No. 05-1323

IN THE

Supreme Court of the United States

UGI UTILITIES, INC.,
Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Last Term, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), this Court found it "prudent to withhold judgment" (*id*. at 170) on an array of issues involving §§ 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), principally because none of the issues had been raised or considered below.

The question presented is:

Whether the Court should take up questions reserved in *Aviall* by reviewing the lone post-*Aviall* court of appeals decision, a decision that reached only one of the questions, answered that question *sua sponte*, and did not "confront the relationship between §§ 107 and 113" (*Aviall*, 543 U.S. at 170).

RULE 29.6 STATEMENT

Respondent Consolidated Edison Company of New York, Inc. is a wholly owned subsidiary of Consolidated Edison, Inc. No other publicly held corporation owns 10% or more of respondent's stock.

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STATUTES INVOLVED

The last sentence of the "Statutes Involved" section of petitioner UGI Utilities, Inc.'s ("UGI") petition (at 4) notes that the statutes involved, CERCLA §§ 107 and 113, 42 U.S.C. §§ 9607 and 9613, are set out in the appendix to the petition at 103a-142a. The remainder of the section essentially consists of statutory exegesis and argument that do not comport with the requirements of Rule 14(1)(f) of this Court. Respondent Consolidated Edison Company of New York, Inc. ("Con Edison") therefore does not respond to them.

COUNTERSTATEMENT OF THE CASE

The facts are as stated in the opinion of the court of appeals (Pet. 2a-4a). As the opinion notes, Con Edison's First Amended Complaint rests solely on § 113(f)(1), and seeks to

recover from UGI a portion of the costs Con Edison incurred in cleaning up environmental contamination. (Pet. 4a, 25a.) The case was briefed and argued in the district court and the court of appeals on the § 113(f)(1) jurisdictional basis.

After this Court's *Aviall* decision came down, the court of appeals asked the parties to file supplemental briefs on the question whether the court continued to have jurisdiction. UGI asserted that jurisdiction no longer attached; Con Edison contended that jurisdiction continued to exist under § 113(f)(3)(B). (Pet. 7a.) Neither party briefed any issue arising under § 107, as both assumed *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), foreclosed such a claim.

The court of appeals rejected the parties' arguments, distinguished the case from *Bedford Affiliates*, and, in answer to one of the § 107 questions reserved in *Aviall*, concluded that a person potentially responsible for environmental contamination ("PRP") that voluntarily cleans up the contamination on its own initiative can pursue a cost recovery claim under § 107(a). The Second Circuit did not decide any of the other open *Aviall* issues, nor address the "significant issue" of the relationship between §§ 107 and 113 (*Aviall*, 543 U.S. at 169).

The court of appeals remanded the case to the district court for further proceedings. Con Edison has not yet amended its complaint in the district court to state a § 107 claim, nor decided whether "to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery)" (*Aviall*, 543 U.S. at 170-71), or in some other fashion.

REASONS FOR DENYING THE PETITION

I. NO ISSUE RESERVED IN *AVIALL* WAS RAISED BELOW

In *Aviall*, the Court flagged a host of § 107 and § 113 questions that had not been raised or decided below: whether a party potentially liable under CERCLA (1) can recover costs under § 107(a)(4)(B); (2) can pursue a § 107(a) action for joint and several liability; (3) can pursue a cost recovery action under § 107(a) for some form of liability other than joint and several; (4) has an express or implied right of contribution under § 107; and (5) has "any judicially implied right of contribution [that] survived the passage of SARA." 543 U.S. at 168-71. The Court also cited the relationship between § 107 and § 113 as "a significant [undecided] issue in its own right." *Id*. at 169. Concluding that these issues "merit full consideration by the courts below," the Court remanded them to the Fifth Circuit. *Id*. at 169, 171.[1]

In *Aviall*, neither the district court, the panel, nor the en banc court reached any § 107 question, either because Aviall had not pressed a § 107 claim in the first instance or had waived it, or because it was unnecessary to reach a § 107 claim regardless of whether it was presented. *Aviall*, 543 U.S. at 168. The Second Circuit's decision here comes to this Court in much the same posture on the merits as the Fifth Circuit's decision did. Indeed, the only difference between them is that the Second Circuit considered one of the questions reserved in *Aviall*.

