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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR

ON BEHALF OF THE PETITIONER

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

In section 113(f) of CERCLA, Congress created a precisely drawn, detailed mechanism for potentially responsible parties to recover their response costs from other PRPs. Respondent seeks to circumvent the limitations that Congress imposed on that remedy by manufacturing a parallel mechanism for contribution-like relief under section 107.

Respondent's theory should be rejected because it violates fundamental canons of statutory construction, renders section 113(f) superfluous, makes a mockery of the textual limitation enforced by this Court in Cooper Industries, and would frustrate Congress's clear intent to encourage settlements with the Government in order to achieve supervised effective cleanups.

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 -- but 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: Oh you -- you think that
22 when the Court said this, it didn't contemplate that
23 PRPs 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
10 Court in Key Tronic was faced with a different question
11 altogether.

12 JUSTICE SOUTER: Who were the PRPs? Who are
13 the individuals other than PRPs who are likely to -- to
14 avail themselves to the cause of action under section 7?
15 That's one of the problems I have. I mean, the -- it's
16 got to be someone other than owners of the land now,
17 owners of the land then. I mean, who's going to bring
18 these 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: Yes, but can you give me an
24 idea of generally --

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

1 and that is not itself --

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

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

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
19 person."

20 JUSTICE SOUTER: No, I realize that. I'm
21 talking about --

22 MR. HUNGAR: But with respect to private
23 parties in particular, any private party who was a
24 so-called innocent person under the statute, who because
25 --

1 JUSTICE SOUTER: No. Those are people who
2 would have a defense under the later sections of --
3 subsections of section 7. They are still people who
4 would fall within the first four categories.

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

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

24 JUSTICE SOUTER: Well, you know that when
25 they go into court. Let's assume they bring the action

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

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

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

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

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

1 MR. HUNGAR: Well I don't think so because
2 what the statute says is people -- the people who are
3 the subject of the sentence shall be liable to other
4 persons. And if someone by virtue of the statute is
5 rendered not liable --

6 CHIEF JUSTICE ROBERTS: Well, but you --

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

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

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

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

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

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

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

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

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

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

25 So I think well, why can't he bring a suit?

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

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

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

25 JUSTICE GINSBURG: How does it work with "or

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

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

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

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

25 JUSTICE GINSBURG: Well, they -- they can.

1 Of course they can but the States are telling us that
2 this puts a burden on them that they don't want.

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

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

1 answer the question of why wouldn't the United States
2 when it is a polluter and it would be responsible on
3 this site, to say well, we are going to -- we are not
4 going to settle?

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

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

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

1 standards. They occupy a hundred pages.

2 JUSTICE SOUTER: Well, excuse me. Are the
3 cases that you referred to cases in which EPA has gone
4 against a -- we'll say a third party polluter, but the
5 Government is also involved?

6 MR. HUNGAR: Yes. We cite a number from the
7 Federal Register.

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

11 MR. HUNGAR: If Your Honor means filing a
12 lawsuit, the answer is no --

13 JUSTICE SOUTER: Yes.

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

1 settle.

2 JUSTICE SOUTER: All right --

3 MR. HUNGAR: They always do that.

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

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

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

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

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

18 MR. HUNGAR: They send a letter.

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

20 MR. HUNGAR: They send a letter to all
21 PRPs.

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

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

1 JUSTICE SOUTER: What if -- what if the
2 Department of Defense says "nothing doing"? What does
3 EPA do then?

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

8 JUSTICE SOUTER: Well, what does it do about
9 the Department of Defense?

10 MR. HUNGAR: Well --

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

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

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

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

22 But leaving that point aside, if --
23 ultimately they would go to the Attorney General I
24 suppose and ask for authority to issue a unilateral
25 order. But I'm not aware that that problem is a

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

10 JUSTICE SOUTER: And at that point 113 would
11 kick in --

12 MR. HUNGAR: Correct.

13 JUSTICE SOUTER: -- regardless of Defense?

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

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

1 Cooper Industries that negotiation terminated.

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

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

1 MR. HUNGAR: Yes. Yes.

2 JUSTICE BREYER: On their side I have an
3 acorn, which is if they don't win, EPA and DOD just are
4 not going to settle these things because they want to
5 escape us suing them. And you say, are you kidding?
6 EPA loves to sue.

7 (Laughter.)

