No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner,*

v.

AVIALL SERVICES, INC., *Respondent.*

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

BRIEF FOR THE PETITIONER

DALE E. STEPHENSON
ALLEN A. KACENJAR
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

WM. BRADFORD REYNOLDS
Counsel of Record
LISA K. HSIAO
HOWREY, SIMON, ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner Cooper Industries, Inc.

QUESTION PRESENTED

Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107(a), 42 U.S.C. §§ 9606 or 9607(a), may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs spent voluntarily to clean up properties contaminated by hazardous substances.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cooper Industries, Inc.

Aviall Services, Inc.

RULE 29.6 STATEMENT

Petitioner Cooper Industries, Inc. is a wholly-owned indirect subsidiary of Cooper Industries, Ltd.

Respondent Aviall Services, Inc. is a wholly-owned subsidiary of Aviall, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

In the Supreme Court of the United States

No. 02-1192

COOPER INDUSTRIES, INC., *Petitioner,*

v.

AVIALL SERVICES, INC., *Respondent*

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

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Fifth Circuit, sitting *en banc,* is reported at 312 F.3d 677 (5th Cir. 2002), and appears in the Appendix to Cooper Industries' Petition for A Writ of Certiorari ("Pet. App.") at 9a. The Fifth Circuit's grant of the petition for rehearing *en banc* by Aviall Services is reported at 278 F.3d 416 (5th Cir. 2001), and appears at Pet. App. 46a. The panel opinion of the Fifth Circuit is reported at 263 F.3d 134 (5th Cir. 2001), and appears at Pet. App. 47a. The district court's opinion, No. 3:97-CV-1926-D (N.D. Tex. Jan. 13, 2000), is unreported and appears at Pet. App. 90a.

JURISDICTION

The Fifth Circuit entered its judgment on November 14, 2002. Pet. App. 9a. Petitioner Cooper Industries timely filed its Petition for a Writ of Certiorari on February 12,

2003. This Court granted certiorari on January 9, 2004 and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the pertinent provisions of 42 U.S.C. §§ 9606, 9607, and 9613 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), appears at Pet. App. 1a-8a.

STATEMENT OF THE CASE

This case involves a dispute over environmental costs incurred at four aircraft engine maintenance facilities in Texas. Petitioner Cooper Industries, Inc. ("Cooper") owned and operated these facilities until 1981, when it sold them to respondent Aviall Services, Inc. ("Aviall"). Pet. App. 48a. Aviall operated the four sites for several years and admittedly contributed to the contamination of these four properties during this time. *Id.* Beginning in 1984, Aviall, on its own, commenced an environmental cleanup of the sites which it claims continued over a span of some 10 years (*id.*), and cost the company approximately $5 million. Joint Appendix ("J.A.") 15A. Between 1987 and 1990, Aviall notified the Texas Natural Resource Conservation Commission ("TNRCC") of the alleged contamination. Pet. App. 48a. TNRCC sent several letters to Aviall concerning the condition on its property, but took no legal action. Pet. App. 10a. There appears to have been no contact with the United States Environmental Protection Agency ("EPA"), and none of the four facilities has ever been designated as a contaminated site under federal law. *Id.* Aviall sold all four facilities to other parties during 1995 and 1996, but retained

responsibility for any continuing cleanup activity that might be necessary. J.A. 15A.

In August 1997, Aviall filed the present action in the United States District Court for the Northern District of Texas, seeking recovery from Cooper of the environmental cleanup costs that Aviall had elected to incur. J.A. 8A. As originally filed, the lawsuit sought direct recovery from Cooper pursuant to 42 U.S.C. § 9607(a) ("Section 107(a)") and also asserted a right of CERCLA contribution from Cooper pursuant to 42 U.S.C. § 9613(f)(1) ("Section 113(f)(1)"). J.A. 16A. Several Texas state law claims were included as well. J.A. 18A-25A. Aviall subsequently amended its complaint to remove the Section 107(a) direct cost-recovery claim (Pet. App. 49a, *see also* J.A. 27A),[1] and to add state law contribution claims under two Texas environmental statutes, the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Chapter 361, and the Texas Water Code, Tex. Water Code Ann. § 26.3513(j). J.A. 27A, 42A-44A.

Cooper filed for summary judgment on Aviall's contribution claim, arguing that, because Aviall was never the subject of a Section 106 or 107(a) civil action, it failed to satisfy Section 113(f)(1)'s requirement that contribution actions only be brought "during or following" such a civil action. The district court granted Cooper's motion. Pet. App. 11a.[2] On August 14, 2001, a divided panel of the Fifth

---

[1] When questioned by the district court about the removal of its Section 107(a) claim, Aviall's counsel conceded that it could not pursue a claim for direct recovery of costs under Section 107(a) because of its contribution to the site contamination while operating the facilities. J.A. 91A-93A; *and see* Pet. App. 10a; *see also* n. 29, *infra*.

[2] In granting summary judgment, the district court declined to exercise supplemental jurisdiction over Aviall's state law claims, and dismissed the action. Pet. App. 99a. The dismissal was without prejudice to Aviall

Circuit affirmed, holding that a potentially responsible party ("PRP") "seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." Pet. App. 66a.

Aviall's petition for rehearing *en banc* was granted on December 19, 2001. Pet. App. 46a. On November 14, 2002, a divided Fifth Circuit, sitting *en banc*, reversed. Pet. App. 33a. The court's majority found Section 113(f)(1)'s "savings clause" to be controlling. That clause states that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] . . . or section [107(a)] of this title." 42 U.S.C. § 9613(f)(1). According to the *en banc* majority, this language forecloses reading the provision's initial clause as limiting the federal right of contribution under Section 113(f)(1) to suits brought "during or following" a Section 106 or 107(a) civil action. Pet. App. 33a. Three judges dissented, observing that Section 113(f)(1)'s first sentence is, in point of fact, its enabling clause, and, under conventional canons of statutory construction, it is the enabling clause, not the following savings clause, that contains the provision's operative language. Because Aviall failed to satisfy the enabling clause's "during or following" requirement, the dissent concluded that the instant Section 113(f)(1) suit for contribution should be dismissed. Pet. App. 34a-45a.

Cooper timely filed its certiorari petition seeking review by this Court on February 12, 2003. The writ was granted on January 9, 2004.

---

refiling its Section 113(f)(1) contribution action in the future, in the event a Section 106 or Section 107(a) action is brought against the company. Pet. App. 98a.

SUMMARY OF THE ARGUMENT

This case involves an issue of statutory interpretation under CERCLA, specifically, whether a party which has voluntarily incurred costs to clean up hazardous waste sites may bring a federal cause of action for contribution under Section 113(f)(1) in the absence of a CERCLA suit to establish the underlying liability. The plain language of the provision in question enables covered persons to sue "any other person who is liable or potentially liable" for contribution "during or following any civil action" under Sections 106 or 107(a) of CERCLA. Congress explicitly provided in Section 113(f)(1)'s second and third sentences that such suits were to be "governed by federal law," and that, in resolving such contribution claims, courts were to "allocate response costs among liable parties." 42 U.S.C. § 9613(f)(1). The provision's final sentence, using standard "savings clause" language, ensures that the right of contribution created in the provision's enabling clause will not "diminish the right of any person" to pursue whatever other rights of contribution might be available. When read together, both the text and context of Section 113(f)(1)'s four sentences compel the conclusion that CERCLA provides only a limited right of contribution which is available exclusively to litigants who have been subject to a Section 106 or Section 107(a) civil action. *See, e.g.*, *Lamie v. United States*, 124 S. Ct. 1023, 1030 (2004) ("'W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'") (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted), quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Congress added Section 113(f)(1) to CERCLA in 1986 as part of SARA. Before SARA's enactment, CERCLA had contained no statutory right of contribution. To be sure, contribution was available as a means of recovering cleanup costs under various state laws. The federal common law also recognized a right of contribution between and among joint tortfeasors, allowing a party which had discharged its liability to pursue other responsible parties for payment of their share of response costs. Indeed, in reliance on the federal common law, some district courts had held that CERCLA enforcement actions under Section 106 or 107(a) would support claims of contribution by implication. *See, e.g.*, *United States v. Medley*, 1986 U.S. Dist. LEXIS 23365, *3-*5 (D.S.C. July 1, 1986) (citing cases); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1491-92 (D. Colo. 1985) (citing cases). Congress enacted Section 113(f)(1) specifically to codify this implied right of contribution. Just as with the implied right, the statutory right created by Congress was available only to those persons who were or had been subject to a civil action under Section 106 or Section 107(a) of CERCLA. Furthermore, by enabling only those persons who faced liability for response costs to pursue contribution against only those persons who shared responsibility for the site contamination, Congress kept faith with the federal common law's core principle of "shared liability."

