No. 12-89

IN THE

Supreme Court of the United States

SOLUTIA, INC., ET AL., PETITIONERS

v.

MCWANE, INC., ET AL.

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

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") creates two "clearly distinct" (Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 n.3 (2004)) civil remedies to permit private parties to recoup costs of environmental cleanup: a general cost recovery action under § 107(a), and a specific, tailored right of contribution under § 113(f).

The question presented is:

Whether the Eleventh Circuit erred in concluding, consistent with every other court of appeals to have decided the question, that a party whose claims are specifically addressed by CERCLA's § 113 contribution remedy may not bypass its limitations by instead pursuing the unbounded general remedy of § 107.

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Walter Energy, Inc. is a publicly traded company. Walter Energy, Inc. does not have a parent company and no other publicly held corporation owns 10% or more of its stock. Walter Energy, Inc. was formerly the sole owner of respondent United States Pipe and Foundry Company, LLC.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 101a-115a) is reported at 672 F.3d 1230. The opinion of the district court granting most respondents summary judgment on petitioners' claims under § 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), but denying summary judgment on petitioners' § 107 claims (Pet. App. 1a-33a), is unreported. The opinion of the district court granting respondents summary judgment on petitioners' § 107 claims (Pet. App. 36a-100a) is reported at 726 F. Supp. 2d 1316.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2012. On June 1, 2012, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including July 19, 2012, and the petition was filed that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

CERCLA § 107, 42 U.S.C. § 9607, is reproduced at Pet. App. 118a-151a; CERCLA § 113, 42 U.S.C. § 9613, is reproduced at Pet. App. 152a-162a.

STATEMENT

1. This case concerns the application of the two "clearly distinct" (Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 n.3 (2004)) civil remedies that CERCLA affords private parties to recoup costs of environmental cleanup: a general cost recovery action

under § 107(a), and a specific, tailored right of contribution under § 113(f).

Congress enacted CERCLA in 1980 to "promote the timely cleanup of hazardous waste sites," Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009) (internal quotation marks omitted). Under CERCLA, the federal government may clean up contamination itself, compel responsible parties to perform the cleanup under § 106, or bring a cost recovery action under § 107(a). The government may recover its response costs under § 107(a)(4)(A) from four categories of persons, commonly referred to as "potentially responsible persons," or "PRPs." CERCLA grants the government broad authority to settle with PRPs to avoid the cost and delay of litigation. As relevant here, § 122(h) authorizes the Environmental Protection Agency ("EPA") to settle cost recovery actions under § 107; § 122(g) also directs EPA, whenever practicable, to settle with PRPs who made only a "minimal" contribution to contamination.[1]

Section 107(a) provides that a PRP "shall be liable" for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." § 107(a)(4)(B). As originally enacted, CERCLA contained no express right of contribution for a private party to recover cleanup costs.

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[1] Both provisions formally grant these authorities to the President. The President has delegated that authority to the Administrator of EPA. See Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987).

In part responding to the uncertainty created by § 107's general language, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 ("SARA") to provide an express right of contribution in § 113. See Pub. L. No. 99-499, § 113, 100 Stat. 1647 (1986). CERCLA § 113(f)(1), added by SARA, authorizes "[a]ny person" to "seek contribution" from any PRP "during or following any civil action under section [1]06 * * * or under section [1]07." Section 113(f)(3)(B) separately provides a right of contribution to "[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."

SARA's right of contribution is subject to three important limitations. First, to encourage settlement and grant "PRPs a measure of finality in return for their willingness to settle," United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990), SARA provides that any 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," § 113(f)(2); see also § 113(f)(3)(B) (settling parties may seek contribution only from "[a] person who is not party to a settlement" covered in § 113(f)(2)). SARA includes parallel settlement bars for minimal contributions to pollution (§ 122(g)(5)) and cost recovery actions (§ 122(h)(4)). Second, while a § 107 cost recovery action places the burden on the defendant to prove divisibility of harm (and many courts have imposed joint and several liability in the absence of proof of

divisibility, see Burlington Northern, 556 U.S. at 613-619 & n.9), in a contribution action, response costs are allocated using equitable apportionment, with the burden on the plaintiff to prove each defendant's liability, § 113(f)(1). Third, a contribution suit generally must be commenced within three years of judgment or settlement, § 113(f)(3); by contrast, the statute of limitations for a § 107 cost recovery action ranges from three to six years, and is triggered by the performance of remediation, not entry of judgment.