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

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

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

19 MR. HUNGAR: Yes, Your Honor.

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

22 MR. HUNGAR: Well, the first and foremost
23 way in which the sky is falling is that the court of
24 appeals approach, Respondent's approach, would
25 eviscerate the settlement bar, because the whole point

1 of the settlement bar is to give parties an incentive to
2 settle with the Government knowing that they will be
3 protected from contribution claims. But if Respondent
4 has a cost recovery claim under section 107, the
5 settlement bar goes out the window. And in fact that's
6 what a number of the courts of appeals have held in --
7 in making clear that section 113 does govern these
8 claims. EPA has entered into settlements with literally
9 tens of thousands of PRPs.

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

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

18 JUSTICE SCALIA: Yes. It would be one thing
19 if you skip away from a settlement without having to pay
20 out any money. But in order to come under -- under
21 9607, they have to -- they have to shell out the money.

22 MR. HUNGAR: Maybe I'm not understanding.
23 My point, Your Honor, is that there are tens of
24 thousands of parties who have already settled, shelling
25 out some money or not, with the EPA in reliance on the

1 unanimous view of the courts of appeals that PRPs could
2 not sue them because the contribution bar protected
3 them, section 113(f) would protect them.

4 CHIEF JUSTICE ROBERTS: Well, how sure are
5 you -- how sure are you that it doesn't protect them
6 still?

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

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

20 MR. HUNGAR: Well, Your Honor, if you want
21 to call what the PRP here is seeking a contribution
22 claim, then we submit that it should be governed by the
23 traditional understanding of "contribution" and by
24 Congress's explicit terms defining what it wants
25 contribution claims to be. Even if you assume that in

1 some sense section 107 imposes liability on PRPs to
2 other PRPs, it doesn't say what to do with that
3 liability, what -- and how you litigate it. Section
4 113(f) is how Congress explicitly, carefully addressed
5 that question and when Congress has done so this Court
6 normally assumes that what Congress specifically said as
7 the remedy and delineated as the remedy, including the
8 limitations thereon, are what apply.

9 CHIEF JUSTICE ROBERTS: You're not worried
10 about any of that when you're dealing with an innocent
11 party, the person you say can bring this action under
12 107(4)(b). Don't all those same concerns and objections
13 apply in that case as well?

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

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

23 MR. HUNGAR: Well, that may be true in many
24 circumstances, Your Honor. But that doesn't mean that
25 we don't give someone who can establish they are an

1 innocent party a right to full recovery and someone who
2 is not an innocent party is relegated to contribution.

3 CHIEF JUSTICE ROBERTS: Do you have another
4 example of an innocent party who can bring an action
5 under 107(4)(b) other than a governmental subdivision?

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

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

13 MR. HUNGAR: I'm sorry?

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

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

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

25 MR. HUNGAR: Well, they could also just

1 resolve it through settlement, Your Honor. And either
2 they could then proceed with their lawsuit or, if they
3 want to admit some minimal liability and obtain a
4 contribution claim, they could proceed in that fashion.
5 But there are solutions to the problems that have been
6 identified under our interpretation, but there is no
7 plausible solution to the problems that their
8 interpretation produce, including eviscerating the
9 settlement bar. It's no surprise that some of the
10 largest polluters in America have lined up in support of
11 this view, because this will allow them to reopen
12 settlements and go after parties who thought they had
13 paid up their liability and obtained settlement
14 protection by virtue of the section 113(f) settlement
15 bar.

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

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

25 JUSTICE GINSBURG: Yes, but to make the

1 statute work in harmony, to harmonize 107 with 113, it
2 seems to me that would be an altogether reasonable
3 position for a court to take. If someone has settled
4 and is protected by virtue of that settlement, then when
5 someone else tries to go after that same person the
6 court could say: We have to make the statute work and
7 we're going to honor the settlement.

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

16 If I may, I'd like to reserve the balance of
17 my time.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Hungar.

20 Mr. Armstrong.

21 ORAL ARGUMENT OF OWEN T. ARMSTRONG, JR.

22 ON BEHALF OF THE RESPONDENT

23 MR. ARMSTRONG: Mr. Chief Justice, and may
24 it please the Court:

25 I would like to address the settlement bar.

1 One thing that the Court should keep in mind is that a
2 cost recovery action under 107(a)(4)(B) is an action for
3 restitution. This is an equitable action. There is no
4 jury trial under CERCLA. The district court is sitting
5 as a court of equity. And as Justice Ginsburg just
6 pointed out, the court is empowered in any case, any
7 107(a)(4)(B) case, to accord settlement protection to a
8 settling party as a matter of equity. It may do that
9 simply as a matter of equity or, as we pointed out in
10 our brief, it may do so by virtue of a contribution
11 counterclaim by the settling party.

