No. 06-562

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, as two circuits have held following this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), a party that is potentially responsible (a "PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, and that undertakes a cleanup, has a cause of action under Section 107(a) against another PRP.

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INTEREST OF THE AMICI CURIAE

Amici curiae Ford Motor Company ("Ford") and General Motors Corporation ("General Motors" or "GM"),[1] are two of the nation's largest manufacturers of automobiles. Collectively, Ford and General Motors have engaged in numerous environmental cleanups, both at their own facilities and at other sites, including sites for which they have been identified as potentially responsible parties ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. Ford and General Motors have initiated many of these cleanups without waiting for the compulsion of a civil lawsuit under Section 106 or 107(a) of CERCLA: rather, they have done so voluntarily, pursuant to United States Environmental Protection Agency ("EPA") orders, as required conditions of operational permits under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, or in cooperation with state regulatory authorities.

Like Respondent, Ford and General Motors have performed, and continue to perform, many such environmental cleanups, even though various federal government PRPs (collectively, the "United States"), which are partially or wholly responsible for the contamination (and therefore liable for some or all of the cost of cleanup) at these sites, have not cooperated or participated in the response actions. Despite this lack of assistance on the part

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[1] The parties' written consents to the filing of this brief are being submitted to the Clerk of this Court. Pursuant to S.Ct. R. 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

of the United States, Ford and General Motors have been willing to undertake these cleanups because, prior to the Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), well-established CERCLA law ensured that other PRPs, including the United States, could be pursued to contribute their fair share under CERCLA.

Rather than presenting additional arguments on the legal issues already addressed at length by Respondent and by the other briefs in support of Respondent, *amici curiae* instead will describe the potential ramifications of the Court's decision in this matter on the liability of the federal government. Indeed, both Ford and General Motors are also currently plaintiffs in *Ford Motor Co. v. United States*, No. 04-cv-72018 (E.D. Mich.) and *General Motors Corp. v. United States*, No. 01-cv-2201 (DMC) (D.N.J.), respectively, in which they are prosecuting claims for cost recovery and/or contribution under CERCLA (among other statutes) against the United States. Ford's and General Motors' rights in these two cases, as well as its rights in other cases not involving responsible federal agencies, may be impacted by the outcome here. Further, the curtailment of the right to contribution urged by the United States will create an disincentive to future voluntary remediation, and will unfairly impose the full costs of cleanup on parties only partly responsible for contamination. Moreover, accepting the United States' interpretation of the statute would impermissibly allow the United States to insulate itself from CERCLA liability and from paying its fair share of remediation costs.

For these reasons, Ford and General Motors have a critical interest in the outcome of this case, and their informed views should assist the Court in resolving this important issue of law.

STATEMENT OF THIS CASE

Amici curiae concur with and adopt the statement of the case proffered by Respondent.

SUMMARY OF ARGUMENT

The central question before the Court is whether "any other person" who voluntarily incurs necessary costs of response under CERCLA – including Respondent, Ford and General Motors – is precluded from seeking contribution from other PRPs, including the United States and its departments and agencies. The United States urges the Court to eliminate the phrase "any other person" from Section 107(a) of CERCLA, and to restrict contribution to parties forced to perform cleanups by government-initiated lawsuits, thereby eliminating contribution for anyone who performs cleanups voluntarily or pursuant to other forms of governmental compulsion. Such a curtailment of the contribution right under CERCLA would create an enormous disincentive to future voluntary remediation, and would inequitably saddle parties only partly responsible for contamination with the full costs of cleanup.

Moreover, rewriting Section 107(a) in such a manner would undermine Congress' express waiver of sovereign immunity pursuant to Section 120(a) of CERCLA. Section 120(a) contains a broad waiver of the United States' sovereign immunity, expressly providing that "[e]ach department, agency and instrumentality of the United States" is to be liable "in the same manner and to the same extent . . . as any nongovernmental entity, including liability under [Section 107]." 42 U.S.C. § 9620(a). Moreover, lower courts have unequivocally stated that "when the government engages in activities that would make a private party liable [under CERCLA] if the private party engaged in those types of activities, then the government is also liable." *FMC Corp.*

v. United States Dep't. of Commerce, 29 F.3d 833, 841 (3d Cir. 1994). In *Cooper*, this Court, with the support of the United States, removed one of the procedures that gave effect to the waiver embodied in Section 120 when it barred contribution actions under Section 113(f)(1) in the absence of a "civil action" under Section 106 or Section 107(a). If the Court, at the government's behest, removes Section 107(a) claims from the private sector's arsenal, then it will substantially alter Congress's express waiver of sovereign immunity. The Court, however, is not at liberty to remove Section 120(a) from the statute, and therefore should affirm the decision of the Court of Appeals.