2. From 1929 to 1971, the Monsanto Company, the corporate predecessor to petitioners Solutia and Pharmacia (collectively, "Solutia"), manufactured polychlorinated biphenyls ("PCBs") at a plant approximately one mile west of downtown Anniston, Alabama (the "Anniston Plant"). Pet. App. 37a. Solutia was the only manufacturer of PCBs in the United States, and the Anniston Plant was the larger of Solutia's two facilities. R17-448 ¶¶ 2-3.[2] From the late 1920s until 1964, Solutia made biphenyls to produce PCBs by passing benzol vapor through as many as 34 vats containing approximately 150,000 pounds of molten lead. EPA Resp. to Public Comments, R13-330 Ex. 15 ("EPA Resp.") at 123. Using Solutia's own production data, EPA estimates that 800,000 pounds of lead were released into the environment using this process. Ibid.[3] Solutia's production of PCBs also re-

[2] Citations to the Record on Appeal are in the form R[volume]-[document number]. Citations to the Supplemental Record on Appeal are in the form SR[volume]-[document number].

[3] Lead was also released from Solutia's production of ferroalloy, the shipping and processing of lead, and various facility waste streams. EPA Resp. 19-20.

sulted in "substantial" PCB air emissions. Id. at 59. Company documents reflect that approximately 70,000 pounds of solid PCBs alone were lost per year as flakes and powder during production, and another 80,000 pounds per year were lost while placing PCBs in drums, much of which was released into the air as fine dust particles. Id. at 55-56. EPA concluded that "air deposition [wa]s a major contributor of PCBs" in the Anniston area. Id. at 58.

In addition, Solutia admits that it and its predecessors discharged PCBs "to the 11th Street Ditch" in Anniston, "which migrated by surface water pathways downstream of the Anniston [P]lant," SR1-480 ¶20, through a system of creeks. Internal company documents reflect that, in 1969, Solutia was discharging 250 pounds of PCBs per day into the 11th Street Ditch. R17-448-2 at 2. While dangerous levels of PCBs are typically measured in concentrations of parts per million ("ppm"), and cleanup is often required down to 1 ppm, Solutia business records note the "ominous * * * fact that sediment in the bottom of these streams miles below our plants may contain up to 2% [or 20,000 ppm] Aroclor," R17-448-4 at 11 (emphasis added), which is Solutia's trade name for PCBs. The ditches and streams were occasionally dredged to maintain water flow and the dredge spoils were deposited nearby; Anniston residents used the PCB-contaminated spoils as fill material. EPA Resp. 12, 19. Solutia also disposed of large volumes of PCB waste in two unlined dumps adjacent to its plant. Volatilization, rain, and surface-water runoff carried PCBs from the landfills off site, including to a nearby ditch leading to the stream system. Id. at 62-63.

Solutia documents reflect that the company produced 680 million pounds of PCBs in Anniston. Id. at 10, 55. Company documents reflect that, in all, the company released 90 million pounds of PCB wastes into the Anniston environment. Id. at 55.

3. As both courts below noted, the "litigation history" of "[t]his case is complex." Pet. App. 102a (internal quotation omitted); id. at 37a.

a. In 1999, EPA began investigating Solutia's releases of PCBs into the environment from its Anniston operations. Based on its findings, EPA entered into an initial Administrative Order on Consent with Solutia in 2000, which required Solutia to conduct certain sampling and cleanup activities in Anniston. R25-622 at 3. In 2001, EPA and Solutia entered into a second Administrative Order on Consent (the "Removal Order"), which required Solutia to conduct testing for PCBs and lead in designated geographic zones identified on a map, and to "remov[e] * * * the top three (3) inches of soil" at properties having PCB levels of 10 ppm or higher. R2-72 PCD Ex. C at 3, 5, 10-13. The Removal Order contemplated that Solutia would clean up other contaminants commingled with PCBs; it specifically set conditions on the disposal of removed soil that were based on PCB concentrations, "provided that such material does not contain elevated levels of other hazardous substances" that would further restrict disposal. Id. at 22 (emphasis added).

In March 2002, EPA filed suit against Solutia under CERCLA. EPA's complaint asserted that Solutia was "liable under Section 107" for "the disposal of hazardous substances" and sought an injunction to compel Solutia to conduct further environmental

cleanup. Enforcement Complaint ¶¶ 1, 9, 28, United States v. Pharmacia Corp., No. 1:02-cv-749-PWG (N.D. Ala. Mar. 25, 2002). In October 2002, Solutia and EPA entered into a Partial Consent Decree ("PCD") to resolve in part EPA's enforcement action, which the district court approved in 2003. The PCD requires Solutia to "finance and perform" the work under the Removal Order and two contemporaneous related agreements: a Remedial Investigation/Feasibility Study Agreement requiring sampling and assessment studies, and a Non-Time-Critical Removal Agreement ("NTC Removal Agreement") requiring Solutia to perform "composite PCB and lead surface soil sampling," and "requir[ing] the removal of the top twelve (12) inches of soil" from "any property" in specified areas found to have surface PCB contamination above 1 ppm. R2-72 PCD at 8-10; R2-72 PCD Ex. G at 13-15. In the NTC Removal Agreement, EPA "acknowledge[d]" Solutia's potential right under CERCLA "to seek contribution for the costs of such removal" if the company removed soil from a residential property having lead in concentrations above 400 ppm. R2-72 PCD Ex. G at 3.

