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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 06-562, United States versus
5 Atlantic Research Corporation.

6 Mr. Hungar.

7 ORAL ARGUMENT OF THOMAS G. HUNGAR

8 ON BEHALF OF THE PETITIONER

9 MR. HUNGAR: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 In Section 113(f) of CERCLA, Congress
12 created a precisely drawn detailed mechanism for
13 potentially responsible parties to recover their
14 response costs from other PRPs. Respondent seeks to
15 circumvent the limitations that Congress imposed on that
16 remedy by manufacturing a parallel mechanism for
17 contribution-like relief under Section 107.
18 Respondent's theory should be rejected because it
19 violates fundamental canons of statutory construction,
20 renders Section 113(f) superfluous, makes a mockery of
21 the textual limitations enforced by this Court in Cooper
22 Industries, and would frustrate Congress's clear intent
23 to encourage settlements with the government in order to
24 achieve supervised effective cleanups.

25 Respondent essentially asks this Court to

1 create a shadow contribution scheme under the guise of
2 Section 107(a) by borrowing all of the features of the
3 Section 113(f) remedy except the one that Respondent
4 can't satisfy, namely the requirement that contribution
5 be sought only during or following a civil action or
6 settlement.

7 JUSTICE GINSBURG: Mr. Hungar, was this
8 Court wrong in your view, it wasn't dispositive of the
9 case in Key Tronic when it said, "Section 107
10 unquestionably provides a cause of action for private
11 parties to seek recovery of cleanup costs?"

12 MR. HUNGAR: Your Honor, we agree that
13 Section 107(a)(1) through (4)(b), subparagraph (b)
14 creates a cause of action for private parties, in
15 particular the private parties who are not PRPs, who are
16 therefore other persons other than the PRPs who are the
17 subject of that statutory sentence. So we agree in that
18 sense. We don't think it creates a cause of action for
19 the particular private parties who are trying to sue in
20 this case, that is PRPs.

21 JUSTICE GINSBURG: So you think that when
22 the Court says this, it didn't contemplate that PRPs
23 would be included among private parties?

24 MR. HUNGAR: Well, in Key Tronic, obviously
25 the Court was facing a different question so I don't

1 think it was trying to in any way authoritatively
2 resolve this issue, as the Court held in Cooper
3 Industries. But I -- certainly there is language in
4 Cooper -- excuse me, in Key Tronic that can be read to
5 suggest that the Court assumed or thought there was some
6 sort of remedy for PRPs. It's not clear whether it was
7 referring to contribution or some other remedy. But in
8 Cooper Industries, the Court made clear that that was
9 dicta and that's in our view correct, because the Court
10 in Key Tronic was faced with a different question
11 altogether.

12 JUSTICE SOUTER: Who were the PRPs, or who
13 are the individuals other than PRPs who are likely to,
14 to avail themselves to the cause of action under Section
15 7? That's one of the problems I have. I mean, it's got
16 to be someone other than owners of the land now, owners
17 of the land then. I mean, who's going to bring these
18 actions?

19 MR. HUNGAR: Well, people who are -- who are
20 excluded by other provisions of Section 107 from the
21 category of liable parties would be entitled to bring
22 such an action if they don't --

23 JUSTICE SOUTER: But can you give me an idea
24 of generally --

25 MR. HUNGAR: A city that cleans up a site

1 and that is not itself --

2 JUSTICE SOUTER: That's not -- you know,
3 that's not a private party within the meaning of the
4 quotation.

5 MR. HUNGAR: No, it is, Your Honor.

6 JUSTICE SOUTER: Pardon?

7 MR. HUNGAR: It is, because a city can't sue
8 under subparagraph (a). Only the State can sue.

9 JUSTICE SOUTER: Well, it's not the United
10 States of America, but we wouldn't normally refer to it
11 as a private party. And -- but I don't mean to get tied
12 up in that, but can you think of any individuals or
13 corporations who are not likely to come in to one of the
14 four categories in 7 who would, who would take advantage
15 of this?

16 MR. HUNGAR: Yes, Your Honor. And first of
17 all, just let me make clear: Subparagraph (b) doesn't
18 refer to private parties only; it says any other person.

19 JUSTICE SOUTER: No I realize that. I'm
20 trying to --

21 MR. HUNGAR: But with respect to private
22 parties in particular, any private party who was a
23 so-called innocent person under the statute, who because
24 --

25 JUSTICE SOUTER: No. Those are people who

1 would have a defense under the later sections of --
2 subsections of Section 7. They are still people who
3 would fall within the first four categories.

4 MR. HUNGAR: I think, Your Honor, that you
5 have to read the statutory sentence in Section 107(a) as
6 a whole, and what it says is that the people in these
7 categories, owners, operators, arrangers and so forth,
8 collect in the conjunctive, shall be liable for -- and
9 then under (b), any other necessary cost or response
10 incurred by any other person.

11 And that the other provisions of the statute
12 such as subparagraph (b) with respect to the third party
13 defense, subparagraph (d), subparagraphs that create --
14 I mean, I'm sorry, subsections that create various
15 defenses, what they say is if you satisfy this defense,
16 you're not liable. You are taken out of the category of
17 liable parties, the category that is the subject of this
18 statutory sentence. And therefore in our view, you
19 become an other person. So people who are able to
20 satisfy the defenses are other persons, and that's what
21 the lower courts have held in cases where this has come
22 up.

23 JUSTICE SOUTER: Well, you know that when
24 they go into court. Let's assume they bring the action
25 and the answer is well, you fall into one of the

1 categories one through four, and the person says oh, but
2 I -- I'm not liable because ultimately I will have an
3 innocent party defense. Would we then have a collateral
4 trial on the innocent party defense in -- in the cause
5 of action for, for reimbursement?

6 MR. HUNGAR: Well, I don't think it's a
7 collateral trial. It's just one of the issues in the
8 case.

9 JUSTICE SOUTER: But I mean if that would be
10 the first issue, we'd have to try the innocence of the
11 person who was bringing the action?

12 MR. HUNGAR: Well, I think the court could
13 obviously structure the issues as it saw fit but
14 certainly that would be one the issues in the case, but
15 again people in that category aren't the only --

16 JUSTICE SOUTER: Well the -- the trouble
17 with having, I mean the trouble with that approach is
18 that whatever you, whatever may be the ultimate effect
19 of subsection (b) is referred to as defenses. And the
20 way you're using it the so-called defenses would be an
21 -- an affirmative element in the action for, for, for
22 cost reimbursement with is just -- and I mean it
23 certainly at the least would involve a very odd language
24 usage in the statute.

25 MR. HUNGAR: Well I don't think so because

1 what the statute says is people, the people who are the
2 subject of the sentence shall be liable to other
3 persons. And if someone by virtue of the statute is
4 rendered not liable --

5 CHIEF JUSTICE ROBERTS: Well, but you --

6 MR. HUNGAR: -- they are not in the
7 subject; they are in the other category.

8 CHIEF JUSTICE ROBERTS: Well you've glided
9 over the great difficulty which is it doesn't say that
10 people identified in the statute shall be liable to
11 other persons. It says they will be liable to, under
12 certain circumstances, the United States, a State or an
13 Indian tribe and they are liable for -- for other costs
14 incurred by any other person. And it just seems that
15 the most natural reading of that construction is that
16 the other refers to other than the United States or a
17 State or an Indian tribe.