The court below finds in Section 113(f)(1)'s savings clause a much broader contribution right. It is, however, a fundamental canon of statutory construction that a statute's savings clause cannot be read to override its enabling clause. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Int'l Paper Co. v. Oullette*, 479 U.S. 481, 494 (1987). Here, a construction of Section 113(f)(1) that permits parties, like Aviall, to pursue a claim of contribution without any previous adjudication or ordered discharge of its liability,

renders wholly superfluous the "during or following" requirement in SARA's federal contribution provision. It also undercuts Congress' effort in SARA to encourage persons responsible for contaminated sites to settle their cleanup claims with the government (Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B)), and in large measure defeats SARA's attempt to minimize the prospect of any single party facing multiple, inconsistent findings of liability (Section 113(f)(2), 42 U.S.C. § 9613(f)(2)). In addition, if the Fifth Circuit's free-standing right of contribution is, indeed, available under Section 113(f)(1)'s savings clause, the three-year limitations' period (Section 113(g)(3), 42 U.S.C. § 9613(g)(3)) that Congress prescribed for the right of contribution brought "during or following a civil action under section [106] . . . or under section [107(a)] . . . " has no application whatsoever to a "savings clause contribution claim" pursued in the absence of such a civil action. Thus, not only does this overly expansive reading of Section 113(f)(1) find no support in the statute's text or essential purpose, but it also defies the coherent structure of SARA's contribution provisions.

In such circumstances, the policies behind the legislation add little to the analysis. *Lamie*, 124 S. Ct. at 1030; *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Ron Pair Enters.*, 489 U.S. at 240. The court below nonetheless suggests that its broader understanding of Section 113(f)(1)'s right of contribution is more hospitable to Congress' presumed interest in encouraging voluntary cleanups of hazardous waste sites. Pet. App. 31A. It is, however, far from clear that Congress viewed CERCLA's enactment as essential to the furtherance of such an interest. What is clear, is that, whatever the policies Congress sought to advance through its CERCLA legislation, it certainly did not regard a right of contribution (in any form) as essential to those policy objectives. Rather, CERCLA, as originally

enacted, was silent on the subject of contribution rights, leaving the matter wholly to the federal common law – which districts courts only later sought to import into the statute by implication. SARA made that implied right explicit. Thus, to suggest that Section 113(f)(1) must be read any more broadly than petitioner urges, so as to ensure that CERCLA policies will not be disserved, may well be a judicial afterthought that warrants mention, but it is hardly a consideration that Congress took into account (either at the time of the original enactment or when the SARA amendments were added). Nor is there any reason for it to occupy the attention of this Court in the present inquiry. The text of the statute is clear, and its grant of a conditioned right of contribution accomplishes the result that Congress fully intended. Reversal of the decision below is, therefore, required.

ARGUMENT

A. CERCLA Background

1. The Original Enactment

In 1980, Congress enacted CERCLA to confront the serious environmental and health problems resulting from contamination of property by hazardous substances. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). The twin goals of CERCLA have been unambiguously identified: "(1) to provide for cleanup if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these cleanups." H.R. Rep. No. 99-253 (III) at 15 (1985); *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038; *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (CERCLA provides a dual mechanism for cleaning up sites and imposing costs of cleanup on those responsible for contamination).

To advance these goals, CERCLA provides two primary vehicles for cleaning up contaminated properties. Under Section 104 of the statute, the EPA may use the Hazardous Substance Superfund to pursue its own response actions. *See* 42 U.S.C. § 9604; *Bestfoods*, 524 U.S. at 55. Alternatively, under Section 106(a), 42 U.S.C. § 9606(a), the EPA may, by issuance of an administrative order or through a suit seeking judicial relief, compel persons responsible for contamination to undertake response actions that EPA will monitor. In either event, the United States may recover its response costs in an action under Section 107(a) against "covered persons" who contributed to the release or threatened release of a hazardous substance.[3] 42 U.S.C. § 9607(a)(1)-(4)(A). These persons – commonly referred to as "potentially responsible parties" ("PRPs") – may be subject to joint and several liability for all cleanup costs which are the subject of such a cost recovery action.[4] *See Key Tronic Corp. v. United States,* 511 U.S. 809, 816 (1994).

Section 107(a) cost recovery actions are also available to States, Indian tribes, and certain "other" persons who have incurred response costs "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(1)-(4)(B). An early question raised as to what was intended by the term

---

[3] The statute identifies four categories of "covered persons:" (1) current owners and operators of vessels or facilities where hazardous substances were disposed of; (2) past owners or operators of any such facilities; (3) persons who arranged for transport for disposal or treatment of hazardous substances; and (4) persons who accepted any such substances for transport to disposal or treatment facilities. 42 U.S.C. § 9607(a).

[4] Section 107(a) authorizes the recovery of all costs that are "not inconsistent with the national contingency plan," which is the federal regulatory scheme establishing the procedure for conducting hazardous waste cleanups. *See* 42 U.S.C. § 9605; 40 C.F.R. § 300; 42 U.S.C. § 9601; 33 U.S.C. § 1321 (Clean Water Act).

"other" has been resolved by the circuit courts as having reference only to persons other than "covered persons" – that is, only to those who neither own nor contaminated the property cleaned up. *See In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke of Ind., Inc. v. Cummings Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996) (same); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

Between or among persons responsible for, or holding an ownership interest in, contaminated facilities or property, CERCLA originally contained no right of contribution. Pet. App. 15a. Nonetheless, during the mid-1980s, a number of district courts held that Section 107(a) could be read to include, by implication, the common law right of contribution exercisable by the target of a government action under Section 106 or 107(a), so as to permit joinder of other PRPs in the action.[5] Juxtaposed against this line of district court decisions were, however, two holdings of this Court declining, in analogous contexts, to read implied contribution rights into a statute that did not expressly provide for such rights. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981); *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 91-95 (1981).