b. In an effort to reach a global resolution for addressing PCB and lead contamination in Anniston, EPA negotiated with Solutia and respondents U.S. Pipe and Foundry Company, Walter Energy, MeadWestvaco Corp., BAE Systems Land & Armaments, L.P., FMC Corporation, McWane, Inc., DII Industries, Phelps Dodge Industries, and Huron Valley Steel (collectively, "Settling Respondents"), which are current and former operators of foundry or other industrial operations in Anniston and surrounding are-

as.[4] After months of negotiations, Solutia withdrew in November 2004. EPA Resp. 20. In May 2005, the Settling Respondents entered into an Administrative Order on Consent (the "Foundry AOC")[5] with EPA, resolving their CERCLA liability for lead and PCB contamination in Anniston. Under the agreement, the Settling Respondents were required to perform sampling and removal in specified areas in and around Anniston at properties with lead concentrations above 400 ppm, including at "commingled" properties with PCBs above 1 ppm and lead above 400 ppm. EPA estimated that the Settling Respondents would spend between $87 and $125 million pursuant to the Foundry AOC. EPA Resp. 23.

In the Foundry AOC, EPA determined that while Solutia discharged "[m]illions of pounds of PCBs * * * into the environment," the Settling Respondents' contribution of PCBs was "minimal in comparison to other hazardous substances, * * * particularly, PCBs contributed by Solutia." R5-296 Ex A at 9, 11. EPA's finding authorized entry of a de minimis settlement agreement under 42 U.S.C. § 9622(g)(5). R5-296 Ex. A at 11. Consequently, the Foundry AOC expressly provides that the Settling Respondents "are entitled * * * to protection * * * from contribution actions or

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[4] Respondents Southern Tool and Scientific-Atlanta, which EPA had not identified as potentially responsible parties for PCB or lead contamination, were not part of the negotiations or the resulting settlement.

[5] The common name for the agreement reflects the fact that many signatories operate or operated foundries. Huron Valley Steel operates a non-ferrous metal recycling facility, however, not a foundry.

claims as provided by Sections 113(f)(2), 122(g)(5), and 122(h)(4) of CERCLA." Id. at 50.

During the negotiations with EPA, Solutia argued that the Settling Respondents had substantially contributed to PCB contamination in Anniston. During the public comment period on the Foundry AOC, Solutia submitted some 250,000 pages of argument and technical data. EPA Resp. 30. After considering the submission, EPA filed a comprehensive 162-page response, concluding that "[t]he [Foundry AOC] is entirely supported by the technical evidence," id. at 51, and that the agreement "achieves all of the cleanup that reasonably can be allocated to the Respondents," ibid. After an "exhaustive review of an enormous amount of data regarding Anniston," id. at 89, EPA confirmed that the Foundry AOC is a "fair settlement" of lead liability, id. at 42, and requires respondents to "contribut[e] more than their fair share" to the cleanup of PCBs, id. at 110.

In response, Solutia argued in its enforcement case with EPA that the government had breached the PCD by limiting Solutia's contribution claims through the contribution protections of the Foundry AOC. The district court in that separate proceeding told Solutia that it could be released from its PCD obligations "upon motion." Pet. App. 52a. Solutia neither moved for such relief nor pursued other potential remedies, such as judicial review of the Foundry AOC under the Administrative Procedure Act, 5 U.S.C. § 702. Instead, Solutia entered into a stipulation with the government "clarifying" its obligations under the PCD. R20-545 Ex. 2 (the "Stipulation"). The Stipulation provides that Solutia "shall clean up all

yards" within specified "Zones" designated on a map. Thus, for example, Solutia is required to sample "all Residential Properties in Zone C," and "clean up all yards containing surface soil PCB concentrations greater than or equal to 1 ppm, regardless of the levels of lead found in such yards." Id. at 10. Solutia also expressly "waive[d] [its] right * * * to seek the suspension of [its] obligations under the PCD." Id. at 13.

4. Solutia filed this action in June 2003, asserting both contribution claims under § 113(f) for cleanup activities and cost recovery claims under § 107(a)(4)(B) based on the same factual allegations. In June 2008, the district court granted the Settling Respondents summary judgment on Solutia's § 113(f) claims because of the CERCLA contribution protection resulting from the Foundry AOC.[6] Pet. App. 28a-29a. The district court initially denied respondents summary judgment on Solutia's § 107 claims, id. at 1a-33a, relying on the absence of an express requirement in the statute that costs be voluntarily incurred in order to be recovered under § 107, id. at 24a.

