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# Superdumb Discrimination in Superfund: CERCLA Section 107 Violates Equal Protection

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Twenty years ago, Congress enacted Superfund, or the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), to make polluters pay for cleanup at hazardous waste sites.<sup>1</sup> In many respects, the law has succeeded: CERCLA drastically reduced industry-generated hazardous waste and “spawned a hugely successful and innovative environmental cleanup industry.”<sup>2</sup> Nevertheless, many view the law as a complete failure,<sup>3</sup> citing its unfair liability scheme,<sup>4</sup> its poor drafting,<sup>5</sup>

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<sup>1</sup> 42 USC §§ 9601-75 (1995).

<sup>2</sup> See Thomas S. Udall, *Superfund: The Keynote Address at the 20th Annual Advanced American Law Institute-American Bar Association Course of Study on Hazardous Wastes, Superfund, and Toxic Substances*, 29 *Envir L Rptr* 10143, 10145 (1999) (arguing that CERCLA has been a success and outlining why CERCLA critics are mistaken).

<sup>3</sup> See *United States v A & N Cleaners and Launderers, Inc.*, 854 F Supp 229, 239 (S D NY 1994) (“CERCLA is now viewed nearly universally as a failure.”); 140 *Cong Rec E602* (March 24, 1994) (statement of William H. Zeff introducing the Superfund Improvement Act of 1994) (“It is time for Congress to admit they made mistakes in Superfund law . . . a law that has gone awry.”).

<sup>4</sup> See John C. Butler, et al, *Rethinking Superfund: It Costs Too Much, It's Unfair, It Must Be Fixed*; Superfund Reform Act of 1994, HR Rep No 103-582 Pt 1, 103d Cong, 2d Sess 76-77 (1994) (listing the six broad categories of criticisms, including high transaction costs stemming from excessive litigation).

<sup>5</sup> CERCLA was rushed through the House right before Ronald Reagan took office. See John Copeland Nagle, *CERCLA's Mistakes*, 38 *Wm & Mary L Rev* 1405, 1405-06 (1997) (discussing CERCLA's poor drafting, ambiguities, vague provisions, and policy errors). One Senator noted that “[o]nly the frailest, moment-to-moment coalition” led to its passage and that “it would now be impossible to pass the bill again, even unchanged.” See Senate Committee on Environment and Public Works, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980* 774 (GPO 1983) (letter from Robert Stafford and Jennings Randolph to James Florio, December 2, 1980).

the excessive legal fees it has generated,<sup>6</sup> and the large number of contaminated sites that have yet to be cleaned up.<sup>7</sup>

Most criticism of CERCLA focuses on its liability scheme, although courts have resisted constitutional challenges to this aspect of the statute.<sup>8</sup> Because CERCLA imposes liability on polluters retroactively, and jointly-and-severally, a company that contributed only a small percentage of hazardous waste to a site in a way that was perfectly legal before CERCLA's enactment now could be forced to pay staggering cleanup costs.<sup>9</sup> These cleanup costs at hazardous waste sites average thirty million dollars per site<sup>10</sup> and approximately 77.5 percent of CERCLA remediation costs can be attributed to waste disposed prior to CERCLA's passage in 1981.<sup>11</sup> Even courts that have recognized the unfairness of retroactive and joint-and-several liability have rejected constitutional challenges to CERCLA's liability scheme, noting its rational relation to a legitimate government interest: making polluters pay for cleanup at hazardous waste sites.<sup>12</sup> Courts have rejected challenges to CERCLA's liability scheme

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<sup>6</sup> See Message to the Congress on Environmental Policy, 31 Weekly Comp Pres Doc 558, 559 (Apr 6, 1995) (quoting then President Clinton, saying that "[f]or far too long, far too many Superfund dollars have been spent on lawyers and not nearly enough have been spent on clean-up").

<sup>7</sup> See Karen S. Danahy, *CERCLA Retroactive Liability in the Aftermath of Eastern Enterprises v Apfel*, 48 Buff L Rev 509, 561 n 359 (2000) (noting that only 497 hazardous waste sites have been cleaned up, and 40,000 remain), citing David K. Aylward, *Superfund Reauthorization Issues in the 106th Congress*, Cong Res Serv 5-6 (Dec 13, 1999).

<sup>8</sup> See, for example, *United States v Maryland Sand, Gravel & Stone Co*, 39 Envir Rptr (BNA) 1761, 1774 (D Md 1994) (holding that, because of CERCLA's joint and several liability scheme, the EPA's exclusion of certain parties from CERCLA settlement negotiations does not violate equal protection); *United States v Conservation Chemical Co*, 619 F Supp 162, 214-15 (W D Mo 1985) (rejecting the claim that CERCLA's joint and several liability violates the Equal Protection Clause).

<sup>9</sup> See Daniel E. Troy, *Retroactive Legislation* 85 (American Enterprise Institute 1997) (questioning the prevailing judicial conclusions that the enacting Congress intended CERCLA to apply retroactively and that such retroactive application is constitutional). But see *Conservation Chemical*, 619 F Supp at 217-222 (holding that CERCLA's retroactivity is constitutional).

<sup>10</sup> Thomas W. Church and Robert T. Nakamura, *Cleaning Up The Mess: Implementation Strategies in Superfund* 8 (Brookings 1993).

<sup>11</sup> See Superfund Program Hearings on HR 3800 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 103d Cong, 2d Sess 441 (1994) (statement of Katherine N. Probst, Research Fellow in the Center for Risk Management at Resources for the Future).

<sup>12</sup> See, for example, *United States v Northeastern Pharmaceutical and Chemical Co*, 810 F2d 726, 733 (8th Cir 1986) (finding parties liable for CERCLA cleanup costs incurred prior to CERCLA's enactment).

under the Due Process Clause,<sup>13</sup> the Takings Clause,<sup>14</sup> and the Ex Post Facto Clause.<sup>15</sup>

A more problematic inequality in CERCLA, and one that parties have yet to challenge on constitutional grounds, is the statute's discrimination against private cost recovery actions in Section 107.<sup>16</sup> In theory, CERCLA cost recovery actions enable governmental and private parties that have cleaned up contaminated sites to sue to collect the cleanup costs from the responsible parties.<sup>17</sup> Thus, cost recovery actions ought to serve CERCLA's twin goals of encouraging cleanup and making polluters pay.<sup>18</sup> Unfortunately, while Section 107 allows the government to collect its attorneys' fees from responsible parties, private parties cannot recover attorneys' fees.<sup>19</sup> This disparity is particularly vulnerable to constitutional challenge because, unlike CERCLA's liability scheme which promotes the "polluter pays" principle, CERCLA's ban on private attorneys' fees benefits polluters and punishes parties who perform the cleanups.

CERCLA Section 107 makes the party responsible for the hazardous waste contamination jointly and severally liable for:

- (A) *all costs* of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other *necessary costs* of response incurred by any other person consistent with the national contingency plan.<sup>20</sup>

This restriction on a private party's recoverable costs thwarts CERCLA's twin goals of encouraging private cleanup and making

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<sup>13</sup> See *id.* at 733. See also *Conservation Chemical*, 619 F Supp at 217-222.

<sup>14</sup> *Northeastern Pharmaceutical*, 810 F2d at 734.

<sup>15</sup> See, for example, *United States v Amtreco, Inc.*, 809 F Supp 959, 970 (M D Ga 1993).

<sup>16</sup> See 42 USC § 9607(a)(4) (creating procedural and substantive barriers to private cost recovery actions but not for governmental cost recovery actions).

<sup>17</sup> See *id.*

<sup>18</sup> See, for example, *Control Data Corp v SCSC Corp*, 53 F3d 930, 935-36 (8th Cir 1995) (noting that CERCLA is designed to encourage timely cleanup and place responsibility on the parties that caused the contamination).

<sup>19</sup> 42 USC § 9607(a)(4) (establishing that private parties may only recover necessary cleanup costs); *Key Tronic Corp v United States*, 511 US 809, 819-20 (1994) (ruling that attorneys' fees related to litigation are not part of the "necessary costs" that private parties may recover); *United States v Chapman*, 146 F3d 1166, 1176 (9th Cir 1998) (holding that the government may recover attorneys' fees). Private parties may recover attorney's fees for cleanup expenses, but not for cost recovery actions.

<sup>20</sup> 42 USC § 9607(a)(4) (emphasis added).

responsible parties pay.<sup>21</sup> The EPA cannot clean up all or even most of the hazardous waste sites in the country, and it relies on private parties to conduct over seventy percent of CERCLA cleanups.<sup>22</sup> Because cleanup costs and especially attorneys' fees are staggering for an average cleanup, the current scheme gives private parties a strong incentive to wait for the government to force them to act.<sup>23</sup> As noted above, CERCLA cleanups cost thirty million dollars on average,<sup>24</sup> of which around half is spent on attorneys' fees.<sup>25</sup> A private party faced with the possibility of recovering only fifteen million dollars on a thirty million dollar recovery is likely to forgo cleanup altogether and wait for the EPA to force it to act.<sup>26</sup>

Section 107's ban on private party attorneys' fees recovery has contributed to the statute's widely-noted failure to bring about private cleanup.<sup>27</sup> An estimated forty thousand hazardous

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<sup>21</sup> See *Control Data Corp*, 53 F3d at 935-36 (stating CERCLA's twin aims).

<sup>22</sup> See HR Rep No 105-582 Pt 1, 103d Cong, 2d Sess 76-77 (1994).

