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 OF *AMICI CURIAE* PHARMACIA CORPORATION (F/K/A MONSANTO COMPANY) AND SOLUTIA INC. IN SUPPORT OF THE PETITION

MARK G. ARNOLD
Counsel of Record
JOSEPH G. NASSIF
JASON A. FLOWER
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
(314) 480-1500
mark.arnold@huschblackwell.com

Attorneys for Pharmacia Corporation and Solutia Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

STATUTES AND OTHER AUTHORITIES — Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 11-30

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 OF *AMICI CURIAE* PHARMACIA CORPORATION (F/K/A MONSANTO COMPANY) AND SOLUTIA INC. IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICI*

Pharmacia Corporation (f/k/a Monsanto Company) and Solutia Inc. (hereafter, collectively "Solutia" or "*Amici*") respectfully submit this brief in support of Morrison Enterprises, LLC's ("Morrison") petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.[1]

[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* made a monetary contribution to its

This case involves the right of potentially responsible parties (PRPs) to recover some or all of their costs of cleaning up hazardous substances as required by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The Eighth Circuit held that entities that incurred response costs pursuant to administrative orders or consent decrees with the government have no right to cost recovery under CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). Instead, they are limited to contribution claims under CERCLA § 113(f), 42 U.S.C. § 9613(f).

Amici are companies that have worked diligently in cooperation with the United States government to address historic environmental contamination at sites across the country. At these sites, *Amici* have stepped up (either individually or as part of site-related groups) and conducted studies of alleged contamination and performed environmental clean-ups where necessary. Of their own accord and incurring their own costs, *Amici* have performed cleanups covered by administrative orders and/or judicially approved consent decrees entered into with the United States.

In its most recent CERCLA opinions, this Court has consistently – and unanimously – rejected lower court holdings that construe CERCLA based on perceived public policy rather than the text of the statute. Unfortunately, lower courts continue to ignore the language of the statute. The Eighth Circuit's opinion in the instant case, which does not

---

preparation or submission. Petitioner and Respondent have filed letters with the Court granting blanket consent for *amici* briefs. Counsel for the parties have been given at least 10 days notice of *Amici's* intention to file this brief.

even attempt to construe the words Congress used, is a perfect illustration.

Moreover, the opinion below actually conflicts with one of the principal goals of CERCLA: encouraging private party cleanups. One of the primary incentives to perform a cleanup is the prospect of recovering some or all of the cost from other PRPs. If the government settles separately with those PRPs, however, CERCLA § 113(f)(2) prohibits contribution claims against them. In recent years, the government has a history of repudiating its settlements and acting to bar *Amici* from recovering their own cleanup costs from other PRPs, thus providing a significant disincentive to entering into such settlements.

Amici have substantial economic interests in a clear interpretation of CERCLA that properly rewards and incentivizes private parties for stepping forward and agreeing to conduct cleanups, as opposed to encouraging parties to sit on the sidelines. *Amici* respectfully request that the Court grant the petition for writ of certiorari and confirm a private party's right to seek cost recovery for cleanup costs it has incurred under CERCLA.

ARGUMENT

The allocation of response costs under CERCLA has always been an issue of exceptional importance. It is a rare CERCLA site that does not involve multiple PRPs. The original version of the statute, enacted in 1980, did not directly address the issue. Most courts initially found that PRPs could seek cost recovery under CERCLA § 107(a)(4)(B) from other PRPs. *E.g.*, *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982); *Jones v.*

Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Ohio 1984).

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA), adding CERCLA § 113(f), which provided express rights of contribution under certain circumstances. After SARA, most courts held that the § 107(a) remedy was limited to "innocent" parties – *i.e.*, parties that had not contributed to the release. *E.g.*, *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 531 (8th Cir. 2003).

This Court has addressed the issue only twice. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Court unanimously held that § 113(f) contribution was not available to a party that had not itself been sued under § 106 or § 107(a). It reserved the issue of whether § 107(a) cost recovery was available. Two Justices would have reached that issue and held that it was.

The second case was *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007), which held that a PRP that had incurred response costs but had not been sued could seek cost recovery under § 107(a). The Court reserved the issue of whether a PRP that had incurred response costs pursuant to a settlement (*e.g.*, a consent decree or administrative order) could recover under § 107(a):

> We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all. For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107(a). In such a case, the PRP does not incur costs voluntarily but does not reimburse

> the costs of another party. ***We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both.***

551 U.S. at 139, n.6 (citations omitted and emphasis added). That is the exact issue Morrison's petition presents.

I. THE EIGHTH CIRCUIT'S METHOD OF CONSTRUING CERCLA DIRECTLY CONTRADICTS *AVIALL* AND *ATLANTIC RESEARCH*.

Both *Aviall* and *Atlantic Research* made it crystal clear that courts must interpret CERCLA based on the language in the statute rather than overarching public policy concerns. The Eighth Circuit's opinion in the instant case does exactly the opposite. It focuses entirely on the statutory purpose and ignores the text of CERCLA.