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[6] Because EPA had not identified Southern Tool and Scientific-Atlanta as PRPs and the Foundry AOC did not include them, petitioners' claims against them were not subject to § 113's settlement bars. The district court recently granted summary judgment to these respondents, however, finding petitioners did not dispute that these parties "did not generate any wastes containing lead" or other metals, and that petitioners' theories concerning use and disposal of PCBs by Southern Tool and Scientific-Atlanta were "an impermissible stretch" for which petitioners offered "no evidence" nor "any direct testimony." Solutia Inc. v. McWane, Inc., 1:03-CV-1345-PWG, 2012 WL 2031350, at *7, *14 (N.D. Ala. June 1, 2012).

The district court later reconsidered that decision, Pet. App. 36a-100a, in light of the "significant number" of federal courts that had subsequently rejected Solutia's reading of § 107, and newly disclosed evidence of the Stipulation clarifying Solutia's cleanup obligations, id. at 58a-60a, 105a-106a.[7] In a 53-page opinion that surveyed the case law and carefully "re-examin[ed] * * * the statutory language," id. at 87a, the district court concluded that Solutia's § 107 cause of action was barred because "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)," ibid. The court noted the significant limitations Congress had imposed on § 113 contribution actions and reasoned that "[i]t cannot be that Congress intended that a plaintiff could avoid [these limitations] * * * just by seeking those very same costs via § 107(a)." Id. at 93a. After exhaustively examining the record, the district court concluded that "[t]here is no question that the costs S[olutia]/P[harmacia] are now seeking to recoup or apportion in this action arise out of their fulfillment of their obligations under the PCD * * * rather than from work performed beyond or outside the scope of those obligations," and that that work was performed to "partially resolve[] their CERCLA liability to the United States, which * * * create[d] contribution

[7] Respondent McWane entered into a settlement with petitioners before the district court's decision.

rights for the associated costs under § 113(f)." Id. at 98a.[8]

5. The court of appeals affirmed. Pet. App. 101a-115a. The court rejected Solutia's argument that "there is no language" in CERCLA "to suggest that § 107(a) and § 113(f) are mutually exclusive remedies," noting this Court's instruction that CERCLA "must 'be read as a whole.'" Id. at 109a (quoting United States v. Atl. Research, Inc., 551 U.S. 128, 135 (2007)). "If a party subject to a consent decree could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a)," the court reasoned, parties "could circumvent the different statutes of limitations that attach to § 113(f) contribution claims and § 107(a) recovery claims," "thwart the contribution protection afforded to parties that settle their liability with EPA," and circumvent the equitable apportionment statutorily mandated for § 113. Id. at 109a-110a. Thus, if parties whose incurred costs gave rise to contribution claims could reframe their arguments as § 107 cost recovery actions, "the structure of CERCLA remedies would be completely un-

[8] Solutia then sought to "clarify and/or amend" the judgment under Fed. R. Civ. P. 59 based on "newly asserted grounds that [Solutia] allegedly incurred certain response costs that were not compelled by or related to requirements of the PCD or any enforcement order or settlement * * * that would give rise to contribution rights." Memorandum Opinion & Order (Oct. 29, 2010), R26-645. The court concluded that these "belatedly raised claims," which conflicted with Solutia's "consistent[]" position throughout the litigation and were "presented for the first time in the Rule 59 motion," id. at 7, did not "provide a proper basis for relief under Rule 59," ibid. In its petition, Solutia does not seek to revisit the district court's ruling that its cleanup was required by the PCD, or the court's denial of its Rule 59 motion.

dermined." Id. at 109a. The court therefore "agree[d] with our sister circuits," id. at 110a, which had uniformly concluded 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," id. at 108a (quoting Morrison Enters., LLC v. Dravo Corp., 638 F.3d 594, 603 (8th Cir. 2011)).

REASONS FOR DENYING THE PETITION

Petitioners argue that review is necessary for three reasons: (1) "to reconfirm the Court's interpretation of the plain language of CERCLA," (2) because whether a party that incurs response costs under a consent decree may pursue a cost recovery claim under § 107(a)(4)(B) or is limited to seeking contribution under § 113 "is causing extensive confusion among the courts" and parties considering cleanups; and (3) "because the availability of § 107(a) cost recovery under CERCLA is an issue of exceptional importance." Pet. 12.