---

[5] *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255 (E.D.N.Y. 1986); *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986); *United States v. Ward*, 1984 U.S. Dist. LEXIS 16774 (E.D.N.C. May 11, 1984); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1986); *Medley*, 1986 U.S. Dist. LEXIS 23365; *Wehner v. Syntex Agribusiness*, 616 F. Supp. 27 (E.D. Mo. 1985); *Asarco*, 608 F. Supp. at 1484; *Mola Dev. Corp. v. United States*, 1985 U.S. Dist. LEXIS 22674 (C.D. Cal. Feb. 11, 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

2. The SARA Amendments

In the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Congress sought to resolve the recurring question of whether "covered persons" under CERCLA could seek contribution from other PRPs by enacting an express federal right of action for contribution. Specifically, SARA added a new provision – CERCLA Section 113(f)(1) – in order to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties . . . ." S. Rep. No. 99-11, at 44 (1985), *reprinted in* 2 Legislative History of Superfund Amendments and Reauthorization Act of 1986. *See also* 131 Cong. Rec. 24,716, 24742 (1985) ("defendants under Superfund should have a right of contribution to bring in additional defendants so that all parties may be before the court at the same time to determine issues of liability and damages with the appropriate determination as to contribution and/or indemnification") (Sen. Specter). The exact language added states:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the

> right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

In addition, SARA created a separate federal right of contribution in new Section 113(f)(3)(B), available to any "person who has resolved its liability to the United States or a State for some or all of a response action, or for some or all of the costs of such action, in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). Even persons who contributed only minimally to the contaminated condition could avail themselves of this provision upon consummation of an approved settlement with the federal or state environmental enforcement authority. *See, e.g.*, 42 U.S.C. § 9622(g) (*de minimis* settlements); 42 U.S.C. § 9622(h) (administrative orders).[6] Contribution under Section 113(f)(3)(B) can be sought, however, only from other PRPs who have not themselves previously settled their response costs with respect to the same site, since Section 113(f)(2) of SARA insulates all settling parties from liability in future contribution actions. *See* 42 U.S.C. § 9613(f)(3)(B) *and* 42 U.S.C. § 9613(f)(2).

---

[6] Since Aviall never entered into an approved settlement with the United States or the State of Texas regarding its response costs, it could not have, and in fact has not, pursued Cooper for contribution under Section 113(f)(3)(B).

B. CERCLA's Plain Language, Its Essential Purpose, And Its Overall Structure Support Petitioner's Reading of Section 113(f)(1)

1. Section 113(f)(1)'s Plain Language Limits When Contribution Actions May Be Brought

The starting and ending point for any examination of a federal statute is the language itself. *See Lamie*, 124 S. Ct. at 1030 ("'[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'") (quoting *Hartford Underwriters Ins.*, 530 U.S. at 6 (2000) (internal quotation marks omitted), quoting *Ron Pair Enters., Inc.*, 489 U.S. at 241, in turn quoting *Caminetti*, 242 U.S. at 485). Here, Section 113(f)(1) is embodied in four sentences, which, under traditional canons of statutory construction, are to be read together, not apart from one another. *See Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 n.7 (2003) (a cardinal rule of statutory construction is "that a statute is to be read as a whole") (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Adherence to this fundamental precept yields but one conclusion: that Section 113(f)(1) contribution can be pursued by a covered person only after that person has been sued by the government in a Section 106 or Section 107(a) civil action, whether pending or concluded.

The provision's first sentence contains its operative language, enabling covered persons to pursue other PRPs for contribution "during or following any civil action under section [106] . . . or under section [107(a)of this title." 42 U.S.C. § 9613(f)(1). The majority below and respondent

here seize upon the use of the word "may" in the Section's opening line – *i.e.*, "[a]ny person may seek" – to argue that Congress intended its newly created right of action to be unconditionally available. Pet. App. 25a (deeming the quoted phrase "a statement of non-exclusive circumstances in which actions for contribution may be brought").[7] Yet, the clear implication of a congressional directive that one "may" take an action upon the occurrence of a specific condition precedent is that, in the absence of that condition occurring, one may not. Nor is the word "only" necessary to make any clearer the intentions of this deliberately chosen syntax.[8]

---

[7] This more expansive view of the statute's contribution provision is shared by the Sixth and Tenth Circuits. *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 352 (6th Cir. 1998); *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192-93 (10th Cir. 1997), *cert. denied*, 522 U.S. 1113 (1998). Most recently, a panel of the Ninth Circuit has also addressed the issue, albeit under different circumstances, and, in *dicta*, has expressed agreement with the Fifth Circuit's view that Section 113(f)(1)'s right of contribution is not limited to suits brought "during or following a civil action under section [106] . . . or under section [107(a)] of this title." *See Western Properties Serv. Corp. v. Shell Oil Co.*, No. 01-55676, 2004 U.S. App. LEXIS 2426, at *10-*13 (9th Cir. Feb. 13, 2004). The Ninth Circuit distinguished the allegations in the case before it from those in the instant case, observing that, "unlike in *Aviall*, Western Properties originally asserted both a § 107(a) response-cost recovery and a § 113(f)(1) contribution claim and maintained those claims when it amended its complaint." It thus held that Western Properties could maintain its claim under Section 113(f)(1) because 'the contribution action in this case was pursued "during . . . a civil action under . . . 107(a).'" *Id.* at *14 (footnote omitted).

[8] While both sides can point to the contemporary definition of "may" as supporting their positions, whether, as used here, the word means "shall [or] must," as Cooper contends, or is to be regarded as meaning "have liberty to," as respondent maintains, depends, of course, on both syntax and context. *See* WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993).

Congress could not have announced Section 113(f)(1)'s condition precedent more precisely or emphatically than it did in the first sentence's "during or following" clause. Under one of the most basic canons of statutory interpretation – *expressio unius est exclusio alterius* – this clear expression of a conditioned right suggests that all else was intentionally excluded. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:23, at 306-07 (6th ed. 2000); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993) (*expressio unius* principle bars judiciary from reading a heightened pleading requirement into federal rules). *See also Lamie*, 124 S. Ct. at 1032 (scope of statute may not be enlarged by an interpretation that goes beyond what the language in fact permits).

That is, indeed, the reading of Section 113(f)(1) that appeared inescapable to the First and Seventh Circuits. *See Rumpke*, 107 F.3d at 1241; *In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir.), *cert. denied*, 510 U.S. 914 (1993).[9] It is, moreover, the way in which similar statutory language has been construed in other contexts not unlike the one here. *See FDIC v. Bates*, 42 F.3d 369, 371 (6th Cir. 1994) (statute providing that financial institution official "may" be held liable for gross negligence deemed to provide exclusive circumstances where liability could be found); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993) (same).

---

[9] Recently, a federal district court in New Jersey reached the same conclusion. *E.I. DuPont de Nemours & Co. v. United States*, No. 97-497, 2003 WL 23104700 at *11, (D.N.J. Dec. 30, 2003). In explicitly rejecting the Fifth Circuit's reading of Section 113(f)(1), the court there relied heavily on the Third Circuit's decision in *In re Reading Co.*, 115 F.3d 1111, 1114 (3d Cir. 1997), which held that CERCLA's contribution action was required by the plain language of the statute to conform to the common law understanding of contribution. *And see* discussion *infra*, at pp.27-30

The remaining text of Section 113(f)(1) reinforces this conclusion. The provision's second sentence unambiguously confirms that Congress intended the express right of contribution featured in the first sentence to describe the sole substantive right being created. It commands, emphatically, that any Section 113(f)(1) contribution claim "*shall* be brought in accordance with this section" – *i.e.*, "during or following any civil action under section [106] . . . or under section [107(a)] of this title" – and "shall be governed by Federal law." 42 U.S.C. § 9613(f)(1) (emphasis added). The last reference is to federal common law, which is effectively what Section 113(f)(1) intended to codify, and which allows only those joint tortfeasors who are or were the subjects of pending or concluded actions to seek contribution – the very result that the restriction in Section 113(f)(1)'s first sentence serves to accomplish. *See, e.g., Key Tronic*, 511 U.S. at 816 n.7 (recognizing common law underpinnings of SARA).

