No. _____

In the
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

ASARCO LLC,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

SHANNON WELLS STEVENSON
Counsel of Record
KENZO S. KAWANABE
BENJAMIN B. STRAWN
ADITI KULKARNI-KNIGHT
DAVIS GRAHAM & STUBBS LLP
1550 17th St., Suite 500
Denver, CO 80202
(303) 892-9400
shannon.stevenson@dgslaw.com

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

This case presents a question on which this Court has recently granted certiorari in *Government of Guam v. United States*, No. 20-382.

Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides a cause of action for contribution to any "person who has resolved its liability to the United States or a State for some or all of a response action * * * in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B).

The question presented by this petition is:

Whether a judicially approved settlement that conclusively determines a party's obligation to perform response actions "resolves its liability" for "some or all of a response action."

Because the Court has already granted review to consider this question, petitioner requests that this petition be held pending the Court's resolution of *Guam*.

PARTIES TO THE PROCEEDING

Petitioner, who was appellant below, is Atlantic Richfield Company.

Respondent, who was appellee below, is Asarco LLC.

CORPORATE DISCLOSURE STATEMENT

Atlantic Richfield Company is a wholly owned subsidiary of BP America Inc., which is a wholly owned subsidiary of BP America Limited. BP America Limited is a wholly owned subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a wholly owned subsidiary of BP p.l.c., which is a publicly held company. Neither Atlantic Richfield Company nor any of its direct or indirect parent companies other than BP p.l.c, is publicly held.

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

Asarco LLC v. Atlantic Richfield Co., No. 14-35723 (Aug. 10, 2017), *reh'g denied* (Oct. 18, 2017)

Asarco LLC v. Atlantic Richfield Co., No. 18-35934 (Sept. 14, 2020)

United States District Court (D. Mont.):

Asarco LLC v. Atlantic Richfield Co., No. 6:12-cv-00053-DLC

Supreme Court of Montana:

Asarco LLC v. Atlantic Richfield Co., DA 15-0464 (Apr. 12, 2016)

District Court of the First Judicial District, In and For the County of Lewis and Clark, Montana:

Asarco LLC v. Atlantic Richfield Co., Cause No. BDV 2015-07 (July 13, 2015)

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The opinion of the United States Court of Appeals for the Ninth Circuit, from which Atlantic Richfield petitions, is reported at 975 F.3d 859 (9th Cir. 2020) and reproduced at Appendix A. The earlier opinion of the United States Court of Appeals for the Ninth Circuit, which addresses the issue presented in this petition, is reported at 866 F.3d 1108 (9th Cir. 2017) and reproduced at Appendix D. The order of the district court granting summary judgment is reported at 73 F. Supp. 3d 1285 (D. Mont. 2014) and reproduced at Appendix E. The district court's Findings of Fact, Conclusions of Law, and Judgment are reported at 353 F. Supp. 3d 916 (D. Mont. 2018) and reproduced at Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its first opinion in this case on August 10, 2017, vacating the judgment and remanding for further proceedings. App. 129. After a trial and final judgment, Atlantic Richfield appealed, and the Ninth Circuit issued its second opinion on September 14, 2020. App. 1. Pursuant to this Court's Order of March 19, 2020, a petition for a writ of certiorari is timely if filed within 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1). This Court may consider questions determined in earlier stages of a proceeding where certiorari is sought from the most recent of the judgments of the Court of Appeals. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001); *see also Virginia Military Inst. v. United States*, 508 U.S. 946 (1993).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.*, are reproduced at Appendix G.

STATEMENT OF THE CASE

This petition presents an important question regarding when a party's claim for contribution arises under CERCLA, and thus when its statute of limitations on that claim begins to run. This Court previously determined that this question, over which the Circuit Courts have split, was worthy of review when it granted certiorari in *Government of Guam v. United States*, No. 20-382. *See* 208 L. Ed. 2d 510, __ S.Ct. __ (Jan. 8, 2021).