Additionally, the United States is supporting an interpretation of Section 107 that would impermissibly allow the United States to prosecute and administer cleanups at certain contaminated sites in a manner that would, according to the Court of Appeals for the Eighth Circuit, "insulate itself from liability for its own pollution." This result is, in the words of the Court of Appeals, "absurd and unjust," and contrary to the fundamental goals of CERCLA that polluters pay for their equitable share of environmental cleanups. Moreover, nothing in the language of Section 107(a) of CERCLA compels this result.

The United States occupies a unique position: it is both an enforcer of environmental laws and one of the largest PRPs. Much of the government's liability stems from wartime industrial production of military equipment and weapons, including direct control by the United States of thousands of facilities throughout the country. For example, on December 11, 1941, just four days after the attack on Pearl Harbor, the Office of Production Management issued an order ending the manufacture of automobiles for private use; General Motors had ceased the production of auto parts at its Trenton, New Jersey facility by the following day. *See* GM-Eastern Aircraft Publication, *A History of Eastern*

Aircraft Division – General Motors, 1944, at 130. Thus, the position espoused by Petitioner – that PRPs are not permitted to seek contribution from other PRPs under Section 107(a) of CERCLA – not only empowers the government to insulate itself from its fair share of cleanup costs simply by choosing not to enforce CERCLA against federal PRPs, but shifts the costs of war and national defense away from the government and onto the private sector.

The United States argues that there is "no factual basis" to support the Court of Appeals' suggestion that the government could insulate itself from liability. Contrary to the United States' assertion, however, Ford and General Motors have experienced circumstances clearly demonstrating that the government is pursuing every avenue within its power to shield itself from CERCLA liability. Equally untenable is Petitioner's argument that the availability of contribution under Section 113(f)(3)(b) following settlements with states alleviates the "highly improbable" problem posed by the self-insulating behavior of the United States. General Motors and Ford's experiences demonstrate that state administrative settlements under Section 113(f)(2) of CERCLA are often difficult to obtain, particularly for sites not listed on the National Priorities List. Moreover, the United States has challenged the validity of at least one state settlement, taking the position that it does not trigger a cause of action for contribution against it under CERCLA. The United States simply cannot argue, on the one hand, that state settlements will ensure that the federal government pay its equitable share under CERCLA, and, on the other hand, that state settlements are invalid against the United States.

I. PETITIONER'S INTERPRETATION WOULD INSULATE THE NATION'S LARGEST POLLUTER FROM CERCLA LIABILITY

On December 29, 1940, President Franklin D. Roosevelt exhorted the nation to stem the Axis threat in Europe and Asia by becoming "the great arsenal of democracy." *See* Fireside Chat 16 (December 29, 1940), available at http://www.millercenter.virginia.edu/scripps/digitalarchive/speeches/spe_1940_1229_roosevelt. Shortly after the Japanese attack on Pearl Harbor, Congress enacted statutes designed to mobilize the United States government and economy in the interests of national defense, to build and operate plants and facilities for the manufacture of war materiel, and to buy, commandeer or otherwise control the industrial facilities, material, equipment, and supplies that were strategic and critical for the war effort. By virtue of these statutes, and the regulations promulgated and executive orders issued to implement the goals of these statutes, the federal government was provided with the power to control the economy and individual plants, including facilities owned and/or operated by Ford and General Motors, in the interests of national defense. Indeed, after the December 11, 1941 order from the Office of Production Management ending the manufacture of automobiles for private use, Ford and General Motors devoted their resources to the war effort.