18 MR. HUNGAR: Your Honor, that would
19 certainly be a -- a permissible reading of the statute,
20 were it not for the other "other." The -- the statute
21 in subparagraph (b) refers to any, provides a cause of
22 action or refers, really imposes liability for any
23 "other" necessary costs. The other necessary costs --
24 that other, the only other costs that that "other" can
25 refer to are the costs of governmental entities, the

1 United States and the States and Indian tribes under
2 subparagraph (a). So the first other in subparagraph
3 (b) makes clear that it's not talking about the
4 subparagraph (a) claims; it's talking about other
5 claims, because by definition the United States or a
6 State cannot recover under (b) by virtue of the first
7 other.

8 Congress in the development of this
9 language, the first other was already in the statutory
10 language. Congress, at the last minute there was a
11 change, a compromise in order to get the bill passed and
12 reduce the onerousness of its provisions, and they added
13 the second other. The only logical explanation and the
14 only way to give effect to the second other is to
15 construe it as we do.

16 JUSTICE ALITO: In the years since CERCLA
17 was enacted have there been any real cases in which a
18 party that you would regard as an innocent party has
19 brought a cost recovery action?

20 MR. HUNGAR: Yes, sir. And actually there's
21 an annotation that, that collects the cases. We haven't
22 done an exhaustive survey, but certainly the annotation
23 is -- which is at 12 A.L.R. F.2d 161 -- collects a
24 number of such cases. And the lower courts have
25 addressed these questions and have, and adjudicated them

1 so this is not a novel suggestion. And it's one that
2 has arisen because, because remember, under the well
3 established law of every circuit that had addressed the
4 question prior to the Cooper Industries decision, a PRP
5 could not sue solely under Section 107(a). They had to
6 sue, they had to comply with the, the Section 113
7 mechanism, and the courts held that in order to avoid
8 the disastrous consequences that would ensue if
9 respondents or the court of appeals --

10 JUSTICE BREYER: What are -- what are they?
11 I mean as I read this, I can't get anything out of the
12 language. I mean the two "others" might just make it
13 more clear. So we have another Section 113 that talks
14 about contribution and it says you can get contribution
15 if there has been a lawsuit, and so forth, or if there
16 has been a settlement. Fine.

17 Now the question comes up, well, suppose
18 there hasn't been a lawsuit or a settlement. Now if we
19 look at the language here, at least my initial reading
20 of it, it does not say. It says that they are liable.
21 These PRPs are liable to this other PRP or person there.
22 But it doesn't just say explicitly bring a suit, and it
23 doesn't say explicitly you can't bring a suit.

24 So I think well, why can't he bring a suit?
25 If he brings a suit how is the sky to fall? On the

1 other hand, if you don't let him bring a suit, they say
2 well, maybe the Government just -- will just stay out of
3 this. The Government won't enter into settlements
4 because the Government is a big polluter. And it would
5 not like to get sued often, so they will stay away from
6 the settlement and be home free.

7 So that's what they say on your -- on their
8 side, I think, primarily. What do you say on your side?
9 How will the sky fall if in fact they win and they can
10 bring suits under 107?

11 MR. HUNGAR: Your Honor, the sky will fall
12 because under that interpretation PRPs can evade the
13 settlement bar that Congress enacted in order to
14 encourage settlement, and Congress's clear goal in
15 providing a contribution remedy and providing an
16 explicit opportunity for PRPs to sue was to encourage
17 settlement with the Government. Congress wanted to
18 reduce litigation, encourage settlement and Government
19 supervised cleanups, and so it created the settlement
20 bar in Section 113(f)(2), which, if a PRP settles with
21 the Government, the United States or a State, settles
22 for a response cost liability, it then has a
23 contribution action to --

24 JUSTICE GINSBURG: How does it work with "or
25 a State" because I thought that there was some

1 suggestion that States, they don't want to bother with
2 the Federal legislation, so they'll say you're okay
3 under the State legislation. You can't force a State to
4 -- to take on that responsibility.

5 MR. HUNGAR: Well, Your Honor in our view
6 what Section 113(f)(3)(b), the settlement contribution
7 provision, requires is that a State settle, the parties
8 settle with the State and resolve its liability to the
9 State for response costs which is a defined term under
10 CERCLA.

11 JUSTICE GINSBURG: The States, we have a
12 brief from the States telling us look, we don't want to
13 put our money on that kind of thing. We've got very
14 high-risk sites and we want to spend our resources
15 making sure those are cleaned up.

16 MR. HUNGAR: Well, Your Honor, every State
17 has a voluntary cleanup program which encourages parties
18 to settle, and under many of those programs there is an
19 opportunity if they do the settlement to required
20 standards to obtain a discharge of liability from the
21 State for response costs. And there is no reason why
22 those settlement agreements can't be written and they
23 often are.

24 JUSTICE GINSBURG: Well, they -- they can.
25 Of course they can but the States are telling us that

1 this puts a burden on them that they don't want.

2 MR. HUNGAR: Your Honor, the States already
3 have these programs in existence. There is no reason
4 why the settlement language can't be written
5 appropriately and moreover, in many States, I suspect
6 most States, the PRPs are required to pay the costs of
7 the State that it incurs in monitoring and in ensuring
8 that the settlement agreement is appropriate. The State
9 of Washington, for example, which is here today, if you
10 look at the web site of its Department of Ecology, it
11 has extensive procedures, extensive opportunities for
12 parties to come to the State, present the information,
13 obtain a settlement if they want -- if they will pay the
14 State's costs in monitoring and making sure that what
15 the PRP is doing is an appropriate cleanup. And that's
16 what CERCLA should encourage. There are --

17 JUSTICE GINSBURG: Well, let's just go back
18 to Justice Breyer's question, because it was I think a
19 major point of the Eighth Circuit. That is, they said
20 the United States, the United States is a big polluter,
21 could avoid its own responsibility by not bringing any
22 enforcement action and by not settling, and you -- you
23 said there would be a disincentive for the PRP -- a
24 disincentive to settlement, but you didn't answer the
25 question of why wouldn't the United States when it is a

1 polluter and it would be responsible on this site, to
2 say well, we are going to, we are not going to settle?

3 MR. HUNGAR: Well, two -- two responses.
4 Number one of course, if that happened, there is always
5 the State option, the States settled thousands of cases.
6 Number two, that's just not the way it works in
7 practice. EPA has the enforcement authority with
8 respect to these private, the private sites that we are
9 talking about. EPA has no incentive not to do its job
10 and every incentive to do its job.

11 JUSTICE SOUTER: Well, what about the --
12 what about the statement in the red brief that -- that
13 there is presently in existence a directive that EPA not
14 proceed against any Federal agency?

15 MR. HUNGAR: I -- I think what Your Honor is
16 referring to is a directive perhaps that requires EPA to
17 obtain the Attorney General's approval before it will
18 issue a unilateral administrative order. But that
19 doesn't apply to Section 107, excuse me, Section 106(1)
20 consent orders the, the EPA issues. It enters into
21 numerous settlement agreements in cases implicating
22 Federal PRPs; we cited a number in our brief and there
23 are many more, and -- and EPA has a detailed set of
24 standards. They occupy a hundred pages.

25 JUSTICE SOUTER: Well, excuse me. Are cases

1 that you referred to cases in which EPA has gone against
2 a -- we'll say a third party polluter, but the
3 Government is also involved?

