No. 20-1337

IN THE

Supreme Court of the United States

APC INVESTMENT CO. ET AL.,

Petitioners,

v.

HOWMET AEROSPACE INC. ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) authorizes parties who have paid more than their fair share to clean up a contaminated site to seek "contribution" from other liable parties. The statute authorizes two types of contribution claims, each with distinct statutory requirements. The first allows parties to seek contribution during or following CERCLA lawsuits against other potentially liable parties at the site. *See* 42 U.S.C. § 9613(f)(1). The second allows parties to seek contribution after entering into certain settlement agreements with the United States. *See* 42 U.S.C. § 9613(f)(3)(B).

In this case, the Ninth Circuit evaluated the timeliness of Respondents' action under the first type of CERCLA contribution claim (under subsection (f)(1)). By contrast, in *Guam v. United States*, No. 20-382, this Court is considering requirements unique to the second type of contribution claim (under subsection (f)(3)(B))—in particular, whether Guam's settlement with the United States under the Clean Water Act "resolved [Guam's] liability to the United States" for "a response action." 42 U.S.C. § 9613(f)(3)(B). That critical language appears only in the provision governing the second type of CERCLA contribution claim, not in the provision governing this case.

The question presented is:

Should the Court decline to hold this petition pending its decision in *Guam* and deny certiorari without regard to the outcome of *Guam*?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

1. Respondent Arconic, Inc., formerly known as Alcoa Inc., is now named Howmet Aerospace Inc. It has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock. The Vanguard Group, a privately owned investment management company, holds more than ten percent (10%) of the outstanding shares in Howmet Aerospace Inc.

2. Respondent Applied Micro Circuits Corporation is now named MACOM Connectivity Solutions, LLC, and is a wholly owned subsidiary of MACOM Technology Solutions Inc., a Delaware corporation. MACOM Technology Solutions Inc. is a wholly owned subsidiary of MACOM Technology Solutions Holdings, Inc., a publicly traded Delaware corporation.

3. Respondent BASF Corporation is a wholly owned subsidiary of BASF Americas Corporation. BASF Americas Corporation is a wholly owned subsidiary of BASFIN Corporation. BASFIN Corporation is a majority-owned subsidiary of BASF USA Holding LLC, a Delaware limited liability company. BASF USA Holding LLC is a wholly owned subsidiary of BASF Nederland BV, a Dutch limited liability company. BASF Nederland BV is a wholly owned subsidiary of BASF SE (Societas Europaea), a publicly held European company.

4. Respondent Baxter Healthcare Corporation is a wholly owned subsidiary of Baxter International Inc., a publicly held corporation.

5. Respondent Cal-Tape & Label Co. has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

6. Respondent California Hydroforming Company, Inc. has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

7. Respondent Cintas Corporation has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

8. Respondent Columbia Showcase & Cabinet Company, Inc. has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

9. Respondent Crosby & Overton, Inc. has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

10. Respondent Disney Enterprises, Inc. is a wholly owned subsidiary of The Walt Disney Company, a publicly held corporation.

11. Respondent FHL Group has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

12. Exchange Building Corporation is the parent corporation of Respondent Forenco, Inc. No publicly held corporation owns ten percent (10%) or more of Respondent Forenco, Inc.'s stock.

13. Respondent General Dynamics Corporation has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

14. Respondent Hercules, Inc. is now named Hercules LLC, reflecting its change from a stock corporation to a membership company. It is a wholly owned subsidiary of Ashland Inc., a publicly held corporation.

15. Respondent Hexcel Corporation has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

16. Respondent Honeywell International Inc. is a public company, and no publicly held corporation owns ten percent (10%) or more of its stock.

17. Respondent International Paper Company has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

18. Respondent Masco Corporation of Indiana has been incorrectly identified. Its correct name is Masco Building Products Corporation. It is a wholly owned subsidiary of Masco Corp., a publicly traded company.

19. Respondent Mattel, Inc. has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

20. Merck & Co., Inc. is the parent corporation of Respondent Merck Sharp & Dohme Corp. No other publicly held corporation owns ten percent (10%) or

more of Respondent Merck Sharpe & Dohme Corp.'s stock.

21. Respondent Pilkington Group Limited, formerly known as Pilkington PLC, is an indirect wholly owned subsidiary of Nippon Sheet Glass Co., Ltd., a publicly traded company in Japan.

22. Respondent Quest Diagnostics Clinical Laboratories, Inc. is a wholly owned subsidiary of Quest Diagnostics Holdings Incorporated, which is a subsidiary of Quest Diagnostics Incorporated, a publicly held corporation.

23. Respondent Raytheon Company has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock.

24. Respondent Safety-Kleen Systems, Inc. is a wholly owned subsidiary of SK Holding Company, Inc., which is a wholly owned subsidiary of Safety-Kleen, Inc. Safety-Kleen, Inc. is a wholly owned subsidiary of Clean Harbors, Inc., a publicly traded company.