The scope of the federal government's involvement in private industry during times of war was massive. It has been reported that the United States government entered into contracts with private industry totaling over $175 billion during World War II alone. *See Economic Concentration and World War II*, American Machinist, Aug. 21, 1950, at 147. By early 1943, the United States, through the Defense Plant Corporation, had invested $14 billion in plants for new industry, building and equipping over 1,000 plants in 43 states. *See 1022 Government-Owned War Plants*, Reader's

Digest, Apr. 9, 1943, at 27. The federal government owned nearly 400 aircraft factories, 70 arms plants and 42 shipyards. *See id.*

Building the "arsenal of democracy" came at a cost to the nation far greater than the billions of dollars spent from its treasury. Environmental concerns were often eased or ignored in the interest of concentrating all resources on the war effort. As the Court of Appeals for the Ninth Circuit noted in *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d 1019, 1023 (9th Cir. 2002), often the federal government "made a policy decision not to divert scarce resources from the war effort to stop the pollution." The Ninth Circuit, quoting from the report of a "government consultant," recognized that war-related industries were causing pollution but "personnel could not be diverted from more pressing objectives to study the complex problems related to waste prevention or treatment - nor could construction materials be secured for such purposes." *Id.* (citation omitted in original).

As a consequence of its military and other activities, the federal government is one of the nation's largest PRPs. As of June 2005, the Department of Defense has identified approximately 6,000 former or current military facilities that require remediation of improperly disposed hazardous wastes and substances. *See* Gen. Accounting Office, *Groundwater Contamination: DOD Uses and Develops a Range of Remediation to Cleanup Military Sites* (No. 05-666, June 2005). At the end of 2002, 158 of the 1,233 sites included on the National Priorities List were either owned by the United States or operated by the United States at the time hazardous substances were released at the site. *See* Gen. Accounting Office, *Superfund Program: Current Status and Future Fiscal Challenges* (GAO-03-850) (2003). The federal government's estimated environmental liabilities arising from these sites exceed $300 billion. *See* Gen.

Accounting Office, *Long-Term Commitments: Improving the Budgetary Focus on Environmental Liabilities* (GAO-03-219) (2003).

Federal courts have confirmed that the federal government may be held liable as a responsible party under CERCLA for its role in wartime manufacturing. In *Cadillac Fairview/California*, the Ninth Circuit ruled that the government was liable under CERCLA as an "owner," "operator" and "arranger" arising from its control of a rubber factory during World War II, and was responsible for the contamination that occurred as a result of wartime production at the facility. *See Cadillac Fairview/California*, 299 F.3d at 1025. In *FMC*, the United States Court of Appeals for the Third Circuit held that the United States exercised such substantial control of a facility during World War II that it was liable as an "operator" under CERCLA. The federal government also owned the equipment that had generated the hazardous waste at issue in that case. The Courts of Appeals have uniformly opined that that placing "a cost of the war on the United States, and thus on society as a whole, [constitutes] a result which is neither untoward nor inconsistent with the policy underlying CERCLA." *Id.* at 846; *see also United States v. Shell Oil Co.*, 294 F.3d 1045, 1060 (9th Cir. 2002) ("the cleanup costs are properly seen as part of the war effort for which the American public as a whole should pay").

II. THE UNITED STATES IS POTENTIALLY RESPONSIBLE FOR CONTAMINATION AT FORD AND GENERAL MOTORS FACILITIES

Ford and General Motors played vital and substantial roles in the nation's war efforts. In fact, General Motors was the nation's largest government contractor during World War II, with contracts totaling $13.8 billion worth of war materiel. *See Economic Concentration and World War II*,

American Machinist, Aug. 21, 1950, at 147. Ford was the third largest government contractor, with $5.2 billion dollars in government contracts. *See id.*

A. The United States Owned and Operated Ford and GM Facilities

At various times before, during, and after World War II and the Korean War, in order to satisfy its military needs, the federal government required Ford and General Motors to cease their regular manufacture of various products and to commence the manufacture of military equipment needed for national defense. For example, between February 1942 and September 1945, General Motors did not manufacture a single passenger car in the United States. *See* Alfred P. Sloan, Jr., *My Years with General Motors* at 376 (1990 ed.). Instead, General Motors transformed the bulk of its operations from automobiles to manufacturing tanks, machine guns, aircraft propellers, and other kinds of military equipment. *See id.* at 377.