4 MR. HUNGAR: Yes. We cite a number from the
5 Federal Register.

6 JUSTICE SOUTER: Okay. Now, has EPA during
7 the pendency of that directive gone directly against any
8 Federal agency?

9 MR. HUNGAR: If Your Honor means filing a
10 lawsuit the answer is no --

11 JUSTICE SOUTER: No.

12 MR. HUNGAR: -- because in our view EPA
13 can't sue the United States. If Your Honor means, I
14 mean definitely there are enforcement actions or --
15 proceeding. The way EPA normally works, just to be
16 clear, is that when it learns of a site, it learns of a
17 release of hazardous materials, it does a preliminary
18 assessment to find out whether this is a problem or not,
19 whether it's a problem that they should pay attention to
20 or if they should instead refer to the State. And if
21 it's of sufficient magnitude that it's for the EPA
22 rather than the State to deal with, they proceed to
23 identify all the PRPs they can send notices to them and
24 attempt to settle.

25 JUSTICE SOUTER: All right --

1 MR. HUNGAR: They always do that.

2 JUSTICE SOUTER: What if, what if one of the
3 PRPs they so identify is the Department of Defense?

4 MR. HUNGAR: Yes. They attempt to settle,
5 they attempt to settle with the Department of Defense as
6 well as --

7 JUSTICE SOUTER: Do they have to get the
8 Attorney General's approval before doing that? Before
9 naming the Department of Defense?

10 MR. HUNGAR: Well, they wouldn't sue them.
11 If you mean by sending notice to the Department of
12 Defense --

13 JUSTICE SOUTER: However they initiate, I
14 don't know as a matter of procedure how they initiate
15 enforcement action --

16 MR. HUNGAR: They send a letter.

17 JUSTICE SOUTER: It's by that letter --

18 MR. HUNGAR: They send a letter to all
19 PRPs.

20 JUSTICE SOUTER: Do they need the Attorney
21 General's approval to send the letter?

22 MR. HUNGAR: I'm not sure. I don't believe
23 so, but I --

24 JUSTICE SOUTER: What if, what the
25 Department of Defense says "nothing doing"? What does

1 EPA do then?

2 MR. HUNGAR: They would -- if, if the
3 private parties are willing to settle and pay, and take
4 responsibility for their share of the liabilities, EPA
5 can and will settle with them, regardless.

6 JUSTICE SOUTER: Well, what does it do about
7 the Department of Defense?

8 MR. HUNGAR: Well --

9 JUSTICE SOUTER: In my hypo, the Department
10 of Defense says you know, we are not talking with you.

11 MR. HUNGAR: Well, number one the Department
12 of Defense has additional legal obligations to deal with
13 hazardous waste even beyond anything EPA can do.

14 JUSTICE SOUTER: Maybe it does. But let's
15 just talk about EPA. What does EPA do in the case that,
16 when Defense stonewalls?

17 MR. HUNGAR: Just, just to be -- just to
18 finish my last point, if I may -- which can be enforced
19 by citizen suits.

20 But leaving that point aside, if --
21 ultimately they would go to the Attorney General I
22 suppose and ask for authority to issue a unilateral
23 order. But I'm not aware that that problem is a
24 significant one, and the fact is there are numerous
25 settlements, and they don't, under -- under -- for

1 Respondent to have a cause of action, EPA doesn't have
2 to settle with the Federal PRP; all they have to do is
3 settle with the private PRP, and if the private PRP is
4 willing to pay its share, which EPA determines according
5 to standards about its -- vary, considering various
6 factors about who contributed what and who caused which
7 portion of the problem --

8 JUSTICE SOUTER: And at that point 113 would
9 kick in --

10 MR. HUNGAR: Correct.

11 JUSTICE SOUTER: -- regardless of Defense?

12 MR. HUNGAR: Correct. And again if EPA
13 somehow refused to settle, the -- they could settle with
14 the State. So it's just not -- EPA does not have any
15 incentive to block cleanups. EPA wants to encourage
16 cleanups and if the best way to get the cleanup done is
17 to settle with a private party, then that's what EPA is
18 going to do.

19 JUSTICE GINSBURG: Then why this case --
20 there's a point that was made by the Eighth Circuit, and
21 also in the States' brief on page 24, and that is that
22 the EPA was engaged in settlement negotiations with
23 Atlantic Research, and then after this Court decided
24 Cooper Industries that negotiation terminated.

25 MR. HUNGAR: Your Honor, that's not correct.

1 My understanding is that the negotiations were between,
2 were -- Atlantic Research brought a claim seeking,
3 seeking money from essentially the Defense Department,
4 and my understanding was that the negotiations were only
5 to settle Atlantic Research's claim whether you call it
6 a contribution or a cost recovery claim, not an attempt
7 by Atlantic Research to resolve its liability to the
8 United States. They were not negotiating with EPA with
9 respect to EPA's enforcement authority. They are
10 negotiating with Justice Department lawyers in the
11 environmental defense section who represent Federal PRP
12 defendants. They weren't -- they weren't trying to
13 resolve their liability in order to give rise to a
14 contribution claim. What they were trying to do was
15 merely make the United States pay them without first
16 having resolved their own liability, which is why it
17 makes no sense for them to be bringing a contribution
18 claim.

19 JUSTICE BREYER: Can I -- can I go back?
20 Because I'm trying to, since I do find it so open with
21 the language, what I'm doing is making what I call the
22 list of acorns. You say the sky is falling and I want a
23 comparative list.

24 MR. HUNGAR: Yes. Yes.

25 JUSTICE BREYER: On their side I have an

1 acorn, which is if they don't win, EPA and DOD just are
2 not going to settle these things because they want to
3 escape us suing them. And you say, are you kidding?
4 EPA loves to sue.

5 (Laughter.)

6 JUSTICE BREYER: And they like to settle.
7 Don't worry about it. All right.

8 On your side, you're saying well, you know,
9 if we don't -- if we don't -- accept your
10 interpretation, they won't enter into settlements. To
11 which I guess they will make the same response. Are you
12 kidding? The EPA loves to sue us and we are frightened
13 of them and we'll settle.

14 Okay. So I've got one acorn each side, now
15 are there other acorns on the Government side; namely
16 the sky is falling --

17 MR. HUNGAR: Yes, Your Honor.

18 JUSTICE BREYER: What are they? I'd just
19 like to make the whole list of acorns.

20 MR. HUNGAR: Well, the first and foremost
21 way in which the sky is falling is that the court of
22 appeals approach, Respondent's approach would eviscerate
23 the settlement bar, because the whole point of the
24 settlement bar is to give parties an incentive to settle
25 with the Government knowing that they will be protected

1 from contribution claims. But if Respondent has a cost
2 recovery claim under Section 107, the settlement bar
3 goes out the window. And in fact that's what a number
4 of the courts of appeals have held in -- in making clear
5 that Section 113 does govern these claims. EPA has
6 entered into settlements with literally tens of
7 thousands of PRPs.

8 JUSTICE SCALIA: But you have to pay the
9 costs. I mean, isn't that something of a disincentive?
10 Before you can sue?

11 MR. HUNGAR: Well, but the claim here is
12 that the parties want to pay the costs and incur
13 voluntary cleanup costs anyway. They just don't want to
14 settle first. So if I'm understanding your question --

15 JUSTICE SCALIA: Yes. It would be one thing
16 if you skip away from a settlement without having to pay
17 any money. But in order to come under, under 9607, they
18 have to, they have to shell out the money.

19 MR. HUNGAR: Maybe I'm not understanding.
20 My point, Your Honor, is that there are tens of
21 thousands of parties who have already settled, shelling
22 out some money or not, with the EPA in reliance on the
23 unanimous view of the courts of appeals that PRPs could
24 not sue them because the contribution bar protected
25 them, Section 113(f) would protect them.