Looking to the provision's third sentence, its interplay with the first two is readily apparent. Sentence three directs district courts to "allocate response costs" associated with Section 113(f)(1) contribution claims "*among liable parties*." 42 U.S.C. § 9613(f)(1) (emphasis added). This language comfortably fits with the enabling clause's "during or following" requirement, by ensuring that the private party seeking contribution is, in fact, a "liable part[y]."[10] And because, under Section 113(f)(1)'s first

---

[10] The circuit courts which have addressed the issue, including the Fifth Circuit, agree that defendants who are the subject of a Section 106 or Section 107(a) civil action are jointly and severally liable. *See, e.g., In re Reading*, 115 F.3d at 1120; *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889 901-02 (5th Cir. 1993); *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

sentence, that party may seek contribution only against a "person who is liable or potentially liable under [Section 107(a)]," the very essence of a contribution claim – *i.e.*, shared liability – is preserved. In sharp contrast, the construction of the statute offered by the Fifth Circuit disregards the importance of this cornerstone of contribution that was firmly established in the federal common law when SARA was enacted, *see Northwest Airlines*, 451 U.S. at 87, and remains an essential element of the concept of contribution. *See E.I. Dupont de Nemours & Co.*, 2003 WL 23104700 at *4 (contribution "denotes a claim by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make") (quoting *In re Reading*, 115 F.3d at 1124).

Section 113(f)(1)'s last sentence is understood by all members of the court below to be a "savings clause," Pet. App. 12a, 26a (*en banc* majority); 36a (dissent). Using standard "savings" language, it provides that nothing in the provision's first three sentences "shall diminish" any other existing right "to bring an action for contribution in the absence of a civil action under section [106] . . . or section [107] of this title." 42 U.S.C. § 9613(f)(1). The purpose of a savings clause is to ensure that the statute in which it appears will not preempt whatever *other* rights of action exist to rectify the harms addressed in the new legislation. *Atherton v. FDIC*, 519 U.S. 213, 227-28 (1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 387 (1982). True to form, Congress here provided that the federal right of contribution created by Section 113(f)(1)'s opening sentence should not be construed in any respect to "*diminish*" contribution rights otherwise available. 42 U.S.C. § 9613(f)(1) (emphasis added).

The dissent below observed that this language – which by its very nature is intended to impact only other

contribution schemes – was inserted to save all state law actions for contribution.[11] Pet. App. 36a. Undoubtedly, this

---

[11] The appeals court's *en banc* majority appears not to dispute that state law contribution actions are saved by Section 113(f)(1)'s last sentence, but suggests that only a few states actually allow state contribution actions. Pet. App. 32a n.28. In fact, state statutory and common law provides a broad range of contribution rights that Section 113(f)(1)'s savings clause makes clear are to remain undiminished in their force and effect. *See* ALASKA STAT. § 09.17.080 (2001); ARIZ. REV. STAT. ANN. § 12-2501 (1994); ARK. CODE ANN. § 13-50.5-102 (West 1989); CAL. CIV. PROC. CODE § 875 (2001); COLO. REV. STAT. § 13-21-111.5 (2001); CONN. GEN. STAT. ANN. § 52-572h(h) (West 1991); DEL. CODE ANN. tit. 10, § 6302 (1974); FLA. STAT. ANN. § 768.31 (West 1986); GA. CODE ANN. § 51-12-32 (Supp. 1994); HAW. REV. STAT. § 663-12 (1985) (expiring Oct. 1995 by statutory mandate); IDAHO CODE § 6-803 (1990); ILL. ANN. STAT. ch. 740, ¶ 100/2 (Smith-Hurd 1993); IOWA CODE ANN. § 668.5 (West 1987); KAN. STAT. ANN. § 60-2413 (2001); KY. REV. STAT. ANN. § 412.030 (Michie/Bobbs-Merrill 1992); LA. CIV. CODE ANN. art. 1804 (West 1987); MD. ANN. CODE art. 50, § 17 (1994); MASS. GEN. LAWS ANN. ch. 231B § 1 (West 1986); MICH. COMP. LAWS ANN. § 600.2925a (West 1986); MISS. CODE ANN. § 85-5-7(4) (1991); MO. REV. STAT. § 537.060 (1988); MONT. CODE ANN. § 27-1-703 (1993); NEV. REV. STAT. § 17.225 (1991); N.H. REV. STAT. ANN. § 507:7-f (Supp. 1994); N.J. STAT. ANN. § 2A:53A-2 (West 1987); N.M. STAT. ANN. § 41-3-2 (Michie 1978); N.Y. CIV. PRAC. L. & R. 1401 (McKinney 1976); N.C. GEN. STAT. § 1B-1 (1983); N.D. CENT. CODE § 32-38-01 (1976); OHIO REV. CODE ANN. § 2307.31 (Baldwin 1990); OKLA. STAT. tit. 12, § 832 (1991); OR. REV. STAT. § 18.440 (1993); 42 PA. CONS. STAT. ANN. § 8324 (1982); R.I. GEN. LAWS § 10-6-3 (1985); S.C. CODE ANN. § 15-38-20 (Law. Co-op. 1977 & Supp. 1993); S.D. CODIFIED LAWS ANN. § 15-8-12 (1984); TENN. CODE ANN. § 29-11-102 (1980); TEX. CIV. PRAC. & REM. CODE ANN. § 33.015 (Vernon Supp. 1995); UTAH CODE ANN. § 78-27-40 (2001); VA. CODE ANN. § 8.01-34 (Michie 1992); VT. STAT. ANN. §1036 (2001); WASH. REV. CODE ANN. § 4.22.040 (West 1988); W. VA. CODE § 55-7-13 (1994); WIS. STAT. ANN. § 885.285(3) (West Supp. 1994); WYO. STAT. § 1-1-109 (2001); *see also Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So. 2d 367 (Ala. 1993) (Alabama), *cert. denied*, 511 U.S. 1051 (1994); *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 223 (D.C. Cir. 1942) (District of Columbia); *Bedell v. Reagan*, 192 A.2d 24, 26 (Me. 1963) (Maine); *Skaja v. Andrews Hotel Co.*, 161 N.W.2d 657 (Minn.

is true. Indeed, *in this very case,* Aviall has asserted two separate state law contribution claims against Cooper under Texas environmental statutes.[12] Pet. App. 91a. Additionally, the final clause, as written, saves those federal rights of action for contribution that can be maintained outside Section 113(f)(1). This includes the federal right of contribution separately created by SARA in Section 113(f)(3)(B), which allows a person to seek contribution following a settlement with the federal or state government.[13] *See* p. 12 *supra.* All such other rights of contribution, whether state or federal, are protected by the statute's savings clause.

It is difficult to imagine that Congress could have intended otherwise. Having enacted Section 113(f)(1) for the express purpose of codifying an explicit federal right of contribution like the one the lower courts had implied (*see* n.

1968) (Minnesota); *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 229 N.W.2d 183 (Neb. 1975) (Nebraska).

[12] As previously indicated, *see* p. 3, *supra.* Aviall's First and Second Amended Complaints sought contribution under both the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. § 361.344(a), and the Texas Water Code, Tex. Water Code Ann. § 26.3513. J.A. 42A-44A; 63A-65A.

[13] The intent to ensure a right of contribution for those who settled their response claims with government environmental authorities was apparent in the earliest drafts of the savings clause language. *See* S. 494, 99th Cong. § 202, at 23 (Feb. 22, 1985) ("[e]xcept as provided in paragraph (4) [allowing a party that had settled to seek contribution] of the subsection, this subsection shall not impair any right of indemnity under existing law"); *see also* H.R. 1342, 99th Cong. § 202, at 23 (Feb. 28, 1985) (identical language); *and see* Environmental Law Reporter Superfund Deskbook 46 (1989 ed.) (reflecting concern that nothing in the new Section 113(f)(1) should affect or modify the rights of a government or person that has settled with the United States from seeking contribution against non-settling persons).

5, *supra*),[14] Congress could have hardly expected that the language it added to save all other contribution rights would be read to render wholly superfluous its very purpose for the legislation. *See* discussion at pp. 27-30, *infra*. The Fifth Circuit has, however, done just that, by construing the savings clause *to delete* the enabling clause's express condition on its grant of contribution. Specifically, the majority below understands the statute's clear command that "[n]othing in this subsection shall diminish" other existing rights of contribution as *an intended enlargement* of the enabling clause itself. Under this interpretation, Section 113(f)(1) effectively authorizes federal contribution actions both by parties who have never been the subject of a Section 106 or Section 107(a) civil action, *and* by parties "during or following" their involvement in such an action. Pet. App. 14a ("Section 113(f)(1) *authorizes* suits against PRPs in both its first and last sentence . . . ") (emphasis added).