Not so. The court of appeals correctly concluded, based on the plain language of CERCLA and consistent with this Court's opinions in Aviall and Atlantic Research, that § 113 provides the exclusive remedy for parties whose claims are addressed by its terms, and such parties may not simply elect to bring an action under § 107 instead. Far from "causing extensive confusion," Pet. 12, that conclusion has been embraced by every court of appeals to decide the question, and the vast majority of district courts. This Court only recently denied certiorari in a case involving the precise question presented here, with the benefit of an amicus brief filed by petitioners that

presented nearly verbatim many of the arguments made in the instant petition. Compare Pet. 14-17, 24-28, with Br. Amicus Curiae of Pharmacia Corp. and Solutia, Inc. 5-8, 9-12, Morrison Enters., LLC v. Dravo, No. 11-30 (filed Aug. 5, 2011), cert. denied, 132 S. Ct. 244 (2011); see also Carpenter Tech. Corp. v. Agere Sys., Inc., 131 S. Ct. 646 (2010) (denying certiorari in case involving whether a party that paid costs to satisfy a private settlement agreement has a § 107 claim). There is no basis for a different outcome here.

A. The Court Of Appeals Correctly Concluded That Section 113 Is Exclusive Where It Applies

Petitioners argue that the court of appeals "ignore[d] the text of CERCLA," Pet. 14, and decided the case based solely on "the perceived policy benefits of making § 113(f) the exclusive means for a PRP to recover" costs incurred under a consent decree, dismissing the decision as "an impermissible judicial rewrite of the statute that conflicts directly with Aviall and Atlantic Research," Pet. 17. Although petitioners claim "the text of CERCLA" supports their contention that they can simply elect to sue under § 107, Pet. 14, the entirety of their textual argument is that "Congress could have expressly provided that § 113 limits the availability of claims under § 107 but, instead, it chose permissive language"; "[i]t provided that PRPs 'may seek contribution' under § 113(f) * * *, not that they may **only** seek contribution," Pet. 17. But as this Court noted in Atlantic Research, CERCLA "must be read as a whole." 551 U.S. at 135 (internal quotation marks omitted). Petitioners' wooden interpretation, which would read the introductory clause

of § 113 in isolation while ignoring the context of the surrounding provisions, does not survive even casual scrutiny.

Petitioners concede that the § 113 contribution remedy that Congress created in SARA specifically addresses their situation. That provision provides parties that EPA sues a cause of action for "contribution from any other [PRP] * * * during or following any civil action under section [1]06 * * * or under section [1]07," § 113(f)(1), and likewise provides a cause of action for contribution for "a person who has resolved its liability to the United States * * * for some or all of a response action," § 113(f)(3)(B). But the cause of action is explicitly made subject to several important limitations. See id. § 113(f)(1) (apportionment by "equitable factors"), § 113(g)(3) (three-year statute of limitations), § 113(f)(2) (settlement bar), §§ 122(g)(5) and (h) (same). Solutia contends that a party unable to satisfy those limitations can simply instead choose to bring an action under § 107. It is not credible to maintain that Congress would have added those limitations to its new § 113 remedy if a potential plaintiff could simply cast them aside and proceed under § 107 at its convenience: "When Congress acts to amend a statute, [courts must] presume it intends its amendment to have real and substantial effect." Stone v. INS, 514 U.S. 386, 397 (1995).

Moreover, the conclusion that parties whose claims are addressed by § 113 may not elect to proceed under § 107 is compelled by the "well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies." Hinck v. United States, 550 U.S. 501, 506

(2007) (internal quotation marks omitted). "The law is settled that however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." Varity Corp. v. Howe, 516 U.S. 489, 519 (1996) (quoting Fourco Glass Co. v. Transmirra Prods. Co., 353 U.S. 222, 228 (1957)) (internal quotation marks omitted); accord, e.g., City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120-121 (2005); 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"). Cf. generally Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012) ("[T]he specific provision is treated as an exception to the general rule."). As the court of appeals concluded after carefully analyzing the limitations Congress had placed on § 113 actions, "[i]f a party subject to a consent decree could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a), then the structure of CERCLA remedies would be completely undermined." Pet. App. 109a; cf. Atl. Research, 551 U.S. at 129 ("that choice of remedies [between § 107(a) and § 113(f)(1)] simply does not exist").

In Aviall, the Court rejected an argument similar to petitioners'—that because § 113 used "permissive[]" language in stating that a party "may" bring a contribution claim, an action under § 113 was "not * * * exclusive," and a party could elect to bring a contribution action that did not satisfy the precondi-

tions of § 113. 543 U.S. at 166. The Court concluded the text of CERCLA was inconsistent with that interpretation: "the natural meaning of 'may' in th[at] context * * * is that it authorizes certain contribution actions—ones that satisfy the subsequent specified conditions—and no others." Ibid. In words directly relevant to petitioners' arguments, this Court concluded that "[t]here is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim [under § 113(f)(1)], and at the same time allow contribution actions absent those conditions." Ibid. Likewise, there is no reason why Congress would have bothered to attach conditions to § 113 contribution rights if petitioners were free to invoke § 107 to evade them.