25. Brilliant National Services, Inc., a privately held company, is the parent corporation of Respondent Soco West, Inc. No publicly held corporation owns ten percent (10%) or more of its stock.

26. Respondent Sparton Technology, Inc. is a wholly owned subsidiary of Sparton Corporation, a publicly traded corporation.

27. Respondent The Boeing Company has no parent corporation. As of May 12, 2021, no corporation

had filed a Schedule 13G with the U.S. Securities and Exchange Commission disclosing ownership of ten percent (10%) or more of the stock of Respondent The Boeing Company.

28. Respondent The Dow Chemical Company is a wholly owned subsidiary of Dow Inc., a publicly traded company.

29. Respondent TriMas Corporation has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock. The Wellington Management Group, a privately owned investment management company, holds more than ten percent (10%) of the outstanding shares in TriMas Corporation.

30. Respondent Univar USA Inc. is now named Univar Solutions USA Inc., and is a wholly owned subsidiary of Univar, Inc. No publicly held corporation owns ten percent (10%) or more of Univar Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 969 F.3d 945. The opinion of the district court (Pet. App. 24-73) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2020. A petition for rehearing was denied on October 21, 2020 (Pet. App. 76). The petition for writ of certiorari was filed on March 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Petitioners urge this Court to hold their petition pending disposition of *Guam v. United States*, No. 20-382. But *Guam* has nothing to do with this case.

The only way Petitioners can even suggest a connection between this case and *Guam* is by misstating the questions at issue. Petitioners frame the question in both cases as whether "the statutory claim for contribution in section 113 of CERCLA … [is] governed exclusively by the statute's text without reference to 'common law' or other non-CERCLA principles of contribution." Pet. i. That is not the question presented in *Guam*. *Guam* raises two interpretive questions about specific words in the provision governing a claim for contribution under CERCLA § 113(f)(3)(B). This case, by contrast, analyzed a different contribution cause of action, CERCLA § 113(f)(1), and raises different questions of interpretation. The critical

language this Court is parsing in *Guam* does not even appear in the provision that governs this case.

Moreover, this Court has no reason to "consider and decide" in *Guam* whether common law principles inform the interpretation of CERCLA's contribution provisions as a general matter, Pet. i, because, as both parties in *Guam* agree, this Court has already resolved that question: CERLCA does incorporate the common law understanding of contribution. The D.C. Circuit's opinion in *Guam* likewise looked to the common law in construing the contribution provision at issue there.

The Ninth Circuit did the same in construing the distinct contribution provision at issue here. Far from "reject[ing]" the statutory text, Pet. 14, the court of appeals started with, and focused intensely on, the text. A key word in the text is "contribution," and so, as one part of its analysis, the court of appeals followed this Court's direction and invoked common law to inform what that word means.

Guam is so irrelevant to this case that the Ninth Circuit did not even comment on the D.C. Circuit's analysis. Nor did Guam's petition for certiorari even cite the decision in this case, much less feature it as a basis for finding a circuit conflict. And, as if to confirm the harmony between the two opinions, the same Government that defends the D.C. Circuit's opinion in *Guam* also filed a brief as amicus curiae advocating the result and analysis the Ninth Circuit reached in this case.

The Ninth Circuit's decision was a factbound holding on the timeliness of a particular contribution action based on a correct interpretation of CERCLA § 113(f)(1) and (g)(3). Petitioners' effort to hitch their case to *Guam* should fail. This Court should reject Petitioners' request to hold the case and deny the petition outright.

STATEMENT OF THE CASE

1. Congress enacted CERCLA to address the serious environmental and health risks posed by properties contaminated with hazardous substances. 42 U.S.C. § 9601, Pub. L. No. 96-510, 94 Stat. 2767 (1980). CERCLA "provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted).

CERCLA offers EPA two mechanisms for holding parties responsible for an environmental "response," defined as an action to "remove, … remedy, and remedia[te]" contamination. 42 U.S.C. § 9601(25). One option is for EPA to undertake the response itself and then, under CERCLA § 107, recover "all costs of removal or remedial action" from the responsible parties. 42 U.S.C. § 9607(a); *see Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 609 (2009). Alternatively, EPA may order a responsible party to undertake the response itself under EPA supervision, pursuant to CERCLA § 106. *See* 42 U.S.C. § 9606. Under either avenue, liability under CERCLA is joint and several: The Government can recover its response costs from *any* "covered person," commonly referred to

as "potentially responsible parties," *id.* § 9607(a)(1)-(4), or order *any* potentially responsible party to take response actions directly, *id.* § 9606.

When joint and several liability would otherwise require a party to incur a disproportionate share of cleanup costs, CERCLA offers several routes for "private parties to recoup [those] costs" from others. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 163 n.3 (2004). The first, CERCLA § 107, applies to "a private party that has itself incurred cleanup costs," such as a party who has voluntarily begun cleaning up a site. *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007). Section 107(a) allows such parties "to recover costs from other [potentially responsible parties]." *Id.* at 141; *see* 42 U.S.C. § 9607(a)(4)(B).