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

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

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

25 JUSTICE BREYER: Well, I would worry about

1 the equity. I just want to know if you want to
2 stipulate that that's the proper interpretation, because
3 I could easily imagine a case where your client bought a
4 beautiful golf course and he wants to turn it into a
5 golf course. Unfortunately, there's a little mess under
6 there and he spends \$10 million on that. And he says
7 the real fault is the Union Oil Company and I'm going to
8 go and sue them because they're the ones who dumped this
9 and they've cost me \$9 million. And it turns out that
10 Union through precisely good luck and a brilliant
11 attorney has settled this very matter for one dollar
12 with EPA.

13 Barred?

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

16 JUSTICE BREYER: Ah, that's what I thought,
17 and that's what he's saying.

18 (Laughter.)

19 JUSTICE BREYER: That's what he's saying,
20 that's why he has brought his second acorn, because he
21 said there's a huge difference here. What you will do
22 is if you get this 107 action you'll argue to the court
23 as to what's fair, but what 113 says is once you settle
24 with the Federal Government, you're home free.

25 MR. ARMSTRONG: Well, Your Honor, in your

1 hypothetical, spending one dollar, there is no question
2 that the court sitting in equity and also as a matter of
3 a contribution counterclaim would be entitled to review
4 the settlement. And if that matter is in the matters
5 addressed, if it has been resolved by the Government --
6 and I should point out that in a settlement, settlements
7 are publicly noticed, so parties have an opportunity to
8 object to any settlement which they feel is unfair. And
9 presumably our golf course owner would be identified in
10 that circumstance.

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

21 MR. ARMSTRONG: That is correct, Your Honor.
22 That would not be unfair any more than it would be
23 unfair in a contribution action, in which case the court
24 is directed to apply principles of equity in allocating
25 responsibility.

1 JUSTICE KENNEDY: Well, almost by definition
2 a settlement is for less than the full amount that you'd
3 have to spend without the settlement, almost by
4 definition.

5 MR. ARMSTRONG: Well, that is correct, Your
6 Honor.

7 JUSTICE STEVENS: You don't usually settle
8 for 100 percent of your liability.

9 MR. ARMSTRONG: That is correct, and I think
10 Congress did write that into the contribution part of
11 the statute because --

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

15 MR. ARMSTRONG: Well, I believe in every
16 settlement agreement the court would have to engage in
17 an analysis as to what matters addressed are for
18 purposes of the settlement.

19 JUSTICE BREYER: How are you going to choose
20 this? Because what he is -- you're in a different -- I
21 think maybe you're in a slightly awkward position
22 because the Government is saying that one of the reasons
23 that you're stuck with 113 is because Congress didn't
24 really want through 107 to give parties like your
25 clients an opportunity to review for fairness or

1 equitable principles, whatever you like, the settlements
2 that had taken place with the defendant and EPA. And
3 that's so we can get people to settle, among other
4 things. They feel they're home free.

5 Now, you have two choices here. I think you
6 could say, one, well, that's the way it is, we should
7 have a 107 action and we should review these settlements
8 for fairness; or two, you could say one of the
9 principles of fairness is the principle that's written
10 into 113 about no review, and we're happy with reading
11 that into 107. So which is it that you would like to
12 say?

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

16 JUSTICE BREYER: When you say that's
17 absolutely true, you mean you -- absolutely true that
18 you have that choice, or is it --

19 MR. ARMSTRONG: I believe that a reviewing
20 court should in each instance -- if a district court
21 decides to avoid the settlement, if it says that it's
22 not fair, I believe that would undercut the finality of
23 a settlement so long as it's contained within the
24 matters addressed.

25 JUSTICE BREYER: All right, so then he's

1 wrong in thinking that the motivating force behind this
2 action is to permit people to get equitable review of
3 prior settlements. What you simply want -- and you're
4 not interested in that; you'll go with no equitable
5 review of private settlements. Read 113 into it. You
6 want the right to bring the case where there has been no
7 settlement and Government has done nothing?

8 MR. ARMSTRONG: That is absolutely correct
9 in our case, Your Honor, and I think we've stipulated to
10 that.

11 JUSTICE GINSBURG: But to talk about the
12 other polluter or the other in this case, where the
13 other polluter is not someone who is going to settle
14 because it's the Government itself --

15 MR. ARMSTRONG: Yes, Your Honor.

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

19 MR. ARMSTRONG: That is correct, Your Honor,
20 because in our case, I think as we have made it quite
21 clear, all we are seeking in this case is to recover a
22 proportion of our response costs. We cannot conceive,
23 because we are not confronted with the issue that has
24 been posed -- I would not object as a matter of a bright
25 line rule if the Court were to rule that a settlement is

1 protected from a back end or a roundabout 107(a)(4)(B)
2 action in order to disturb a settlement agreement. We
3 do not have those circumstances in this case, that is
4 correct. And we are only seeking restitution in our
5 case. We are seeking an equitable result, a
6 proportionate share of ARC's response costs.