In some circumstances, the government required Ford and General Motors to expand existing facilities and construct new facilities for these war-production-related purposes, and Ford and General Motors often used equipment owned by the federal government at these facilities. Between June 1940 and August 1944, General Motors received approximately $810 million in public funding to expand its production capacity; Ford received approximately $355 million in public funding. *See* War Production Board, *War Manufacturing Facilities Authorized Through August, 1944* (Jan. 20, 1945). Most notably, with financing and oversight by the government, Ford built and, beginning in 1942, operated the Willow Run B-24 Bomber Plant on government-owned land in Ypsilanti, Michigan (the "Willow Run Facility"), the largest warplane manufacturing facility ever to be built. *See Ford Motor Co. v. United*

States, 378 F.3d 1314, 1315 (Fed. Cir. 2004). Manufacturing operations at the Willow Run Facility included aluminum anodizing and zinc cyanide plating, and produced a discharge of acid and cyanide chemical waste to a waste treatment plant at the facility and to a sludge lagoon and surrounding areas. *See id*. By June 1945, 8,685 aircraft had been manufactured at the facility using machinery and equipment owned by the United States. After World War II, the United States maintained control over several areas of the facility, and continued to require that war materials be built there. For example, during the Korean War, military aircraft were manufactured by Kaiser-Frazer on behalf of the United States at the Willow Run Facility. General Motors purchased the Willow Run Facility from Kaiser-Frazer in 1953.

B. Ford and General Motors Remediation of War Plants

1. The Willow Run Facility

In 1988, the Michigan Department of Natural Resources and EPA notified Ford, General Motors, and five other entities of their potential liability for the Willow Run Creek Site, including cleanup of chemical waste from Ford's war contract operations. *See Ford*, 378 F.3d at 1315. Although government activities at the Willow Run Facility during World War II clearly contributed to contamination at the Willow Run Creek Superfund Site, the United States was not identified as a PRP by EPA with respect to the site. In fact, the "site," as delineated by EPA, did not include property that had been owned by the federal government. Nevertheless, several "Areas of Concern" at the Willow Run Facility have been contaminated by hazardous substances attributable to wartime manufacturing, such as trichloroethylene ("TCE"), total petroleum hydrocarbons ("TPH") and cyanide.

In 1988, Ford and General Motors entered into an Administrative Order on Consent with EPA to conduct a Remedial Investigation and Feasibility Study of the Willow Run Creek Superfund Site. In March 1995, Ford, General Motors and other PRPs agreed to conduct response activities at the site pursuant to a Consent Judgment and Agreement with the State of Michigan. Based on the EPA's delineation of the Willow Run Creek Superfund Site, the Consent Judgment and Agreement did not include the Willow Run Facility itself. Consequently, General Motors has been saddled with investigating and remediating hazardous substances on the property, much of which are directly attributable to the government's ownership, even though General Motors did not conduct any operations at the facility during World War II or the Korean War.

Ford filed suit against the United States for breach of contract for failure to reimburse Ford for costs of the environmental cleanup at the Willow Run Creek Site as required by its War Contract and Termination Agreements. Although it was ultimately successful in enforcing its contractual right to reimbursement, *see Ford*, 378 F.3d at 1320, Ford spent ten years negotiating and in litigation with the United States, incurring significant transaction and litigation costs, including unrecoverable attorneys' fees.

General Motors, however, had no contractual rights *vis-à-vis* the Willow Run Facility. In May 2001, General Motors brought suit against the United States in the United States District Court for the District of New Jersey for contribution under Section 113(f)(1) of CERCLA arising from the government's ownership and operation of sixteen industrial plants during World War II, the Korean War and the Vietnam Conflict, including the Willow Run Facility. Prior to the Court's decision in *Cooper*, the United States settled its liability with General Motors for fourteen of these plants. After the Court granted certiorari in *Cooper*,

however, the United States moved for a judgment on the pleadings, arguing that General Motors failed to state a valid claim under Section 113(f)(1) of CERCLA because "GM does not allege that its liability at the Willow Run or Grand Blanc facilities is, or has been, the subject of an action pursuant to Sections 106 or 107(a) of CERCLA." United States' Mem. In Support of Its Mot. for Judgment on the Pleadings, General Motors Corporation v. United States, No. 01-cv-2201 (DMC) (D.N.J. May 6, 2004), at 9. The United States argued that the civil action brought against General Motors (and Ford) under Section 107(a) of CERCLA with respect to the Willow Run Creek Superfund Site, and subsequent consent decree, did not qualify as a "civil action" for purposes of conferring standing under Section 113(f)(1) of CERCLA because it addressed "[c]ertain off-site contamination from the Willow Run facility," and did not address the "plant itself and the property on which that plant is located." *Id.* at 8, n.5. The District Court stayed this action pending final resolution of *E. I. du Pont de Nemours and Company v. United States*, which itself is currently pending before the Court.