It is thus unsurprising that every court of appeals to have resolved this issue, as well as "almost all other [district] courts," Order 11-12, Solutia, Inc. v. McWane, Inc., Civ. No. 1:03-cv-1345-PWG (May 6, 2010) (R21-587) (collecting authorities), has 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," such as a consent decree or administrative consent order. Morrison Enters., 638 F.3d at 603; accord Agere Sys., Inc. v. Advanced Envtl. Tech. Corp., 602 F.3d 204, 227-229 (3d Cir. 2010) (holding that parties subject to a consent decree cannot bring a claim under § 107); Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 127-128 (2d Cir. 2010) (holding that parties that settle CERCLA liability with government agencies can only bring § 113(f) contribution claims); ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 458 (6th Cir.

2007).[9] Moreover, this conclusion also represents the considered view of the expert agency Congress has charged with administering CERCLA, as expressed in numerous amicus briefs, including ones filed before the courts of appeals in this case and in Morrison Enterprises. See, e.g., Br. Amicus Curiae of U.S. 20, Solutia, Inc. v. McWane, Inc., No. 10-15639-DD (11th Cir. July 1, 2011) ("PRPs in procedural circumstances addressed by § 113 may only seek contribution under

[9] A number of district courts have embraced the position adopted by the court of appeals in this case (in addition to the district court opinions affirmed in Agere Systems, Morrison Enterprises, and Niagara Mohawk). See, e.g., United States v. NCR Corp., No. 10-C-910, 2011 WL 2634245, at *1-2 (E.D. Wis. July 5, 2011); Tennessee v. Roane Holdings Ltd., 835 F. Supp. 2d 527, 538-540 (E.D. Tenn. 2011); Stimson Lumber Co. v. Int'l Paper Co., No. CV 10-79-M-DWM-JCL, 2011 WL 1532411, at *15-19 (D. Mont. Feb. 28, 2011); Bernstein v. Bankert, No. 1:08-cv-0427-RLY-DML, 2010 WL 3893121, at *4-9 (S.D. Ind. Sept. 29, 2010); Appleton Papers Inc. v. George A. Whiting Paper Co., 572 F. Supp. 2d 1034, 1044-1045 (E.D. Wis. 2008). But see Emhart Indus., Inc. v. U.S. Dep't of the Air Force, No. 11-023 S, 2011 WL 5184192, at *1 (D.R.I. Nov. 1, 2011) (denying motion to dismiss CERCLA § 107 claims pled "in the alternative" to § 113 claims). Other cases typically hold that a party may proceed under § 107 with respect to claims that are not addressed by § 113. See, e.g., Ford Motor Co. v. Mich. Consol. Gas Co., No. 08-CV-13503-DT, 2009 WL 3190418, at *4-14 (E.D. Mich. 2009) (allowing plaintiff to proceed under § 107, rather than § 113, because claims did not involve a CERCLA "settlement"); City of Waukegan, Ill. v. Nat'l Gypsum Co., No. 07 C 5008, 2009 WL 4043295, at *3-8 (N.D. Ill. Nov. 20, 2009) (denying motion to dismiss CERCLA § 107 claims where plaintiff alleged it had incurred some costs outside the scope of a CERCLA consent decree); United States v. Pharmacia Corp., 713 F. Supp. 2d 785, 790 (S.D. Ill. 2010) (denying motion to dismiss CERCLA § 107 claims that allegedly sought to recover response costs outside scope of earlier CERCLA litigation).

that provision," not § 107); Br. Amicus Curiae of U.S. 18, Morrison Enters., Inc. v. Dravo Corp., No. 10-1468 (8th Cir. June 9, 2010) ("[T]he 'general language' of § 107(a) 'must give way to the more specific provisions' of §§ 113(f)(1) and 113(f)(3)(B).") (quoting Voyageurs Region Nat'l Park Ass'n v. Lujan, 966 F.2d 424, 428 (8th Cir. 1992)).[10]

B. The Court Of Appeals' Decision Reflects The Consensus View

Petitioners are mistaken in contending that this issue "is causing extensive confusion among the lower courts." Pet. 12. As petitioners concede, all "the circuit courts to address the issue have * * * decided that a party who incurs costs pursuant to a CERCLA consent decree [is] limited to a § 113 contribution claim."[11] While a handful of district courts have

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[10] Because there is no division of authority among the courts of appeals and EPA has already publicly expressed its views of the merits in many publicly available briefs, there is no more warrant for inviting the views of the Solicitor General in this case than there was in Morrison Enterprises.