1 CHIEF JUSTICE ROBERTS: Well, how sure are
2 you -- how sure are you that it doesn't protect them
3 still?

4 MR. HUNGAR: Well, Your Honor, what it
5 applies to is contribution claims, and respondent and
6 Respondent's amici are very clear that they want is not
7 a contribution claim because they recognize that the
8 settlement bar would preclude their claims, but a cost
9 recovery claim, and Section 113(f)(2) says
10 "contribution," not "cost recovery." Those are very
11 clearly --

12 CHIEF JUSTICE ROBERTS: Well, when one
13 responsible party has paid out the cost and is seeking a
14 cost recovery claim from another responsible party, it's
15 not too much of a stretch to call it a contribution
16 claim, is it?

17 MR. HUNGAR: Well, Your Honor, if you want
18 to call what the PRP is seeking a contribution claim,
19 then we submit that it should be governed by the
20 traditional understanding of contribution and by
21 Congress's explicit terms defining what it wants
22 contribution claims to be. Even if you assume that in
23 some sense Section 107 imposes liability on PRPs to
24 other PRPs, it doesn't say what to do with that
25 liability and how you litigate it. Section 113(f) is

1 how Congress explicitly, carefully addressed that
2 question and when Congress has done so this Court
3 normally assumes that what Congress specifically said as
4 the remedy and delineated as the remedy, including the
5 limitations thereon, are what apply.

6 CHIEF JUSTICE ROBERTS: You're not worried
7 about any of that when you're dealing with an innocent
8 party, the person you say can bring this action under
9 107(4) (b). Don't all those same concerns and objections
10 apply in that case as well?

11 MR. HUNGAR: No, Your Honor, because the
12 normal rule in American law is that innocent victims get
13 to sue the people who have injured them for recovery,
14 but the defendants, the liable parties, don't get to sue
15 each other except in contribution when it has been made
16 available.

17 CHIEF JUSTICE ROBERTS: But you don't know,
18 you don't know, that you're dealing with an innocent
19 party until the end of the litigation.

20 MR. HUNGAR: Well, that might be true in
21 many circumstances, Your Honor. But that doesn't mean
22 that we don't give someone who can establish they are
23 innocent party a right to full recovery and someone who
24 is not an innocent party is relegated to contribution.

25 CHIEF JUSTICE ROBERTS: Do you have another

1 example of an innocent party who can bring an action
2 under 107(4)(b) other than a governmental subdivision?

3 MR. HUNGAR: Yes, Your Honor. A party who
4 qualifies, who can show that under the third party
5 defense the hazardous release was not due to any, any
6 fault of their own, and can satisfy the requirements of
7 that defense.

8 CHIEF JUSTICE ROBERTS: But they're somehow
9 affected by the hazardous release.

10 MR. HUNGAR: I'm sorry?

11 CHIEF JUSTICE ROBERTS: But they're still
12 somehow affected by the hazardous release.

13 MR. HUNGAR: Well, yes. They could be a
14 subsequent owner, for example, under the bona fide
15 purchaser exemption or the third party exemption.

16 CHIEF JUSTICE ROBERTS: But my point is that
17 subsequent owner, EPA is going to start looking at him
18 as a PRP, not as an innocent party. In other words,
19 there is going to have to be an awful lot of litigation
20 before he can establish that he is not a PRP and is
21 instead an innocent, innocent party.

22 MR. HUNGAR: Well, they could also just
23 resolve it through settlement, Your Honor. And either
24 they could then proceed with their lawsuit or, if they
25 want to admit some minimal liability and obtain a

1 contribution claim, they could proceed in that fashion.
2 But there are solutions to the problems that have been
3 identified under our interpretation, but there is no
4 plausible solution to the problems that their
5 interpretation produce, including eviscerating the
6 settlement bar. It's no surprise that some of the
7 largest polluters in America have lined up in support of
8 this view, because this will allow them to reopen
9 settlements and go after parties who thought they had
10 paid up their liability and obtained settlement
11 protection by virtue of the Section 113(f) settlement
12 bar.

13 JUSTICE GINSBURG: The person who settled,
14 wouldn't that person be protected? Wouldn't the court
15 say, this person has made a bargain with the EPA and
16 we're not going to extract any more from them?

17 MR. HUNGAR: Not if the claim is a cost
18 recovery claim under Section 107, because section -- the
19 settlement bar applies only to claims for contribution.
20 This is Section 113(f)(2), which appears on page 9a of
21 the appendix to our brief.

22 JUSTICE GINSBURG: Yes, but to make the
23 statute work in harmony, to harmonize 107 with 113, it
24 seems to me that would be an altogether reasonable
25 position for a court to take. If someone has settled

1 and is protected by virtue of that settlement, then when
2 someone else tries to go after that same person the
3 court could say: We have to make the statute work and
4 we're going to honor the settlement.

5 MR. HUNGAR: Your Honor, I submit if the
6 court were seeking go harmonize Sections 113 and 107 the
7 way to do it would be to give effect to the limitations
8 that Congress imposed on PRP remedies, but not merely
9 the settlement bar, but also the requirement that
10 actions be brought during or following civil actions and
11 settlements, and also the statute of limitations, which
12 the Respondent's theory would also permit them to evade.

13 If I may, I'd like to reserve the balance of
14 my time.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Hungar.

17 Mr. Armstrong.

18 ORAL ARGUMENT OF OWEN T. ARMSTRONG, JR.

19 ON BEHALF OF THE RESPONDENT

20 MR. ARMSTRONG: Mr. Chief Justice and may it
21 please the Court:

22 I would like to address the settlement bar.
23 One thing that the Court should keep in mind is that a
24 cost recovery action under 107(a)(4)(B) is an action for
25 restitution. This is an equitable action. There is no

1 jury trial under CERCLA. The district court is sitting
2 as a court of equity. And as Justice Ginsburg just
3 pointed out, the court is empowered in any case, any
4 107(a)(4)(B) case, to accord settlement protection to a
5 settling party as a matter of equity. It may do that
6 simply as a matter of equity or, as we pointed out in
7 our brief, it may do so by virtue of a contribution
8 counterclaim by the settling party.

9 So the court, a district court, is empowered
10 to give full protection to any party who has settled so
11 long as the matters addressed a portion of 107 --

12 JUSTICE BREYER: How? I'm not so sure
13 because -- unless you want to stipulate that that
14 restitution -- if you want us to write in the opinion
15 that in fact in a 107 action if one of the parties sued
16 has entered into a settlement he shall have precisely
17 the same protection from suit as if it were a 113
18 action. Do you want to say that or not?

19 MR. ARMSTRONG: Well, Your Honor, I believe
20 the district court as a matter of equity should accord
21 in most cases -- now there may be exceptions --

22 JUSTICE BREYER: Well, I would worry about
23 the equity. I just want to know if you want to
24 stipulate that that's the proper interpretation, because
25 I could easily imagine a case where your client bought a

1 beautiful golf course and he wants to turn it into a
2 golf course. Unfortunately, there's a little mess under
3 there and he spends \$10 million on that. And he says
4 the real fault is the Union Oil Company and I'm going to
5 sue them because they're the ones who dumped this and
6 they've cost me \$9 million. And it turns out that Union
7 through precisely good luck and a brilliant attorney has
8 settled this very matter for one dollar with EPA.
9 Barred?