The court of appeals in *Aviall* focused its attention on the statutory purpose, rather than the "dissent's narrow textual interpretation." *Aviall Services, Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 681 (5th Cir. en banc 2002), *rev'd*, 543 U.S. 157 (2004). This Court held that the purpose was irrelevant:

> Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

543 U.S. at 167 (citations and internal punctuation omitted).

Viewed strictly from a policy perspective, the result in *Aviall* is an odd one: a PRP that voluntarily remediates a CERCLA site cannot seek contribution under § 113(f). But it is a result compelled by the plain text of the statute: § 113(f)(1) "authorizes contribution claims only 'during or following' a civil action," and Aviall had not been subject to such a suit. 543 U.S. at 168.

Prior to *Aviall*, there was "overwhelming authority in the circuit courts" that a PRP's only remedy was a § 113(f) action for contribution; only "innocent" parties could seek cost recovery under § 107(a). *Dico*, 340 F.3d at 531. The rationale for this rule, however, had nothing to do with the text of the statute. In *Atlantic Research*, this Court held that the "plain terms of § 107(a)(4)(B) allow a PRP to recover costs from other PRPs." 551 U.S. at 141. For this holding, the Court simply read the language of § 107 which states that a party responsible under CERCLA is liable for all response costs incurred by the government and:

> [A]ny other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. § 9607(a)(4)(B). Consequently, "the statute provides Atlantic Research with a cause of action." 551 U.S. at 141.

In the instant case, 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." Pet. App. 14-15. The opinion does not even attempt to defend that holding based on the language of

CERCLA. Instead, the sole focus is on the statutory purpose:

- "To ensure the continued vitality of the precise and limited right to contribution Congress set forth in § 113."
- A contrary holding "would in effect nullify the SARA amendment."
- "To maintain the vitality of § 113."

Pet. App. 14 (citations and internal punctuation omitted).

Had the Eighth Circuit analyzed the text of CERCLA and its implementing regulations, as this Court has instructed it to do, it would have reached the opposite conclusion. SARA did not amend one word of § 107. Not one word in § 113(f) says that it is the exclusive remedy for a PRP that has settled with the government. If PRPs could seek cost recovery from other PRPs under § 107 before SARA, as most cases held, nothing in SARA abrogated or limited such claims.

Section 113(f)(1) provides that a party "may seek contribution" from another PRP "during or following any civil action under section 9606 of this title or under section 9607(a) of this title." Section 113(f)(3)(B) provides that a party who has resolved its liability to the government "may seek contribution" from another PRP. Neither subsection provides that a party "may only" seek such recovery.

40 C.F.R. § 300.700(c) further confirms that § 113(f) rights are not exclusive:

> For the purposes of cost recovery under section 107(a)(4)(B) of CERCLA, . . . [a]ny response action carried out in compliance with the terms

> of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree under section 122 of CERCLA, will be considered 'consistent with the NCP [national contingency plan]'.

If parties to consent decrees cannot seek cost recovery under § 107, this regulation has no meaning.

That regulation is the product of notice and comment rulemaking for the stated purpose of revising the NCP "to implement regulatory changes necessitated by SARA." 55 Fed. Reg. 8666, 8666 (March 8, 1990). Such a regulation has the force of law. It is "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

Nine former high-ranking EPA officials, from both sides of the political aisle, filed an amicus brief in *Atlantic Research*, 2007 WL 1046711 (Apr. 5, 2007). That amicus brief cites § 300.700(c) as "even more compelling" evidence that "a party that receives a Section 106 Order or enters into a consent decree with EPA . . . can still sue under Section 107(a)(4)(B)." 2007 WL 1046711, at *11 n.4.[2]

The opinion below ignores the text of the statute and regulation in favor of the perceived policy benefits of making § 113(f) the exclusive means for a PRP to recover some or all of its costs incurred in remediating contaminated sites. That is an impermissible judicial rewrite of the statute that conflicts directly with *Aviall* and *Atlantic Research*.

---

[2] The *amicus* brief also notes that "a broad and clear right of recovery under Section 107(a)(4)(B)" would moot a substantial amount of litigation about what kinds of agreements satisfy § 113(f)(3)(B). 2007 WL 1046711, at *19.

II. THE AVAILABILITY OF § 107 COST RECOVERY IS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

Virtually every CERCLA site involves more than one PRP and often dozens of PRPs. So the issue of how response costs will be allocated among those parties affects virtually every CERCLA site. As the government put it in its petition for certiorari in *Atlantic Research*:

> The question whether a PRP can bring an action against another PRP under Section 107(a) is a recurring one of great importance to the operation of CERCLA.