In 1998, Asarco LLC and the Environmental Protection Agency ("EPA") entered into a consent decree (the "1998 Consent Decree") regarding the East Helena Superfund Site ("East Helena Site" or "Site"). Through judicial approval and entry of the Decree, Asarco resolved and settled claims filed by EPA for multiple violations of the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act ("CWA") by agreeing to fund and perform a comprehensive investigation and cleanup of the Site. In exchange for Asarco's commitment to perform the cleanup, EPA agreed to forego further enforcement at the Site, and its claims for injunctive relief and civil penalties against Asarco were dismissed.

Seven years later, Asarco had not followed through on its commitment to clean up the Site and had entered bankruptcy. EPA filed proofs of claim

against Asarco in the bankruptcy based on Asarco's commitments in the 1998 Consent Decree. Acknowledging its obligations to do the work it had promised, Asarco settled EPA's claims in bankruptcy in 2009 by paying approximately $100 million into a trust that assumed responsibility for the cleanup. In 2012 (fourteen years after resolving its liability to clean up the East Helena Site), Asarco sought contribution from Atlantic Richfield for the first time by filing this action.

The material facts related to Asarco's 1998 Consent Decree and Guam's 2004 Consent Decree are the same. Pursuant to CERCLA § 113(f)(3)(B), both of these decrees resolved each party's respective liability for some or all of a response action, and both triggered claims for contribution. Just as the D.C. Circuit held in *Guam*, the statute of limitations began to run on Asarco's claim when it entered the 1998 Consent Decree, and its belated contribution claim should have been dismissed. The Court should hold this petition pending its decision in the *Guam* case, and then grant, vacate, and remand for the Ninth Circuit to reconsider its ruling in light of this Court's decision in *Guam*.

A. Asarco's Smelter Operations, the Resulting Contamination, and CERCLA Listing.

The East Helena Superfund Site is located on the outskirts of the city of East Helena in Lewis and Clark County, Montana. App. 134. Asarco and its predecessors owned and operated a smelting facility at the Site for more than 100 years, from approximately 1888 until 2001. App. 134. The smelter processed various ores to recover elemental metals, primarily lead bullion. App. 5.

A predecessor of Atlantic Richfield, The Anaconda Company ("Anaconda"), leased land from Asarco at the Site from 1927 to 1972, where it operated a zinc fuming plant. App. 134. In 1972, Anaconda sold the zinc fuming plant and transferred its operational records to Asarco, which operated the plant until approximately 1982, when fuming operations ceased. App. 134. Anaconda had no further operations at the Site after 1972.

Asarco's lead smelting operations released hazardous substances, including arsenic, lead, and other heavy metals, throughout the Site and into the surrounding environment. App. 134. In 1984, EPA added the Site to the National Priorities List under CERCLA, or "Superfund." *Id*. That same year, Asarco entered into a CERCLA Administrative Order on Consent with EPA under which, over the next several years, Asarco investigated the Site to characterize the risks posed by hazardous substances and to evaluate potential remedies. ER152, 159.[1]

In the late 1980s, EPA identified Atlantic Richfield as an additional Potentially Responsible Party, or "PRP." App. 134. Throughout this process, Atlantic Richfield maintained to EPA its continuing belief that the operation of the zinc fuming plant did not contribute to or exacerbate the contamination at the Site. ER101, 158-60. Throughout all of their investigations, neither EPA nor Asarco ever identified the zinc fuming plant as a significant source of any contamination.

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[1] Citations to the record below are to the Excerpts of Record ("ER") and Supplemental Excerpts of Record ("SER") filed in Case No. 14-35723 (9th Cir.).

B. Asarco Resolves Its Liability for a Comprehensive Cleanup at the Site.

In May 1998, EPA sued Asarco in the United States District Court for the District of Montana. App. 135, 255. The Complaint alleged that Asarco had for years illegally disposed of hazardous waste at the Site. App. 135. As a result of Asarco's illegal disposal activities, the Complaint alleged that hazardous waste had been released into the environment, thereby triggering EPA's corrective action enforcement authority under RCRA. App. 135. Based on this, EPA asserted claims against Asarco for multiple violations of RCRA and the CWA. The relief sought included civil penalties and injunctive relief to conduct corrective action pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h). App. 135.