<sup>23</sup> See Kenneth F. Rossman IV, Case Note, *Key Tronic Corp v United States: Ratifying an Inequitable Distribution of Private Party Costs Under Superfund By Refusing to Shift Attorneys' Fees*, 4 Geo Mason U L Rev 113, 132-33 (arguing that Congress should legislatively reverse *Key Tronic*).

<sup>24</sup> See *id* at 113 n 8, citing Mark Reisch, *Congressional Research Service Issue Brief 94-016 Superfund Reauthorization Issues in the 103d Congress 2* (1994) (noting that the average cleanup costs thirty million dollars).

<sup>25</sup> See Kimberly Leue, *Private Party Settlements in the Superfund Amendment and Reauthorization Act of 1986*, 8 Stan Envir L J 131, 135 n 21 (1989) (citing studies that litigation/transaction costs consume 55 percent of cleanup expenditures). There is some dispute about the actual percentage of cleanup costs that are spent on litigation:

*Transaction costs.* One of the most obvious collateral effects of Superfund is the creation of massive transaction costs, especially in the private sector. The RAND Institute for Civil Justice recently reported aggregate transaction cost data for five fortune 100 companies of 21 percent for all toxic waste sites between 1986 and 1989, but between 30 and 40 percent at multiparty sites. The National Paint and Coatings Association survey of its members, mostly smaller businesses, reported average transaction costs of 77 percent. And this does not include the nearly \$500 million a year RAND found that insurers were spending on Superfund, nearly half of which was spent to defend PRP's in their disputes with EPA. Any way you look at it then, diversion of corporate resources to fundamentally unproductive activity related to Superfund liability are high, especially for a country already facing competitive challenges from abroad.

Congressional Record - Extension of Remarks, 138 Cong Rec E 3328, 102d Cong, 2d Sess (Oct 29, 1992) (statement of Representative Tauzin).

<sup>26</sup> See Rossman, Case Note, 4 Geo Mason U L Rev at 132-33 (cited in note 23).

<sup>27</sup> See Barry L. Johnson and Christopher T. DeRosa, *The Toxicological Hazard of Superfund Hazardous Waste Sites*, 12 Rev on Environ Health 235, 236 (1997) (concluding that the high percentage of CERCLA sites containing high levels of toxic substances are a major human health threat) (citations omitted).

waste sites have been reported to various federal agencies.<sup>28</sup> In addition, there are more than one thousand sites on the Superfund National Priorities List ("NPL") that have yet to be cleaned up.<sup>29</sup> The EPA puts sites on the NPL when it determines that they "pose the greatest threat to the public's health and the environment."<sup>30</sup> The magnitude of the cleanups that must be completed creates a pressing need to provide private plaintiffs the same ability as governmental plaintiffs to recover their attorneys' fees when they bring cost recovery actions.<sup>31</sup>

The Supreme Court has rejected a statutory interpretation of CERCLA that would level the playing field between governmental and private cost recovery actions.<sup>32</sup> Courts, however, have yet to hear an equal protection challenge to Section 107's discrimination against private plaintiffs. This Comment argues that the current disparity in Section 107 cost recovery actions violates the Equal Protection Clause of the Fourteenth Amendment as applied to the federal government through the Due Process Clause of the Fifth Amendment, which requires that laws discriminating against similarly situated parties be rationally related to a legitimate government interest.<sup>33</sup> A Fifth Amendment equal protection challenge to CERCLA, a statute that involves no fundamental right and employs no suspect classification such as race, must show that Section 107 lacks a rational basis for treating similarly situated parties differently.<sup>34</sup>

As no case law or scholarship addresses this question, this Comment constructs an equal protection challenge to Section 107

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<sup>28</sup> See *id.*

<sup>29</sup> See Danahy, 48 Buff L Rev at 561 n 359 (cited in note 7), citing Aylward, *Superfund Reauthorization Issues in the 106th Congress* at 5-6 (finding only 201 sites have been deleted from the NPL after nineteen years of CERCLA); see also Rossman, Case Note, 4 Geo Mason U L Rev at 132 n 139 (cited in note 23), citing Reisch, *Superfund Reauthorization Issues* at 8 (cited in note 24) (finding that fourteen years after the enactment of CERCLA, cleanup has been completed a fewer than 20 percent of the sites placed on the NPL).

<sup>30</sup> Johnson and DeRosa, 12 Rev on Environ Health at 236 (cited in note 27).

<sup>31</sup> See Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 Geo Wash L Rev 1043, 1132-33 (1994) (arguing, prior to the *Key Tronic* decision, that barring private parties from recovering attorneys' fees will discourage parties from settling, leading to delay in remediation of contaminated sites and wasteful litigation over response costs).

<sup>32</sup> See *Key Tronic*, 511 US at 819-20 (rejecting a statutory construction challenge to Section 107's bar on private plaintiff attorneys' fees).

<sup>33</sup> See *Heller v Doe*, 509 US 312, 319-20 (1993) (describing rational basis review).

<sup>34</sup> See *id.* (describing rational basis review and holding that a Kentucky statute allowing lower standard of proof in mental retardation committee hearings than in mental illness commitment hearings is subject to rational basis review).

using analogous case law and policy analysis. Part I confronts potential problems in applying equal protection analysis to laws that discriminate between the government and private parties. Part II demonstrates why governmental and private parties are similarly situated in Section 107 cost recovery actions. Part III establishes that courts will analyze an equal protection challenge to Section 107 under the rational basis standard, and discusses different ways courts apply this standard. Finally, Part IV uses analogous federal cases from recent challenges to the Prison Litigation Reform Act ("PLRA") to show that Section 107's ban on private plaintiff attorneys' fees recovery violates equal protection.

### I. APPLYING EQUAL PROTECTION TO SIMILARLY SITUATED GOVERNMENTAL AND PRIVATE PARTIES

Private plaintiffs seeking to challenge Section 107 face an initial hurdle: whether courts should analyze discrimination among governmental and private parties using equal protection analysis. Indeed, some cases specifically hold that because the federal government is not a "person" under the Equal Protection Clause, equal protection analysis is not the correct standard to judge laws that discriminate between governmental and private parties.<sup>35</sup> The essential requirements of the Equal Protection Clause of the Fourteenth Amendment, which extend to the federal government through the Fifth Amendment,<sup>36</sup> establish that no state shall "deprive any *person* of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>37</sup> If the government is not a "person," Section 107's discrimination against private parties may not raise a constitutional question. This section evaluates several possible arguments private CERCLA parties can make to avoid the "personhood" issue and convince a court to hear an equal protection challenge to Section 107.

Part A presents cases that hold that the government is not a constitutional "person." These cases could bar a challenge to Section 107 because, if the government is not a "person" for equal protection purposes, the law's discrimination amongst governmental and private parties may not raise a constitutional ques-

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<sup>35</sup> See, for example, *United States v Nèbo*, 90 F Supp 73, 95-96 (W D La 1950).

<sup>36</sup> See *Bolling v Sharpe*, 347 US 497, 499-500 (1954) (holding that racially segregated schools in the District of Columbia violated the Due Process Clause of the Fifth Amendment).

<sup>37</sup> US Const Amend XIV (emphasis added).

tion. Part B notes that Congress defined the government as a “person” in drafting CERCLA, and argues that this fact may allow a plaintiff to challenge Section 107 on equal protection grounds. Part C argues that, even if the government is not a “person,” courts should still hear equal protection challenges to CERCLA brought by private parties, because they are persons. Finally, Part D argues that even if the “personhood” issue prevents private CERCLA plaintiffs from challenging Section 107 on equal protection grounds, it would not prevent CERCLA defendants from doing so.

A. The Government is Usually Not Considered a Constitutional “Person”

1. *United States v Nebo Oil Co.*

In *United States v Nebo Oil Co.*,<sup>38</sup> a Louisiana district court case from 1950, the court held that the federal government is not a “person” under the Fourteenth Amendment.<sup>39</sup> Although not the first or last case to decide this question,<sup>40</sup> *Nebo* thoroughly explained its reasoning and therefore provides an important introduction to the issue of the government’s “personhood” under the Constitution.<sup>41</sup> In *Nebo*, the United States challenged Louisiana Act No. 315 of 1940 (“the Act”), which negatively affected its property rights.<sup>42</sup>

Notably, the United States argued that the Act violated the Equal Protection Clause of the Fourteenth Amendment.<sup>43</sup> The court rejected this argument, however, holding that the United

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<sup>38</sup> 90 F Supp 73 (W D La 1950).

<sup>39</sup> *Id* at 95.

<sup>40</sup> See, for example, *Wisconsin v Zimmerman*, 205 F Supp 673, 675 (W D Wis 1962) (holding that the government is not a “person” under the Fourteenth Amendment); *Scott v Frazier*, 258 F 669, 671 (N D SD 1919), *revd* on other grounds at 253 US 243, 244 (1920) (same).

<sup>41</sup> See *Nebo*, 90 F Supp at 95–96.

<sup>42</sup> *Id* at 84. The law in question, Act. No. 315 of 1940, provided that when the United States bought land subject to prior mineral rights, those rights were imprescriptible. *Id* at 79. The United States made a number of preliminary constitutional arguments, beginning with the claim that the Act violated Article IV, Section 3, Clause 2, which prohibits discrimination against government property. *Id* at 94–95. The court held that the United States’s interest in the property was so speculative that the issue did not rise to a constitutional question. *Nebo*, 90 F Supp at 84–85. The court also held that the Act did not violate the Contract Clause because it merely supported parties understanding of their contract obligations and a statute of prescription is not part of a contract and can be amended without impairing contractual obligations. *Id* at 94–95.