7 JUSTICE GINSBURG: What about the
8 Government's concern that prenups shouldn't go on
9 unsupervised. That's when EPA brings an enforcement
10 action, there's a monitor there. When there's a
11 settlement, then the Government is there. But if you
12 just go off on your own and do this, you're doing it
13 unsupervised by any State authority, any Federal
14 authority, and that could --

15 MR. ARMSTRONG: Your Honor, I believe in
16 most cases there is State involvement. There is in the
17 ARC case, although it is not in the record. We have
18 entered into a cooperative relationship with the State
19 in cleaning up the site. And I think in almost every
20 case a PRP is well-advised to bring in experts to make
21 sure that the cleanup is consistent with the National
22 Contingency Plan, because absent that -- satisfying that
23 requirement, the PRP is not entitled to recover any of
24 its costs. So there is a very demanding requirement
25 written into CERCLA. The National Contingency Plan

1 occupies 9605 and it occupies several hundred pages of
2 40 C.F.R. part 300.

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

6 MR. ARMSTRONG: No, Your Honor. That is
7 correct, although --

8 CHIEF JUSTICE ROBERTS: You could set up a
9 company that cleans up these sites, right, and go
10 traveling around the country and clean them up and then
11 send people a bill and cite your reading of 107(4)(B),
12 right?

13 MR. ARMSTRONG: 107(a)(4)(B) would include
14 both PRPs and what we might call non-PRPs. I believe
15 one of the amicus parties studied 364 cases between the
16 years of 1995 and 2000 and there was one case out of
17 that 364 that involved precisely your hypothetical, Your
18 Honor.

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

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

23 CHIEF JUSTICE ROBERTS: Can non-PRPs?

24 MR. ARMSTRONG: There are very few non-PRPs.
25 The only non-PRPs that I can think of is perhaps the

1 hypothetical you just advanced, because as has been
2 pointed out, the so-called innocent adjoining landowner
3 is a PRP, is a covered person under 107(a)(4)(b), and
4 only has a defense to liability. And it is absolutely
5 true that in order to bring an action, according to the
6 Government, that particular PRP would have to establish
7 through affirmative action that it's -- that it
8 satisfies the -- the liability exclusion in 107(b). And
9 that is a very drawn out process. The criteria for
10 satisfying the defense in 107(b) takes up 2 1/2 pages of
11 the -- of the statute.

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

23 And Congress when it passed 113, was looking
24 at those cases only that had some doubt about whether
25 contribution could also be brought. In other words,

1 whether a party could seek restitution despite the fact
2 that it was compelled to do a cleanup via a lawsuit.
3 And some courts found that there was an implied right to
4 contribution, some found that there was a common law
5 right, but Congress in 1986 specifically said, we are
6 only concerned with the implied right to contribution,
7 given this Court's holding in the Northwest Airlines
8 case and in Texas Industries. Congress was concerned
9 that there would be no right to contribution unless it
10 codified that right, which it did in 1986. And I think
11 the legislative history makes it quite clear that
12 Congress did not intend to disturb or to cut back on the
13 rights that courts had found consistently in that
14 six-year window between 1980 and 1986, all of which held
15 that PRPs indeed do have a right to bring cost recovery
16 actions.

17 JUSTICE SOUTER: But in -- in response to
18 your -- going back to your response to Justice Breyer, I
19 take it the -- the right under -- under 107 was affected
20 to the extent -- or at least you would agree that it was
21 affected to the extent -- that if there is a settlement
22 they are home free and there can't be a 107 action; is
23 that correct?

24 MR. ARMSTRONG: That is correct.

25 JUSTICE SOUTER: Okay. So it disturbed the

1 old scheme to that extent.

2 MR. ARMSTRONG: It did, although most of
3 these cases I do believe did not involve settlements,
4 but I think obviously when Congress enacted 113, I think
5 it certainly wanted to encourage settlements in cases
6 where there had been an action brought against a PRP.
7 Obviously I think settlement saves everybody the time
8 and effort of litigating these matters, and I think for
9 that reason, in 113 we get contribution protection, we
10 get the ability to bring a contribution action. So
11 certainly settlement was a key element of 113 but it was
12 a key element of that provision, not section 107. But I
13 think Congress has made it quite clear to encourage
14 settlements, if it's in the matters addressed, that
15 there should be immunity for those parties that are
16 settling their claims with the Government or a State in
17 a judicially approved or administratively approved
18 settlement. So I don't believe --

19 JUSTICE GINSBURG: What about the
20 disincentive to settlement? You just said how important
21 settlement was, or what a good thing it is to encourage
22 it. But the Government says if you could just clean up
23 without any order and without making any proposed
24 settlement, just do it and get back your costs, then
25 there's a powerful disincentive to settle.