United States v. Atlantic Research Corp., 2006 WL 3024300, at * 24 (U.S. Oct. 24, 2006).

The proper resolution of that question is essential to serving one of CERCLA's principal objectives: to "encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) (internal punctuation omitted).

Even before SARA, EPA recognized the importance of private party cleanups. For example, in guidance in 1985, EPA recognized that:

> Fund-financed cleanups, administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites. The Agency is therefore ***re-evaluating its settlement policy***, in light of three years experience with negotiation and litigation of hazardous

> waste cases, ***to remove or minimize if possible the impediments to voluntary cleanup***.
>
> * * *
>
> An effective program depends on a balanced approach relying on a mix of Fund-financed cleanup, ***voluntary agreements reached through negotiations***, and litigation.

Lee M. Thomas and F. Henry Habicht II, U.S. EPA, *Interim CERCLA Settlement Policy* (OSWER Directive No. 9835.0) (Dec. 5, 1984), *published at* 50 Fed. Reg. 5034, 5035 (Feb. 5 1985) (emphasis added). Thus, EPA has always viewed private party cleanups as essential and, in fact, viewed cleanups pursuant to settlements as "voluntary."

After SARA, private party cleanups have been hailed as one of the great successes of the Superfund program. For example, when reporting on Superfund in 1988, then Acting Assistant Administrator Timothy Fields, Jr. stated that "responsible parties are performing or funding approximately 75% of Superfund long-term cleanups, saving taxpayers more than $12 billion to date." Hearing Before the Subcomm. on Finance and Hazardous Materials, (Feb. 4, 1998), *available at* http://www.epa.gov/superfund/action/congress/test0204.htm. Similarly, then Assistant Administrator Steven A. Herman emphasized that "responsible parties play a vital, and in our view, irreplaceable role in cleaning up the nation's Superfund sites." Hearings Before the Subcomm. on Commerce, Trade and Hazardous Materials of the House Comm. on Commerce, (July 18, 1995) (Serial No. 104-54), *available at* http://babel.hathitrust.org/cgi/pt?id=pst.000025256697.

In 2009 alone, EPA reported private parties agreed to conduct $1.99 billion in future response work.[3] Since 2005, EPA has reported private party commitments to future response work totaling approximately $5.5 billion.[4] EPA was correct in 1984 when it recognized that encouraging settlements covering private party cleanups was essential to the successful cleanup of the nation's hazardous waste sites.

Given the goal of promoting private party cleanups, one of the most significant incentives for a private party, such as *Amici*, to step forward and work with the government to investigate a site and conduct a cleanup is the right to pursue other PRPs to recover its costs. Limiting such a party to contribution under § 113(f) weakens that incentive because the government can (and will) unilaterally settle with recalcitrant parties to protect them from the performing party's contribution claim.

The instant case presents a clear opportunity to resolve, once and for all, the correct scope of § 107(a). As the government put it in its petition in *Atlantic Research*:

---

[3] U.S. EPA, Superfund National Accomplishments Summary Fiscal Year 2009, http://www.epa.gov/superfund/accomp/numbers09.html.

[4] *Id.*; U.S. EPA, Superfund National Accomplishments Summary Fiscal Year 2008, http://www.epa.gov/superfund/accomp/numbers08.htm; U.S. EPA, Superfund National Accomplishments Summary Fiscal Year 2007, http://www.epa.gov/superfund/accomp/numbers07.htm; U.S. EPA, Superfund National Accomplishments Summary Fiscal Year 2006, http://www.epa.gov/superfund/accomp/numbers06.htm; U.S. EPA, Superfund National Accomplishments Summary Fiscal Year 2005, http://www.epa.gov/superfund/accomp/numbers05.htm.

> [T]he continued uncertainty concerning the availability of an action for cost recovery under Section 107(a) is resulting in the significant expenditure of judicial and party resources, especially given the complex and time-consuming nature of CERCLA litigation. In some cases, it appears that such uncertainty may be deterring PRPs from entering into settlements with the government.

2006 WL 3024300, at *25. That statement is just as true today as it was in 2006.

CONCLUSION

For these reasons, *Amici* respectfully request that the Court grant the petition and decide the issue it left open in *Atlantic Research*. The Court's decision would end the journey that began with *Cooper Industries*, and finally and conclusively clarify private party rights to seek cost recovery under CERCLA.

Respectfully submitted,

MARK G. ARNOLD
Counsel of Record
JOSEPH G. NASSIF
JASON A. FLOWER
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
(314) 480-1500
mark.arnold@huschblackwell.com

Attorneys for Pharmacia Corporation and Solutia Inc.