<sup>43</sup> *Id* at 95.



States is not a "person" within the meaning of the Fourteenth Amendment and is not "within the jurisdiction" of Louisiana as that phrase is used in the Fourteenth Amendment.<sup>44</sup> Thus, the United States lacked standing to sue under the Equal Protection Clause.<sup>45</sup> The court based its decision on legislative intent, stating that the Fourteenth Amendment was designed to protect individual "persons" because it was adopted at the close of the Civil War for the specific purpose of "guaranteeing Negroes their freedom."<sup>46</sup> Also, because the United States challenged a Louisiana law, the *Nebo* court noted that it would be "inconceivable" that Congress and the states would seek to regulate the delicate balance of federalism through "muffled words and inept phrases" defining the government as a "person" under the Fourteenth Amendment.<sup>47</sup>

Even if the government were a person for the constitutional analysis, the *Nebo* court would have found its equal protection argument unconvincing.<sup>48</sup> The court found a rational basis for the Act's classifications that disadvantaged the United States, because there was "an obvious difference between the sovereign and a private person or corporation" and the state had a legitimate interest in preventing the United States from withdrawing land from commerce for long periods of time.<sup>49</sup>

## 2. *South Carolina v Katzenbach*.

In addition to the district court opinion in *Nebo*, which held that the federal government is not a person under the Fourteenth Amendment, the Supreme Court ruled in *South Carolina v Katzenbach*<sup>50</sup> that a state is not a "person" under the Due Process Clause of the Fifth Amendment.<sup>51</sup> The Court used this holding to reject South Carolina's claim that the Voting Rights Act of 1965 impaired its due process rights through provisions limiting judi-

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<sup>44</sup> *Id.*

<sup>45</sup> *Nebo*, 90 F Supp at 95.

<sup>46</sup> *Id.* at 96.

<sup>47</sup> *Id.*

<sup>48</sup> See *id.* at 97 ("Even if the Act fell within the literal wording of the Fourteenth Amendment, however, it would nevertheless be valid on the ground that it is a reasonable classification.").

<sup>49</sup> See *Nebo*, 90 F Supp at 99-100.

<sup>50</sup> 383 US 301 (1966).

<sup>51</sup> *Id.* at 323-24 ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.") (citations omitted).

cial review and violating the separation of powers doctrine.<sup>52</sup> *Katzenbach* does not address equal protection or whether the federal government is a constitutional “person”, so its analysis may not apply in an equal protection challenge to Section 107.<sup>53</sup> Nevertheless, *Katzenbach*’s hostility towards affording constitutional personhood to a state suggests that the Supreme Court accepts *Nebo*’s exclusion of sovereign entities from the class of “persons” protected by the Constitution.<sup>54</sup>

### B. CERCLA Defines the Government as a “Person”

By defining the government as a constitutional non-person, *Nebo* and *Katzenbach* may preclude an equal protection challenge to Section 107. CERCLA, however, defines “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, *United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.*”<sup>55</sup> Thus, CERCLA shows clear congressional intent to treat both governmental and private parties as “persons.”

CERCLA’s definition of governmental entities as “persons” may allow a court to apply equal protection analysis to Section 107’s discrimination amongst governmental and private parties. *Nebo* and *Katzenbach* did not involve statutes that defined the government as a “person.” The courts in those cases had no statutory text to look to for guidance on the personhood issue, and instead relied on the traditional notion the government is not a “person” under the constitution.<sup>56</sup> These cases may have come out differently if the challenged statute defined both governmental and private entities as “persons.”<sup>57</sup> Perhaps by passing a law like CERCLA that defines the government as a “person,” Congress

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<sup>52</sup> Id at 323. The Court rejected a Fifth Amendment analysis of the Voting Rights Act, reasoning that the Fifteenth Amendment granted Congress clear authority to pass such legislation. Id at 325–26.

<sup>53</sup> See *Republic of Argentina v Weltover, Inc*, 504 US 607, 619 (1992) (holding that Argentina possessed “minimum contacts” with the United States based on its commercial activity and, citing *Katzenbach*, “[a]ssuming, without deciding, that a foreign state is a ‘person’ for purposes of the Due Process Clause”) (emphasis added).

<sup>54</sup> See *Katzenbach*, 383 US at 325–26.

<sup>55</sup> 42 USC § 9601(21) (emphasis added).

<sup>56</sup> See *Nebo*, 90 F Supp at 95–100; *Katzenbach*, 383 US at 325–26.

<sup>57</sup> See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 Yale L J 1535, 1599–1602 (2000) (noting that a Congressional statute overturning established constitutional jurisprudence could be upheld, although it probably would not be by the current Court).

can waive the government's traditional non-personhood just as it can waive federal sovereign immunity, as CERCLA also does.<sup>68</sup>

Academics have questioned whether Congress can override a court decision on constitutional personhood in the controversial context of abortion rights, and the issue is far from settled. In *Roe v Wade*,<sup>69</sup> the Supreme Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."<sup>60</sup> *Roe*, however, did not state whether Congress could overturn the Court's decision by enacting a law defining a fetus as a "person," although the Court has since provided some guidance on this issue with its decision in *City of Boerne v Flores*.<sup>61</sup> *Flores*, which held that Congress may not, pursuant to its powers under Section 5 of the Fourteenth Amendment, rewrite the substantive guarantees of the Constitution,<sup>62</sup> probably bars Congress from overturning *Roe* by statute, although this is not a settled question.<sup>63</sup> If Congress may not overturn *Roe* by defining a fetus as a "person," they probably may not overturn cases like *Nebo* and *Katzenbach* by defining the government as a "person," as CERCLA does.<sup>64</sup>

It is nevertheless worth considering the argument because it is not well established that private parties may not assert an equal protection violation when a law discriminates in favor of the federal government in the unique situations such as CERCLA where the federal and private parties are similarly situated.<sup>65</sup> While a court may not appreciate a Congressional attempt to overturn *Roe*'s constitutional interpretation, it is much more likely to defer to Congress's "person" definition in CERCLA absent a controlling judicial decision.<sup>66</sup> Neither *Nebo* nor *Katzenbach*

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<sup>68</sup> See *id.* at 1599. One could also propose that CERCLA merely invites the court to revisit its prior rulings on the personhood of governmental entities. See Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U Chi L Rev 819, 824 (1986) (arguing that Section 5 of the Fourteenth Amendment should be "understood as a tool that permits the Congress to use its power to enact ordinary legislation to engage the Court in a dialogue about our fundamental rights, thereby 'forcing' the Justices to take a fresh look at their own judgments").

<sup>69</sup> 410 US 113 (1973).

<sup>60</sup> *Id.* at 158.

<sup>61</sup> 521 US 507 (1997).

<sup>62</sup> *Id.* at 519-20.

<sup>63</sup> See note 58.

<sup>64</sup> See *id.*

<sup>65</sup> See Section III C.

<sup>66</sup> See Roger Clegg, *Is a Ban on Partial-Birth Abortions Within Congress's Enumerated Powers?* 3 Nexus J Op 25, 30 (1998) (noting that the Supreme Court could allow a ban on partial-birth abortions without contradicting *Flores*, because the "personhood" of the fetus at this stage was not completely resolved in *Roe*).

directly address whether the federal government is a “person” under the Fifth Amendment’s Equal Protection Clause, and neither case addresses whether the government is a “person” when it brings a cost recovery action just like any other private CERCLA plaintiff. In *Flores*, the Court rebuffed Congress’s attempt to overturn *Employment Division v Smith*<sup>67</sup> by passing the Religious Freedom Restoration Act.<sup>68</sup> The *Flores* Court noted that, “[i]t is for Congress in the first instance to ‘determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference.”<sup>69</sup> Even though Congress may not have intended to define the government as a constitutional “person” in drafting CERCLA, the statute appears to be a “first instance” case where the Court may permit Congress to state who is a “person” and who is not. Therefore, a private party asserting an equal protection challenge to Section 107 is more likely to overcome the personhood hurdle than a plaintiff expecting to overturn *Roe* with a Congressional statute defining fetuses as “persons.”<sup>70</sup>

### C. The Government’s “Personhood” Should Be Irrelevant

A more persuasive argument in favor of applying equal protection analysis to Section 107 is that, since the violation is raised by a private plaintiff, the government’s personhood should not be at issue. Unlike *Nebo*, where the court held that the federal government did not have standing to raise an equal protection violation because it was not a “person,” a private cost recovery plaintiff challenging CERCLA is without question a constitutional “person.”<sup>71</sup> So far, equal protection case law has not adequately addressed whether all of the similarly situated parties in an equal protection analysis must be “persons,” or whether only those asserting the equal protection violation must be.

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<sup>67</sup> 494 US 872 (1990).

<sup>68</sup> *Flores*, 521 US at 515, citing *Katzenbach*, 384 US at 651.

<sup>69</sup> 521 US at 536.

<sup>70</sup> See note 57.

<sup>71</sup> See *Santa Clara County v Southern Pacific Railroad Co*, 118 US 394, 396 (1886) (“The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person the equal protection of the laws, applies to these corporations. We are all of opinion that it does.”).

1. *Pan Am Health Organization v Montgomery County*: all parties must be “persons” in equal protection analyses.