1 MR. ARMSTRONG: Well, Your Honor, I think
2 once again, settling -- it is not a disincentive in the
3 sense that if you do settle, you are deemed -- all of
4 your costs are deemed to be consistent with the national
5 contingency plan. You need not be concerned in that
6 particular case about satisfying the burden of proof
7 that you have as a PRP that your costs are consistent
8 with the national contingency plan, which is no easy
9 matter. The national contingency plan as I stated,
10 appearing in 40 C.F.R. part 300, occupies a good hundred
11 pages. It is a very detailed and demanding set of
12 requirements. So there is a strong incentive, I still
13 believe, for parties to settle because in such a case
14 they do not have to establish that there is consistency
15 with the national contingency plan.

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

25 JUSTICE SCALIA: So you say there are two

1 factors which still exert pressure to settle. One is
2 that you don't have to bear the burden of showing that
3 you conform with the national contingency plan, and
4 second, that --

5 MR. ARMSTRONG: The second factor is --

6 JUSTICE SCALIA: -- you insulate yourself
7 from contribution suits by other people.

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

12 JUSTICE SCALIA: Do you rely at all on -- in
13 9607(a)(b)? It says, "any other necessary costs of
14 response incurred by any other person." The word "any"
15 add anything to your case? Do you think it urges us to
16 give the broadest possible interpretation to "other
17 person"?

18 MR. ARMSTRONG: I believe it --

19 JUSTICE SCALIA: Other necessary costs?

20 MR. ARMSTRONG: I believe it does, Your
21 Honor. I mean, I can't imagine language more broad than
22 that. I do believe the first use of the word "other"
23 that opposing counsel referred to is to make it quite
24 clear that there can't be a duplication of liability.
25 Obviously a PRP that is exposed to liability in a case

1 cannot be required to pay both the Government and the
2 other party who is cleaning up the site.

3 And I would say that the second use of the
4 word other, which has become quite critical in the
5 Government's argument, the Government I think concedes
6 that the way the statute initially read in the first
7 draft omitted the term other and simply read "any
8 person." And the Government says well, the insertion of
9 the word other prior to the enactment of CERCLA
10 indicates that what Congress intended was to withdraw
11 from that huge basket, if you will, all PRPs. Well,
12 that is not the case at all, because initially the
13 definition section of "person" that was contained in the
14 initial draft of CERCLA did not include the United
15 States. It cross-referenced the Clean Water Act. So
16 the United States was not a person within the initial
17 draft.

18 And the addition of the word other, the
19 second other in 107(a)(4)(B), was to make it clear.
20 Otherwise, you're going to have a statute that says the
21 government can recover under (a)(4)(A) and (a)(4)(b).
22 So I do believe that the addition of the second word
23 other simply explained and clarified that the Government
24 was to bring its action under 107(a)(4)(a), not under
25 107(a)(4)(b).

1 And I think as Justice Scalia has mentioned
2 before, it would be very odd for Congress to have so
3 drastically changed CERCLA by inserting the word other
4 without any commentary whatsoever. There was a good
5 deal of debate about the exclusion of joint and several
6 liability under CERCLA, about the exclusion of
7 contribution, and other matters. There was not a
8 mention made of the addition of the word other preceding
9 person in 107(a)(4)(b).

10 JUSTICE SCALIA: Now you say this very
11 language that's in 107 now had been interpreted
12 unanimously by the courts?

13 MR. ARMSTRONG: That's correct.

14 JUSTICE SCALIA: So that part of your case
15 is that -- is that to say that it's limited by 113 is to
16 say that there's been an implied repeal.

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

18 JUSTICE SCALIA: Unless all those cases were
19 wrong.

20 MR. ARMSTRONG: That is absolutely correct.

21 JUSTICE SCALIA: So it's not just a
22 legislative history point you're making, it's not just a
23 point as to what Congress's expectations were. It's
24 also -- it's also a point that relates to implicit
25 repeal.

1 MR. ARMSTRONG: It would be tantamount to a
2 repeal.

3 JUSTICE SCALIA: And if the Government's
4 only strong point is that 113 is meant to coerce
5 settlement, and 113 didn't exist before, then it must be
6 very clear that previously 107 did give a cause of
7 action.

8 MR. ARMSTRONG: That is absolutely correct.
9 That logic is impeccable, Your Honor, I believe so.
10 Because that -- that law was well established and there
11 was no -- there was no such thing as contribution.
12 There was no protection prior to --

13 JUSTICE SCALIA: No acorns on the other
14 side.

15 MR. ARMSTRONG: No acorns.

16 (Laughter.)