10 MR. ARMSTRONG: No, Your Honor, it would not
11 be barred in that case.

12 JUSTICE BREYER: Ah, that's what I thought,
13 and that's what he's saying. That's what he's saying,
14 that's why he has brought his second acorn, because he
15 said there's a huge difference here. What you will do
16 is if you get this 107 action you'll argue to the court
17 as to what's fair, but what 113 says is once you settle
18 with the Federal Government you're home free.

19 MR. ARMSTRONG: Well, Your Honor, in your
20 hypothetical, spending one dollar, there is no question
21 that the court sitting in equity and also as a matter of
22 a contribution counterclaim would be entitled to review
23 the settlement and if that matter is in the matters
24 addressed, if it has been resolved by the Government --
25 and I should point out that in a settlement, settlements

1 are publicly noticed, so parties have an opportunity to
2 object to any settlement which they feel is unfair. And
3 presumably our golf course owner would be identified in
4 that circumstance.

5 CHIEF JUSTICE ROBERTS: Well, but there's
6 nothing, there's nothing unnecessarily unfair. It turns
7 out that the Union Oil Company is bankrupt and in part
8 of the settlement they agreed to turn over all the
9 documents listing whoever it was that gave them the
10 chemicals. And it's a very complicated thing because
11 we're dealing with people often in these cases that
12 don't have assets and only limited responsible parties
13 have the assets. So they're trying to recover what they
14 can from the others.

15 MR. ARMSTRONG: That is correct, Your Honor.
16 That would not be unfair any more than it would be
17 unfair in a contribution action, in which case the court
18 is directed to apply principles of equity in allocating
19 responsibility.

20 JUSTICE STEVENS: Well, almost by definition
21 a settlement is for the full amount that you'd have to
22 spend without the settlement, almost by definition.

23 MR. ARMSTRONG: Well, that is correct, Your
24 Honor.

25 JUSTICE STEVENS: You don't usually settle

1 for 100 percent of your liability.

2 MR. ARMSTRONG: That is correct, and I think
3 Congress did write that into the contribution part of
4 the statute --

5 JUSTICE KENNEDY: So that means that in
6 every settlement agreement you'd have to engage in this
7 analysis to see whether or not it was fair.

8 MR. ARMSTRONG: Well, I believe in every
9 settlement agreement the court would have to engage in
10 an analysis as to what matters addressed are for
11 purposes of the settlement.

12 JUSTICE BREYER: How are you going to choose
13 this? Because he is, I think you're -- maybe you're in
14 a slightly awkward position because the Government is
15 saying that one of the reasons that you're stuck with
16 113 is because Congress didn't really want through 107
17 to give parties like your clients an opportunity to
18 review for fairness or equitable principles, whatever
19 you like, the settlements that had taken place with the
20 defendant in EPA. And that's so we can get people to
21 settle, among other things. They feel they're home
22 free.

23 Now, you have two choices here. I think you
24 could say, one, well, that's the way it is, we should
25 have a 107 action and we should review these settlements

1 for fairness; or two, you could say one of the
2 principles of fairness is the principle that's written
3 into 113 about no review, and we're happy with reading
4 that into 107. So which is it that you would like to
5 say?

6 MR. ARMSTRONG: Well, Your Honor, that's
7 absolutely true, because I think one of the principles
8 of fairness is to solidify the settlement agreement.

9 JUSTICE BREYER: When you say that's
10 absolutely true, you mean absolutely true that you have
11 that choice, or is it --

12 MR. ARMSTRONG: I believe that a reviewing
13 court should in each instance -- if a district court
14 decides to avoid the settlement, if it says that it's
15 not fair, I believe that would undercut the finality of
16 a settlement so long as it's contained within the
17 matters addressed.

18 JUSTICE BREYER: All right, so then he's
19 wrong in thinking that the motivating force behind this
20 action is to permit people to get equitable review of
21 prior settlements? What you simply want -- and you're
22 not interested in that; you'll go with no equitable
23 review of private settlements. Read 113 into it. You
24 want the right to bring the case where there has no
25 settlement and Government has done nothing.

1 MR. ARMSTRONG: That is absolutely correct
2 in our case, Your Honor, and I think we've stipulated to
3 that.

4 JUSTICE GINSBURG: But to talk about the
5 other polluter or the other in this case, where the
6 other polluter is not someone who is going to settle
7 because it's the Government itself --

8 MR. ARMSTRONG: Yes, Your Honor.

9 JUSTICE GINSBURG: So I don't think you're
10 in a position to concede anything one way or another
11 because that's not your case.

12 MR. ARMSTRONG: That is correct, Your Honor,
13 because in our case, I think as we have made it quite
14 clear, all we are seeking in this case is to recover a
15 proportion of our response costs. We cannot conceive,
16 because we are not confronted with the issue that has
17 been posed -- I would not object as a matter of a bright
18 line rule if the Court were to rule that a settlement is
19 protected from a back end or a roundabout 107(a)(4)(B)
20 action in order to disturb a settlement agreement. We
21 do not have those circumstances in this case, that is
22 correct. And we are only seeking restitution in our
23 case. We are seeking an equitable result, a
24 proportionate share of ARC's response costs.

25 JUSTICE GINSBURG: What about the

1 Government's concern that prenups shouldn't go on
2 unsupervised. That's when EPA brings an enforcement
3 action, there's a monitor there. When there's a
4 settlement, then the Government is there. But if you
5 just go off on your own and do this, you're doing it
6 unsupervised by any State authority, any Federal
7 authority, and that could --

8 MR. ARMSTRONG: Your Honor, I believe in
9 most cases there is State involvement. There is in the
10 ARC case, although it is not in the record. We have
11 entered into a cooperative relationship with the State
12 in cleaning up the site. And I think in almost every
13 case a PRP is well advised to bring in experts to make
14 sure that the cleanup is consistent with the national
15 contingency plan, because absent that, satisfying that
16 requirement, the PRP is not entitled to recover any of
17 its costs. So there is a very demanding requirement
18 written into CERCLA. The national contingency plan
19 occupies 9605 and it occupies several hundred pages of
20 40 C.F.R. part 300.

21 CHIEF JUSTICE ROBERTS: As you read the
22 statute, you're talking about a PRP, but any other
23 person doesn't have to be a PRP, does it?

24 MR. ARMSTRONG: No, Your Honor. That is
25 correct, although --

1 CHIEF JUSTICE ROBERTS: You could set up a
2 company that cleans up these sites, right, and go
3 traveling around the country and clean them up and then
4 send people a bill and cite your reading of 1074(b),
5 right?

6 MR. ARMSTRONG: 107(a)(4)(B) would include
7 both PRPs and what we might call non-PRPs. I believe
8 one of the amicus parties studies 364 cases between the
9 years of 1995 and 2000 and there was one case out of
10 that 364 that involved precisely your hypothetical, Your
11 Honor.

12 CHIEF JUSTICE ROBERTS: Well, if we rule in
13 your favor presumably there will be a lot more, right?

14 MR. ARMSTRONG: PRPs will certainly be able
15 to seek cost recovery under 107(a)(4)(B).

16 CHIEF JUSTICE ROBERTS: What about non-PRPs?

17 MR. ARMSTRONG: There are very few non-PRPs.
18 The only non-PRPs that I can think of is perhaps the
19 hypothetical you just advanced, because as has been
20 pointed out, the so-called innocent adjoining landowner
21 is a PRP, is a covered person under 107(a)(4)(b), and
22 only has a defense to liability. And it is absolutely
23 true that in order to bring an action, according to the
24 Government, that particular PRP would have to establish
25 through affirmative action that it's -- that it

1 satisfies the, the liability exclusion in 107(b). And
2 that is a very drawn out process. The criteria for
3 satisfying the defense in 107(b) takes up 2 1/2 pages of
4 the, of the statute.