[11] Petitioners quote a district court opinion for the conclusion that "both the circuit courts and many district courts are deeply divided" on this issue. Pet. 18 (quoting Pharmacia Corp., 713 F. Supp. 2d at 790. That court relied (as do petitioners, see Pet. 18-19, 20), on W.R. Grace & Co. v. Zotos Int'l, Inc., 559 F.3d 85 (2d Cir. 2009), but that decision is inapposite. The W.R. Grace court concluded that a plaintiff whose state law consent decree did not implicate § 113(f)(3)(B) because it did not resolve CERCLA liability could assert a claim under § 107(a)(4)(B). (Indeed, petitioners concede that "the party [in W.R. Grace] had not entered into a CERCLA settlement." Pet. 20.) The Pharmacia court failed to note that while the motion before it was pending, the Second Circuit rendered a decision that is squarely on point, making clear that a party whose circumstances implicate

reached the opposite conclusion, see n.9, supra, that is not a "compelling reason[]" for this Court's review, see S. Ct. R. 10(a), and in any event, most of those decisions did not have the benefit of the recent court of appeals decisions that fully accord with the judgment below.[12] As petitioners must concede, the conclusion of the court below reflects the clear "trend in the circuit courts." Pet. 23.

The Third Circuit's opinion in Agere Systems (see Pet. 22-23) likewise is entirely consistent with this consensus. Agere Systems held, consistent with the decision below, that parties that had entered into a consent decree with the government (and which thus had a cause of action for contribution under § 113) could not pursue a cause of action under § 107, 602 F.3d at 227-229, but parties that had contributed to a

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§ 113(f) may only proceed under that section. See Niagara Mohawk, 596 F.3d at 128.

[12] The Seventh Circuit recently said in dicta that this Court "intimated that the two statutes may not always be mutually exclusive," United States v. NCR Corp., No. 12-2069, 2012 WL 3140191, at *10 (7th Cir. Aug. 3, 2012) (emphasis added), citing the Atlantic Research footnote in which this Court noted it was not resolving the question and stating in passing that "[w]e do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all," 551 U.S. at 139-140 & n.6. The issue, however, was neither before the Seventh Circuit nor briefed by the parties as part of the interlocutory appeal of a preliminary injunction that was at issue there; the court took pains to note that "[i]f and when the time comes, NCR will be free to explore whatever possibilities may still be available to it for either contribution or cost recovery." 2012 WL 3140191, at *10. That court also mistakenly suggested that W.R. Grace is inconsistent with the decision below and with Morrison Enterprises v. Dravo, see id., but because the issue was not briefed, it failed to note the consistent position the Second Circuit took in Niagara Mohawk. See n.11, supra.

settlement with private plaintiffs could pursue such an action. Because there is no dispute that such private settlements create no cause of action for contribution under § 113, that conclusion in no way implicates the principle that "a precisely drawn, detailed [remedy] pre-empts more general remedies." Hinck, 550 U.S. at 506 (internal quotations omitted). Petitioners claim that the interpretation adopted by the courts below leads to "perverse consequences." Pet. 21. But as the Third Circuit suggested, there is nothing "perverse" about making the more favorable terms of § 107 available to parties that "agree to come forward and assist in a cleanup even though they have not been subjected to a cost recovery suit." Agere Sys., 602 F.3d at 226.

Petitioners suggest (Pet. 19) that there is confusion about the availability of a § 107 action when a party incurs costs outside of an administratively approved settlement, and assert—without citation—that "the lower courts have struggled with determining whether cleanups are 'voluntary' or 'compelled.'" Ibid. Whatever the merit of those arguments, this case does not implicate such concerns. Petitioners concede that in the PCD, "they were obligating themselves to perform remediation." Pet. 24. In any event, as the district court concluded, "[t]here is no question that the costs [petitioners] are now seeking to recoup or apportion in this action arise out of their fulfillment of their obligations under the PCD * * * rather than from work performed beyond or outside the scope of those obligations." Pet. App. 98a.[13] And

[13] Although petitioners contend they agreed to "perform[] removal activities related to PCBs (but not lead)," Pet. 4, that is squarely contradicted by the record, which "demonstrates that

the court of appeals agreed that no claims of voluntarily incurred costs were properly before it. Id. at 113a-115a. There is no basis for revisiting that fact-bound determination.