2. The Ford Rouge Manufacturing Complex

Ford's wartime production at its Rouge Manufacturing Complex in Dearborn, Michigan ("Rouge Facility") is also relevant to the Court's consideration of the question presented herein. Ford entered into one or more contracts with the United States to construct "Eagle Boats," mass-produced submarine-chasers, at the Rouge Facility in 1918. Construction of the manufacturing complex at the Facility began in or about January 1918, and continued until about August 1919. Between 1941 and 1946, the United States entered into and maintained several contracts with Ford for the construction and installation of buildings, machinery, equipment and other facilities at the Rouge Facility

necessary for the production of essential war materials, including aircraft, aircraft engines and parts, B-2 superchargers, jettison fuel tanks, tanks, armor plate, shot, and parts for military trucks and jeeps.[2] Among the facilities owned by the government were an aluminum foundry, a Thylox gas purification plant, and a steel foundry. The activities at these war production plants resulted in the generation and release of hazardous substances at the site.

In April 2000, Ford entered into a Corrective Action Consent Order ("CACO") with the Michigan Department of Environmental Quality ("MDEQ") pursuant to the Michigan Natural Resources Protection Act, CERCLA and RCRA. Under the CACO, Ford agreed to investigate and remediate several Areas of Concern. To recover the federal government's fair share of these costs incurred in remediating the Rouge Facility, Ford filed a complaint captioned *Ford Motor Co. v. United States*, No. 04-cv-72018 (E.D. Mich.) ("*Ford v. United States*"), seeking contribution from the United States under CERCLA among other causes of action.

III. PETITIONER'S INTERPRETATION OF SECTION 107(A) WOULD DEFEAT CONGRESS'S INTENTION TO TREAT THE UNITED STATES THE SAME AS ANY OTHER PRP

Section 120(a)(1) of CERCLA provides that:

> [e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and

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[2] Production of automobiles at the Rouge Facility ceased in or about February 1942, after the United States ordered that civilian automobile construction be halted. Civilian automobile manufacturing did not resume at the Rouge Facility until about July 1945.

> judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1). This "'unequivoca[l] express[ion]' of the Federal Government's waiver of its own sovereign immunity," *Pennsylvania v. Union Gas*, 491 U.S 1, 10 (1989) (citation omitted) (alteration in original), makes clear that the United States, as a PRP, is to be treated no differently from any other PRP. *See* H.R. Rep. No. 99-253 (I), at 95 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2877.

Although the legislative history of CERCLA itself contains no reference to Congress's intent in adopting this section, one of CERCLA's sponsors confirmed the intent the Court discerned in *Union Gas*. At a 1984 hearing on possible amendments to CERCLA, Senator Robert Stafford lectured a Department of Defense witness that

> [w]hen those of us on this committee sat here in 1979 and 1980 drafting the Superfund law, we all agreed that *the Federal Government was to be treated just like any other responsible party*. The obligations of the Federal Government were to be exactly the same as those of a private citizen, no more and no less. We think we made this absolutely clear in some of the law's provisions. … We included these provisions in the law for several policy reasons. First, based on our experience in other environmental laws, *we believed there was a distinct possibility the Federal Government would seek to treat itself*

> *differently from private citizens*. … I will conclude by saying that these provisions were discussed during markup by this committee, and I don't recall any dissent. *Despite these explicit provisions, the law has been implemented in a way that, for practical purposes, exempts the Department of Defense and other Federal facilities from the Superfund requirement*. Would you please explain why the committee was possibly wrong in deciding that the Department of Defense should be treated exactly as private parties?

Hearings Before the Committee on Environment and Public Works, United States Senate, May 23, 1984, at 343 (statement of Sen. Stafford) (emphasis added). Congress's primary concern in enacting the waiver of sovereign immunity is no less a concern today, when the United States stands poised to erase Congress's clearly expressed intentions almost entirely.

The United States' interpretation of Section 107(a) is fundamentally inconsistent with the broad waiver of sovereign immunity embodied in CERCLA because it could leave PRPs who undertake cleanups voluntarily or in the absence of governmental coercion (*i.e.*, "any other person") without an effective remedy, when the federal government is wholly or partially responsible for the contamination. While PRPs may have a remedy under Section 113(f)(1) or Section 113(f)(3)(B), these remedies are difficult to secure because they depend on the federal or state governments to take proactive measures (filing a lawsuit against the PRP or entering into an administrative settlement with the PRP) that confer standing to the PRP. *See infra*, Section IV(A). By contrast, a remedy under Section 107(a) provides the PRP with an *automatic* remedy against the United States; a

remedy that is not contingent on the government taking steps that are contrary to its self-interest.