The Second Circuit did not take up the other *Aviall* questions for procedural reasons somewhat analogous to those that resulted in the Fifth Circuit's not reaching any

[1] The Fifth Circuit in turn remanded the case to the District Court for the Northern District of Texas, which presently has motions for partial summary judgment on these issues under advisement.

of them. In the present case, Con Edison based its First Amended Complaint only on § 113(f)(1), on the theory that *Bedford Affiliates* foreclosed a concurrent § 107 claim. *Aviall* was decided after the district court below had ruled and the parties had submitted their briefs to the Second Circuit. The court of appeals subsequently directed the parties to file supplemental briefs addressing the impact of *Aviall* upon Con Edison's § 113(f)(1) claim. The parties did not brief any § 107 issue, on the incorrect assumption that the court of appeals' pre-*Aviall* decision in *Bedford Affiliates* precluded the panel from revisiting § 107. The Second Circuit's decision below accordingly addressed only one of the § 107 questions left open in *Aviall*.[2] These issues remain in flux in the Second Circuit.[3]

To be sure, the questions left unanswered in *Aviall* are important, as was the one the Court did decide. But that is no reason for the Court to deviate from its ordinary course of not deciding "'in the first instance issues not decided below.'"

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[2] UGI effectively concedes as much. (Pet. 18.) Indeed, UGI cites the court of appeals' failure to reach and decide these questions as a reason why this Court should decide them (*id*.), a course the Court expressly declined to follow in *Aviall*. To the extent UGI also invites the Court to review issues UGI suggests were implicitly or impliedly decided by the court of appeals, the Court should decline that invitation as well. *Cf. Aviall*, 543 U.S. at 170 ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' *Webster v. Fall*, 266 U.S. 507, 511 (1925).").

[3] For example, in *Syms v. Olin Corp*., 408 F.3d 95, 106-07 (2d Cir. 2005), the Second Circuit declined to determine whether the rule announced in *Bedford Affiliates* remained viable after *Aviall*. The parties had not fully briefed or argued the impact of *Aviall* on *Bedford Affiliates*, and the court of appeals concluded that the best course was to allow the district court to address the issue in the first instance. *Id*. at 107; *see also Seneca Meadows, Inc. v. ECI Liquidating, Inc*., No. 95-CV-6400L, 2006 WL 1030321, at *4 (W.D.N.Y. Apr. 20, 2006) (noting that "the waters in this area still remain somewhat murky" in the Second Circuit).

Aviall, 543 U.S. at 168-69 (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam)).

With the judgment below coming to the Court in this analytical and procedural posture, it remains "more prudent" to "withhold judgment on these matters." *Aviall*, 543 U.S. at 170. Denial of the petition would allow *Aviall* itself to proceed in the normal remand course through the district court and the court of appeals. *See, e.g.*, *Adarand*, 534 U.S. at 105-07, 110-11 (tracing the remand route followed in a case involving a racial classification issue "of fundamental national importance calling for final resolution by this Court"). Such an approach likewise would allow these questions to be given "full consideration" (*Aviall*, 543 U.S. at 169) by the various courts of appeals which now or soon will have the issues before them.[4] Perhaps most importantly, it would permit this Court to play its role as "'a court of final review and not first view.'" *Adarand*, 534 U.S. at 110 (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part)).

II. NO POST-*AVIALL* CIRCUIT CONFLICT EXISTS

This Court decided *Aviall* less than eighteen months ago. It is thus not surprising that only one court of appeals—the Second Circuit—has had an opportunity to consider the many questions left open in *Aviall*, and even that court addressed but one of them.