Although petitioners claim their interpretation is based on the text of the statute, Pet. 12, 17, at bottom their argument is an appeal to legislative purpose. They assert that holding a § 113 cause of action to be exclusive would send a "message to practitioners[:] 'don't agree to conduct cleanups under CERCLA,'" Pet. 20, which they say will undermine CERCLA's recognized purpose of "encouraging settlement," H.R. Rep. No. 99-253(I), at 80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835; see also Pet. 25-27. That argument is baseless. Parties have strong incentives to enter into settlements to resolve their potential CERCLA liability with EPA or state regulators.[14] As this Court noted in Atlantic Research, "settlement carries the inherent benefit of finally resolving liability as to the United States or a State." 551 U.S. at 141. Moreover, EPA, which has every incentive to encourage early settlements, has plainly concluded that the best means of doing so is to protect the set-

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[petitioners] were obligated to clean areas in which PCBs were commingled with other hazardous substances, namely, lead," Pet. App. 112a.

[14] Petitioners are mistaken in suggesting that polluters do not have a cause of action for contribution under § 113 when they "incur[] cleanup costs under agreements with states, rather than the federal government." Pet. 20. The relevant inquiry is whether the polluter has "resolved its [CERCLA] 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." 42 U.S.C. § 9613(f)(3)(B).

tlement bar from ready circumvention through permissive resort to § 107 actions.[15] See pp. 18-19, supra. Petitioners provide no basis for questioning that agency's expert judgment.

Indeed, the strength of a PRP's incentives to settle is evident from the facts of this case. Even after EPA entered into the Foundry AOC and the provisions of CERCLA eliminated petitioners' ability to pursue a contribution claim against the Settling Respondents, petitioners "never took the [d]istrict [c]ourt up on its offer" to release petitioners from their Partial Consent Decree with EPA. Pet. App. 104a. Instead, petitioners "expressly waived their right" to do so, id. at 53a. That decision is tacit acknowledgement of the considerable benefits of resolving CERCLA liability.

C. Review Is Not Warranted

Quoting the government's six-year-old certiorari petition in Atlantic Research, petitioners contend that whether one PRP "can bring an action against another PRP under Section 107(a)" is a question of "great importance to the operation of CERCLA" and that "continued uncertainty" will waste judicial resources. Pet. 24, 27. But those statements were made in the context of a "direct conflict" between the circuits (Pet. 9, United States v. Atlantic Research, No. 06-562 (Oct. 24, 2006)) that is plainly absent here.

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[15] Similarly, petitioners claim that decisions like the one below "encourage[] parties to wait to conduct cleanups until they are issued Unilateral Administrative Orders under § 106," Pet. 23, but they support that assertion by citing a single seven-year-old district court case.

Finally, petitioners assert that they have been required to "perform remediation of other parties' waste materials," Pet. 24, saying that "physical transport and placement" of spent foundry sands and "fluff" from respondents—rather than petitioners' own air- and water-borne deposition of massive amounts of PCB and lead waste, see EPA Resp. 12, 55-59, 62-63—"is the only explanation for the contamination, id. at 4, 6, 24. Petitioners tell this Court that they "were able to document that over 95% of the residential homes they remediated had yards containing contaminated foundry fill" (Pet. 6)—quite an improvement from when they told EPA, in formal written comments on the Foundry AOC, that only "77% of the Residential Properties with PCBs that [they] ha[d] cleaned up had identifiable 'foundry waste' on the property," EPA Resp. 76; but see id. at n.34 ("EPA takes issues with both the methodology and the conclusions [Solutia] utilized to reach this 77% figure."); see also Solutia, Inc. v. McWane, Inc., No. 1:03-cv-01345, Hearing Tr. 28 (Sept. 9, 2009) (Solutia represents that 412 of 498 properties on which it had performed removals "were found to have foundry fill material present," but only "47 of th[ose]" properties—about 9.4%— had PCBs above 1 ppm or lead above 400 ppm).

Putting aside for the moment that petitioners have conceded it was "technically impossible for Solutia to only address its own contamination" (Solutia Appeal Reply Br. 23-24), by leaving other contaminants behind when it was removing the requisite number of inches of PCB-contaminated topsoil specified in the PCD and incorporated documents, see supra pp. 6-7, petitioners' claims simply are not credi-

ble. As EPA concluded after exhaustive review, "sampling evidence indicates that only a small percentage of [foundry] sand is contaminated with lead or PCBs at levels of concern to EPA. Existing evidence indicates that the vast majority of the sand * * * does not pose a risk to human health or the environment." EPA Resp. 99.

The Settling Respondents have already paid a "fair settlement" for lead contamination in Anniston and "more than their fair share of cleanup" of PCBs. EPA Resp. 42, 110 (emphasis added). Solutia has consumed the last nine years and untold millions of dollars fruitlessly trying to shift its cleanup liability to others, regardless of its own fault. It is time for that to end. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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