One district court has, in dicta, rejected the notion that a law could violate equal protection by discriminating against a “person” in favor of a “non-person” governmental entity. In *Pan American Health Organization v Montgomery County*,<sup>72</sup> the district court in Maryland noted that the plaintiff health organization (PAHO) could not assert an equal protection violation, reasoning in a footnote that:

Although not directly raised by the parties, it occurs to the undersigned that it may indeed be inappropriate for PAHO to contend that it has the right to be treated equally to the State of Maryland, a non-person for purposes of equal protection or to the United States, which is accorded supremacy. One would logically assume that the comparators for equal protection purposes ought all be “persons” subject to equal protection analysis.<sup>73</sup>

The court, however, did not mention any justification for its “logical” assumption. Furthermore, the court’s dicta conflicts with the decisions of two other courts that have analyzed equal protection challenges, brought by private parties, to laws like CERCLA that discriminate against private and governmental parties.

2. *United States v Williams*: equal protection analysis of private and public gambling.

The Third Circuit, in *United States v Williams*,<sup>74</sup> recently employed an equal protection analysis to a statute that discriminated against private gambling.<sup>75</sup> Williams, a criminal defendant convicted for racketeering under a Pennsylvania statute that made private gambling illegal, brought a Fourteenth Amendment equal protection claim challenging his conviction on the grounds that the racketeering statute violated the Fourteenth Amendment’s guarantee of equal protection.<sup>76</sup> He argued that the statute permitted some forms of gambling, such as the state lottery,

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<sup>72</sup> 889 F Supp 234 (D Md 1994).

<sup>73</sup> Id at 240 n 7.

<sup>74</sup> 124 F3d 411 (3d Cir 1997).

<sup>75</sup> Id at 421–22.

<sup>76</sup> Id.

while prohibiting similar gambling organized by private parties.<sup>77</sup> The court accepted his characterization of the constitutional question, and analyzed the statute on rational basis grounds, ignoring the issue of whether the state is a person under the Fourteenth Amendment's Equal Protection Clause.<sup>78</sup> The court eventually found a rational basis for the statute, reasoning that it was designed to regulate the undesirable effects of organized crime which was largely associated with private gambling, and thus did not violate equal protection.<sup>79</sup>

3. *South Louisiana Grain Services, Inc v Bergland*: equal protection analysis of private and public grain inspection.

In a case presenting issues more analogous to those presented in the CERCLA context, *South Louisiana Grain Services, Inc v Bergland*,<sup>80</sup> the D.C. Circuit analyzed the United States Grain Standards Act of 1976 ("the GSA") on equal protection grounds.<sup>81</sup> Prior to 1976, private agencies had performed most grain regulation.<sup>82</sup> Because of rampant corruption, Congress enacted the GSA to replace the private system with a public inspection regime.<sup>83</sup> *South Louisiana Grain Services*, a private grain inspection organization, argued that the law violated the Fifth Amendment's Due Process Clause because it "unreasonably discriminated against private inspection agencies while permitting some Service-approved state agencies to continue to conduct official inspections."<sup>84</sup> The court analyzed this claim on rational basis grounds, and ultimately rejected it, finding that Congress acted reasonably in replacing corrupt private regulators with a public system.<sup>85</sup>

*Bergland* is probably the best case to show that Section 107 should be evaluated under the equal protection clause. Both the GSA analyzed in *Bergland* and Section 107 discriminate against private parties who perform a quasi-regulatory function, and in favor of governmental entities. In *Bergland*, the GSA replaced private regulators with public regulators because of concerns

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<sup>77</sup> *Id.*

<sup>78</sup> *Williams*, 124 F3d at 422-23.

<sup>79</sup> *Id.* at 423.

<sup>80</sup> 590 F2d 1204 (DC Cir 1978) (per curiam).

<sup>81</sup> *Id.* at 1206-07.

<sup>82</sup> *Id.* at 1206.

<sup>83</sup> *Id.* at 1206-07.

<sup>84</sup> *Bergland*, 590 F2d at 1207.

<sup>85</sup> *Id.* (applying rational basis review without explaining the standard).

about corruption.<sup>86</sup> Under Section 107, private cost recovery plaintiffs suffer discrimination even though they are also engaged in a quasi-regulatory role of cleaning up contaminated sites.

#### 4. Summary of the personhood issue.

Case law does not clearly state whether private CERCLA plaintiffs may raise an equal protection challenge to Section 107. The only court to address the question directly, albeit in dicta, noted that such a challenge is not permissible because not all of the parties are "persons."<sup>87</sup> On the other hand, several courts have considered and rejected similar constitutional challenges without requiring that all of the comparators had to be "persons."<sup>88</sup> A private party seeking to challenge Section 107 should emphasize that (1) Congress intended to treat the government as a "person," (2) previous decisions such as *Bergland* analyzed similar claims involving private and government parties, and (3) such a decision would not open up the floodgates to equal protection challenges because CERCLA presents a unique situation where both governmental and private parties are acting similarly by cleaning up land they did not contaminate and suing to recover the costs.

#### D. Private Cost Recovery Defendants May Raise the Equal Protection Issue

If the federal government's "non-personhood" prevented private cost recovery plaintiffs from challenging Section 107's ban on attorneys' fees, private cost recovery defendants could raise the issue instead. A private CERCLA defendant who is forced to pay attorneys' fees to a governmental cost recovery plaintiff could argue that the statute, by authorizing governmental but not private parties to recover attorneys' fees, arbitrarily discriminates among identically situated private defendants. This argument has the positive aspect of being a typical equal protection argument against a law that discriminates against similarly situated parties.

Unfortunately, such an argument has two significant problems. First, the result of a successful challenge by a CERCLA defendant might be that neither governmental nor private parties could recover their attorneys' fees, and this would have negative

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<sup>86</sup> See id at 1206-07.

<sup>87</sup> See Part I C 2-3.

<sup>88</sup> See Part I C 1.

policy consequences. Second, courts are not likely to accept this argument, given that courts have summarily rejected other constitutional challenges to CERCLA brought by defendants because they do not want to undermine the statute's "polluter pays" principle.<sup>89</sup> Still, these challenges could be successful because there is no rational basis for the disparity: Section 107 would allow two identically situated private defendants to receive different outcomes at trial merely because one was sued by a private party and the other by a governmental party.<sup>90</sup> Finally, even if defendants are not successful in challenging Section 107, private plaintiffs should argue that since defendants can make equal protection challenges to Section 107, they should be able to as well. Since the best policy outcome is for both governmental and private parties to recover their attorneys' fees, it would be unfortunate if the only parties that could challenge Section 107 were polluters, and not the companies that actually clean up another party's waste.

## II. PRIVATE AND GOVERNMENTAL COST RECOVERY PLAINTIFFS ARE SIMILARLY SITUATED UNDER SECTION 107

Assuming that the question of defining the government as a "person" does not bar a private plaintiff's equal protection challenge to Section 107, the plaintiff must next prove that it is similarly situated with respect to governmental cost recovery plaintiffs.<sup>91</sup> A private plaintiff does not have to show that private and governmental cost recovery plaintiffs are *identically* situated in Section 107 actions, only that they are sufficiently similarly situated to require that statutory discrimination not be entirely arbitrary or irrational.<sup>92</sup> For example, the Supreme Court in *Rinaldi v Yeager*<sup>93</sup> and *Baxstrom v Herold*<sup>94</sup> found that parties as dissimilar

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<sup>89</sup> See, for example, notes 18–20 and accompanying text.

<sup>90</sup> See Part IV.

<sup>91</sup> See *Heller v Doe*, 509 US 312, 319–21 (1993) (rejecting a rational basis challenge to a statute that distinguished between the mentally ill and the mentally retarded and finding that the statute discriminated amongst dissimilar parties).

<sup>92</sup> See *Johnson v Daley*, 117 F Supp 2d 889, 894–95 (W D Wis 2000) (holding that a law awarding different attorneys' fees to prisoners and non-prisoners is unconstitutional) (citations omitted).

<sup>93</sup> 384 US 305 (1966).

<sup>94</sup> 383 US 107 (1966).



as prisoners and non-prisoners are still similarly situated for equal protection purposes.<sup>95</sup>

The government, as a sovereign, is never identically situated to private actors, whether they are individuals or corporations.<sup>96</sup> Therefore, private cost recovery plaintiffs seeking to challenge Section 107 on equal protection grounds will have to dispel the preliminary assumption that governmental and private parties are not similarly situated.

#### A. CERCLA Shows That the Parties Are Similarly Situated

CERCLA § 101 defines “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.”<sup>97</sup> As the Supreme Court recognized in *Pennsylvania v Union Gas Co.*,<sup>98</sup> Congress understood that the government would be liable in all circumstances under CERCLA absent a specific statutory authorization to the contrary.<sup>99</sup> For example, in Section 101(20)(D), Congress excludes the government from liability for property that it acquires involuntarily by virtue of its sovereign functions, such as bankruptcy or tax delinquency.<sup>100</sup> Section 101(20)(D)’s express exclusion of the government from liability for sovereign functions shows that Congress’s background under-

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<sup>95</sup> *Rinaldi*, 384 US at 308 (holding that it violates equal protection to require certain indigent prisoners, but not nonprisoners, to reimburse counties for the costs of their transcripts on appeal); *Baxstrom*, 383 US at 110 (holding that it violates equal protection to deny allegedly mentally ill prisoners the same right to a de novo jury trial review of a civil commitment decision that the state afforded nonprisoners). But see *Allen v Cuomo*, 100 F3d 253, 260–61 (2d Cir 1996) (holding that absence of a hardship waiver for surcharges assessed against prisoners convicted of disciplinary infractions is consistent with equal protection because prisoners and nonprisoners are not similarly situated).