5 So what we are involved in in that case,
6 Your Honor, is yes, PRPs may bring cost recovery
7 actions. And I think that was true in 1980 when the
8 statute was passed. Contrary to the Government's
9 representation, there are 10 cases holding that actions
10 may be brought under 107(a)(4)(b) by so-called PRPs
11 between the time that CERCLA was passed in 1980 and the
12 amendment to CERCLA in 1986, in October of 1986. Courts
13 held without exception, without exception, that covered
14 persons or PRPs indeed do have a right to bring a cost
15 recovery action under 107(a)(4)(b).

16 And Congress when it passed 113, was looking
17 at those cases only that had some doubt about whether
18 contribution could also be brought. In other words,
19 whether a party could seek restitution despite the fact
20 that it was compelled to do a cleanup via a lawsuit.
21 And some courts found that there was an implied right to
22 contribution, some found that there was a common law
23 right, but Congress in 1986 specifically said, we are
24 only concerned with the implied right to contribution,
25 given this Court's holding in the Northwest Airlines

1 case and in Texas Industries. Congress was concerned
2 that there would be no right to contribution unless it
3 codified that right, which it did in 1986. And I think
4 the legislative history makes it quite clear that
5 Congress did not intend to disturb or to cut back on the
6 rights that courts had found consistently in that
7 six-year window between 1980 and 1986, all of which held
8 that PRPs indeed do have a right to bring cost recovery
9 actions.

10 JUSTICE SOUTER: But in -- in response to
11 your -- going back to your response to Justice Breyer, I
12 take it the -- the right under -- under 107 was affected
13 to the extent, or at least you would agree that it was
14 affected to the extent that if there is a settlement
15 they are home free and there can't be a 107 action; is
16 that correct?

17 MR. ARMSTRONG: That is correct.

18 JUSTICE SOUTER: Okay. So it disturbed the
19 old scheme to that extent.

20 MR. ARMSTRONG: It did, although most of
21 these cases I do believe did not involve settlements,
22 but I think obviously when Congress enacted 113, I think
23 it certainly wanted to encourage settlements in cases
24 where there had been an action brought against a PRP.
25 Obviously I think settlement saves everybody the time

1 and effort of litigating these matters, and I think for
2 that reason, in 113 we get contribution protection, we
3 get the ability to bring a contribution action. So
4 certainly settlement was a key element of 113 but it was
5 a key element of that provision, not Section 107. But I
6 think Congress has made it quite clear to encourage
7 settlements, if it's in the matters addressed, that
8 there should be immunity for those parties that are
9 settling their claims with the Government or a State in
10 a judicially approved or administratively approved
11 settlement. So I don't believe --

12 JUSTICE GINSBURG: What about the
13 disincentive to settlement? You just said how important
14 settlement was, or what a good thing it is to encourage
15 it. But the Government says if you could just clean up
16 without any order and without making any proposed
17 settlement, just do it and get back your costs, then
18 there's a powerful disincentive to settle.

19 MR. ARMSTRONG: Well, Your Honor, I think
20 once again, settling is not a disincentive in the sense
21 that if you do settle, you are deemed -- all of your
22 costs are deemed to be consistent with the national
23 contingency plan. You need not be concerned in that
24 particular case about satisfying the burden of proof
25 that you have as a PRP that your costs are consistent

1 with the national contingency plan, which is no easy
2 matter. The national contingency plan as I stated,
3 appearing in 40 C.F.R., part 300, occupies a good
4 hundred pages. It is a very detailed and demanding set
5 of requirements. So there is a strong incentive, I
6 still believe, for parties to settle because in such a
7 case they do not have to establish that there is
8 consistency with the national contingency plan.

9 They also obtain immunity from suits,
10 assuming it's in the matters addressed. Now a party
11 that voluntarily remediates a site has to worry about
12 both of these elements. It can be sued. It has no
13 immunity. It is certainly subject to being sued by
14 another PRP, by a State, an Indian tribe, or the
15 Government, regardless of how much or how well it's done
16 in remediating a site, whereas a settlement gives that
17 protection to a PRP.

18 JUSTICE SCALIA: So you say there are two
19 factors which still exert pressure to settle. One is
20 that you don't have to bear the burden of showing that
21 you conform with the national contingency plan, and
22 second, that --

23 MR. ARMSTRONG: The second factor is --

24 JUSTICE SCALIA: -- you insulate yourself
25 from contribution suits by other people.

1 MR. ARMSTRONG: That is correct, Your Honor.
2 That is absolutely correct. Because in cleaning up a
3 site, you can clean up all or part of a site. That's
4 what 113(f)(3)(b) states.

5 JUSTICE SCALIA: Do you rely at all on -- in
6 9607(a)(b)? It says any other necessary costs of
7 response incurred by any other person. Does the word
8 "any" add anything to your case? Do you think it urges
9 us to give the broadest possible interpretation to other
10 person?

11 MR. ARMSTRONG: I believe it --

12 JUSTICE SCALIA: Other necessary costs?

13 MR. ARMSTRONG: I believe it does, Your
14 Honor. I mean, I can't imagine language more broad than
15 that. I do believe the first use of the word other that
16 opposing counsel referred to is to make it quite clear
17 that there can't be a duplication of liability.
18 Obviously a PRP that is exposed to liability in a case
19 cannot be required to pay both the Government and the
20 other party who is cleaning up the site.

21 And I would say that the second use of the
22 word other, which has become quite critical in the
23 Government's argument, the Government I think concedes
24 that the way the statute initially read in the first
25 draft omitted the term other and simply read any person.

1 And the Government says well, the insertion of the word
2 other prior to the enactment of CERCLA indicates that
3 what Congress intended was to withdraw from that huge
4 basket, if you will, all PRPs. Well, that is not the
5 case at all, because initially the definition section of
6 person that was contained in the initial draft of CERCLA
7 did not include the United States. It cross-referenced
8 the Clean Water Act. So the United States was not a
9 person within the initial draft.

10 And the addition of the word other, the
11 second other in 107(a)(4)(b) was to make it clear.
12 Otherwise, you're going to have a statute that says the
13 government can recover under (a)(4)(a) and (a)(4)(b).
14 So I do believe that the addition of the second word
15 other simply explained and clarified that the Government
16 was to bring its action under 107(a)(4)(a), not under
17 107(a)(4)(b).

18 And I think as Justice Scalia has mentioned
19 before, it would be very odd for Congress to have so
20 drastically changed CERCLA by inserting the word other
21 without any commentary whatsoever. There was a good
22 deal of debate about the exclusion of joint and several
23 liability under CERCLA, about the exclusion of
24 contribution, and other matters. There was not a
25 mention made of the addition of the word other preceding

1 person in 107(a)(4)(b).

2 JUSTICE SCALIA: Now you say this very
3 language that's in 107 now had been interpreted
4 unanimously by the courts?

5 MR. ARMSTRONG: That's correct.

6 JUSTICE SCALIA: So that part of your case
7 is that, is to say that it's limited by 113 is to say
8 that there's been an implied repeal.

9 MR. ARMSTRONG: That's correct, Your Honor.

10 JUSTICE SCALIA: Unless all those cases were
11 wrong.

12 MR. ARMSTRONG: That is absolutely correct.

13 JUSTICE SCALIA: So it's not just a
14 legislative history point you're making, it's not just a
15 point as to what Congress's expectations were. It's
16 also -- it's also a point that relates to implicit
17 repeal.

