113 to elect to recover costs under § 107(a) could allow them to circumvent the claim protection provided by § 113 and bring suit against a PRP that has settled with the United States. *See also Solutia, Inc.*, 726 F. Supp. 2d at 1343 ("[I]t would be particularly anomalous for Congress to grant a settling party protection from

liability for 'contribution' but then allow a plaintiff to sidestep the bar by doing nothing more than formally restyling the same claim as one seeking 'cost recovery' under § 107(a).").

By misinterpreting CERCLA, Morrison attempts to unfairly expand the availability of the actions one PRP has against another. It argues that, the definition of "voluntarily" aside, any party that merely incurs cleanup costs should be able to pursue a § 107 claim. Pet. 32. As the Eighth Circuit explained, however, this is not how CERCLA works. Morrison entered into administrative and judicially approved settlements by which it is bound. Pet. App. 16. Unlike the plaintiff in *Atlantic Research* – which had never been subject to an action under §§ 106 or 107 – the government filed a § 107 complaint against Morrison for releases and potential releases of hazardous substances at the FAR-MAR-CO Subsite and entered administrative settlements to resolve its liability. Notwithstanding Morrison's unsupported assertions to the contrary, one of the agreements, the 1996 AOC, specifically obligates Petitioner to operate Well-D to remove TCE from contaminated groundwater as a "liable party" under § 107(a). Pet. App. 16. Morrison is subject to penalties if it fails to do so. In these circumstances, as the Eighth Circuit highlighted, reimbursement of response costs incurred pursuant to administrative settlements or following a suit under § 106 or § 107(a) must be pursued through § 113, if available.[4] Pet. App. 16; *see also Atlantic Research*, 551 U.S. at 139 n.6.

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[4] Amici Pharmacia Corporation suggests that the Eighth Circuit improperly expanded the text of CERCLA

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in holding that § 113(f) is the exclusive remedy for a PRP that has settled with or been sued by the government. As Amici would have it, the Eighth Circuit erroneously added words to the statute that are not there. That characterization is off the mark. The Eighth Circuit arrived at its exclusive remedy conclusion by doing exactly what it was supposed to – looking at the relevant provisions of the statute in context. As is readily apparent from its opinion, the court thoughtfully examined CERCLA's framework – in particular the interaction between §§ 107 and 113 – and resolved the issue left open by the relevant caselaw: whether a liable party sustaining expenses under a settlement of following a §§ 106 or 107 suit could recover such compelled costs under § 107(a), § 113(f) or both. In its holding, the Eighth Circuit clarified that, of these three options, § 107(a) by itself or with § 113(f) is not available to a liable party compelled to incur costs; § 113(f) is the only or exclusive option. That holding is firmly grounded in the plain language of CERCLA and all sources relevant to determining the meaning of the statute.

Although no party to this proceeding ever has done so, Amici also relies on regulations promulgated by EPA to criticize the Eighth Circuit's construction of the statute. But those regulations are consistent with the view that PRPs who cannot seek contribution under § 113(f) have no remedy under § 107(a). While 40 C.F.R. 300.700(c)(3)(ii) states that a response action carried out in compliance with a § 106 order or a § 122 consent decree "will be considered 'consistent with the NCP [national contingency plan]' " for purposes of cost recovery under § 107(a), it does not follow that PRPs that are ineligible for § 113(f) relief can bring suit under § 107(a). A private party can be subject to an administrative order under § 106 even if it is not a PRP (*see* 42 U.S.C. 9606(b)(2)(C)) and, in any

Similarly, Morrison's interpretation of "common liability" belies CERCLA's structure and purpose and cannot be what Congress intended, as reflected in the plain language of the statute. It contends it could not seek contribution from Dravo pursuant to § 113(f) because Morrison and Dravo released different contaminants at different facilities. Pet. 34. In Morrison's view, because it had never been subject to § 107 liability for response costs related to TCE originating at the Colorado Avenue Subsite, it did not, as a matter of law, share "common liability" with Dravo necessary to support a § 113 action.

As the Eighth Circuit explained, however, Morrison's interpretation "fundamentally misconstrue[s] liability under CERCLA." "Under CERCLA, if a responsible party ... releases hazardous materials into the environment, and that release 'causes the incurrence of response costs,' then the party is liable .... for 'any other necessary cost of

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event, to the extent that § 107(a) imposes the underlying liability that is a necessary predicate for a contribution claim under § 113(f), the regulation simply makes clear that, when a PRP is entitled to obtain contribution for cost recovery pursuant to § 113(f), it may recover any costs covered by that regulation without having to burden itself (and the courts) with the necessity of proving consistency with the NCP - often a costly, complex, and time-consuming matter that is best resolved through administrative expertise rather than the unnecessary expenditure of judicial resources. *See* United States' Reply Brief in *Atlantic Research*, 551 U.S. 128 (2007).

response incurred by any other person consistent with the national contingency plan.'" *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 (8th Cir. 1995) (quoting 42 U.S.C. § 9607(a)). When multiple parties are liable for response costs, the focus properly shifts to allocation which is controlled by § 113(f). Pet. App. 20-12 (citing *United States v. Hercules, Inc.*, 247 F.3d 706, 715-17 (8th Cir. 2001); *see also Control Data*, 53 F.3d at 938 (affirming decision to allocate response costs between liable parties based, in part, on the relative toxicity of the distinct hazardous substances each released into the groundwater at different sites).

Here, Morrison had a viable, if not classic, § 113 contribution claim but chose to pursue recovery of their Well-D costs under § 107 instead. Morrison apparently wanted to avoid application of § 113's equitable factors because application of those factors likely would have led to a much smaller recovery. But Morrison's failed attempt to seek a higher recovery is no reason to unsettle CERCLA and its very workable and easily administered cost recovery scheme.[5]

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[5] Amici Pharmacia also asserts, without support, that the Eighth Circuit's holding will reduce the incentive for PRPs to resolve their liability to the United States and clean up contaminated sites. The United States, for its part, firmly disagrees. In its amicus brief below, the United States explained that contribution protection under § 113(f) obtained in a settlement with the government creates an incentive for PRPs to resolve their liability to the United States and engage in cleanup activities. Otherwise, a party covered by § 113(f) could elect to recover costs under § 107, thereby circumventing contribution protection and bringing a suit against a PRP that has settled with the

A decision contrary to the Eighth Circuit's holding would allow parties to shoehorn a § 113 claim into a § 107 claim and nullify § 113's apportionment structure. This Court recognized that giving PRPs that choice would allow PRPs to "eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a)." *Atlantic Research*, 551 U.S. at 138. This Court noted, however, that a purely voluntary party, such as the plaintiff in *Atlantic Research*, having never been subject to an action under § 106 or § 107, was not even eligible to bring a § 113 claim. *Id.*; 42 U.S.C. § 9613(f).

Under CERCLA, the lines of demarcation are clear and allow the statute to achieve its purpose. Accordingly, based on a review of CERCLA's function, structure and relevant authorities, it is apparent that Morrison's efforts to condemn the Eighth Circuit's "bright-line" rule are unfounded.

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government. Amici's interpretation would upend the statute by discouraging settlement and significantly increasing litigation.

CONCLUSION

There is no perceptible reason for this Court to invest its scarce resources in this case. The Eighth Circuit's holding creates no direct conflict with any other court of appeals and its reasoning properly gives the CERCLA statutory scheme its intended effect. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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