Certainly, the plain language of the enabling clause does not alone support such a conclusion. Nor do the words of the savings clause, which on their own terms create nothing, but simply preserve, undiminished, *other* contribution rights that may exist elsewhere. *Atherton*, 519 U.S. at 228. *See also United States v. Locke*, 529 U.S. 89, 105 (2000) (a savings clause creates no substantive rights of its own, operating only to protect rights existing otherwise and elsewhere). To read Section 113(f)(1) otherwise – that is, as creating in its final sentence a broad federal right of contribution that overrides the limitations explicitly imposed

---

[14] *See* H.R. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (Section 113(f)(1) was intended to "confirm" the decisions of those federal courts that had implied a right of contribution under CERCLA); 131 Cong. Rec. 24,425, 24,450 (1985) (statement of Sen. Stafford, predicting that Section 113 would "remove[] any doubt" as to contribution right).

on contribution by the sentence first written – defies every recognized principle of statutory construction. *See Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 340-41 (1994) (statutes should not be read to render other provisions in the same enactment inoperative) (*citing Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)); *Morales*, 504 U.S. at 384 (general savings clause will not be read to override specific provisions of statute); *Northwest Airlines*, 451 U.S. at 91-92 (implied rights of contribution are disfavored).

This Court has specifically admonished that a savings clause should not be read to override or negate a statute's enabling clause. *Morales*, 504 U.S. at 384 (savings clause will not be interpreted to render specific provisions inoperative); *Oullette*, 479 U.S. at 494 (declining to undermine statute by application of general savings clause). Indeed, the general rule of choice is that any tension between a statute's savings clause and enabling clause should be resolved by invalidating the savings clause. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:12 (6th ed. 2000). Here, of course, there is no need to take such drastic action since both clauses, if neither is overread, fit well with one another.[15] As observed by this Court earlier this Term, a statute should not be read to authorize an absurd result when its plain language can be read to have a "plain, non-absurd meaning." *Lamie*, 124 S. Ct. at 1032.

---

[15] Indeed, throughout the legislative process, Congress considered the two clauses as complementary to one another, not contradictory. Thus, early House and Senate bills included versions of both the enabling clause and the savings clause, as did H.R. 2005, which went to the House Senate Conference and produced much of Section 113(f)(1)'s final language. *See* S. Rep. No. 99-73, at 90 (1985).

2. The Statute's Essential Purpose Supports A Limited Right of Action Under Section 113(f)(1)

Congress passed Section 113(f)(1) to make explicit a previously implied right of contribution, as found in federal common law, by enabling those parties which were or had been the subject of cost recovery actions under Sections 106 or 107(a) of CERCLA to implead or bring separate actions against third parties responsible or potentially responsible for the contamination. As Senator Stafford observed during the floor debate on the legislative language that eventually went to conference: "It was and is my understanding that the amendment is solely to correct a difficulty which some third-party plaintiffs are encountering in obtaining joinder of third-party defendants in claims for contribution under CERCLA." 131 Cong. Rec. at 24,743 (Sen. Stafford).[16] Senator Specter underscored the same point, stating: "defendants under Superfund should have a right of contribution to bring in additional defendants so that all parties may be before the court at the same time to determine issues of liability and damages with the appropriate determination as to contribution and/or indemnification." *Id.* at 24,742 (Sen. Specter). A similar understanding of the purpose of the legislation was expressed in the House Report accompanying the SARA amendments:

> This section clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from

---

[16] While legislative history must be used cautiously in trying to discern the Congressional intent behind the language of a statute, *see Lamie*, 124 S. Ct. at 1032-33, Congress' design, object, and policy certainly can be helpful to an understanding of the purpose of the legislation. *Crandon v. United States*, 494 U.S. 152, 158 (1990).

> other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.

H.R. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N. at 2861 (emphasis added).[17]

At the time of SARA's enactment, every case finding an implied right of contribution arose in the context of a pending or concluded Section 106 or Section 107(a) civil action. *See* n.5, *supra*. The House Report accompanying the language that became Section 113(f)(1) explicitly mentioned two of those cases, where federal district courts had held that an implied right of contribution existed as part of an underlying Section 107(a) suit:

> It has been held that, when joint and several liability is imposed under section 106 or 107(a) of the Act, a concomitant right of contribution exists under CERCLA, *United States v. Ward*, 8 Chem. & Rad. Waste Litg. Rep. 484, 487-88 (D.N.C. May 14, 1984). Other courts have recognized that a right to contribution exists without squarely addressing the issue. See, e.g., United States v. South Carolina Recycling and Disposal, Inc., 7 Chem. & Rad. Waste Litig. Rep. 674, 677 (D.S.C. February 23, 1984). This section

---

[17] Similarly, the Senate Report noted an express contribution remedy was being added to CERCLA to "clarif[y] and confirm[] the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." S. Rep. No. 99-11 at 44 (1985) (emphasis added).

> clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or costs that may be greater than its equitable share under the circumstances.

See H. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N. at 2861.[18]

The House Report also described the litigation context in which the new contribution right would arise:

> The section contemplates that *if an action under section 106 or 107(a) of the Act is under way*, any related claims for contribution or indemnification may be brought in such an action. This provision should also encourage private party

---

[18] In contrast, the cases cited by the Fifth Circuit for the proposition that other early federal court decisions allowed actions for recovery "in the nature of contribution" to proceed, even though the plaintiff had not been sued under Section 106 or Section 107(a), do not even address "contribution." *See, e.g., Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1442-44 (S.D. Fla. 1984); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). They involve, instead, persons who sued for direct cost recovery – not contribution. While the Fifth Circuit claims that "[w]hether the cases actually used the word 'contribution' is irrelevant" (Pet. App. 17a), Congress' concern was not with these direct cost recovery decisions, which were nowhere referenced in the legislative history, but rather was with the separate line of cases represented by the two mentioned in the above House Report that had specifically found an implied right of contribution under section 107(a). And *see* cases cited at n.5, *supra*. New Section 113(f)(1) made explicit the implied right of contribution exercisable (as with the implied right) by parties subject to, or who had been subject to, Section 106 or Section 107(a) CERCLA liability. 42 U.S.C. § 9613(f)(1).

> settlements and cleanup since the actuality of being brought into litigation as a third-party defendant, concurrent with the original litigation, has the effect of bringing all such responsible parties to the bargaining table at an early date. In addition, this provision will lessen any ill will that is created between the government and the original defendants selected by the government for naming in the original suit. *This provision allows all counterclaims, cross-claims and third-party actions to be dealt with in a single action if the court is so inclined.*

H. Rep. No. 99-253(I), at 80, *reprinted in* 1986 U.S.C.C.A.N. at 2862 (emphasis added).

This relationship between Sections 107 and 113 has been fully recognized as important to understanding the express right of contribution codified in Section 113(f)(1). As this Court has observed, the two sections work together to enable a party held liable under CERCLA, or involved in a CERCLA action, to seek contribution from other potentially responsible parties. *See Key Tronic*, 511 U.S. at 816 (as amended by SARA, CERCLA "now expressly authorizes a cause of action for contribution in § 113" and "impliedly authorizes a similar and somewhat overlapping remedy in § 107").