17 JUSTICE STEVENS: May I ask just one
18 question about your position on the meaning of the
19 settlement provision in 113(f)(2)? Do you read it to
20 provide not only immunity from contribution suits but
21 from any other litigation whatsoever?

22 MR. ARMSTRONG: No, Your Honor, it's not any
23 other litigation whatsoever. I think that it is quite
24 clear that what (f)(2) does provide is in a settlement,
25 if a party is seeking under CERCLA -- now when you say

1 other litigation, I assume you perhaps mean State law,
2 et cetera. If it's a State law contribution claim, I
3 believe that provision would afford immunity from a
4 State law contribution claim, assuming it could be
5 asserted. Now of course it could not be asserted
6 against the United States. But I do believe that that
7 language --

8 JUSTICE STEVENS: If there were a claim that
9 didn't really technically qualify as contribution, it
10 would not -- it would not provide a bar?

11 MR. ARMSTRONG: If it were a CERCLA claim,
12 Your Honor, under 107(a)(4)(b), it would. However, if
13 it is not a claim based upon CERCLA, and there are
14 certainly a myriad of claims that can be brought --
15 remember, CERCLA is a strict liability provision --

16 JUSTICE STEVENS: It would bar all --

17 MR. ARMSTRONG: I don't believe that would
18 bar all lawsuits entirely. That's correct, Your Honor.
19 If there's nothing further --

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Armstrong.

22 Mr. Geck.

23 ORAL ARGUMENT OF JAY D. GECK

24 ON BEHALF OF WASHINGTON, ET AL., AS AMICI CURIAE

25 SUPPORTING THE RESPONDENT

1 MR. GECK: Thank you, Mr. Chief Justice.

2 May it please the Court:

3 There are more than 400,000 sites across the
4 country that are contaminated by hazardous wastes. The
5 amici States recognize that if these sites are to be
6 cleaned up, it's going to take the work of private
7 parties. In turn, we recognize that private parties
8 rely upon cost recovery to obtain their costs and
9 financial incentives to do the site cleanup. The United
10 States argument ignores this vast majority of sites that
11 do not have the opportunity of litigation and do not
12 have the opportunity of settlement.

13 I'll turn first to the words "any other
14 person" where the United States argues that it means
15 innocent person. The words "innocent person" are found
16 nowhere in section 107 of CERCLA. To get there, the
17 United States borrows from other sections of CERCLA. If
18 the word other were superfluous -- and we do not think
19 it is, we do not think that's the right reading -- the
20 better textual reading here is the natural reading of
21 section 107. These are two sections that are
22 practically twins and if words are known by the company
23 they keep, you have three parallel structures in each of
24 these cost recovery sections.

25 And further, we point out that the

1 Government's argument leads to an implausible result.
2 If people have to prove their innocence in order to
3 qualify for a cost recovery claim, then there would be,
4 indeed, a possible multiyear trial just in order to
5 decide whether they had a right to cost recovery. A far
6 better approach would be not to destroy a cost recovery
7 claim after that work but to allow those issues, that is
8 a plaintiff's potential liability under 107, to be
9 raised as a contribution counterclaim. And that way you
10 have an incentive for settlement between that private
11 plaintiff and the defendants, and that way you have
12 equity being done.

13 JUSTICE SCALIA: Why wouldn't the States
14 prefer to proceed -- to force people to proceed under
15 113, so that the States would have, you know, a hand in
16 deciding how the cleanup should go? I don't -- I don't
17 quite understand why you're here. I would have thought
18 that the States' interest would be similar to the
19 Government's.

20 MR. GECK: The States recognize that to
21 proceed under settlement puts a near impossible task.
22 EPA, of course, can settle very few sites, they have
23 limited resources, and that's one of the reasons why we
24 don't have settlements in many cases. And apparently
25 they sometimes have disincentives for proceeding with a

1 settlement because it would open the Government to a
2 contribution claim. The States also have similar
3 resource limits.

4 The States in order to go into a settlement,
5 and this is an important point, the Government is
6 blurring the State settlement right here. It's
7 referring to a cost recovery right which the States
8 could seek under section 107 of CERCLA, but there's a
9 great deal of uncertainty as to whether a State
10 settlement that orders a cleanup would be a resolution
11 of CERCLA liability, and the Second Circuit case from
12 Con Edison that's pending before this Court discusses
13 that at length. Uncertainty does not drive settlement.