The second route allows parties to seek contribution for cleanup costs imposed on them through litigation or settlement. In that circumstance, defendants held liable for more than their fair share in an initial litigation or settlement may seek "contribution" from others responsible for the contamination. CERCLA § 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section [107(a)] …, during or following any civil action under" § 106 or § 107(a). 42 U.S.C. § 9613(f)(1).

A separate contribution remedy applies to those private parties who incurred their liability in a settlement with the federal Government or a State. Under § 113(f)(3)(B), a "person who has resolved its liability to the United States or a State" in "an administrative or judicially approved settlement" may also bring a

contribution action against a non-party to that settlement. 42 U.S.C. § 9613(f)(3)(B).

The "cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties," but the "two remedies are clearly distinct." *Cooper Indus.*, 543 U.S. at 163 n.3. The remedies "complement each other by providing causes of action to persons in different procedural circumstances." *Atl. Research*, 551 U.S. at 139 (internal quotation marks omitted).

Section § 113(f) contribution claims are subject to a three-year statute of limitations. Section 113(g)(3) provides: "No action for contribution for any response costs or damages may be commenced more than 3 years after … (A) the date of judgment in any action … for recovery of such costs or damages, or (B) the date of … entry of a judicially approved settlement with respect to such costs or damages." 42 U.S.C. § 9613(g)(3).

2. In the mid-1990s, EPA discovered that a waste recycling plant in California operated by the Omega Chemical Corporation had been mishandling toxic chemicals sent to it for processing for years, "severely contaminating nearby soil and groundwater." Pet. App. 5. Further study revealed that Omega was only one of several contributors to a large plume of contamination spanning at least four miles. Pet. App. 7.

EPA set about developing a plan for cleaning up the Superfund site, dividing it into discrete, incremental phases called "operable units." Pet. App. 5.

EPA started its cleanup efforts by addressing the soil and groundwater contamination in the very small area at and immediately surrounding the Omega facility, which it designated "Operable Unit 1" (OU-1). Pet. App. 5-6.

3. Respondents are a subset of the thousands of customers who had trusted Omega to properly dispose of their chemicals, and thus were potentially liable for the contamination Omega caused. They were potentially responsible for the cleanup of OU-1 because CERCLA imposes strict liability for cleanup costs not only on owners or operators of facilities that directly release hazardous substances (like Omega), but also on any entity that merely sent hazardous substances to those facilities for disposal or treatment (like Respondents). 42 U.S.C. § 9607(a)(1)-(4).

Respondents banded together with a handful of other Omega customers to form the Omega Chemical Potentially Responsible Parties Organized Group (OPOG). Pet. App. 5. EPA and OPOG negotiated the cleanup of OU-1, ultimately agreeing that OPOG would lead the remedial efforts under EPA oversight. Pet. App. 5. Once the parties had reached a consent decree covering OU-1, the United States formally filed an action against OPOG under CERCLA § 106 and § 107 and simultaneously lodged the proposed consent decree with the district court for judicial approval. Pet. App. 5-6. The cleanup work mandated by the OU-1 consent decree focused almost entirely on efforts to contain groundwater contamination at the Omega facility and prevent it from spreading beyond OU-1's boundary. Pet. App. 6.

Having both been sued by the United States under CERCLA § 106 and § 107 and incurred response costs in the consent decree, OPOG's next step was to sue under CERCLA § 107(a) and § 113(f)(1) to recover its excess costs from over a hundred other Omega customers who had also sent hazardous substances to Omega but had refused to participate in the OU-1 cleanup. Pet. App. 6. EPA designated many of the defendants in those suits "de minimis defendants" because their contribution to the contamination was comparatively small in amount and effect. Pet. App. 6; *see* 42 U.S.C. § 9622(g)(1)(A). Because these actions were focused on OU-1, they did not target Petitioners in this case—Omega's neighbors, who contributed to pollution along the large plume *outside* of OU-1.

OPOG and the de minimis defendants reached a judicially approved settlement in 2007. Pet. App. 6. In keeping with their minimal liability, the de minimis defendants paid OPOG $1.7 million to settle OPOG's claims for OU-1.

Meanwhile, after finalizing the OU-1 consent decree, EPA turned its attention to Operable Unit 2 (OU-2), its name for the effort to address the groundwater contamination in the broader Superfund site. Pet. App. 7. OU-2 covered not just contamination that had migrated from the Omega facility itself, but also significant amounts of contamination that *other* properties within the region had released. Pet. App. 7. After years of study, EPA announced its OU-2 remediation plan in 2011. Pet. App. 7.

OPOG promptly began OU-2 response work. Petitioners, by contrast, refused to work with EPA or

OPOG to fund or participate in the OU-2 work. By 2014, OPOG had already incurred considerable OU-2 costs. So it sued Petitioners under CERCLA § 107, which allows a party who has undertaken voluntary remedial action to seek "cost recovery" from others. Pet. App. 8.