Denying PRPs an automatic remedy under Section 107(a) would, in many instances, as a practical matter, destroy Congress's intent by cutting off the government's liability for contamination it caused at hundreds, if not thousands, of facilities where remediation has been completed or is still ongoing. For example, if the Court reverses the decision of the Court of Appeals, the United States may be excused from liability at the two unresolved General Motors sites covered by its Complaint in *General Motors Corporation v. United States*, as well as additional General Motors sites that are not part of the pending lawsuit.

As detailed *infra*, Petitioner's interpretation of Section 107(a) would create numerous options for strategic maneuvering by the federal government to avoid liability for contamination for which the government itself is responsible. For example, the government could simply choose to avoid any enforcement at such sites, or EPA could issue a Section 106 order to a private PRP, requiring it to undertake a cleanup, but without conferring any right of contribution to the PRP. So long as it avoids a civil action under Section 106 or 107, the United States could rest assured that, unlike other PRPs, it would not have to pay the costs of remediating contamination for which it is responsible.

Interpreting Section 107(a) to limit contribution actions to so-called "innocent parties" permits the United States to effectively render meaningless Congress's broad waiver of sovereign immunity. The various means by which the United States could limit a responsible party's recourse against other polluters would have the pernicious effect of distorting the government's enforcement priorities and allowing the United States to evade liability for its own role in contaminating property. Congress plainly never intended

that result. Thus, for the United States truly to be subject to liability "in the same manner and to the same extent" as private parties, a broad contribution right under Section 107(a) must be available to private parties under CERCLA who have incurred response costs for which the United States is partly liable.

IV. PETITIONER'S INTERPRETATION WOULD ALLOW THE UNITED STATES TO INSULATE ITSELF FROM LIABILITY

The behavior of the United States in the wake of the Court's decision in *Cooper* demonstrates that the United States can and will make every attempt to insulate itself from CERCLA liability for its ownership and operation of facilities – such as the Ford and General Motors facilities described above. While the United States now argues that it cannot, and will not, escape liability, its actions belie its arguments. The EPA has several enforcement options that do not trigger a PRP's right to contribution from other PRPs, and EPA has chosen to utilize those options instead of alternatives that would provide a right to contribution from the United States. Similarly, the United States has argued in actual cases that it *cannot* be subject to contribution under Section 113(f)(3)(B) where the PRP has settled its liability with a state on the basis of its purported immunity to state laws and regulations. Thus, the actions of the United States have shown that the problem imagined by the Court of Appeals below is not a hypothetical, abstract concern, but an actual pattern of practice by the United States that the Court should not ignore.

A. EPA Has Several Enforcement Options that Do Not Trigger Contribution Rights

In *Atlantic Research*, the Court of Appeals correctly noted that, in the absence of a PRP's right to contribution under Section 107(a), the federal government could wield its enforcement powers in a way that cuts off contribution rights of PRPs who incur remediation costs voluntarily, and thus protect itself from liability. The Court of Appeals' concern stems from the fact that the federal government is both one of the nation's largest PRP and the ultimate enforcer of the nation's environmental laws. Moreover, EPA, which serves as the primary CERCLA enforcement agency, has long been prohibited from proceeding under CERCLA against the other federal agencies that are often PRPs. *See* Exec. Order 12,580 § 4(e), 52 Fed. Reg. 2923 (Jan. 23, 1987). In fact, the Department of Justice does not permit EPA to sue other federal agencies or issue cleanup orders to them. *See* EPA Interim CERCLA Settlement Policy (OSWER Directive No. 9835.0) (Dec. 5, 1984) at p. 19 ("Instead of litigation," EPA will enter into a Memorandum of Understanding and inter-agency negotiations to resolve federal PRPs' CERCLA liability). Consequently, the government's liability under CERCLA will almost invariably be limited to contribution actions asserted by other PRPs, whether under Section 107(a), Section 113(f)(1) or Section 113(f)(3)(B).