Simultaneously with the filing of the 1998 Complaint, Asarco and the United States submitted a Consent Decree to the district court for its review and approval. *See* App. H. The 1998 Consent Decree settled and resolved all of the claims for relief asserted in the 1998 Complaint, including claims for injunctive relief (*i.e.*, corrective action cleanup) under RCRA and civil penalties under RCRA and the CWA. App. 209, 252-53, 255-56. As consideration for the settlement and resolution of the claims asserted in the 1998 Complaint, Asarco agreed to carry out a comprehensive Site cleanup. App. 210-49. As defined by the 1998 Consent Decree, Asarco's investigation and cleanup obligations extended to all the contamination associated with historic operations at the Site with the objective of implementing a comprehensive, complete remedy.

Asarco also agreed to pay civil penalties in the amount of $3,386,100. App. 249.

The 1998 Consent Decree provided that Asarco's payment of penalties and completion of the Site cleanup shall constitute "full satisfaction of the claims for civil penalties for civil violations" asserted in the 1998 Complaint. App. 249, ¶ 209. In exchange for Asarco's RCRA cleanup commitments, EPA also agreed that it would forego further enforcement under RCRA at the Site. *See* App. 252, ¶ 214 ("EPA agrees that, so long as ASARCO remains in compliance with Part VII of this Decree, EPA shall not initiate a separate action under Sections 3008(h) and 3013 of RCRA … for work to be performed at the Facility."). EPA reserved, however, all of its rights which "pertain[ed] to ASARCO's failure to comply with any of the requirements of [the] Decree." App. 252, ¶ 213. Asarco shut down its smelting operation in 2001. App. 134. Its obligations under the 1998 Consent Decree were unaffected. *See* SER66-70.

C. Asarco Discharges Its Liability Through Bankruptcy.

On August 9, 2005, Asarco filed for Chapter 11 bankruptcy protection. App. 135-36. At that time, its Site-wide cleanup under the 1998 Consent Decree was far from complete. App. 135; SER89-90. The United States therefore filed proofs of claim in the bankruptcy proceeding to ensure resources were available to fund Asarco's outstanding commitments. App. 136.

To resolve EPA's claims in the bankruptcy, Asarco and EPA entered into a June 2009 Consent Decree, which addressed all of Asarco's outstanding

environmental liabilities at several sites in Montana, including its outstanding cleanup commitments under the 1998 Consent Decree. App. 136. Ultimately, Asarco was required to pay a total of $138,300,000 into a custodial trust to fund the cleanup activities at all of Asarco's Montana sites. ER337-39. Of this total, $99.294 million was initially planned to fund Asarco's commitments for the East Helena Site under the 1998 Consent Decree. App. 136. An appointed trustee assumed Asarco's commitments to complete the cleanup, which continues today. App. 136. Through this settlement, Asarco discharged its remaining environmental liabilities at the East Helena Site. App. 136.

D. Procedural History

1. Asarco filed its Complaint against Atlantic Richfield in this action in 2012, seeking contribution toward the bankruptcy settlement payment it made to fund its obligations under the 1998 Consent Decree. App. 136. Atlantic Richfield moved for summary judgment on the ground that Asarco's claim had not been filed within the three year statute of limitations. Pursuant to CERCLA § 113(f)(3)(B), Atlantic Richfield argued that the claim had accrued when Asarco resolved its liability for a comprehensive cleanup of the Site by entering the 1998 Consent Decree.