<sup>96</sup> See *Carter v United States*, 982 F2d 1141, 1144–45 (7th Cir 1992) (noting that “the national government is never situated identically to private parties,” but nevertheless holding that the government may be liable under the Federal Tort Claims Act for medical malpractice when a private citizen would be liable in similar circumstances).

<sup>97</sup> 42 USC § 9601(21).

<sup>98</sup> 491 US 1 (1989).

<sup>99</sup> See *id.* at 12, *revid* on other grounds by *Seminole Tribe of Florida v Florida*, 517 US 44, 64–65 (1995) (holding that the federal government cannot abrogate states’ sovereign immunity from suit under the Indian Commerce Clause). The problem *Seminole Tribe* found in *Union Gas* was its Eleventh Amendment analysis, not its statutory analysis of CERCLA. See *id.* at 64–66. In fact, Justice Scalia, writing for three of the dissenting justices in *Union Gas*, explicitly accepted the majority’s statutory analysis. See *Union Gas*, 491 US at 29 (Scalia dissenting).

<sup>100</sup> See 42 USC § 9601(20)(D). See also *Union Gas*, 491 US at 11–12.

standing was that governmental parties ought to be liable to the same extent as private parties.<sup>101</sup>

Not only did Congress intend the government to be liable for its own pollution just as private parties were, it also intended the government's cost recovery actions to be similar to those brought by private parties.<sup>102</sup> After describing governmental cost recoveries, Section 107(a)(4)(B) describes private cost recoveries as those done by "any other person," showing that Congress conceived of governmental parties as "persons" similar to private parties for the purpose of cost recovery actions and liability.<sup>103</sup>

#### B. The Government is Not Uniquely Situated in Cost Recovery Actions

One could argue that since the government is responsible for developing and administering the National Contingency Plan (NCP), it is not similarly situated to a private cost recovery plaintiff, who is merely a pawn in the grand statutory scheme. CERCLA Section 105 orders the President to monitor a comprehensive "national contingency plan" for the removal of oil and other hazardous substances that establishes "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants."<sup>104</sup> The NCP includes, among many other provisions, criteria for determining priorities of cleanups,<sup>105</sup> methods for discovering and investigating hazardous waste contamination,<sup>106</sup> and appropriate roles for federal, state, and local governments in carrying out the plan's goals.<sup>107</sup> As the statute delegates primary authority for ensuring the NCP's success to governments, one could argue that this fact alone makes it impossible for the government to be similarly situated with respect to private parties.

This argument, however, is only partially valid. This is true for the CERCLA scheme overall, where the government is not similarly situated with respect to private parties because it is in

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<sup>101</sup> See *Union Gas*, 491 US at 11-12.

<sup>102</sup> See 42 USC § 9607(a)(4)(B).

<sup>103</sup> See *id.* Of course, Section 107 shows that Congress did not intend for the law to apply equally to governmental and private parties. Nevertheless, the statute as a whole recognizes the similar nature of private and governmental cleanups. This similarity ought to be enough to require that discriminatory treatment have a rational basis.

<sup>104</sup> See 42 USC § 9605(a).

<sup>105</sup> See 42 USC § 9605(a)(8).

<sup>106</sup> See 42 USC § 9605(a)(1).

<sup>107</sup> See 42 USC § 9605(a)(4).

charge of overseeing the entire system of site cleanups.<sup>108</sup> With respect to cost recovery actions under Section 107, though, the government is situated similarly to private parties.<sup>109</sup> In fact, despite the government's role in promulgating the NCP, Section 107 requires the government to comply with the NCP in order to recover its costs from the responsible parties, as it does to private parties.<sup>110</sup> Therefore, the argument that the NCP renders the government unique in cost recovery actions is inconsistent with the statute's text.

In Section 107 cost recovery actions, both governmental and private plaintiffs sue to recover their costs from the responsible parties after cleaning up contaminated land—land that they are often not responsible for contaminating.<sup>111</sup> Indeed, in *United States v Iron Mountain Mines*,<sup>112</sup> a district court rejected the government's argument that CERCLA gives the government sovereign immunity from negligent cleanup suits, noting that governmental cleanup and cost recovery actions are "not different in any significant respect" from those of a private party.<sup>113</sup> Academic commentators have also agreed with this assessment, and several have used the similarity of governmental and private cost recovery actions to argue that Section 107 unfairly discriminates against private parties.<sup>114</sup>

Nor is the government uniquely situated in cost recovery actions because of its concern for the public interest. It is true that the government bears responsibility for the National Contingency

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<sup>108</sup> See generally 42 USC § 9605 (describing government responsibility over CERCLA).

<sup>109</sup> See 42 USC § 9607.

<sup>110</sup> See 42 USC § 9607(a)(4)(A) (stating that CERCLA defendants are liable for costs incurred by governments "not inconsistent with the national contingency plan").

<sup>111</sup> See 42 USC § 9607. See also *United States v Iron Mountain Mines*, 881 F Supp 1432, 1445 (E D Cal 1995) (memorandum opinion).

<sup>112</sup> 881 F Supp 1432 (E D Cal 1995) (memorandum opinion).

<sup>113</sup> *Id.* at 1445. The government had argued that governmental bodies clean up the pollution caused by third parties while private parties do not, but the court recognized that since both governmental and private parties could bring a cost recovery suit, both would clean up third party pollution. See *id.* See also Arnold W. Reitze, Jr., Andrew J. Harrison, Jr., and Monica J. Palko, *Cost Recovery By Private Parties Under CERCLA: Planning a Response Action for Maximum Recovery*, 27 Tulsa L J 365, 411 (1992) ("Although a private party cannot bring an enforcement action against another private party under CERCLA as can the United States government, the private party can clean up the site and then bring a cost recovery action. Functionally, the end result is the same; the goals of CERCLA are accomplished by the cleanup and apportionment of the costs to the responsible party.") (citations omitted).

<sup>114</sup> See, for example, Dianne K. LeVerrier, *Are Some Polluters More Equal Than Others? A Critique of Caselaw Establishing Preferential Treatment of Federal Potentially Responsible Parties Under CERCLA*, 17 Touro L Rev 503, 522–23 (2001).

Plan and thus is expected to ensure the overall success of the cleanup system.<sup>115</sup> Furthermore, the government, unlike private parties, theoretically cleans up sites not only to avoid liability, but also because it seeks to promote the public good. Different incentives, however, should not render governmental and private cost recovery plaintiffs dissimilarly situated. In spite of their "selfish" motives, private parties are in fact promoting the public good by cleaning up contaminated sites, just as the government does when it cleans up a site. In fact, the EPA relies on private parties to conduct most CERCLA cleanups,<sup>116</sup> and thus private parties should be seen as the government's partners in fulfilling the NCP.

Finally, the question of whether governmental and private cost recovery plaintiffs are similarly situated is largely intertwined with the question of whether Section 107 has a rational basis for its discriminatory impact. The extent to which a court will accept that governmental and private plaintiffs are similarly situated in Section 107 actions turns in part on whether the court considers the discrimination against private parties to be unreasonable.<sup>117</sup>

### III. COURTS WILL ANALYZE SECTION 107 USING RATIONAL BASIS REVIEW

The Equal Protection Clause of the Fourteenth Amendment prohibits states from discriminating against particular individuals or classes.<sup>118</sup> Although the Fourteenth Amendment's Equal Protection Clause does not directly apply to federal legislation, courts have ruled that federal laws are subject to equal protection challenge through the Fifth Amendment's Due Process Clause.<sup>119</sup>

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<sup>115</sup> See 42 USC § 9605.

<sup>116</sup> See HR Rep No 103-582 at 76 (cited in note 4).

<sup>117</sup> See *Vasquez-Velezmore v United States INS*, 281 F3d 693, 697 (8th Cir 2002) ("[Petitioner's] equal protection claim cannot succeed. The reason is that petitioner's situation is not sufficiently similar to a person eligible for FFOA treatment to require equal treatment. In other words, there is a rational basis for distinguishing between petitioner and an alien who received FFOA relief.")

<sup>118</sup> US Const Amend XIV.

<sup>119</sup> See *Bolling v Sharpe*, 347 US 497, 499-500 (1954) (holding that the requirement of equal protection applies to the federal government through the Fifth Amendment). This was not always the case. The Supreme Court initially did not view the equal protection clause to apply to acts by Congress or other branches of the federal government. See, for example, *La Belle Iron Works v United States*, 256 US 377, 392 (1921) (upholding a federal law defining "invested capital" based on original rather than present value for tax deduction purposes, and rejecting any requirement that the law must comport with equal pro-

## A. Standards of Review in Equal Protection Challenges

When deciding which standard of review to apply to an equal protection challenge, courts look at whether the discrimination harms a suspect class or burdens a fundamental right. Courts employ a strict scrutiny standard when the government uses a suspect classification, such as race, national origin, or religion, in order to discriminate among otherwise similarly situated parties.<sup>120</sup> Courts also apply strict scrutiny when the government burdens a fundamental right, by denying the right to vote or access to the courts, for example, in discriminating among similarly situated parties.<sup>121</sup> In order to survive strict scrutiny, a law must be narrowly tailored to serve a compelling state interest.<sup>122</sup>

The second standard courts use to analyze equal protection challenges is intermediate scrutiny.<sup>123</sup> Courts apply the intermediate scrutiny standard when a statute employs a quasi-suspect classification such as gender.<sup>124</sup> Under intermediate scrutiny, the government must show that the challenged classification serves an important state interest and that the classification is at least substantially related to serving that interest.<sup>125</sup>

The lowest level of scrutiny that courts employ in analyzing equal protection challenges is rational basis review.<sup>126</sup> Courts ap-

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tection standards). However, the Court now views the Fifth Amendment as incorporating the requirements of the Equal Protection Clause and applying it to the federal government. See *Bolling*, 347 US at 499–500. Despite the different constitutional sources for equal protection challenges to state and federal actions, courts do not analyze Fifth Amendment equal protection challenges differently than those brought under the Fourteenth Amendment. See *Weinberger v Wiesenfeld*, 420 US 636, 638 n 2 (1975) (holding that a provision of the Social Security Act granting survivor benefits to widows but not widowers was a violation of the Fifth Amendment, and noting that “[t]his Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment”) (citations omitted).