14 You asked a question, Justice Scalia, about
15 other reasons why there are incentives for settlement,
16 and I'd point out a third, fourth and fifth one. One,
17 you do get to settle your claims that the Government is
18 bringing against you, which is a powerful incentive to
19 settle, to have peace with the Government in certainty.
20 And then a further point is that you get no better
21 remedy necessarily. There is no reason to walk away
22 from the settlement with the Government, and I don't
23 believe the Government can point to any examples where
24 people have walked away from settlements in order to
25 pursue 107 claims, because 107 doesn't necessarily lead

1 to a windfall. If you're a liable person or potentially
2 liable person, you're going to see your defendants raise
3 your liability and they are going to interpose a
4 cross-claim under section 113.

5 And finally --

6 CHIEF JUSTICE ROBERTS: Is that how it
7 works? They would have to -- if you bring a 107 action,
8 the defendant has to bring his responsive action under
9 113? Or is it as, I guess your friend had stated
10 earlier, equitable principles are going to lead to an
11 allocation of responsibility under 107?

12 MR. GECK: I would rely first on the textual
13 basis, that any person can bring a cost recovery claim.
14 And then the text in section 113(f)(1) says that any
15 person sued under section 107 may bring their
16 contribution claim against any other person. That would
17 naturally include even the plaintiff in that claim.

18 JUSTICE SCALIA: The last sentence of
19 (f)(1), right?

20 MR. GECK: The first sentence of (f)(1) is
21 what I was referring to. "Any person may seek
22 contribution from" -- and this is on 67a of the petition
23 appendix, and I believe 9a or 11a of the U.S. brief --
24 "any person may seek contribution from any other person
25 who is liable or potentially liable under section 107

1 during or following the 107 action." A 113 action
2 supplements the 107 action that the government is so
3 concerned about.

4 Turning then to the question that this would
5 bypass contribution protection: As a threshold matter,
6 that is an issue that is rooted in the language of
7 section 113(f)(2). It is not a signal as to how to
8 interpret section 107 itself, because there are a host
9 of potential 107 actions that might come to bear that
10 the United States admits to and those actions could
11 equally be posed. But more importantly perhaps is that
12 because any person who does a settlement with the
13 Government would raise their settlement either as a
14 defense or as a counterclaim, as my colleague said, the
15 court would have the authority under 113(f)(1), the
16 third sentence there, to allocate and apportion
17 responsibility among all liable persons. And at that
18 point, if it had been a judicial settlement, that would
19 be very strong evidence that you had paid your
20 proportionate share to the site.

21 Furthermore, what the Government is
22 overlooking is the settlements, there are a number of
23 checks and balances on settlements. This is not a real
24 world problem that the Government is describing. The
25 matters addressed, provision of the settlement that the

1 EPA very carefully crafts, doesn't overreach.
2 Occasionally it will, but when it does address an entire
3 cleanup at a site, that signals that the EPA is going to
4 be in control of the cleanup for the remainder of the
5 site and you're not going to have unknown parties coming
6 in and entering a site.

7 To do so would be in fact inconsistent
8 with the national contingency plan and you would never
9 make the elements of proving consistency with the
10 National Contingency Plan in triggering a 107 right.

11 JUSTICE SCALIA: What's the meaning of that
12 last sentence in (f)(1), "Nothing in this subsection
13 shall diminish the right of any person to bring an
14 action for contribution in the absence of a civil
15 action -- of a civil action under 9606 or 9607"? What
16 are they referring to?

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

20 JUSTICE SCALIA: State law? Is that --

21 MR. GECK: State law is certainly a
22 possibility there and that would of course be a strong
23 indicator that you could give a broader reading to
24 contribution protection under (f)(2) and that's what
25 several courts have done. But the scope of whether a

1 State law meets contribution protection has been debated
2 in the courts and it's of course not before us today.

3 In the end, the last and most important
4 point is that the Government's construction not only
5 bars cost recovery from potentially liable persons, even
6 an innocent person who reads section 107 would not step
7 forward. If you touch a site and you begin operating
8 and moving waste -- and Mr. Chief Justice, your
9 hypothetical about a do-gooder organization that might
10 come in and do cleanups, there is a good likelihood that
11 they would be receiving a counterclaim that would say
12 that they had operated the site and become a liable
13 party. And that could litigate for years.

14 So in the end -- in the end of the case, the
15 United States leaves no incentive for private cost
16 recovery and there are 400,000 sites that do need
17 cleanup, and Congress did contemplate that there would
18 be two cause of actions, one under 107 for cost recovery
19 when people had incurred costs, and the other one would
20 be for contribution when people had been sued or had
21 settled their civil-suit liability.