In the first instance, the United States has the ability to shield itself from liability under Section 113(f)(1). According to *Cooper*, the United States can only be subject to a Section 113(f)(1) contribution claim where there is a prior civil action under Section 106 or 107 against the plaintiff PRP. Thus to avoid liability, the government could simply choose to avoid initiating Section 106 or Section 107 enforcement actions at any sites where the government has contributed to the release of hazardous substances. Without an enforcement action under Sections 106 or 107, a PRP who

voluntarily occurs cleanup costs will have no standing to sue the government under Section 113(f)(1).

Additionally, EPA has made it a policy to move remediation out from under CERCLA authority and into other federal and state programs. *See, e.g.*, Steven Herman, Assistant Administrator, EPA, *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities*, (Sept. 24, 1996), at p. 2 ("[I]t has long been EPA's policy to defer facilities that may be eligible for inclusion on the National Priorities List (NPL) [under CERCLA] to the RCRA program. . . ."). Thus, the vast majority of contaminated sites across the nation are now being cleaned up under non-CERCLA authority. However, the United States has argued, and one federal court has held, that RCRA consent orders do not constitute a "civil action" for purposes of conferring Section 113(f)(1) contribution rights. *See BASF Catalysts LLC v. United States*, No. 05-11241, --- F. Supp. 2d ---, 2007 WL 925682, at *4-5 (D. Mass. Mar. 26, 2007).

The United States argues in this case that there is no "factual basis" to support the Court of Appeals' suggestion that "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action" and pursuing alternative enforcement options such as RCRA and Unilateral Administrative Orders (UAOs") under Section 106 of CERCLA. To support its argument, the United States refers to several pre-*Cooper* actions in which federal PRPs were sued by non-governmental PRPs. In each of those cases, however, the EPA had brought suit against non-governmental PRPs at sites where there was potential federal liability, thereby triggering the PRPs' right to sue federal PRPs. A few hand-picked cases that pre-date *Cooper*, furthermore, are irrelevant because it was well-established prior to *Cooper* that a PRP had a right to contribution against

other PRPs – including the United States – so long as it had incurred necessary costs of response that were in excess of its equitable share of liability.

Not only are pre-*Cooper* cases irrelevant to an examination of the government's motives and behavior in a post-*Cooper* landscape, but there is a "factual basis" to the Court of Appeals' suggestion. It is well-documented that UAOs have become EPA's increasingly favored vehicle for securing private party response actions. In 1994, the Deputy Regional Counsel for EPA, Region II reported that since the early 1990s, the "issuance of unilateral orders became more common," and that "more than 50% of privately-funded remedial work is being secured through unilateral administrative orders." Walter E. Mugdan, *The Use of CERCLA Section 106 Administrative Orders to Secure Remedial Action*, C948 ALI-ABA 113, 118 (Oct. 27, 1994).[3] *See also* EPA, *Progress Towards Implementing Superfund, Fiscal Year 1998*, at p. 33 (noting that EPA's issuance of 88 UAOs in 1998 represented "an increase of over 30 percent from last year's issuance"). However, recent federal court decisions have held that UAOs do not constitute a "civil action" for purposes of Section 113(f)(1) or an "administrative settlement" for purposes of Section 113(f)(3)(B). *See, e.g., Pharmacia Corp. v. Clayton Chemical Acquisition LLC*, 382 F. Supp. 2d 1079, 1091 (S.D. Ill. 2005); *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1144 (D. Kan. 2006). Therefore, regardless of its motivation, by its increasing reliance on UAOs (and decreasing use of consent decree settlements), EPA reduces the number of PRPs who can avail themselves

[3] Deputy Regional Counsel Mugdan noted that this increase could be explained by the fact that "consent decree settlement negotiations with [PRPSs] were allowed to drag on interminably." *Id.* at 117.

of Sections 113(f)(1) and 113(f)(3)(B) – including those PRPs who would look to the United States for contribution.[4]

Finally, whether there is a "factual basis" to the Eighth Circuit's concern is irrelevant. What is relevant is the fact that the government could, if it so chose, use its enforcement options to circumvent liability under CERCLA, and thereby circumvent the intent of Congress that government agencies be subject to CERCLA "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity…" 42 U.S.C. § 9620(a)(1).[5] Indeed, Congress envisioned a "comprehensive" scheme that would address all contaminated sites. Under the United States' view, however, CERCLA becomes much more limited.