After EPA determined that OPOG members were potentially responsible parties for OU-2, OPOG and EPA crafted a consent decree in 2016 covering a significant portion of the cleanup work required for OU-2. Pet. App. 7. Once the deal was struck, the Government again filed an action against OPOG under CERCLA § 107 and simultaneously lodged the proposed consent decree with the district court for judicial approval. Pet. App. 7. The district court approved the OU-2 consent decree in March 2017. Pet. App. 7.

After the Government filed its complaint in April 2016, OPOG amended its complaint against Petitioners to drop its cost-recovery claim and to substitute a contribution claim, because it was now subject to a suit under § 106 or § 107 for OU-2, and thus eligible to assert a contribution claim for OU-2. Pet. App. 8. In this case, OPOG seeks contribution for the $16.5 million it has already spent on response work in OU-2 and for the tens of millions more it expects to incur as the cleanup continues over the next 30-plus years.

4. Petitioners here are among the defendants in that contribution action. They sought summary judgment, arguing that OPOG's 2007 settlement agreement with the de minimis defendants (concerning OU-1) triggered the three-year statute of limitations for any contribution action OPOG might ever bring

against anyone related to any part of the Superfund site. After issuing two tentative orders initially rejecting Petitioners' arguments, Pet. App. 25 n.1, the district court reversed course, accepting Petitioners' statute of limitations argument and granting them summary judgment, Pet. App. 24-73.

The court determined that the costs OPOG seeks here are the same as those "covered in" the 2007 settlement agreement and therefore held that this suit was time-barred because it sought "response costs or damages" more than "3 years after … the date of … entry of a judicially approved settlement with respect to such costs or damages," 42 U.S.C. § 9613(g)(3)(B). Pet. App. 58-73.

5. Respondents appealed, supported by amicus briefs from the United States and the California Department of Toxic Substances Control. The court of appeals unanimously reversed. Pet. App. 1-23.

"Starting … with the statute's text," the court explained that it found "the limitations provision's applicability to claims for 'contribution' largely dispositive." Pet. App. 11. Following this Court's guidance in *Atlantic Research* that "[n]othing in § 113(f) suggests that Congress used … 'contribution' in anything other than [its] traditional sense," the Ninth Circuit reiterated that the term "refers to the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share.'" Pet. App. 11 (quoting *Atl. Research*, 551 U.S. at 138) (alterations in original).

Based on the plain text of § 113(g)(3), which provides that the limitations period is triggered by a "settlement with respect to such costs," the Ninth Circuit held that a settlement "starts the limitations period on a § 113(f)(1) claim for response costs only if it imposed those costs and serves as the basis for seeking contribution." Pet. App. 12-13. The court noted that, in this action, Respondents "seek[] the [Petitioners'] share of the liability [Respondents] assumed in the 2017 OU-2 consent decree"—so it is that consent decree, and not the 2007 settlement agreement, that triggered the statute of limitations on Respondents' contribution claim. Pet. App. 13. The 2007 settlement agreement did not "address those costs," "resolve[] … who would pay for OU-2's remediation nor what that effort would entail," "impose on [Respondents] any response costs or remedial obligations," or "extinguish [Respondents'] and [Petitioners'] common liability to the United States for OU-2." Pet. App. 13. Accordingly, that earlier agreement "did not start the limitations period." Pet. App. 13.

The court of appeals was unpersuaded by Petitioners' arguments to the contrary. The court rejected Petitioners' "capacious" reading in which "the limitations period" for a § 113(f)(1) contribution claim "could expire prior to the filing of a § 106 or § 107 claim" that would give rise to the contribution claim. Pet. App. 14-15. The court explained that such a "nonsensical" interpretation would "contravene[] not only the central tenet of common-law contribution, but also the 'standard rule' that a limitations period does not run—let alone expire—before a party can assert the associated claim." Pet. App. 14-16 (quoting *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016)). The court concluded

that "CERCLA's symmetrical scheme for pursuing contribution claims," precedent from this Court and the Ninth Circuit, the legislative history, and CERCLA's remedial objectives all supported its interpretation of the plain statutory text. Pet. App. 16-21.

The Ninth Circuit denied rehearing and rehearing en banc, with no judge calling for a vote on the petition. Pet. App. 76.

REASONS FOR DENYING CERTIORARI

Petitioners' main contention (Pet. i, 7-8) is that this Court should hold their petition pending disposition of *Guam v. United States*. A hold is unwarranted, however, because nothing this Court says in *Guam* will have any bearing on this case.

The only similarity between the cases is that both relate to the timeliness of CERCLA contribution claims. But the questions of statutory interpretation are entirely different. *Guam* raises two interpretive questions about specific words in the provision governing a claim under CERCLA § 113(f)(3)(B). This case, by contrast, analyzed a different contribution cause of action, CERCLA § 113(f)(1), raising different questions of interpretation. That is why the Ninth Circuit did not even cite—much less dispute—the D.C. Circuit's analysis in *Guam*, even though Petitioners cited that decision to the court below in two separate Fed. R. App. P. 28(j) letters shortly after oral argument. That is why Guam's petition for certiorari did not cite the decision in this case as part of any conflict among the courts of appeals, even though the decision below was issued over a month before

Guam's petition. And that is why the United States went out of its way to file an amicus brief supporting Respondents here (the contribution plaintiffs) even as it appeared as the defendant in a contribution action in *Guam*.