The district court, exercising its jurisdiction pursuant to 28 U.S.C. § 1331, granted summary judgment. App. 170. The court first held that section 113(f)(3)(B) "does not require resolution of CERCLA liability in particular," but instead "gives rise to a contribution claim based upon a judicially approved

settlement that resolves a party's liability for some or all of a 'response action,' as that term is defined in [CERCLA] §§ 101(23)-(25)." App. 180, 186. The court held that Asarco's obligations and funding commitments in the 1998 Consent Decree fell within CERCLA's definition of "response action," and therefore the 1998 Consent Decree gave rise to a claim for contribution and triggered the corresponding three-year limitations period. App. 186-87. Second, the court held that "the only work the Trust is required to perform and fund under the 2009 Decree are the pre-existing obligations ASARCO had yet to perform under the previous agreements, including primarily the 1998 Decree. Simply stated, there was no 'new' work created by the 2009 Decree." App. 191. Accordingly, the court granted Atlantic Richfield's motion and dismissed the case. App. 192.

2. Asarco appealed the grant of summary judgment, and the Ninth Circuit reversed, addressing both of the issues presented by the *Guam* petition. First, the panel considered whether a non-CERCLA consent decree could trigger a claim for contribution. Looking to the broad definition of the term "response," the panel concluded that contribution claims were not limited to CERCLA settlements. App. 143-151.

The panel then held that the 1998 Consent Decree required Asarco to take "response actions," including to:

> • Implement interim measures to "control or abate . . . imminent threats to human health and/or the environment";

> • Prevent or minimize the spread of hazardous waste "while long-term corrective measure alternatives are being evaluated";
>
> • Remove and dispose of contaminated soil and sediment at the Site; and, more generally, to
>
> • Fulfill the Decree's "remedial objectives" and "remedial activities"—specifically by (i) implementing "corrective measures" to "reduce levels of hazardous waste or hazardous constituents to applicable standards"; (ii) remediating "any contamination in groundwater, surface water and soils, and the ore storage areas"; (iii) taking actions that "will result in the remediation of contaminated media"; and (iv) "provid[ing] the minimum level of exposure to contaminants and the maximum reduction in exposure."

App. 150.

Finally, the panel addressed whether the 1998 Consent Decree "resolved [Asarco's] liability to the United States or [Montana] for some or all of a response action." App. 151.[2] Reviewing cases from the Sixth and Seventh Circuits, the court "adopt[ed] a meaning of the phrase 'resolved its liability' that f[ell] somewhere in the middle of these various cases." App.

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[2] The panel acknowledged that Asarco had failed to raise this issue in the district court, but nevertheless agreed to decide it on appeal. App. 151.

157. It did not find that a party's refusal to concede liability necessarily precluded resolution of liability, nor did it find that EPA's preservation of its right to bring an enforcement action necessarily precluded liability. App. 157-59. Instead, it held that a "PRP 'resolves its liability' to the government where a settlement agreement decides with certainty and finality a PRP's obligations for at least some of its response actions or costs as set forth in the agreement." App. 159.

Although the panel acknowledged that the 1998 Consent Decree obligated Asarco to complete response actions, it nevertheless found that the Decree did not resolve Asarco's liability for two reasons. First, the court erroneously found that the Consent Decree released Asarco only from the government's claims for civil penalties, not from claims for injunctive relief, and concluded that resolving a claim for civil penalties was insufficient to trigger the statute of limitations. App. 160-61. Second, the court observed that the Consent Decree was "replete with references to Asarco's continued legal exposure." App. 161. These included (1) a provision that did not limit Asarco's obligation to perform work outside the facility's boundaries, even if it lacked access (¶ 122); (2) a paragraph setting forth a limited covenant not to sue (¶ 214); and (3) other paragraphs setting forth the scope of the release (¶¶ 216-17). App. 161-62.

Having concluded that the 1998 Consent Decree did not resolve Asarco's liability, the panel went on to consider whether the 2009 Consent Decree did. Although this decree merely funded the obligations that Asarco had already committed to in the 1998 Decree, the panel held that it resolved Asarco's liability

because it contained a covenant not to sue, as well as a broader release for all of Asarco's response obligations. App. 166-68. Thus, the panel concluded, it gave Asarco a new right to seek contribution toward its bankruptcy settlement payment.