18 MR. ARMSTRONG: It would be tantamount to a
19 repeal.

20 JUSTICE SCALIA: And if the Government's
21 only strong point is that 113 is meant to coerce
22 settlement, and 113 didn't exist before, then it must be
23 very clear that previously 107 did give them a cause of
24 action.

25 MR. ARMSTRONG: That is absolutely correct.

1 That logic is impeccable, Your Honor, I believe so.
2 Because that -- that law was well established and there
3 was no -- there was no such thing as contribution.
4 There was no protection prior to --

5 JUSTICE SCALIA: No acorns on the other
6 side.

7 MR. ARMSTRONG: No acorns.

8 (Laughter.)

9 JUSTICE STEVENS: May I ask just one
10 question about your position on the remedial settlement
11 provision in 113(f)(2)? Do you read it to provide not
12 only immunity from contribution suits but from any other
13 litigation whatsoever?

14 MR. ARMSTRONG: No, Your Honor, it's not any
15 other litigation whatsoever. I think that it is quite
16 clear that what (f)(2) does provide is in a settlement,
17 if a party is seeking under CERCLA -- now when you say
18 other litigation, I assume you perhaps mean State law,
19 etcetera. If it's a State law contribution claim, I
20 believe that provision would afford immunity from a
21 State law contribution claim, assuming it could be
22 asserted. Now of course it could not be asserted
23 against the United States. But I do believe that that
24 language --

25 JUSTICE STEVENS: If there were a claim that

1 didn't really technically qualify as contribution, it
2 would not, it would not provide a bar.

3 MR. ARMSTRONG: If it were a CERCLA claim,
4 Your Honor, under 107(a)(4)(b), it would. However, if
5 it is not a claim based upon CERCLA, and there are
6 certainly a myriad of claims that can be brought --
7 remember, CERCLA is a strict liability provision -- I
8 don't believe that would bar all lawsuits entirely.
9 That's correct, Your Honor. If there's nothing further
10 --

11 CHIEF JUSTICE ROBERTS: Thanks,
12 Mr. Armstrong.

13 Mr. Geck.

14 ORAL ARGUMENT OF JAY D. GECK
15 ON BEHALF OF WASHINGTON, ET AL., AS AMICI CURIAE
16 SUPPORTING THE RESPONDENT

17 MR. GECK: Thank you, Mr. Chief Justice.
18 May it please the Court:

19 There are more than 400,000 sites across the
20 country that are contaminated by hazardous wastes. The
21 amici States recognize that if these sites are to be
22 cleaned up, it's going to take the work of private
23 parties. In turn, we recognize that private parties
24 rely upon cost recovery to obtain their costs and
25 financial incentives to do the site cleanup. The United

1 States argument ignores this vast majority of sites that
2 do not have the opportunity of litigation and do not
3 have the opportunity of settlement.

4 I'll turn first to the words "any other
5 person" where the United States argues that it means
6 innocent person. The words "innocent person" are found
7 nowhere in Section 107 of CERCLA. To get there, the
8 United States borrows from other sections of CERCLA. If
9 the word other were superfluous -- and we do not think
10 it is, we do not think that's the right reading -- the
11 better textual reading here is the natural reading of
12 Section 107. These are two sections that are
13 practically twins and if words are known by the company
14 they keep, you have three parallel structures in each of
15 these cost recovery sections.

16 And further, we point out that the
17 Government's argument leads to an implausible result.
18 If people have to prove their innocence in order to
19 qualify for a cost recovery claim, then there would be,
20 indeed, a possible multiyear trial just in order to
21 decide whether they had a right to cost recovery. A far
22 better approach would be not to destroy a cost recovery
23 claim after that work but to allow those issues, that is
24 a plaintiff's potential liability under 107, to be
25 raised as a contribution counterclaim. And that way you

1 have an incentive for settlement between that private
2 plaintiff and the defendants, and that way you have
3 equity being done.

4 JUSTICE SCALIA: Why wouldn't the States
5 prefer to proceed, to force people to proceed under 113,
6 so that the States would have, you know, a hand in
7 deciding how the cleanup should go? I don't -- I don't
8 quite understand why you're here. I would have thought
9 that the States' interest would be similar to the
10 Government's.

11 MR. GECK: The States recognize that to
12 proceed under settlement puts a near impossible task.
13 EPA, of course, can settle very few sites, they have
14 limited resources, and that's one of the reasons why we
15 don't have settlements in many cases. And apparently
16 they sometimes have disincentives for proceeding with a
17 settlement because it would open the Government to a
18 contribution claim. The States also have some other
19 resource limits.

20 The States in order to go into a settlement,
21 and this is an important point, the Government is
22 blurring the State settlement right here. It's
23 referring to a cost recovery right which the States
24 could seek under Section 107 of CERCLA, but there's a
25 great deal of uncertainty as to whether a State

1 settlement that orders a cleanup would be a resolution
2 of CERCLA liability, and a Second Circuit case from Con
3 Edison that's pending before this Court discusses that
4 at length. Uncertainty does not drive settlement.

5 You asked a question, Justice Scalia, about
6 other reasons why there are incentives for settlement,
7 and I'd point out a third, fourth and fifth one. One,
8 you do get to settle your claims that the Government is
9 bringing against you, which is a powerful incentive to
10 settle, to have peace with the Government in certainty.
11 And then a further point is that you get no better
12 remedy necessarily. There is no reason to walk away
13 from the settlement with the Government, and I don't
14 believe the Government can point to any examples where
15 people have walked away from settlements in order to
16 pursue 107 claims, because 107 doesn't necessarily lead
17 to a windfall. If you're a liable person or potentially
18 liable person, you're going to see your defendants raise
19 your liability and they are going to interpose a
20 cross-claim under Section 113.

21 And finally --

22 CHIEF JUSTICE ROBERTS: Is that how it
23 works? They would have to, if you bring a 107 action,
24 the defendant has to bring his responsive action under
25 113? Or is it as, I guess your friend had stated

1 earlier, equitable principles are going to lead to an
2 allocation of responsibility under 107?

3 MR. GECK: I would rely first on the textual
4 basis, that any person can bring a cost recovery claim.
5 And then the text in Section 113(f)(1) says that any
6 person sued under Section 107 may bring their
7 contribution claim against any other person. That would
8 naturally include even the plaintiff in that claim.

9 JUSTICE SCALIA: The last sentence of
10 (f)(1), right?

11 MR. GECK: The fifth sentence of (f)(1) is
12 what I was referring to. Any person may seek
13 contribution from -- and this is at 67a of the petition,
14 and I believe it's 9a or 11a of the U.S. brief -- any
15 person may seek contribution from any other person who
16 is liable or potentially liable under Section 107 during
17 or following the 107 action. A 113 action supplements
18 the 107 action that the government is so concerned
19 about.

20 Turning then to the question that this would
21 bypass contribution protection: As a threshold matter,
22 that is an issue that is rooted in the language of
23 Section 113(f)(2). It is not a signal as to how to
24 interpret Section 107 itself, because there are a host
25 of potential 107 actions that might come to bear that

1 the United States admits to and those actions could
2 equally be posed. But more importantly perhaps is that
3 because any person who does a settlement with the
4 Government would raise their settlement either as a
5 defense or as a counterclaim, as my colleague said, the
6 court would have the authority under 113(f)(1), the
7 third sentence, there to allocate and apportion
8 responsibility among all liable persons. And at that
9 point, if it had been a judicial settlement that would
10 be very strong evidence that you had paid your
11 proportionate share to the site.