Petitioners do not otherwise contend that the decision below conflicts with any decision of this Court or any court of appeals. The court of appeals correctly applied CERCLA § 113(f)(1) and (g)(3) to the specific sequence of litigations at issue here. That factbound holding does not warrant review.

I. Holding This Petition For *Guam* Is Unwarranted Because This Case Presents Different Questions On Different Facts Concerning Different Statutory Provisions.

The first indication that something is terribly amiss with Petitioners' portrayal of a connection between *Guam* and this case comes on page i, where Petitioners resort to misstating the question presented in *Guam*, as follows:

> Is the statutory claim for contribution in section 113 of CERCLA … governed exclusively by the statute's text without reference to "common law" or other non-CERCLA principles of contribution?

Pet. i. That is not even close to the question presented in *Guam*. Nor does it remotely capture what the court of appeals decided here.

The dispute in *Guam* concerns whether, in a settlement between the United States and Guam under the Clean Water Act, Guam accrued a contribution claim against the United States under CERCLA § 113(f)(3)(B). The two questions presented in *Guam* revolve around the meaning of the italicized words of § 113(f)(3)(B), which provides that a contribution claim accrues only to:

> [a] person who has *resolved its liability to the United States* or a State *for some or all of a response action* or for some or all of the costs of such action in an administrative or judicially approved settlement.

42 U.S.C. § 9613(f)(3)(B) (emphasis added). Those words are not in the statutory provision at issue here and those questions bear no relation to any question the court of appeals resolved below. So *Guam*, regardless of its outcome, will not affect this case. We address first the actual questions presented in *Guam* and then turn to Petitioners' assertion of a thematic inconsistency between the D.C. Circuit's opinion in *Guam* and the opinion below.

A. Neither question presented in *Guam* is relevant to this case.

1. The first question presented in *Guam* is whether Guam accrued a § 113(f)(3)(B) contribution claim when it entered into "a non-CERCLA settlement" (specifically, a settlement that resolved claims brought under the Clean Water Act). *Guam* Petr. Br. ii. That question is irrelevant here.

At the most basic level, the key factual predicate is absent here, because the settlement that Petitioners say triggered Respondents' contribution claim in this case resolved claims under CERCLA itself. *See supra* at 7 (the 2007 settlement agreement arose from Respondents' CERCLA § 107(a) and § 113(f) suit).

As important, the statutory language that resolves the question in *Guam* is not at issue here. Petitioners assert that Respondents accrued a § 113(f)(1) contribution claim in 2007 when they settled with the de minimis defendants. So the only contribution provision in dispute here is CERCLA § 113(f)(1)—not § 113(f)(3)(B), as in *Guam*, because the 2007 settlement did not involve any government counterparty. But nothing in § 113(f)(1) asks whether a party has "resolved its liability to the United States … for some or all of a response action." That language appears only in § 113(f)(3)(B). The parties in *Guam* are debating what kind of "liability" must be resolved under § 113(f)(3)(B): liability in a suit under CERCLA itself (Guam's position), or liability that merely obligates the settling party to perform cleanup activities falling within CERCLA's ambit (the United States' view). Whatever the answer to that question, it will not impact the analysis of claims under a statute that does not contain that requirement.

Indeed, both sides in *Guam* agree that a contribution claim under § 113(f)(1) (the type of claim at issue here) arises only from a lawsuit under CERCLA. *Compare Guam* Petr. Br. 14, *with* U.S. Br. 27. That much is clear from § 113(f)(1)'s plain text, which authorizes a contribution claim only "during or following any civil action under [CERCLA § 106] or under

[CERCLA § 107(a)]"). 42 U.S.C. § 9613(f)(1). So, whether the same is true of § 113(f)(3)(B), or whether that provision is broader in scope, would not affect this case.

2. The second question presented in *Guam* is equally irrelevant here. It asks whether Guam actually "resolved its liability to the United States" when it included several caveats in its settlement of the Government's suit against it: Guam disclaimed any admission of liability; the United States reserved certain rights to sue Guam in the future; and the settlement's liability release was contingent on Guam's performance under the agreement. *See Guam* Petr. Br. 41-43. But none of those features is present here, and so this Court's evaluation of their legal effect will be immaterial to this case.

Indeed, resolution of the second question presented in *Guam* will have no bearing on the proper interpretation of § 113(f)(1). Once again, the question focuses on contribution claims under a different statutory provision—§ 113(f)(3)(B). It involves the same disputed phrase ("resolved its liability") that appears only in § 113(f)(3)(B)—not in § 113(f)(1). And the 2007 settlement that Petitioners say triggered the limitations period on Respondents' § 113(f)(1) contribution claim was not one in which Respondents "resolved [*their*] liability" at all: Respondents were the *plaintiffs* in that action, suing the de minimis defendants for contribution. *See supra* at 7.