Atlantic Richfield petitioned for rehearing, which was denied. App. 193.

3. The Ninth Circuit remanded, and Asarco's contribution claim proceeded to an eight-day bench trial. Applying the "law of the case," the court complied with the Ninth Circuit's earlier holding that Asarco's claims were not barred by the statute of limitations. App. 123-24. With respect to the amount of the judgment, the court determined that the total amount of necessary response costs incurred by Asarco were $111.4 million (its total bankruptcy settlement related to East Helena), and that Atlantic Richfield should be allocated 25% of those costs. App. 95-96, 120.[3]

Atlantic Richfield appealed both aspects of the judgment. It argued that the district court had erred in determining that the total amount of "necessary response costs" was $111.4 million because, although Asarco had paid that much in settlement, only

[3] The district court also credited Asarco's assertion that Anaconda and Atlantic Richfield had misled EPA and Asarco, primarily by incorrectly describing the zinc fuming plant as utilizing a "closed" piping system in documents sent to EPA and Asarco in 1990. App. 99-101. Based on these findings, the court awarded Asarco $1 million as an equitable "uncertainty" adjustment. App. 119-20. Atlantic Richfield disagreed with the court's conclusion, but did not challenge it on appeal.

$61 million had arguably been spent on "necessary response costs," *i.e.*, costs to remedy threats to human health and the environment at the Site. Second, Atlantic Richfield argued that the court erred in allocating 25% of those costs to Atlantic Richfield, where all of the available data showed that Atlantic Richfield's contribution was de minimis.

The Ninth Circuit agreed in part. It affirmed the 25% allocation. App. 18-20. However, with respect to the total amount of "necessary response costs," it agreed that the district court had erred by including speculative future costs that had not been "incurred." App. 9-11. It thus vacated the judgment and remanded for the district court to determine what necessary response costs had actually been "incurred," and were subject to allocation. App. 17-18.

Following remand, the district court held an evidentiary hearing on February 4-5, 2021, for the parties to present evidence regarding the total amount of necessary response costs that had been incurred. As of the filing of this petition, the district court has not issued a new final judgment.

REASONS THE PETITION SHOULD BE GRANTED

Because this case presents the same question that the Court will consider this term in *Government of Guam v. United States*, petitioner respectfully requests that the Court hold this petition pending its decision in *Guam*. As described below, the D.C. Circuit correctly analyzed the question of when a consent decree "resolves liability" and gives rise to a claim for contribution. If this Court affirms the decision of the

D.C. Circuit—as it should—the Ninth's Circuit's judgment in this case must be reversed and the case remanded for dismissal.

I. This Court Has Already Granted Certiorari on the Issue Presented by this Case.

In *Guam v. United States*, this Court granted certiorari on two issues that were also decided by the Ninth Circuit in this case—(1) whether a non-CERCLA consent decree triggers a cause of action under Section 113(f)(3)(B), and (2) whether a judicially approved consent decree in which a PRP commits to undertake certain response actions "resolves its liability" for those response actions, thus triggering its claim for contribution. *Guam*, Pet. for Writ of Certiorari at ii (filed Sept. 16, 2020); Brief for the United States in Opposition at I (filed Dec. 7, 2020), 208 L. Ed. 2d 510, __ S.Ct. __ (Jan. 8, 2021). Although the Ninth Circuit addressed both of these issues in this case, Atlantic Richfield seeks review of the second issue only, because the first issue was resolved in its favor.

The facts of this case present the same issue that this Court will consider in *Guam*. In defining the term "resolve its liability" in this case, the Ninth Circuit looked to the decisions of the Sixth and Seventh Circuits in *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552 (6th Cir. 2007), *ITT Industries, Inc. v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007), *Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014), *Florida Power Corporation v. FirstEnergy Corporation*, 810 F.3d 996 (6th Cir. 2015) and *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2012). After recounting the approaches taken in those cases,

the Ninth Circuit stated: "We adopt a meaning of the phrase 'resolved its liability' that falls somewhere in the middle of these various cases." App. 157. This holding plants the Ninth Circuit's holding squarely in the crossfire of the competing positions advocated by Guam and the United States.