Where, for example, a person responsible for contaminating his property *is subjected to CERCLA liability claims*, he may not bring a separate direct cost recovery action against another responsible party under Section 107(a) seeking to impose joint and several liability, *see Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998) (citing cases from other circuits); *Amoco Oil Co. v. Borden,*

Inc., 889 F.2d 664, 672-73 (5th Cir. 1989); *see also* n.29, *infra*, but is limited to pursuing contribution in the underlying CERCLA suit under Section 113(f)(1). This is to be distinguished from the person bearing no responsibility for the contaminated condition of its property, who, *if not subject to CERCLA liability claims*, can bring *only* a direct cost recovery action under Section 107(a), but cannot pursue contribution under Section 113(f)(1). *See, e.g., Rumpke*, 107 F.3d at 1241; *Redwing Carriers*, 94 F.3d at 1496.

Aviall, of course, fits neither category. Having contributed to the contamination of its property (*see* n.1, *supra*), it cannot pursue a direct cost recovery action under Section 107(a). *See* n. 29, *infra* (listing cases). Moreover, since Aviall has never been the subject of a Section 106 or 107(a) civil action, it can assert no right of contribution under Section 113(f)(1). Yet, true to Section 113(f)(1)'s savings clause, whatever other avenues to contribution might be available to Aviall remain "[un]diminish[ed]." It continues to assert state claims for contribution under Texas law, *see* n.12, *supra*. In addition, Aviall could have pursued contribution under Section 113(f)(3)(B) if it had entered into an approved settlement for contribution with a state or federal authority. *See* n.6, *supra*. To our knowledge, this exhausts all rights of contribution Aviall could possibly assert – other than the stand-alone contribution right fashioned by the court below from Section 113(f)(1)'s savings clause which, as discussed herein, itself creates no right of contribution at all.

The error in the Fifth Circuit's analysis is not in failing to acknowledge this interplay between Sections 107(a) and 113, s*ee* Pet. App. 18a-19a, but in refusing to follow the connection through to its necessary conclusion. Thus, the court below creates a free-standing cause of action for contribution that requires no underlying Section 106 or

107(a) liability. Yet, in order for the savings clause in Section 113(f)(1) to operate in this manner, it would have to establish liability on its own – something it decidedly cannot do. *See Locke,* 529 U.S. at 105 (a savings clause creates no substantive rights of its own); *and see* pp. 20-21, *supra.*

Nor can a construction of Section 113(f)(1)'s savings clause to create for Aviall a stand-alone right of contribution be squared with the federal common law. Congress undeniably understood the right of contribution to be based on the common law concept of shared liability among joint tortfeasors, and it intended Section 113(f)(1) to codify that common law.[19] *See United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *see also* pp. 10-12, *supra.* At federal common law, one could not seek contribution unless and until that person had first discharged, pursuant to judgment or settlement, the liability of other wrongdoers against whom contribution was being sought. *See Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 298 (1993) (only those "charged with liability" in a common law suit for contribution under securities laws had a right to contribution); *Texas Indus.*, 451 U.S. at 634 (characterizing contribution as helping "one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim"); *Northwest Airlines*, 451 U.S. at 87-88 (right to contribution "is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability").

---

[19] The House Report fully anticipates that "[a]s with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law." H. Rep. No. 99-253(I), at 80, *reprinted in* 1986 U.S.C.C.A.N. at 2862.

This understanding was carried forward in the Restatements. *See* RESTATEMENT (SECOND) OF TORTS § 886A (1979); *and see* RESTATEMENT (THIRD) OF TORTS § 23, cmt. b (2000) ("[a] person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment").[20] Only recently was the Restatement modified in conformance with Section 113(f)(1) to allow a person to sue for contribution *during* the pendency of an underlying action, as well as *after* a judgment or settlement regarding liability. *See* RESTATEMENT (THIRD) OF TORTS § 23, cmts. b, n. (2000); s*ee also* Uniform Contribution Among Tortfeasors Act § 1(d), 12 U.L.A. 194 (1996).[21]

---

[20] BLACK'S LAW DICTIONARY 328 (6th ed. 1990) defines "Contribution" as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear." *See also id.* at 329 (7th ed. 1999).

[21] The original Senate bill that served as a precursor to Section 113(f)(1) provided that contribution could not be sought until after judgment in a Section 106 or 107(a) civil action, reflecting the limitations set forth in the Restatement (Second). *See* S. Rep. No. 99-11 at 103 (1985). The Senate was initially concerned that allowing defendants to implead third parties with contribution claims during a pending cost recovery action would unduly prolong and expand the scope of the underlying litigation. *Id.* at 44. Not until the floor debate on the bill did the Senate add the language "during or following," so that the defendant in the original Section 106 or 107(a) action could implead a third party with a contribution claim while that action was still pending. *See* 131 Cong. Rec. at 24,449-450 (floor amendment adding "during or following" would allow "any defendant in a Government enforcement action under CERCLA" to file a claim against others as soon as enforcement action has been brought) (Sen. Stafford). This amendment brought the Senate bill into conformity with the House bill, which had initially provided that contribution could be sought by "any defendant alleged or held to be liable in an action under section 106 or section 107(a)." H.R. Rep. No. 99-253(I) at 13 (1985). *And see* n. 13, *supra*.

The federal right of action that the Fifth Circuit implanted into Section 113(f)(1)'s savings clause wrenches the right of contribution from its common law roots. Persons (like Aviall) neither adjudged liable, nor even facing liability, for the payment of response costs, and thus heretofore unable to seek contribution, are, under the decision below, now free to pursue contribution in federal court. Thus, removed from the right of contribution is what has long been acknowledged as one of its essential elements – joint underlying liability. *See* 18 AM. JUR. 2D Contribution § 15 (1985) (one is entitled to contribution if the payment made by him was compulsory -- *i.e.*, "the party making it cannot legally resist it" -- under a legal and fixed obligation); RESTATEMENT (SECOND) OF TORTS § 886A, cmt. e ("before there can be contribution between joint tortfeasors there must first of all be joint tortfeasors"); *see also Northwest Airlines*, 451 U.S. at 83 (two principal elements of common law right to contribution are "(1) common liability and (2) the party seeking contribution has been required to pay more than its just share of the award").

Traditionally, one who makes a voluntary payment cannot seek reimbursement from others by way of contribution. *See* 18 AM. JUR. 2d Contribution § 15; RESTATEMENT (SECOND) OF TORTS § 886A, cmt. e (1979) (equity rule provides that contribution "will not be allowed in favor of a volunteer").[22] The reading of Section 113(f)(1) advanced below changes all that, by affording Aviall a right of contribution it simply did not have at federal common

---

[22] As previously noted, *see* p. 9-10, *supra*, post-SARA decisions continue to recognize that a person uninvolved in contaminating the property, who voluntarily pays cleanup costs, can bring a direct action under Section 107(a) against the responsible parties, but cannot pursue a Section 113(f)(1) contribution suit. *See, e.g. Rumpke*, 107 F.3d at 1241.

law.[23] To the extent Congress intended so dramatic an overhaul of the federal common law, it was required to do so explicitly. Failing such explicit action, this Court has admonished strongly against judicial endorsements of a rewriting of federal common law by implication. *See Bestfoods*, 524 U.S. at 63.

Indeed, in *Bestfoods*, this Court declined to read into CERCLA Section 107(a) an implied liability for the parent corporation of a PRP that would depart from the common law rule against piercing of the corporate veil. As there explained: "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that 'in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *Id.* (*quoting United States v. Texas*, 507 U.S. 529, 534 (1993)). *See also Key Tronic*, 511 U.S. at 809 (rejecting implied right under CERCLA to collect attorneys' fees); *Musick, Peeler & Garrett*, 508 U.S. at 293-96 (court has only "limited" discretion to imply contribution right based on judicially-fashioned implied private right of action under securities laws); *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-05 (1959) ("'no statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.'") (quoting *Shaw v. Railroad Co.*, 101 U.S. 557 565 (1879); *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907)). Here, too, if the federal common law of

---

[23] Prior to SARA, federal law afforded no free-standing right of contribution wholly detached from Section 107(a) liability – not even by implication. *See* pp. 22-24, *supra.* Thus, there plainly was no need for the Fifth Circuit to create such a right in order to ensure that it not be "diminish[ed]," 42 U.S.C. § 9613(f)(1), by the statute's enabling clause.

contribution is to be altered so dramatically, that task properly falls to Congress to accomplish through explicit statutory language, not to the circuit courts through an overly broad construction of Section 113(f)(1)'s savings clause.