Accordingly, whether or not Guam's resolution of liability against it as a *defendant* immediately gave rise to a § 113(f)(3)(B) contribution claim,

notwithstanding the settlement features Guam points to, would not affect the court of appeals' conclusion here that Respondents did not accrue a § 113(f)(1) contribution claim when they settled a case against third parties that they had brought years earlier.

B. Petitioners' assertion of a thematic tension with the D.C. Circuit's *Guam* decision is meritless.

Despite the stark differences between the two cases, Petitioners assert a sort of thematic tension. They build their petition around the claim that "this case and *Guam* present the same issue—what controls the application of section 113: the text or 'traditional contribution principles'?" Pet. 8 (header formatting omitted). Petitioners assert that the court of appeals below chose an "atextual" approach, in contrast to the D.C. Circuit's textual approach in *Guam*. Pet. 17. That is a grotesquely inaccurate portrayal of the opinion below, the D.C. Circuit's opinion in *Guam*, and the arguments before this Court in *Guam*. Even if this Court were to affirm the D.C. Circuit's decision that Petitioners paint as contrary, it would not affect this case.

1. As to the opinion below, at no point did the court of appeals say—or even suggest—that "atextual principles trump CERCLA's directives," Pet. 17, or that "federal courts are free to rewrite section 113 based on" common law principles, Pet. 11. The first words of the court's analysis were: "Starting, as we must, with the statute's text …" Pet. App. 11. The court focused on the meaning of the word

"contribution," which is not defined in the statute. Pet. App. 11-12. It wrestled with the phrase "settlement with respect to *such costs*." Pet. App. 12-13 (emphasis added). It addressed Petitioners' parsing of "with respect to," noting that one problem with their reading was that "we construe statutory language in context." Pet. App. 14. It noted the absurd results that would arise from Petitioners' "broad construction of 'settlement' and 'costs,'" choosing what it considered "[t]he better reading." Pet. App. 15, 17. It "construe[d] 'judicially approved settlements.'" Pet. App. 17 n.5. There was nothing atextual about this careful dissection of the statutory text.

The only basis on which Petitioners contend that the court of appeals elevated common law over text was a passage addressing the meaning of the word "contribution." Petitioners fault the court of appeals for giving this undefined word its ordinary legal meaning based on its "common law" roots. Pet. 10-11. But the court was not citing "'basic precepts of common law contribution' as the basis for not enforcing the natural meaning of CERCLA's text." Pet. 7. It was following this Court's "settled principle of interpretation that … Congress intends to incorporate the well-settled meaning of the common-law terms it uses" unless it indicates otherwise. *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (internal quotation marks omitted). Indeed, the court of appeals was following this Court's own application of that principle to this very word in this very statute: "Nothing in § 113(f) suggests that Congress used the term 'contribution' in anything other than this traditional sense." *Atl. Research*, 551 U.S. at 138.

2. More to the point, there is simply no conflict between the decision below and the D.C. Circuit's decision in *Guam*. To start, the D.C. Circuit expressly *agreed* with existing Ninth Circuit precedent holding that "[a]t common law, tortfeasors … were typically entitled to 'contribution.'" *Gov't of Guam v. United States*, 950 F.3d 104, 107 (D.C. Cir. 2020). *Contra* Pet. 10-11 (denying that a common law of contribution exists). And the D.C. Circuit's description of that common-law right of contribution—a "'right to collect from joint tortfeasors when, and to the extent that, the tortfeasor has paid more than his or her proportionate share to the injured party,'" *Guam*, 950 F.3d at 107 (quoting Black's Law Dictionary (11th ed. 2019))—is exactly the same as the decision below. *See* Pet. App. 11 (in its "'traditional sense,' the term [contribution] refers to the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share'" (quoting *Atl. Research*, 551 U.S. at 138)). The decision below may have said more about the common-law roots of contribution claims than the D.C. Circuit did. But both understand CERCLA contribution claims to work the same way.

Nothing about the D.C. Circuit's opinion presented a "disagreement … about the primacy of CERCLA's text." Pet. 2. The D.C. Circuit looked to the "ordinary meaning" of the phrase "resolved its liability," *Guam*, 950 F.3d at 115, in the very same way that the opinion below addressed the traditional meaning of "contribution." And it was the D.C. Circuit—not the court of appeals below—that explicitly said that it would not "read" § 113(f)(3)(B) "literally," as that "could create non-sensical results." *Guam*, 950

F.3d at 112. So Petitioners are simply wrong that the court below considered CERCLA's "context" in construing the statute, while the D.C. Circuit eschewed context in favor of "the text of 113" to resolve the questions before it. Pet. 6, 9. Both did exactly what Petitioners concede is appropriate: They read § 113 "in a fashion that recognizes and combines the various unique moving parts of CERCLA in a specific and easily applied manner." Pet. 13.