The briefing and decisions in the *Guam* case confirm this. In its initial ruling, the district court in *Guam* reviewed these same cases, and ultimately adopted the approach of the Sixth and Seventh Circuits, observing that the Ninth Circuit "appears to have charted its own course in analyzing the effect of disclaimers of liability, conditional releases, broad reservations of rights, and the like." *Gov't of Guam v. United States*, 341 F. Supp. 3d 74, 88-89 (D.D.C. 2018). And, as Guam laid out in its Petition for Certiorari, the D.C. Circuit

> sided with the Ninth Circuit in holding that a settlement can trigger Section 113(f)(3)(B) even if it includes an express "disclaimer of liability" and a "covenant not to sue" conditioned on "full implementation of the settlement's requirements." But when it came to the reservation-of-rights provisions, the court embraced the United States' "disagreement with [that] part of *Asarco*'s holding." The court held that, despite Guam's continued legal exposure, all that matters is whether the settling party agreed to perform "'some' of a response action."

Guam, Pet. for Writ of Certiorari at 20 (internal citations omitted).

Asarco's holding falls squarely in the middle of the various circuit opinions that this Court will review in *Guam*, and in between the positions advocated by Guam and the United States. Thus, in answering the question posed by the parties in *Guam* regarding the meaning of the phrase "resolved its liability," this Court will necessarily decide the question presented by this petition.

II. This Court's Interpretation of "Resolved Its Liability" Will Determine the Outcome of This Case.

With respect to the question presented in this petition, the relevant facts and law addressed by this case and *Guam* are virtually identical. Thus, if the Court affirms the D.C. Circuit's opinion, the Ninth Circuit's opinion in this case must be reversed.

The operative facts of this case and Guam are virtually identical. In *Guam*, the Ordot Dump was placed on the NPL in the early 1980s and EPA began ordering Guam to take certain steps to investigate the Site. As the United States describes in its brief in opposition:

> In 2002, the [EPA] sued [Guam under the CWA, seeking injunctive and declaratory relief . . . . In 2004, the parties settled the suit in a court-approved consent decree. The decree, which constituted a final judgment, required [Guam] to pay a civil penalty, to take action to close the Ordot Dump, to halt the discharge of contaminants from the dump, and to build a new municipal landfill to replace the dump. The consent decree stated that the United States reserved the right to pursue claims for violations unrelated to the claims in its complaint; that petitioner would be released from the United States' claims when it complied with the settlement's requirements; and that the parties had entered the agreement "without any finding or admission of liability against or by the Government of Guam." Thirteen years later, petitioner filed this suit in the United States District Court for the District of Connecticut.

Guam, Br. in Opp'n at 4-5 (internal citations omitted).

By merely changing the dates, party names, and cleanup details, this same description applies equally to this case:

> In 1998, EPA sued Asarco under RCRA and the Clean Water Act, seeking injunctive and declaratory relief. In 1998, the parties settled in a court-approved consent decree. The decree, which constituted

> a final judgment, required Asarco to pay a civil penalty, to carry out a comprehensive Site cleanup, addressing critical source areas and contaminant migration pathways. The consent decree stated that the United States reserved the right to pursue claims for violations unrelated to the claims in its complaint; that Asarco would be released from the United States' claims when it complied with the settlement's requirements; and that Asarco's "assent to this Consent Decree shall not constitute or be construed as an admission of liability." Fourteen years later, Asarco filed this suit in the United States District Court for the District of Montana.

Approaching these virtually identical sets of facts, however, the D.C. Circuit and the Ninth Circuit reached different conclusions. Both courts agreed that resolution of liability was not defeated by either the lack of an admission of liability from the PRP, nor by the fact that a release did not occur until the PRP's work was complete. Both courts quoted the Seventh Circuit's decision in *Bernstein*, holding that to "resolve its liability," "the nature, extent, or amount of a PRP's liability must be decided, determined, or settled, at least in part, by way of agreement with the EPA.'" *Gov't of Guam v. United States*, 950 F.3d 104, 115 (D.C. Cir. 2020); App. 153.