3. Section 113(f)(1)'s Limited Right of Action is Also Supported By CERCLA's Overall Structure And Scheme

Further support for reading Section 113(f)(1) as enacting only a limited contribution right is found in the other provisions of CERCLA that relate to contribution. For example, Section 113(g)(3) identifies the applicable limitations period for pursuing a right of contribution. This provision allows a contribution action to be brought within three years from the date of judgment or settlement of a Section 106 or Section 107(a) action. 42 U.S.C. § 9613(g)(3).[24] Notably, Section 113(g)(3) identifies no

---

[24] Section 113(g)(3) provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after – (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3). This language also applies to contribution suits brought under Section 113(f)(3)(B), with the three years running from the date of the triggering settlement with the government entered into pursuant to CERCLA Section 122, 42 U.S.C. § 9622.

limitations period for contribution suits brought in the absence of either an underlying Section 106 or 107(a) civil action or a governmental settlement. This omission further suggests that Congress intended to create only the conditioned right of contribution set forth in Section 113(f)(1)'s enabling clause and the contribution right included in Section 113(f)(3)(B) for persons entering into approved settlements with government authorities (*see* p. 12, *supra*). *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:23, at 306-07 (*expressio unius* principle requires conclusion that excluded language was omitted intentionally). If Congress had intended to create a "savings clause contribution claim," it is safe to presume that it would have crafted a limitations period to match.

Some appellate courts, and the *en banc* majority below (Pet. App. 30a), have attempted to fill this void by substituting the limitations' period of six years separately established by Congress in Section 113(g)(2) (42 U.S.C. § 9613(g)(2)) for Section 107(a) cost recovery actions.[25] *See, e.g.*, *Centerior Serv. Co*, 153 F.3d at 355; *Sun Co.*, 124 F.3d at 1192-93. This, however, is plainly *not* the limitations' period prescribed by Congress for federal contribution actions, nor the one contemplated by the statutory scheme that Congress devised for these purposes. If the decision below is allowed to stand, the discrepancy as to when a Section 113(f)(1) contribution action must commence will persist. Those suits seeking contribution under Section 113(f)(1)'s enabling clause – *i.e.*, "during or following" the filing of a Section 106 or 107(a) suit – will be held to a three-

---

[25] Section 113(g)(2) provides: "[a]n initial action for recovery of the costs referred to in section [107] of this title must be commenced . . . (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . ." 42 U.S.C. § 9613(g)(2)(B).

year statute of limitations, while those suits "brought" under the savings clause will ostensibly enjoy a more lenient six-year statute of limitations. Nothing in SARA's history or text remotely suggests that Congress intended such disparity.

Allowing Section 113(f)(1) contribution actions in the absence of a pending or concluded civil action under Sections 106 or 107(a) also undermines Section 113(f)'s "comprehensive scheme" to encourage early settlement of Section 106 or 107(a) suits. *See In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997); *United States v. Charter Int'l Oil Co.*, 83 F.3d 510 (1st Cir. 1996) (describing scheme). When the federal government, or a state, brings suit against one or more PRPs under Sections 106 or 107(a), Section 113(f)(2) (42 U.S.C. § 9613(f)(2)) protects those who settle early from future contribution claims.[26] *See, e.g., In re Reading*, 115 F.3d at 1119. PRPs who refuse to settle are, on the other hand, subject to potentially disproportionate liability, as they cannot seek contribution from the settling parties. *Id.*; *see also United Techs. Corp.*, 33 F.3d at 103. Section 113(f) was thus "'designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle.'" *United Techs. Corp.*, 33 F.3d at 103 (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990)); *see also* H.R. Rep. No. 99-253(I), at 80, *reprinted in* 1986 U.S.C.C.A.N. at 2862.

By allowing Section 113(f)(1) contribution claims in the absence of an underlying Section 106 or Section 107(a)

---

[26] Section 113(f)(2) provides, in pertinent part: "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide . . . ." 42 U.S.C. § 9613(f)(2).

civil action, the Fifth Circuit majority exposes all defendants named in such "savings clause claims" to the very real prospect of multiple, inconsistent liability should the government (or a private party) thereafter pursue any or all of them under Section 106 or Section 107(a). *See* Brief for the United States as Amicus Curiae at 15 n.9. This follows, necessarily, because neither an ordered contribution payment in the private suit first brought, nor a settlement with said private plaintiff who claimed to have engaged in a voluntary cleanup, provides Section 113(f)(2) contribution protection.[27] Thus, the Fifth Circuit's overly expansive reading of Section 113(f)(1)'s "savings clause" not only seriously undercuts CERCLA's objective to have cleanup costs appropriately allocated among joint tortfeasors, *see United Techs. Corp.*, 33 F.3d at 102-03, but also takes out of play the "contribution protection" that Section 113(f)(2) affords liable parties upon settlement of a government suit under the enabling clause.[28]

This same concern was integral to the First and Third Circuit's determinations that responsible parties may not assert Section 107(a) cost recovery actions against other responsible parties, but instead must seek contribution under

---

[27] For example, a defendant alleged to be liable for only a portion of the cleanup costs, in a contribution suit brought pursuant to Section 113(f)(1)'s savings clause, could still be held jointly and severally liable for all cleanup costs in a later suit by the government. The government in the later suit could then assert that the cleanup for which contribution had been sought and obtained in the private "savings clause" action was in some respects deficient or inadequate, and pursue duplicative costs to repeat the initial work that was poorly done by another party.

[28] Similarly, the availability of a free-standing right of contribution under Section 113(f)(1)'s savings clause renders largely superfluous Section 113(f)(3)(B), which allows a right of contribution only after settlement of an action brought by the government. *See also* p. 12, *supra*.

Section 113(f)(1).[29] In *In re Reading*, 115 F.3d at 1119, the Third Circuit observed:

> If a party could end run § 113(f)(2) and (3) by suing a settling party under § 107(a)(4)(B) for "costs of response," the settlement scheme would be bypassed. The incentive to early settlement would disappear, and the extent of litigation involved in a CERCLA case would increase dramatically. Consent agreements would no longer provide protection, and settling parties would have to endure additional rounds of litigation to apportion their losses.

See also United Techs. Corp., 33 F.3d at 103 (settlement-encouraging mechanism would be "gutted" by allowing private parties who contributed to the contamination to maintain Section 107(a) cost recovery actions against other potentially responsible parties prior to any government assessment of CERCLA liability). As the dissent below noted (Pet. App. 41a n.41), allowing a private suit for contribution under Section 113(f)(1)'s savings clause, without a predicate finding of CERCLA liability against the plaintiff, would be equally disruptive of the statute's overall settlement scheme.

---

[29] Every court of appeals considering the issue, including the Fifth Circuit, has held that parties who contribute to property contamination (like Aviall) are prohibited from pursuing direct cost recovery claims under Section 107(a). *See, e.g., Bedford Affiliates*, 156 F.3d at 423-24 and cases cited therein; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989). *And see* n. 1, *supra*.