22 If there is no further questions, thank you.

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

24 Mr. Hungar, you have four minutes remaining.

25 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR

1 ON BEHALF OF THE PETITIONER

2 MR. HUNGAR: Mr. Chief Justice:

3 Justice Souter, in further answer to your
4 question, EPA can and does send PRP letters to Federal
5 PRPs without approval from the Justice Department. The
6 approval is only for a unilateral administrative order
7 under section 106.

8 JUSTICE SOUTER: So the only thing they
9 would need the Attorney General's approval for would be
10 institution of suit?

11 MR. HUNGAR: Or a unilateral administrative
12 order.

13 JUSTICE SOUTER: Can they institute suit?

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

17 With respect to the implied repeal issue
18 that was discussed, we disagree strongly with the
19 assertion that there was this unanimous group of ten or
20 some cases prior to 1986. In fact the cases were
21 divided, as we explain in our reply brief.

22 JUSTICE SCALIA: Well even if there wasn't,
23 you wouldn't have your principal argument, which is, you
24 know, which is that the reason not to interpret 107 the
25 way your friends on the other side want is that you're

1 going to destroy the settlement provision of 113, which
2 didn't use to exist. What argument would you make for
3 having us read the word "other" in the what seems to me
4 strange way you want?

5 MR. HUNGAR: Your Honor, the point is that
6 the settlement bar under their interpretation is either
7 eviscerated, as Respondent's amici argue, or that's the
8 position that they take, that they want to be able to
9 sue for cost recovery and evade the settlement bar.
10 Respondent of course doesn't make that argument because
11 they don't have to in this case. But unless the Court
12 imports the settlement bar into cost recovery actions,
13 there's going to be this huge problem. And if the Court
14 does import --

15 JUSTICE SCALIA: You're missing my point.
16 My point is the settlement bar did not used to exist.
17 So previously, whether the cases were split or not,
18 there was -- your best argument for the proposition that
19 107(a) does not permit suit did not exist.

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

24 JUSTICE SCALIA: Assume it didn't exist.
25 Assume that body of law didn't exist. Why -- what would

1 you have argued when somebody came in and said 107, this
2 provision, includes PRPs? You may have argued -- your
3 best argument would not have been available.

4 MR. HUNGAR: But, Your Honor, the point is
5 it was not clear in 1986 what this language meant and
6 what the extent of the PRP rights were. Congress
7 addressed that question. There is not a hint of a
8 suggestion in the legislative history that Congress was
9 recognizing a PRP action under 107 independent of
10 section 113. Congress spoke to the question of PRPs
11 suing and the only way it spoke to it explicitly was in
12 section 113. When Congress does that, this Court has
13 said over and over again that when Congress speaks in an
14 area of uncertainty, as in Fausto, as in Block against
15 North Dakota, as in Estate of Romani, where the prior
16 asserted right was not clearly established, was not
17 authoritatively recognized, it's not an implied repeal
18 question. It's a question of reconciling the statutes
19 in a way that gives effect to the later statute, the
20 more specific statute.

21 Which as here, section 113, their
22 interpretation gives effect to part of it because they
23 say oh well, let's borrow a settlement bar to make it
24 all work, but you can't do -- you can't do it that way.
25 The Court rejected that very same approach in the Rancho

1 Palos Verdes case from a couple of terms ago.

2 We agree that you need to borrow the
3 limitations of section 113(f). You just need to borrow
4 all of them, including the one that they can't satisfy,
5 which is that Congress said for suits by PRPs against
6 PRPs, just like is normally the case among joint tort
7 feasons, it's a contribution suit and they have to wait
8 for a lawsuit or for a settlement, or some discharge of
9 the liability. And that also avoids burdening the
10 courts with the extremely time-consuming and costly and
11 difficult question of assessing whether the NCP has been
12 complied with, whether the costs comply with the
13 national contingency plan. Because if they've settled,
14 then the expert agency has already had a chance to
15 address that and the court doesn't need to get into it
16 in anywhere near the same detail. Their approach is a
17 recipe for burdening the Federal courts with claims that
18 Congress did not clearly indicate should be there.

19 If States want to provide contribution
20 actions that allow these sorts of claims they can, and
21 many States have done so, including Washington State,
22 which is here. So parties can bring these claims in
23 State court if they want to. They can get settlements
24 from the States if they want to and are willing to pay
25 the costs. So the burdens that they identify are not

1 there. Implied repeal does not apply here and because
2 of the uncertainty, as we indicated at pages 9 through
3 10 of our reply brief and footnote 5, there was no
4 unanimous, widespread consensus among the Federal
5 courts. This just hadn't come up very much, and the
6 courts were divided. I'd also like to address -- thank
7 you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Hungar. The case is submitted.

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

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