And both courts agreed that it was the certainty of the PRP's commitment to perform the response action that determined whether liability had been resolved. Specifically, the Ninth Circuit held

that a "PRP 'resolve[s] its liability' to the government where a settlement agreement **decides with certainty and finality a PRP's obligations** for at least some of its response actions or costs as set forth in the agreement." App. 159 (emphases added); *Guam*, 950 F.3d at 116 ("[A] decree need not decisively determine every action that a party may one day be required to perform at the relevant site. What matters is whether what it *does* require qualifies as 'some' of a 'response action.'").

But instead of relying on the certainty of Asarco's obligations to undertake the response actions, the Ninth Circuit panel went further to analyze the precise scope of Asarco's release. The panel repeatedly acknowledged the 1998 Consent Decree unequivocally "obligated" Asarco to perform significant response actions at the Site. *See, e.g.*, App. 135 (1998 Consent Decree "required Asarco to take certain remedial actions to address past violations."); App. 150 ("[T]he 1998 Consent Decree obligated Asarco to [perform a corrective action]," which is a "response action."); App. 150 (describing "the scope of [Asarco's] obligations under the Decree"). These "obligations"—which Asarco committed to fund and perform under a judicially approved consent decree enforceable in federal court—were "decide[d] with certainty and finality." Despite these certain obligations, however, the panel held that the details of the release prevented a finding that Asarco had resolved its liability. *See, e.g.*, App. 160-61 (noting the *release* provision, Paragraph 209, "is expressly limited to liability with regards to the United States' claims for civil penalties"); App. 162 (indicating no resolution of liability because "Asarco's CERCLA liability for response costs would

not be *released* even if Asarco fully complied with the Decree" (emphasis added)).[4]

Considering virtually identical facts, the D.C. Circuit reached the opposite conclusion. Looking to the plain terms of Guam's 2004 Consent Decree, the court held that it resolved the claims asserted in the complaint in exchange for Guam's promise to take certain remedial actions. "EPA's Clean Water Act lawsuit, in other words, sought injunctive relief for Guam to take action that qualified as a 'response action,' and the 2004 Consent Decree released Guam from legal exposure for that claim in exchange for Guam's commitment to perform work that qualified as a 'response action.'" *Guam*, 950 F.3d at 116. Unlike the Ninth Circuit, the D.C. Circuit was not persuaded by Guam's arguments based on the government's broad reservations of rights. *Id.* And the court emphasized that

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[4] In addition to erroneously focusing on the scope of the release, the Ninth Circuit also misconstrued it. Specifically, the panel stated that the release was limited to civil penalties and did not include injunctive relief. App. 160-61. This is incorrect. The panel quoted the first half of Paragraph 214, App. 161, but then ignored the second half, which clearly states that EPA is foregoing its claims for injunctive relief: "so long as ASARCO remains in compliance with Part VII of this Decree, EPA shall not initiate a separate action under Sections 3008(h) and 3013 of RCRA … for work to be performed at the Facility." App. 252, ¶ 214. EPA further confirmed this when it published its Public Notice of the Consent Decree in the Federal Register, confirming that the decree "resolve[d] civil penalty *and injunctive relief claims* of the United States against ASARCO under RCRA." 63 Fed. Reg. 8473 (Feb. 19, 1998) (emphasis added); *see id.* ("The consent decree . . . resolves civil penalty claims of the United States against [ASARCO] under the CWA . . . [and] also resolves civil penalty *and injunctive relief claims* of the United States against ASARCO under RCRA…." (emphasis added)).