<sup>120</sup> See *Adarand Constructors, Inc v Pena*, 515 US 200, 214, 227–29 (applying strict scrutiny to a racial set-aside program).

<sup>121</sup> See *Moore v Detroit School Reform Board*, 293 F3d 352, 370–71 (6th Cir 2002) (declining to apply strict scrutiny because no fundamental right was violated by infringing the plaintiffs’ ability to elect members of the Detroit school board).

<sup>122</sup> *City of Richmond v J.A. Croson*, 488 US 469, 491–93 (1989) (applying strict scrutiny to a racial set-aside program).

<sup>123</sup> *Plyler v Doe*, 457 US 202, 223–24 (1982) (noting that even though the legislation in question did not burden a suspect class or a fundamental right, its disastrous effects on undocumented children means that it should “hardly be considered rational unless it furthers some substantial goal of the State”).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See *Cleburne v Cleburne Living Center*, 473 US 452, 440 (1985) (holding, under rational basis review, that zoning restrictions targeting the mentally retarded were unconstitutional, even though the mentally retarded were not a quasi-suspect class).

ply rational basis review when a classification does not burden a suspect class or a fundamental right.<sup>127</sup> Discrimination on the basis of sexual preference or economic status are examples of classifications analyzed under the rational basis standard.<sup>128</sup> To survive a rational basis challenge, the government need only show that the challenged classification is rationally related to serving a legitimate state interest.<sup>129</sup>

#### B. Courts Will Use Rational Basis Review for Section 107

Federal courts will use the rational basis standard to analyze challenges to Section 107's discrimination against private cost recovery plaintiffs. Section 107 burdens private party cost recovery plaintiffs, who are not a suspect class, and instead favors governmental cost recovery plaintiffs.<sup>130</sup> In addition, Section 107's discrimination against private parties does not burden a fundamental right, such as the right to vote or to migrate freely between states. The statute merely makes it more difficult for private parties to recover their costs after cleaning up a hazardous waste site that they did not contaminate.<sup>131</sup> Therefore, the statute does not trigger a strict scrutiny or intermediate scrutiny review, and courts will analyze it under the more deferential rational basis standard.<sup>132</sup>

#### C. How Courts Apply Rational Basis Review

The rational basis test calls for strong judicial deference to legislative judgment. In *Heller v Doe*,<sup>133</sup> the Supreme Court articulated this view of the rational basis test, noting that:

[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . . Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations. . . . [T]he

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<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Id.

<sup>130</sup> See 42 USC § 9607(a)(4).

<sup>131</sup> See id.

<sup>132</sup> See notes 126–29 and accompanying text.

<sup>133</sup> 509 US 312 (1993).

burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.<sup>134</sup>

The *Heller* Court's view of rational basis is extremely deferential, and critics have classified it as an abdication of the Court's responsibility to review unfairly discriminatory statutes.<sup>135</sup> As applied to Section 107, this view of rational basis would allow a court to uphold the classification through an ad-hoc justification, even though Congress expressed no support for the court's justification.<sup>136</sup> Furthermore, the *Heller* Court's view of the rational basis test does not appear to involve any balancing of competing interests. Under *Heller*, a court will only consider whether there is any conceivable rational basis for the statute, not whether the alleged rational bases outweigh the interests of the class that the statute discriminates against.<sup>137</sup>

At times, however, the Court has employed a version of the rational basis test that is less deferential than that applied in *Heller*.<sup>138</sup> In certain cases when a disadvantaged group is particularly sympathetic and the interests of the party discriminated against are strong, courts apply the rational basis test in a less categorical fashion, balancing the competing interests involved.<sup>139</sup> For example, in *Romer v Evans*,<sup>140</sup> a case decided after *Heller*, the Court used the rational basis test to strike down a Colorado constitutional amendment that harmed the ability of gay rights activists to lobby for legislation that would protect homosexuals.<sup>141</sup> In *Romer*, the Court did more than try to find any conceivable state interest that justified the statute; it also employed a balancing test that weighed the state's asserted interests with the strong individual interests at stake if the discriminatory law were to be upheld.<sup>142</sup>

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<sup>134</sup> Id at 319–20 (citations omitted).

<sup>135</sup> See Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 NC L Rev 329, 424–25 (1995) (arguing that courts should more carefully scrutinize the purposes behind governmental actions).

<sup>136</sup> See *Heller*, 509 US at 319–20.

<sup>137</sup> See id.

<sup>138</sup> See, for example, *Romer v Evans*, 517 US 620 (1996).

<sup>139</sup> See id at 631.

<sup>140</sup> 517 US 620 (1996).

<sup>141</sup> Id at 631.

<sup>142</sup> See id at 632–33 (balancing a homosexual person's right to lobby for protection against discrimination with the state's asserted interests in allowing citizens freedom of association and in conserving state resources to fight other kinds of discrimination).

A court reviewing an equal protection challenge to Section 107 might use either *Heller's* deferential categorical approach or *Romer's* balancing test. A private cost recovery plaintiff challenging Section 107's classifications should heed *Heller's* requirement that it negate every "conceivable basis" for the statute.<sup>143</sup> The challenging party should also emphasize that its interests outweigh possible bases for Section 107's classification, as the challengers in *Romer* did.<sup>144</sup> In the context of Section 107, a private plaintiff should argue that the current discriminatory scheme punishes private parties for engaging in cleanups that further the public good, and discourages private parties from undertaking massive cleanup efforts.<sup>145</sup> An equal protection challenge to Section 107 should both undermine all possible rationales for the statute's discrimination and make the court sympathize with the situation of private cost recovery plaintiffs.

#### IV. SECTION 107 VIOLATES EQUAL PROTECTION BY DISCRIMINATING AGAINST PRIVATE PLAINTIFFS

##### A. Section 107 Bars Private Plaintiffs From Recovering Attorneys' Fees

Under Section 107, governmental entities bringing cost recovery actions may recover "all costs" of recovery.<sup>146</sup> In contrast, private parties must prove that their costs were "necessary" and may only recover the cleanup costs that the statute permits.<sup>147</sup> In 1994, the Supreme Court ruled in *Key Tronic v United States*<sup>148</sup> that Section 107's language limiting private plaintiffs to "necessary costs" bars them from recovering attorneys' fees associated with cleanup.<sup>149</sup> This bar applies only to private plaintiffs; after *Key Tronic*, several lower courts ruled that the government may still recover its attorneys' fees when it brings a cost recovery action under Section 107.<sup>150</sup> *Key Tronic* focused solely on the statutory interpretation of Section 107, and did not discuss the policy implications of its decision.<sup>151</sup> Thus, *Key Tronic* only stands for the

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<sup>143</sup> See *Heller*, 509 US at 320.

<sup>144</sup> See *Romer*, 517 US at 631.

<sup>145</sup> See Rossman, Case Note, 4 Geo Mason U L Rev at 132 (cited in note 23).

<sup>146</sup> See 42 USC § 9607(a)(4)(A).

<sup>147</sup> See *id.*

<sup>148</sup> 511 US 809 (1994).

<sup>149</sup> *Id.* at 820-21.

<sup>150</sup> See, for example, *United States v Chapman*, 146 F3d 1166, 1176 (9th Cir 1998).

<sup>151</sup> See *Key Tronic*, 511 US at 811-12.



proposition that Section 107 discriminates between private and governmental parties in awarding attorneys' fees, not that the statute has a rational basis for discriminating.<sup>162</sup>

## B. Analogous Equal Protection Cases: Challenges to the PLRA

Recent litigation challenging caps on the attorneys' fees under the Prison Litigation Reform Act (PLRA) provides an equal protection challenge analogous to Section 107's ban on private party attorneys' fees.<sup>163</sup> The PLRA restricts the amount of attorneys' fees prisoners can recover when they prevail in constitutional claims against the government.<sup>164</sup> Prisoners have argued that the PLRA violates equal protection because they are only entitled to limited attorneys' fees while non-prisoners who prevail in suits against the government for constitutional violations are allowed to fully recover attorneys' fees.<sup>165</sup> The PLRA cases are appropriate analogies to Section 107's attorneys' fees ban because courts analyze equal protection challenges to the PLRA under a rational basis test<sup>166</sup> as they would a challenge to Section 107.<sup>167</sup> Additionally, both the PLRA and Section 107 seek to protect the government by discriminating against classes of plaintiffs in the awarding of attorneys' fees.<sup>168</sup> Federal courts currently split over whether the PLRA's cap on attorneys' fees violates equal protection principles.<sup>169</sup>

### 1. Split decisions on the PLRA.

In *Johnson v Daley*,<sup>160</sup> a federal district court in Wisconsin found that the PLRA's cap on attorneys' fees violated equal protection principles by discriminating between prisoners and non-

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<sup>162</sup> See *id.*

<sup>163</sup> See *Johnson v Daley*, 117 F Supp 2d 889, 903 (W D Wis 2000) (ruling that the PLRA is unconstitutional on equal protection grounds).