C. Reading Section 113(f)(1) As A Conditioned Grant Of Contribution Is Fully Consistent With CERCLA's Policies

As we have already discussed, the central purpose behind enactment of Section 113(f)(1) was to codify in SARA a federal right of contribution like the one some lower courts had theretofore implied, enabling persons liable for response costs under Sections 106 or 107(a) of CERCLA to join or otherwise pursue other joint tortfeasors in an action for contribution. *See* pp. 22-25, *supra*. Keeping faith with the "during or following" requirement in the provision's enabling clause fully serves that purpose. For the reasons previously discussed, the same cannot be said for the more open-ended interpretation of the statutory provision urged by respondent and the *en banc* majority below.[30]

Nonetheless, respondent and the Fifth Circuit suggest that, by embracing a conditioned right of federal contribution under Section 113(f)(1), voluntary cleanups will be discouraged (Pet. App. 31a), contrary to CERCLA's broad policy "to promote prompt and effective cleanup of hazardous waste sites." *Id.* at 14a. We have, however, been unable to discern any policy that Congress anywhere tied enactment of the original statute to a policy favoring voluntarism.[31] Yet, even if, as the Fifth Circuit seems to

---

[30] To read Section 113(f)(1) as enabling persons to pursue contribution claims against other parties in the absence of a pending or adjudged Section 106 or Section 107(a) suit neither comports with federal common law (pp. 27-29, *supra*), ensures a fair allocation of costs among joint tortfeasors (pp. 16-17, *supra*), encourages early settlements (pp. 33-35 *supra*), protects against multiple and conflicting recoveries (p.34, *supra*), nor holds similar claims of contribution to like limitations' periods (pp. 31-33, *supra*).

[31] Not until after CERCLA was passed did the EPA, in 1984, even express a policy interest in removing or minimizing "the impediments to

suggest (Pet. App. 31a), it could be maintained that such a policy might be lurking *sub silentio* behind CERCLA's recognized twin purposes of promoting the cleanup of hazardous waste sites and imposing on those parties responsible the costs needed to rid the site of contamination, it is abundantly clear that, whatever the policies underlying enactment of CERCLA, Congress plainly did not at the time regard a right of contribution (in any form) as essential to the furtherance of those policies. Accordingly, the suggestion that a grant in SARA – of a conditioned, rather than a wholly unconditioned, right of contribution – somehow disserves CERCLA's intended cleanup purposes seems more of a judicial afterthought than a legislative deliberation. Surely, if CERCLA's cleanup policies can be perfectly well served with no right of contribution at all (except as provided at common law) – as was the case when Congress first enacted the statute in 1980 (*see* p. 10 *supra*) – then SARA needs to add no greater right of contribution than what is, in essence, the statutory equivalent of the common law contribution right to ensure that those policies will continue to be equally well served. This is, we submit, exactly what Section 113(f)(1) both does and was intended to do. *See* pp. 13-25, *supra*.

The argument from respondent and the *en banc* majority below, that only a more expansive right of contribution will do, is thus neither legislatively compelled nor logically persuasive. As observed by the United States in its *amicus* brief urging that certiorari be granted, "there is no evidence in the record of this case to support the court of appeals' assumption (Pet. App. 31a) that the availability of a contribution action in the absence of a Section 106 or 107(a) suit is critical to encouraging . . . [voluntary] cleanups."

---

voluntary clean-up." *See* Lee Thomas and F. Henry Habicht II, U.S. EPA, Interior CERCLA Settlement Policy (OSER Dir. No. 9835.0) (1984).

Brief for the United States as Amicus Curiae at 15 n.9. This is not to suggest, of course, that such encouragement is of no interest to Congress. Rather, there is simply no indication that Congress intended Section 113(f)(1) to advance such any agenda. Only later did it address that interest by passing the Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. 107-118, Tit. II, 115 Stat. 2356 (2002). Unclean sites not placed on the National Priorities List – which essentially targets the worst of the hazardous waste locations for federal intervention under CERCLA, *see Exxon Corp. v. Hunt*, 475 U.S. 355, 374 (1986), – are subject to EPA, state, and local oversight pursuant to federal and state "brownfields" programs.[32] These programs are designed to facilitate voluntary, privately funded cleanups with minimal formal governmental involvement. *See* Northeast-Midwest Institute, Brownfields: State of The States (Nov. 2001). The legislation enacted in 2001 openly endorses these programs and includes measures to support and expedite the cleanup process that they foster. *See generally* S. Rep. No. 107-2 (2001).

Nothing in CERCLA undermines this congressional scheme. To the contrary, viewing the final sentence in Section 113(f)(1) as simply a savings clause designed to preserve "[un]diminish[ed]" state law rights of contribution, ensures that persons in Aviall's shoes, upon electing to address contamination voluntarily can, indeed, pursue other PRPs for contribution in available state court actions. *See* pp. 17-19 *supra*. Perhaps the ultimate irony is that, if the Fifth Circuit's more expansive reading of Section 113(f)(1)'s

---

[32] The EPA's Brownfields Initiative is designed to provide a federal imprimatur on state voluntary cleanup programs of sites not on the National Priorities List or other sites of no federal interest. *See* Environmental Protection Agency, "Interim Approaches for Regional Relations with State Voluntary Cleanup Programs" at 1, Nov. 14, 1996.

final sentence prevails, this same opportunity may well be forever lost. Under such a construction, Section 113(f)(1), unconditioned, would presumably occupy the field, preempting the very state law contribution claims that the provision's concluding sentence was intended to save.[33] *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing *Locke*, 529 U.S. at 110).

That is not the federal right of contribution Congress undertook to add to CERCLA in the SARA amendments. Rather, Section 113(f)(1)'s enabling language is explicit in its limitation of a right of contribution to those persons who are facing liability for response costs in a Section 106 or Section 107(a) civil action that is already underway or has concluded. *See* pp. 13-15, *supra*. This explicit limitation codifies the implied right of contribution that had been originally engrafted onto Section 107(a) of CERCLA by some district courts in keeping with the traditional contribution principles found in federal common law. *See* n.5, pp. 27-29, *supra*. By providing, in Section 113(f)(1)'s final sentence, that this new right of contribution shall diminish no others, Congress saved whatever contribution

---

[33] By contrast, a reading of Section 113(f)(1) that limits the federal right of contribution to suits brought "during or following" Section 106 or Section 107(a) civil actions would, as the Seventh Circuit has recognized, preempt only those state rights of contribution in direct conflict with that federal right, but would not otherwise interfere with a party's right to pursue contribution under state law. *See PMC v. Sherwin Williams Co.*, 151 F.3d 610, 617-18 (7th Cir. 1998) (Section 113(f)(1) preempted Illinois contribution statute only insofar as the state statute would have nullified CERCLA's requirement of consistency with the National Contingency Plan). *And see Bedford Affiliates*, 156 F.3d at 425-27 (Section 113(f) preemption is limited to those common law restitution and indemnification actions that would allow bypass of CERCLA scheme favoring settlements); *In re Reading*, 115 F.3d at 1119-20 (same).

rights were otherwise available under state and federal law. *See* pp. 17-19, *supra*.

It is, of course, the statute's text that best informs Congressional intent. *See Lamie,* 124 S. Ct. at 1030 ("[t]he starting point in discerning congressional intent is the exiting statutory text") (citing *Hughes Aircraft Co.*, 525 U.S. at 438); *Pavelic & Le Flore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (the judiciary's task is "to apply the text, not to improve upon it"); *Ron Pair Enters.*, 489 U.S. at 240 ("'[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.'"); *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (same). Here, not only SARA's language, but also its essential purpose, demands the reading of Section 113(f)(1) urged by petitioner. This reading neither conflicts with nor contravenes the dual policies underlying CERCLA. *See* pp. 36-39, *supra*. Accordingly, reversal of the Fifth Circuit's more expansive view of the legislation is required.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and Aviall's case dismissed.

Respectfully submitted.

DALE E. STEPHENSON
ALLEN A. KACENJAR
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

WM. BRADFORD REYNOLDS
LISA K. HSIAO
HOWREY, SIMON, ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner Cooper Industries, Inc.

FEBRUARY 2003

APPENDIX