Section 113(f)(3)(B) requires that liability be resolved for only "some" of a response action—not that a decree need "decisively determine every action that a party may one day be required to perform at the relevant site." *Id.*

There are no material differences between Asarco's 1998 Consent Decree and Guam's 2004 Consent Decree. In each, the PRP committed to undertake response actions in exchange for the dismissal of the government's complaints against it, thus resolving its liability for some or all of a response action. If the D.C. Circuit is affirmed on this point, the Ninth Circuit's judgment in this case must be reversed and the case remanded for dismissal. And if the Court adopts an alternative test and remands for the D.C. Circuit to apply that test in Guam, the Court should grant, vacate, and remand for application of that same test in this case.

III. The Facts of this Case Illustrate Why the D.C. Circuit was Correct.

The application of a statute of limitations often has an element of severity. In *Guam*, the D.C. Circuit noted that "[f]rom Guam's perspective, the result we reach today is harsh." 950 F.3d at 118. But the unique facts of *Guam* should not distract from the important policies advanced by CERCLA's statute of limitations for contribution claims.

Civil statutes of limitations "represent a public policy about the privilege to litigate," and "their underlying rationale is 'to encourage promptness in the bringing of actions.'" *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (quoting *Mo., Kan. & Tex. R.*

Co. v. Harriman, 227 U.S. 657, 672 (1913)). Limitations periods "are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected, they promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared, and they are primarily designed to assure fairness to defendants." *Id.* (citations omitted). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* Statutes of limitations also ensure that courts are "relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Id.*

In this case, Asarco had worked with the EPA since the early 1980s to investigate the environmental hazards of the East Helena Superfund Site. Because Asarco had leased the land for the zinc fuming operation to Atlantic Richfield, had acquired the operation in 1972, and had run the operation itself for at least a decade, it had direct and extensive knowledge of any contribution of the zinc fuming plant to the Site's contamination. Throughout the 1980s and 1990s, Asarco conducted numerous Site investigations to characterize the contamination at the Site and never once identified the zinc fuming operation as a significant contributor.

With this knowledge, Asarco in 1998 entered a comprehensive settlement agreement with EPA, in which Asarco undertook to perform a complete

remediation of the Site in exchange for the EPA's dismissal of its claims. Seven years after entering the 1998 Consent Decree, Asarco filed for bankruptcy. In the bankruptcy proceedings, Asarco fully acknowledged its obligations, undertaken in the 1998 Consent Decree, to cleanup the East Helena Superfund Site, and agreed to fund that cleanup with a cash payment. This 2009 Consent Decree *imposed no new work obligations* on Asarco.

In 2012, three years after entering its bankruptcy settlement, and *forty years* after Atlantic Richfield had ceased any operations at the Site, Asarco sought for the first time to demand contribution from Atlantic Richfield for work that Asarco had committed to perform in 1998. The irony of the situation is that it was only *because* Asarco abdicated its duties and filed for bankruptcy that it was able to enter a second decree and gain a new chance to make a claim for contribution. Had Asarco not filed for bankruptcy, it would have had no basis to resurrect its untimely contribution claim.

On these facts, the Ninth Circuit acknowledged that it was Atlantic Richfield whose "ox g[ot] gored" and recognized the unfairness of "allow[ing] Asarco to benefit from its own alleged neglect under the RCRA Decree." App. 168. Had the Ninth Circuit properly applied CERCLA's statute of limitations, this problem would have been avoided. The Court should affirm the D.C. Circuit's analysis and ensure the just resolution of this case.

CONCLUSION

Atlantic Richfield requests that the Court hold this petition pending resolution of *Guam*, and then grant, vacate, and remand the petition for reconsideration in light of *Guam*.

Respectfully submitted,

SHANNON WELLS STEVENSON
Counsel of Record
KENZO S. KAWANABE
BENJAMIN B. STRAWN
ADITI KULKARNI-KNIGHT
DAVIS GRAHAM &
STUBBS LLP
1550 17th St., Suite 500
Denver, CO 80202
(303) 892-9400
shannon.stevenson@dgslaw.com

Counsel for Petitioner

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