<sup>164</sup> 42 USC § 1997e(d)(2)-(3) (capping attorneys fees at 150 percent of the judgment or 150 percent of the hourly rate of court appointed counsel under the Criminal Justice Act).

<sup>165</sup> See *Johnson*, 117 F Supp 2d at 893.

<sup>166</sup> See *id.* at 894.

<sup>167</sup> See Part II.

<sup>168</sup> See *Johnson*, 117 F Supp at 900-01 (discussing the PLRA's aim of protecting the public fisc). See also 42 USC § 9607 (giving preferential treatment to governmental cost recovery actions).

<sup>169</sup> Compare *Johnson*, 117 F Supp 2d at 903 (holding that the PLRA is unconstitutional), with *Madrid v Gomez*, 190 F3d 990, 996 (9th Cir 1999) (holding that the PLRA is constitutional).

<sup>160</sup> 117 F Supp 2d 889.

prisoners who sue the government.<sup>161</sup> The court rejected the argument that the cap on attorneys' fees was necessary to deter frivolous suits by prisoners who, it argued, were more likely to file such claims.<sup>162</sup> The *Johnson* court reasoned that frivolous suits are often dismissed early in litigation and that the possibility of attorneys' fees will not affect prisoners' decisions.<sup>163</sup> In addition, the court rejected the argument that the cap was necessary to protect the public fisc, noting that non-prisoners are not subject to the cap and that a desire to protect the public fisc does not justify arbitrary discrimination.<sup>164</sup>

The Third Circuit, sitting en banc, split evenly on the question,<sup>165</sup> and the First,<sup>166</sup> Sixth,<sup>167</sup> and Ninth Circuits<sup>168</sup> found no equal protection violation. In the Ninth Circuit case, *Madrid v Gomez*,<sup>169</sup> the court commented on Congress's stated goal of reducing frivolous lawsuits in enacting the PLRA, noting that this also minimizes costs to taxpayers.<sup>170</sup> The court determined that even though the statute achieved its goal by singling out prisoners, Congress could reasonably assume that prisoners filed a disproportionate number of frivolous claims because of their small op-

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<sup>161</sup> Id at 893.

<sup>162</sup> See id at 895–900.

<sup>163</sup> See id at 895–96.

<sup>164</sup> See *Johnson*, 117 F Supp 2d at 900–01 (noting that it is unfair to single out a group of people to achieve even a legitimate goal such as protecting the public fisc). See also *Robbins v Chronister*, 2002 US Dist LEXIS 3835, \*22-23 n 5 (D KS) (holding that the PLRA's fee cap does not apply to a prisoner challenging a constitutional violation that occurred when the plaintiff was not a prisoner). The *Robbins* court noted that none of the possible justifications for the PLRA's fee limitations are rational when applied to claims that arose before the plaintiff was incarcerated. Id at 22-23. Furthermore, the court noted that it had "grave concerns" regarding the constitutionality of applying the fee limitations in this case, and that the only governmental interest that would be advanced by doing so, protecting the public fisc, must not unjustifiably burden one group. Id at 23. This reasoning is even more apt for Section 107's discrimination, which discriminates against a particular group in the award of attorneys' fees without any rational basis, not even the protection of the public fisc.

<sup>165</sup> See *Collins v Montgomery County Board of Prison Inspectors*, 176 F3d 679, 686 (3d Cir 1999) (en banc) (also noting that in this particular case, invalidating the fee cap would not alter the plaintiff's award), cert denied, 528 US 1115 (2000). Under Third Circuit jurisprudence, such divided en banc decisions are entitled to no precedential weight. See *Tunis Brothers Co, Inc v Ford Motor Co*, 763 F2d 1482, 1501 (3d Cir 1985) (rejecting precedential value of two specific earlier cases because they were affirmed by equally divided en banc courts), vacd on other grounds, 475 US 1105 (1986).

<sup>166</sup> *Boivin v Black*, 225 F3d 36, 43–46 (1st Cir 2000) (finding a rational relationship between the fee cap and legitimate governmental purposes).

<sup>167</sup> *Hadix v Johnson*, 230 F3d 840, 847 (6th Cir 2000) (finding a rational relationship between the fee cap and the government's desire to reduce frivolous lawsuits).

<sup>168</sup> *Madrid v Gomez*, 190 F3d 990, 995–96 (9th Cir 1999) (same).

<sup>169</sup> 190 F3d 990 (9th Cir 1999).

<sup>170</sup> Id at 996.

portunity costs and large potential gains.<sup>171</sup> Throughout its opinion, the *Madrid* court referred to the legislative history of the PLRA, which showed Congress's strong desire to curb prisoner litigation and explained the rationale for the attorneys' fee cap.<sup>172</sup>

## 2. Using the PLRA cases to challenge Section 107.

As an example of a Fifth Amendment equal protection challenge to a substantively discriminatory statute, the PLRA cases are helpful to a Section 107 challenge. In using these cases to challenge Section 107, a plaintiff should explain why the cases, such as *Johnson*, that found equal protection violations were correctly decided. After doing so, the plaintiff should explore the analogy between the PLRA and Section 107's substantive discrimination against private cost recovery plaintiffs, emphasizing that both discriminate by limiting the attorneys' fees a particular class of plaintiffs may recover.<sup>173</sup> Finally, the plaintiff should use the particular rational basis arguments presented and rejected in cases like *Johnson* to show why similar attempts to find a rational basis for Section 107 ought to fail. The plaintiff should also explain how cases holding that the PLRA possessed a rational basis are distinguishable in the Section 107 context.

a) *Johnson was correctly decided.* The district court in *Johnson* correctly held that the PLRA's restrictions on prisoners' ability to recover attorneys' fees arbitrarily discriminated against prisoners.<sup>174</sup> A desire to protect the public fisc does not excuse the government from the requirement of an independent basis for statutory discrimination.<sup>175</sup> The *Johnson* court forced the government to explain why the PLRA capped prisoners' attorneys' fees to reduce the government's liability. The government's argument, that prisoners file a disproportionate number of frivolous lawsuits, is unsound. *Johnson* correctly reasoned that the possibility of recovering reduced attorneys' fees at some point in the future was unlikely to sway prisoners' decisions, and that courts already dismiss frivolous lawsuits early in litigation.<sup>176</sup> Therefore, *Johnson*

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<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at 995–98.

<sup>173</sup> See *Johnson*, 117 F Supp 2d at 903; 42 USC § 9607(a)(4).

<sup>174</sup> See *Johnson*, 117 F Supp 2d at 902–03.

<sup>175</sup> See *id.* at 900–01.

<sup>176</sup> See *id.* at 896–900.

correctly held there was no reason for a statute to single out prisoners for fee caps.<sup>177</sup>

Lynn Branham, an academic commentator, recently published a persuasive criticism of the PLRA's attorneys' fee cap, specifically refuting the argument that prisoners file a disproportionate number of lawsuits.<sup>178</sup> First, Branham disputes the claim that, absent fee caps, prisoners are more likely to file frivolous lawsuits.<sup>179</sup> Branham notes that Rule 11 sanctions are applicable to those who file fraudulent or extremely frivolous claims, and these already effectively deter frivolous suits.<sup>180</sup> Branham's analysis supports *Johnson's* holding and establishes a very strong critique of the proposed rational basis for the PLRA's discrimination.

b) *Making the analogy between the PLRA and Section 107.* Whereas Congress designed the PLRA's cap on prisoners' attorneys' fees to protect the public fisc, its ban on private parties attorneys' fees under Section 107 only protects the finances of polluters. Thus, the main justification for the PLRA, that it protects the public fisc from expensive frivolous lawsuits, does not apply to Section 107.<sup>181</sup> Therefore, there is a better argument for invalidating Section 107's discrimination rather than the PLRA's, as doing so would only hurt polluters, not the government.

Nevertheless, several aspects of the PLRA do provide helpful analogies to Section 107. For one, both the PLRA and Section 107 address caps on attorneys' fees. In fact, Section 107, which categorically prohibits private cost recovery plaintiffs from recovering any attorneys' fees, is much harsher than the PLRA, which merely limits the amount of attorneys' fees prisoners can recover.<sup>182</sup> Furthermore, the PLRA cases address whether distinctions among plaintiffs can be justified by a desire to give the gov-

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<sup>177</sup> Id at 900.

<sup>178</sup> See Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorneys' Fees*, 89 Cal L Rev 999, 1022-23 (2001).

<sup>179</sup> See id at 1023-24.

<sup>180</sup> See id (explaining that attorneys, not wanting to receive Rule 11 sanctions, will not bring frivolous lawsuits on behalf of inmates).

<sup>181</sup> See *Madrid*, 190 F3d at 996.