12 Furthermore, what the Government is
13 overlooking is the settlements, there are a number of
14 checks and balances on settlements. This is not a real
15 world problem that the Government describing. The
16 matters addressed, provision of the settlement that the
17 EPA very carefully crafts, doesn't overreach.
18 Occasionally it will, but when it does address an entire
19 cleanup at a site that signals that the EPA is going to
20 be in control of the cleanup for the remainder of the
21 site and you're not going to have unknown parties coming
22 in and entering a site.

23 To do so would be in fact inconsistent
24 with the national contingency plan and you would never
25 make the elements of proving consistency with the

1 national consistency plan in triggering a 107 right.

2 JUSTICE SCALIA: What's the meaning of that
3 last sentence in (f)(1), "Nothing in this subsection
4 shall diminish the right of any person to bring an
5 action of contribution in the absence of a civil
6 action," of a civil action under 9606 or 9607? What are
7 they referring to.

8 MR. GECK: Well, it clearly indicates that
9 there is a savings for other contribution rights that
10 may exist under other areas of law.

11 JUSTICE SCALIA: State law?

12 MR. GECK: State law is certainly a
13 possibility there and that would of course be a stronger
14 indicator that you could give a broader reading to
15 contribution protection under (f)(2) and that's what
16 several courts have done. But the scope of whether a
17 State law meets contribution protection has been debated
18 in the courts and it's of course not before us today.

19 In the end, the last and most important
20 point is that the Government's construction not only
21 bars cost recovery from potentially liable persons even
22 an innocent person who reads Section 107 would not step
23 forward. If you touch a site and you begin operating
24 and moving waste -- and Mr. Chief Justice, your
25 hypothetical about a do-gooder organization that might

1 come in and do cleanups. There is a good likelihood
2 that they would be receiving a counterclaim that would
3 say that they had operated the site and become a liable
4 party. And that could litigate for years.

5 So in the end, in the end of the case, the
6 United States leaves no incentive for private cost
7 recovery and there are 400,000 sites that do need
8 cleanup, and Congress did contemplate there would be two
9 cause of actions, one under 107 for cost recovery when
10 people had incurred costs, and the other one would be
11 for contribution when people had been sued or had
12 settled their civil suit liability.

13 If there is no further questions, thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Geck.

15 (Whereupon, at 10:57 a.m., the case in the
16 above-entitled matter was submitted.)

17 Mr. Hungar, you have four minutes remaining.

18 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR

19 ON BEHALF OF THE PETITIONER

20 MR. HUNGAR: Mr. Chief Justice:

21 Justice Souter, in further answer to your
22 question, EPA can and does send PRP letters to Federal
23 PRPs without approval from the Justice Department. The
24 approval is only for a unilateral administrative order
25 under Section 106.

1 JUSTICE SOUTER: So the only thing they
2 would need the Attorney General's approval for would be
3 institution of suit?

4 MR. HUNGAR: Or a unilateral administrative
5 order.

6 JUSTICE SOUTER: Could they institute suit?

7 MR. HUNGAR: Well, in our view the EPA can't
8 sue the Department of Defense because there would be no
9 justiciable controversy.

10 With respect to the implied repeal issue
11 that was discussed, we disagree strongly with the
12 assertion that there was this unanimous group of ten or
13 some cases prior to 1986. In fact the cases were
14 divided, as we explain in our reply brief.

15 JUSTICE SCALIA: But even if there wasn't,
16 you wouldn't have your principal argument, which is, you
17 know, which is that the reason not to interpret 107 the
18 way your friends on the other side want is that you're
19 going to destroy the settlement provision of 113, which
20 didn't use to exist. What argument would you make for
21 having us read the word "other" in the what seems to me
22 strange way you want?

23 MR. HUNGAR: Your Honor, the point is that
24 the settlement bar under their interpretation is either
25 eviscerated, as Respondents amici argue, or that's the

1 position that they take, that they want to be able to
2 sue for cost recovery and evade the settlement bar.
3 Respondent of course doesn't make that argument because
4 they don't have to in this case. But unless the Court
5 imports the settlement bar into cost recovery actions,
6 there's going to be this huge problem. And if the Court
7 does import --

8 JUSTICE SCALIA: You're missing my point.
9 My point is the settlement bar didn't used to exist. So
10 previously, whether the cases were split or not, there
11 was -- your best argument for the proposition that
12 107(a) does not permit suit did not exist.

13 MR. HUNGAR: Your Honor, as I understand the
14 argument it's that there was this unanimous pre-1986
15 body of law and it was completely clear and perfectly
16 understood that there was this cause of action.

17 JUSTICE SCALIA: Assume it didn't exist.
18 Assume that body of law didn't exist. But what would
19 you have argued when somebody came in and said 107, this
20 provision, includes PRPs? You may have argued -- your
21 best argument would not have been available.

22 MR. HUNGAR: But, Your Honor, the point is
23 it was not clear in 1986 what this language meant and
24 what the extent of the PRP rights were. Congress
25 addressed that question. There is not a hint of a

1 suggestion in the legislative history that Congress was
2 recognizing a PRP action under 107 independent of
3 Section 113. Congress spoke to the question of PRPs
4 suing and the only way it spoke to it explicitly was in
5 Section 113. When Congress says that, this Court has
6 said over and over again that when Congress speaks in an
7 area of uncertainty, as in Fausto, as in Brock against
8 North Dakota, as in the State of Vermont, is where the
9 prior asserted right was not clearly established, was
10 not authoritatively recognized, it's not an implied
11 repeal question. It's a question of reconciling the
12 statutes in a way that gives effect to the later
13 statutes, a more specific statute.

14 Which as here, Section 113, their
15 interpretation gives effect to part of it because they
16 say oh well, let's borrow a settlement bar to make it
17 all work, but you can't do -- you can't do it that way.
18 The Court rejected that very same approach in the Rancho
19 Palos Verdes case from a couple of terms ago.

20 We agree that you need to borrow the
21 limitations of Section 113(f). You just need to borrow
22 all of them, including the one that they can't satisfy,
23 which is that Congress said for suits by PRPs against
24 PRPs, just like is normally the case among joint tort
25 feorsors, it's a contribution suit and they have to wait

1 for a law suit or for a settlement, or some discharge of
2 the liability. And that also avoids burdening the
3 courts with the extremely time-consuming and costly and
4 difficult question of assessing whether the NCP has been
5 complied with, whether the costs comply with the
6 national contingency plan. Because if they settled,
7 then the expert agency has already had a chance to
8 address that and the court doesn't need to get into it
9 in anywhere near the same detail. Their approach is a
10 recipe for burdening the Federal courts with claims that
11 Congress did not clearly indicate should be there.

12 If States want to provide contribution
13 actions that allow these sorts of claims they can, and
14 many States have done so, including Washington State,
15 which is here. So parties can bring these claims in
16 State court if they want to. They can get settlements
17 from the States if they want to and are willing to pay
18 the costs. So the burdens that they identify are not
19 there. Implied repeal does not apply here and because
20 of the uncertainty, as we indicated at pages 9 through
21 10 of our reply brief and footnote 5, there was no
22 unanimous widespread consensus among the Federal courts.
23 This just hasn't come up very much, and the courts were
24 divided. I'd also like to address -- thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Hungar. The case is submitted.

2 (Whereupon, at 11:02 a.m., the case in the
3 above-entitled matter was submitted.)

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