All of the cases UGI cites for the proposition that there is a circuit split (Pet. 10-11) were reached before this Court's decision in *Aviall*, and four of them are currently being

[4] Further examination of these issues by the lower courts would be particularly beneficial given the "miasmatic" nature of CERCLA's provisions. *Commander Oil Corp. v. Barlo Equip. Corp*., 215 F.3d 321, 326 (2d Cir. 2000).

revisited by the respective court of appeals. The questions are *sub judice* before the Eighth and the Third Circuits,[5] and in the briefing stage in the Seventh and the Ninth Circuits.[6]

Moreover, as the Second Circuit found, the cases to which UGI points are in any event inapposite, because they "considered plaintiffs that [unlike Con Edison] had either been held liable—or, because they had been sued, might imminently be held liable—under an administrative or court order or judgment." (Pet. 20a.)[7] Finally, all but two of the post-

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[5] *Atl. Research Corp. v. United States*, No. 05-3152 (8th Cir. filed Aug. 8, 2005) (argued Mar. 16, 2006); *E.I. DuPont de Nemours & Co. v. United States*, No. 04-2096 (3d Cir. filed Apr. 27, 2004) (argued Apr. 17, 2006).

[6] *N. Am. Galvanizing & Coatings, Inc. v. Metro. Water Reclamation Dist. of Greater Chicago*, No. 05-3299 (7th Cir. filed Aug. 8, 2005) (argued Jan. 20, 2006); *City of Rialto v. U.S. Dep't of Def.*, No. 05-56749 (9th Cir. filed Nov. 22, 2005); *Kotrous v. Goss-Jewett Co. of N. Cal., Inc.*, No. 06-15162 (9th Cir. filed Feb. 1, 2006).

[7] The Second Circuit did view its conclusion as at odds with the Ninth Circuit's pre-*Aviall* decision in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), but it is unclear if that is in fact the case. Of the eight post-*Aviall* district court decisions in the Ninth Circuit, six have ruled that *Pinal Creek* does not pose an obstacle to a § 107 claim by a PRP. *See* the four Ninth Circuit cases cited at Pet. 28 & n.15; *Sunnyside Dev. Corp. v. Opsys U.S. Corp.*, No. C 05-01447 SI, 2006 WL 1128039 (N.D. Cal. Apr. 27, 2006); *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1133 (D. Or. 2006). The court in *Adobe Lumber, Inc. v. Hellman* thought that *Pinal Creek* may well preclude such a § 107 claim, but declined to dismiss plaintiff's claim for contribution, because the court had "difficulty imagining that the Ninth Circuit would prevent PRPs from pursuing contribution claims for clean up costs incurred voluntarily." 415 F. Supp. 2d 1070, 1078-79 (E.D. Cal. 2006), *petition for permission to appeal granted*, No. 06-80026 (9th Cir. May 26, 2006). Only *City of Rialto v. United States Department of Defense*, No. EDCV 04-00079-VAP (SSx), 2005 U.S. Dist. LEXIS 26941 (C.D. Cal. Aug. 16, 2005), relied on *Pinal Creek* to reject a § 107 contribution claim by a PRP. *City of Rialto* is on appeal to the Ninth Circuit, which will decide if *Pinal Creek* ever was at odds with the ruling below and, if so, whether it should remain so in light of *Aviall*.

Aviall district court decisions cited by UGI have reached the same conclusion as the Second Circuit did here. (*See* Pet. 27, 28 & n.15.) The other two district courts found that they could not reach the issue, given existing pre-*Aviall* precedent analogous to *Bedford Affiliates* in their respective circuits. (*See* Pet. 28.)