<sup>182</sup> See *Johnson*, 117 F Supp 2d at 905 (finding that attorneys' fee award following a jury award of forty thousand dollars in damages should be 200 percent, not 150 percent, of the judgment). See also 42 USC § 1997e(d)(2)-(3).

ernment special treatment.<sup>183</sup> *Johnson's* reasoning that arbitrary attorneys' fee caps are unconstitutional even if they do benefit the government provides support for a challenge to the ban on private party attorneys' fees in Section 107.<sup>184</sup>

Another important way one can use the PLRA cases to challenge Section 107 is to establish that governmental and private parties are similarly situated in cost recovery actions. The PLRA cases provide support for a finding that statutory discrimination among non-identically situated parties violates equal protection.<sup>185</sup> As noted above, one might claim that Section 107 does not discriminate among similarly situated parties, since governmental and private plaintiffs are not identical.<sup>186</sup> However, the PLRA cases show that even when a statute discriminates among parties as dissimilar as prisoners and non-prisoners, it still needs a rational basis.<sup>187</sup> The analogy is particularly apt because in both the PLRA and the Section 107 contexts, the arguably dissimilar parties are engaged in the same activity: bringing suit in federal court.<sup>188</sup>

*c) The Madrid court's concern about frivolous litigation does not apply to Section 107.* Another important distinction between the PLRA and Section 107 is that unlike prisoners, private parties do not incur low opportunity costs in filing frivolous claims for cost recovery.<sup>189</sup> The *Madrid* court accepted Congress's position that prisoners file an excessive number of frivolous lawsuits because they have little else to do and they are willing to spend the time in order to reap potentially large rewards.<sup>190</sup> In contrast, hazardous site cleanup and subsequent cost recovery actions cannot be considered low cost to a private party, as the cost of these activities average thirty million dollars.<sup>191</sup> A private party is not likely to risk so much money, most of which they would have to pay before they could even bring a cost recovery action, on a frivolous claim.

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<sup>183</sup> See *Johnson*, 117 F Supp 2d at 900-01.

<sup>184</sup> See *id.*

<sup>185</sup> See *id.* at 902-03.

<sup>186</sup> See Part II.

<sup>187</sup> See *Madrid*, 190 F3d at 996 ("[W]e simply ask whether there is a rational basis for the classification.").

<sup>188</sup> See 42 USC § 9607(a)(4).

<sup>189</sup> See note 25.

<sup>190</sup> See *Madrid*, 190 F3d at 996.

<sup>191</sup> See note 25.

One could still argue that the rational basis for Section 107's substantive discrimination is that, in reducing the incentives of private parties to litigate, it encourages them to settle. This argument was advanced in an amicus curiae brief to the Supreme Court in *Key Tronic*.<sup>192</sup> The brief argued that awarding attorneys' fees promotes endless litigation by allowing private cost recovery plaintiffs to litigate for free.<sup>193</sup> This argument seems reasonable, but for a variety of reasons it fails to provide a rational basis for discrimination in Section 107.

The first problem with this contention is that the rational basis argument is only complete after it explains why the concern over settlement incentives does not also apply to the government. If Congress sought to encourage CERCLA settlements, why did it not apply Section 107's ban on attorneys' fees to both governmental and private plaintiffs? The prospect of recovering attorneys' fees might also encourage governmental parties to pursue litigation instead of settlement. In addition, as discussed above with respect to Section 107's procedural discrimination, governmental agencies are often subject to political pressure.<sup>194</sup> The government may face strong pressure to litigate instead of settle, to show that it does not tolerate polluters. The prospect of recovering attorneys' fees only further skews these incentives. In sum, there are many reasons to believe that, if the desire to encourage settlement is a rational basis for Section 107's substantive discrimination against private plaintiffs, the ban on fee recovery should also apply to the government.

The second problem with the possibility that Section 107 encourages private parties to settle is that, in fact, allowing parties to recover attorneys' fees may encourage the responsible parties to settle.<sup>195</sup> Even if one accepts that the government does not need a cap on attorneys' fees to encourage it to settle, for Section 107 to have a rational basis, the ban on private plaintiffs attorneys' fees

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<sup>192</sup> Brief of the Sand Springs Superfund PRP Group as Amicus Curiae in Support of Respondents, *Key Tronic v United States*, No 93-376 (filed Feb 28, 1994) (available on Lexis at 1993 US Briefs 376).

<sup>193</sup> See *id.*

<sup>194</sup> See George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J Econ & Mgmt Sci 3, 3-21 (1971) (noting that regulators often issue regulations favoring certain interest groups that have something to offer in return).

<sup>195</sup> See Rossman, Case Note, 4 Geo Mason U L Rev at 132 (cited in note 23), citing Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J Legal Stud 399, 428-29 (1973) (observing that awarding attorneys' fees increases the costs for a party mistakenly expecting success in litigation, thereby raising the rate of settlements).

must be effective in encouraging settlement. Instead, all that Section 107's cap on attorneys' fees accomplishes is an increase in the bargaining power of the responsible defendants in settlement negotiations.<sup>196</sup>

Given that so many contaminated sites have yet to be cleaned up, and that private parties routinely spend staggering amounts on CERCLA cleanups, the current regime has not succeeded in encouraging private parties to clean up contaminated land and settle with the responsible parties.<sup>197</sup> The possibility that Section 107 may encourage some private parties to settle must be weighed against the stated goals of the statute.<sup>198</sup> The statute's ban on private party attorneys' fees compromises these goals. As the Supreme Court noted in *Union Gas*, in enacting CERCLA Congress sought to encourage private cleanups by allowing private parties to recover their costs from the responsible parties.<sup>199</sup> Despite Congress's intent to encourage private cleanups, CERCLA § 107 undermines this goal, and in doing so, violates equal protection.

### C. Refuting The Claim That Private Parties Might Inflate Costs

One aspect of Section 107's discrimination that the PLRA cases do not address is the possibility that private cost recovery plaintiffs may be tempted to inflate attorneys' fees. While Congress did not explicitly state this as a rationale for the disparity in recoverable costs, it is possible that the statute does serve this goal.<sup>200</sup> If private parties know that their fees are not recoverable, they have an incentive to keep their costs reasonable.

Simply stating that private parties may inflate costs without Section 107's restrictions is not enough. To convince a court to uphold Section 107, the government must also show why a private party is more likely to inflate fees than the EPA or other government agency acting in a remedial capacity.<sup>201</sup> Otherwise,

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<sup>196</sup> See Rossman, Case Note, 4 Geo Mason L Rev at 133 (cited in note 23).

<sup>197</sup> See notes 2–6 and accompanying text.

<sup>198</sup> See notes 138–42 and accompanying text.

<sup>199</sup> See *Union Gas*, 491 US at 21–22.

<sup>200</sup> See *Heller*, 509 US at 319–20 (noting that Congress does not have to express a particular rationale in order for a court to use it as a rational basis).

<sup>201</sup> *City of Cleburne v Cleburne Living Center, Inc.*, 473 US 432, 448–50 (1985) (holding that a municipal zoning regulation that excludes a group home for the retarded cannot be upheld against an equal protection challenge because the city cannot explain why it gives beneficial treatment given to other permitted uses).

the government has not proven that the statute has a rational basis for discriminating against private parties.<sup>202</sup>

While one could argue that the government would not inflate costs as much as a private party, this argument is very weak. For one, the argument is contradicted by data showing that private parties perform cleanups quicker and at lower cost than the EPA.<sup>203</sup> As one scholar has noted, the EPA is extremely wasteful in hiring contractors to perform cleanups:

In 1988, the EPA agreed to establish semi-permanent offices for forty-five companies that would plan and supervise cleanups. The EPA has been paying salaries, rent and other business costs—such as recruitment and training costs and employee bonuses—without regard to the number of cleanup jobs the companies have been managing. It even paid the contractors start-up money before they had any projects to manage. Four firms on the West Coast received \$855,000 for half of 1989 without visiting even one toxic waste site. In some cases, the EPA has paid twice as much for a firm to administer a cleanup site as it actually cost the firm to clean it up. . . .<sup>204</sup>

The contrast between private party efficiency and governmental waste makes sense in the context of CERCLA cleanups. Private parties have very little, if any, profit to gain by inflating costs, since a cost recovery plaintiff proceeding under Section 107 is only entitled to recover “necessary” expenses.<sup>205</sup>

### CONCLUSION

CERCLA’s discrimination against private party cost recovery actions is inequitable and unwise. Section 107 encourages private parties who own contaminated land not to clean it up, since they will never recover their attorneys’ fees. Section 107’s discrimination against private parties only protects polluters; it does not

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<sup>202</sup> See *id.*

<sup>203</sup> See Roseann Oliver, *The Intersection of CERCLA and RCRA: What Companies Should Know*, 42 Fed’n of Ins & Corp Couns Q 445, 449–50 (1992).

<sup>204</sup> Robert W. McGee, *Should Superfund Be Wasted? The Case to Trash the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 11 Glendale L Rev 120, 122, 125 (1992) (footnotes omitted).

<sup>205</sup> See 42 USC § 9607(a)(4)(B) (limiting private cost recovery actions to “necessary” costs).



protect the environment or any other conceivable public policy goals.

Therefore, private plaintiffs should challenge Section 107 on the grounds that it violates equal protection. No court has ever invalidated, on equal protection grounds, a statute that discriminates between governmental and private plaintiffs. Section 107, however, is uniquely suited for equal protection analysis because governmental and private plaintiffs are similarly situated in CERCLA cost recovery actions. Furthermore, Section 107's denial of private attorneys' fees is so irrational—much more so than the PLRA's controversial limit on prisoner fee awards—that it is unconstitutional. Twenty years after Congress passed CERCLA, the statute has still failed to encourage private cleanup. Eliminating the disparity between private and governmental cost recoveries will breathe new life into an ineffective statute.