3. The petition also contorts what the parties are arguing to this Court in *Guam*. Contrary to Petitioners' portrayal of the question presented in *Guam* (quoted above, at 12), the parties there are not disputing what the term "contribution" means in CERCLA. To the contrary, everyone in *Guam* agrees that Congress used the word "contribution" in its traditional sense; neither party is asking the Court to adopt Petitioners' interpretation. And both parties in *Guam*, like the D.C. Circuit, flatly reject Petitioners' assertion here that "[n]o 'traditional principles' of contribution exist, nor is there a 'common law' of contribution." Pet. 10.

On one side of the case is Guam, which asserts that "[c]ontribution is a longstanding and familiar legal term," and "Congress used the term in its traditional sense in Section 113(f)." *Guam* Petr. Br. 21 (internal quotation marks omitted); *see also Guam* Petr. Br. 34-35 (the United States' position would "upend[] the traditional understanding of contribution animating Section 113(f)(3)(B), which … requires the resolution of a *common* liability"); *Guam* Petr. Br. 39, 40; *Guam* Reply Br. 9-11, 16. At no point, however, does Guam make the assertion that Petitioners

attribute to it: "that 'traditional contribution principles' override the text of section 113." Pet. 7. Rather, Guam acknowledges that the text controls. *E.g.*, *Guam* Petr. Br. 16 ("The text of Section 113(f)(3)(B) … compels the conclusion that Section 113(f)(3)(B) requires the resolution of CERCLA liability.").

There is no dispute from the other side about these basic principles. The Government—the defendant in the contribution action, defending the D.C. Circuit's holding—explains that the substantive rules that govern contribution should "be read to reflect" the "background law of contribution"—"not to depart from it." *Guam* U.S. Br. 37; *see id.* ("A statute 'is not to be construed as making any innovation upon the common law which it does not fairly express.'" (quoting *Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879))); *see also Guam* U.S. Br. 2, 28-30, 39. And it explains that, by specifying that contribution claims "shall be governed by Federal law," 42 U.S.C. § 9613(f)(1), (f)(3)(C), CERCLA specifically "authoriz[es] the federal courts to develop the applicable substantive rules [for contribution claims] as a matter of federal common law." *Guam* U.S. Br. 4; *see also id.* at 25.

Put simply, the dispute between the parties in *Guam* is not over whether common law is relevant in interpreting CERCLA's text; everyone agrees it is. And the dispute is not over whether common law trumps text; everyone agrees it does not. The dispute is over *how* those common law principles affect Guam's claim.

The briefing aside, there is another strong indication that Petitioners are wrong in asserting that

ruling against the Government in *Guam* will undermine the result in this case: The Government was defending against Guam's contribution claim at the very same time that it supported Respondents' position in the court of appeals here. And here, too, the Government rejected the position Petitioners are now pressing (and mistakenly attributing to the D.C. Circuit). The Government insisted that "[t]raditional common-law notions of contribution confirm that OPOG's OU-2 contribution claims were not triggered by the 2007 settlement." U.S. Amicus Br. *14, *Arconic Inc. v. APC Investment Co.*, No. 19-55181, 2019 WL 3430370 (9th Cir. July 22, 2019).

For all these reasons, there is no possibility that this Court's decision in *Guam* will cast any doubt on the court of appeals' conclusion below—and certainly not on the basis Petitioners assert.

II. The Decision Below Is Correct.

The court of appeals correctly held that a settlement "starts the limitations period on a § 113(f)(1) claim for response costs only if it imposed those costs and serves as the basis for seeking contribution." Pet. App. 12-13. This conclusion flows from the plain text of the statute, the traditional operation of a contribution claim, this Court's precedent, and the structure and purpose of CERCLA. And because no court of appeals has held to the contrary, this Court's review is unwarranted.

1. Under CERCLA § 113(g)(3), a contribution action "for any response costs or damages" may not be commenced more than three years after the date of

"entry of a judicially approved settlement *with respect to such costs or damages*." 42 U.S.C. § 9613(g)(3) (emphasis added). The key legal holding of the court of appeals in this case is that the italicized words mean that only a "contribution claim for *particular remedial costs* is subject to a three-year statute of limitations," and the limitations period applies only "once liability [*for those particular costs*] … becomes recognized through a judicially approved settlement." *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015) (emphasis added). The phrase "such costs" means that the limitations period triggered by a judicially approved settlement runs only for the "costs" imposed by that settlement. Conversely, there "is no limit in the statute to prevent a party in an early settlement from seeking contribution related to a later settlement, as long as those settlements cover separate obligations." *Whittaker Corp. v. United States*, 825 F.3d 1002, 1011 (9th Cir. 2016) (quoting *Celanese*, 792 F.3d at 1215) (concluding that a party's right to contribution extends *only* to the party's expenses that were at issue in the triggering litigation or settlement).