B. Administrative Settlements Do Not Provide a Guaranteed Alternative Avenue for Contribution from Other PRPs

The United States also argues that the availability of contribution under Section 113(f)(3)(B) to those who settle

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[4] Additionally, many companies have observed that EPA is using UAOs to avoid federal liability. *See, e.g.*, Inside EPA Superfund Report, *Industry Says U.S. Using Post-Aviall Cleanup Orders to Evade Liability (*Mar. 13, 2006) (noting that Raytheon Aircraft Co. and the U.S. Chamber of Commerce "are charging that the U.S. government is using the Supreme Court's landmark *Aviall* ruling to eliminate its own Superfund liability by issuing cleanup orders that may prevent cost recovery by private parties under the decision, as part of litigation seeking to recover cleanup costs at a former Army facility.").

[5] Similarly, the failure to "provide evidence that the EPA actually uses its enforcement discretion to avoid subjecting other federal agencies to potential liability in a later contribution suit" before the Third Circuit in *DuPont* misses the point. *See DuPont*, 460 F.3d at 542, n.31. Furthermore, any "evidence" of internal EPA or Department of Justice deliberations would likely be privileged and/or unavailable to PRPs under the Freedom of Information Act, 5 U.S.C. § 552.

their liability with the United States or a state will thwart any self-insulating behavior on behalf of the United States. However, just as EPA has the power to avoid enforcement techniques that would trigger the federal government's liability at former government-owned or operated facilities, EPA and the Department of Justice also have the discretion to refuse to enter into settlements with PRPs where the federal government contributed to contamination at the facility at issue. Thus, the federal government's *de facto* exposure under Section 113(f)(3)(B), with respect to settlements with the United States, cannot be relied upon in all situations. *See, e.g.*, EPA's Interim Guidance CERCLA Settlement Policy (OSWER Directive No. 9835.0) (Dec. 5, 1984) at 17 (to obtain release and covenant not to sue, "[r]esponsible parties must release any related claims against the United States").

Similarly, the government's argument that state settlements will ensure that the United States is held responsible for the environmental degradation it caused ignores the simple fact that state administrative settlements that address CERCLA liability are often difficult to obtain. Although state environmental agencies enter into numerous settlements with private parties, these settlements are generally governed by state environmental statutes and are based on model documents that reference state enabling statutes. Additionally, settlements with a state depend on the willingness of the state to settle with the PRP, and the availability of adequate state resources to negotiate settlements in a timely fashion. Where EPA is the lead agency with respect to a facility, however, a state has little or no incentive to settle with a PRP, particularly where such settlement would require the state agency to devote resources to a facility to which it is not otherwise committing resources. Moreover, states might be reluctant to enter into a settlement out of fear that such settlements could interfere

with EPA's administration of remedial actions at such facilities.[6] The Court need not look beyond Respondent and other *amici* in this case to find examples of PRPs who cleaned up sites without a state settlement addressing all or a portion of their CERCLA liability under Section 113(f)(3)(B). *See, e.g., E. I. du Pont de Nemours and Company v. United States*, 460 F.3d 515, 526 (3d Cir. 2006) (DuPont "voluntarily incurred its cleanup costs without having been sued or settled its liability").

Finally, *amicus* General Motors has direct experience with the difficulty that PRPs face in achieving administrative settlements with state agencies. In April 2005, General Motors approached the New Jersey Department of Environmental Protection ("NJDEP") in hopes of settling its CERCLA liability to the State of New Jersey for its facility in Linden, New Jersey, for which the federal government is a PRP. The General Motors automobile assembly plant in Linden was completely retrofitted with government-owned equipment during World War II to manufacture military aircraft. Two years later, NJDEP has simply not responded to General Motors' request. Consequently, a ruling against Respondent in this case would leave General Motors with no CERCLA contribution rights against the United States and saddle the company with the costs attributable to war production.

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[6] The United States itself has recognized this problem in the context of a RCRA citizens action brought against federal PRPs, where plaintiff sought injunctive relief compelling a cleanup, and where there was an existing state Administrative Consent Order governing portions of the cleanup. The United States argued, under the primary jurisdiction doctrine, that such an order would create "the possibility of conflicting administrative and judicial rulings governing the remediation of the same site." Defs.' Mem. of Points and Authorities in Support of Mot. for Summary Judgment and Dismissal, MAXXAM Group, Inc. v. United States, No. 2:05-cv-1834 (D.N.J. Apr. 3, 2007) at 32.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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