When only one court of appeals has reached any issue left open in *Aviall*, there by definition can be no "split" in the circuits, let alone one worthy of this Court's attention at this early juncture.[8]

III. NO EXCEPTIONAL CIRCUMSTANCE SUPPORTS REVIEW

As shown in Parts I and II, no question left open in *Aviall* was raised below, the court of appeals reached only one, and did so *sua sponte*, and there is no circuit conflict. Moreover, not even UGI asserts that any "exceptional circumstance" warrants deviation from the Court's settled rule of not resolving in the first instance issues not decided below. *Aviall*, 543 U.S. at 168-69. Indeed, here, as in *Aviall*, "the circumstances . . . cut *against* resolving the § 107 claim." *Id*. at 169.[9]

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[8] In light of the state of pre-*Aviall* law, and the posture of post-*Aviall* litigation in the various circuits, the Second Circuit's decision hardly "risks disrupting the settled CERCLA construction in every other circuit" and creating "nationwide uncertainty" (Pet. 10, 25). The other circuits in any event will make their own decisions independently, just as they would have if the Second Circuit had ruled otherwise, or not at all.

[9] Even if these considerations governing review on certiorari did not weigh heavily against granting the petition, but were in equipoise, the federal government's litigation tactics in cases in which it has been sued as a PRP (*see* Pet. 22-25) would not tip the scales the other way. These cases arise because "[m]uch of the worst pollution in the United States emanates from facilities owned and operated by the federal government." J.B. Wolverton, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 Harv.

We therefore do not extend this brief by responding to petitioner's arguments as to why the court of appeals' ruling on the issue it did reach was erroneous.[10] We likewise do not engage in the *Alice in Wonderland* exercise of defending the Second Circuit from UGI's attacks on analyses the court of appeals never undertook, rationales it never embraced, or answers it never gave to questions it never reached. (*See, e.g.*, Pet. 13-18 (taking the Second Circuit to task over such issues).) We instead confine ourselves here to a portion of Justice Ginsburg's dissent in *Aviall*:

> In *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994), all Members of this Court agreed that § 107 of [CERCLA] "unquestionably provides a cause of action for [potentially responsible persons (PRPs)] to seek recovery of cleanup costs." The Court rested that determination squarely and solely on § 107(a)(4)(B), which allows *any* person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA.
>
> The *Key Tronic* Court divided, however, on the question whether the right to contribution is implicit in

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Envtl. L. Rev. 565, 565 (1991). For that reason, when the federal government is a polluter, it enjoys no sovereign immunity and is no different from any other PRP under CERCLA. *See, e.g., FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994).

That the government as a PRP defendant has chosen to argue that contribution rights should be restricted is thus no more surprising, and entitled to no more attention, than the fact that private PRPs like UGI have done so. In fact, it may be even less remarkable if, as has been suggested, the government's tactics in such cases are part of a broader litigation strategy designed to avoid paying cleanup costs altogether. *See* Brief of Amicus Curiae United States Chamber of Commerce § III(B), *Raytheon Aircraft Co. v. United States* (D. Kan. Feb. 24, 2006) (No. 05-2328 JWL), Toxics L. Rep. (BNA) 239, 245-46 (Mar. 2, 2006).

[10] Should the Court grant the petition, Con Edison will rebut these contentions fully and at length in its brief on the merits.

> § 107(a)'s text, as the majority determined, or whether § 107(a) expressly confers the right, as the dissenters urged. . . . But no Justice expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.

Aviall, 543 U.S. at 172 (Ginsburg, J., dissenting) (second alteration in original) (footnote omitted).

We do not quote the above passage to argue that the views there expressed commanded a majority of the Court or disposed of the question the Second Circuit did decide. Rather, we do so because the views alone suffice to refute petitioner's contention that the Second Circuit's ruling on the § 107(a)(4)(B) issue departs so far from the statutory text and this Court's jurisprudence that this Court must immediately intervene to prevent other courts of appeals from considering this, and the other outstanding *Aviall* issues, in the ordinary course.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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