Every circuit to address the question agrees with this holding. *See Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 13 (1st Cir. 2004) (reasoning that the phrase "such costs or damages" "identifies a particular claim or payment" and limits only the time period in which to recover costs that were actually incurred in a prior judgment or settlement, not for "any response costs or damages that could arise in the future"); *RSR Corp. v. Com. Metals Co.*, 496 F.3d 552, 559 (6th Cir. 2007) ("[W]e likewise construe 'such costs or damages' in

§ 113(g)(3)(B) to refer only to those 'costs or damages' imposed by the judicially approved settlement.").

Traditional requirements of a contribution action confirm this interpretation. For the reasons already discussed (at 16-21), the court of appeals was correct in concluding that Congress used the word "contribution" in § 113(f) to capture its "traditional" meaning: a "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share" of a "common liability." *Atl. Research*, 551 U.S. at 138-39 (quoting Black's Law Dictionary 353 (8th ed. 2004)); *see* Restatement (Second) of Torts § 886A (1979). A person seeking contribution must first "extinguish the liability of the person against whom contribution is sought for that portion of liability." Restatement (Third) of Torts § 23 cmt. b (2000).

It is only *after* a party has extinguished a common liability owed to a third party that it can seek contribution from all other parties who should share in that common liability; and the contribution plaintiff may seek only "that portion of liability" it singlehandedly satisfied in the earlier action. *Id.* It follows that when § 113(g)(3) refers to the limitations period for a contribution action being triggered by an earlier settlement, that limitations period extends only to the liability extinguished in the settlement and thus eligible to be pursued via contribution—that is, the "such costs" imposed by the agreement. And because the costs for which Respondents seek contribution here arose in 2017—not from the 2007 settlement agreement that Petitioners point to—the statute of

limitations did not begin to run until 2017, and thus Respondents' claim was timely. Pet. App. 11-22.

2. The court of appeals was also correct in explaining that this interpretation is consistent with CERCLA's structure and purpose. Pet. App. 16-17, 19-21. Under "CERCLA's symmetrical scheme for pursuing contribution claims," Congress provided that a contribution claim accrues when a party is sued under § 106 or § 107(a), and the statute of limitations on a contribution claim against others who should share in the liability then begins to run "once *that litigation* settles or ends by judgment" and the defendant in the initial suit "knows the scope of its obligations." Pet. App. 16-17 (quoting *Celanese*, 792 F.3d at 1209). In accordance with this structure, the cleanup during a typical CERCLA project is divided into incremental work phases; as the Government determines its plan for each cleanup phase, it sues potentially responsible parties to conduct or pay for the work required, and those parties bring corresponding contribution actions against others who should by right share in their liability for that phase. Pet. App. 16-17.

Petitioners' approach, by contrast, "would make a mess of both § 113(f) and the traditional workings of contribution." Pet. App. 17. It would contravene the remedial objectives of CERCLA by punishing the very parties Congress sought to protect by adding a right of contribution to the statute—those who cooperated early with the Government and agreed to take on "a share of the cleanup or cost that [is] greater than [their] equitable share under the circumstances" to get the response underway quickly. H.R. Rep. No. 99-253, pt. 1, at 79 (1985). It would impede the "phased

and orderly resolution of response obligations for complex sites." Pet. App. 20. And it would undermine an important aspect of the CERCLA regime by discouraging settlements with de minimis potentially responsible parties, agreements that "supply a needed influx of funds for cleanup work," "simplify[] litigation," and "reduc[e] transaction costs." Pet. App. 19-20; *see also* Office of Solid Waste & Emergency Response Directive No. 9834.7-1C, *Methodology for Early De Minimis Waste Contributor Settlements Under CERCLA Section 122(g)(1)(A)*, at 2 (1992).

3. The petition challenges only the court of appeals' statutory construction, not how the court applied § 113(g)(3)'s plain meaning to the facts before it. *See* Pet. 12-19. That factbound analysis is far from cert-worthy.

It is also correct. The court of appeals correctly held that Respondents' contribution claim was not time-barred because the costs they incurred under the 2007 settlement agreement are not the same "costs" for which they seek contribution here. Pet. App. 11-19. The 2007 settlement agreement primarily involved a payment *to* Respondents by the de minimis defendants for their share of OU-1 costs, Pet. App. 6-7; it was also an indemnification agreement by which Respondents agreed to assume liability for the unrealized future liability the de minimis defendants might face across the Superfund site. The agreement did not impose any costs on Respondents, much less the ones sought in this case, which instead arose directly from Respondents' 2017 consent decree with the Government concerning the later OU-2 phase of the cleanup. Thus, the court of appeals properly

applied these principles to find that the limitations clock did not start running until 2017, when the district court approved the OU-2 consent decree between Respondents and the Government.

* * *

In any event, Petitioners will get another shot at the Ninth Circuit even without a hold. The case reached the Ninth Circuit in an interlocutory posture (on a partial final judgment under Fed. R. Civ. P. 54(b)); and since the Ninth Circuit remanded, the case has been proceeding apace in the district court, where cross-motions for summary judgment are currently pending. If Petitioners are ultimately dissatisfied with the district court's final judgment, they are free to address any new arguments to the Ninth Circuit at that time. Given the interlocutory posture, there is no need for this Court to step in at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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