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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JAMES BRIGGS HARRIS
Counsel of Record
STEPHEN F. FINK
THOMPSON & KNIGHT LLP
1722 Routh Street
Suite 1500
Dallas, Texas 75201
Telephone: (214) 969-1700
james.harris@tklaw.com
stephen.fink@tklaw.com

Counsel for Petitioners
Additional counsel listed on signature page

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX TABLE

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

The Court has now answered the question the petition presents: whether the statutory claim for contribution in section 113 of CERCLA is governed by the statute's text without reference to any common-law or other non-CERCLA principles of contribution that may exist. The answer is "yes." *Territory of Guam v. United States*, No. 20-382, slip op., at 4–6 (May 24, 2021). Despite both parties in *Guam* invoking "traditional" or "common-law" principles to support their interpretation of section 113, the Court focused entirely on CERCLA's text and structure. The Court observed that there is no "general federal right of contribution," *id.* at 5, making clear that the scope of any right to contribution under CERCLA (or other federal statutes) is controlled by the statutory language creating the right. In short, the arguments about other asserted contribution principles were not relevant.

This reply explains why, given the Court's decision in *Guam*, the Court should grant the petition, vacate the Ninth Circuit's decision, and remand the case to the Ninth Circuit for reconsideration in light of *Guam*. Alternatively, if the Court disagrees with petitioners' reading of *Guam*, the question presented meets the Court's criteria for review and for that reason the petition should be granted.

REPLY ARGUMENT

I. *GUAM*, BY RELYING ON CERCLA'S TEXT AND STRUCTURE WITHOUT REFERENCE TO COMMON-LAW OR OTHER NON-CERCLA PRINCIPLES OF CONTRIBUTION, CONFIRMS THE ERROR OF THE NINTH CIRCUIT'S APPROACH IN THIS CASE.

In *Guam* both parties argued that non-textual principles drawn from state contribution statutes and judicial decisions supported their positions. *See* Brief for Petitioner at 20–24 (Feb. 22, 2021); Brief for Respondent at 28–30 (March 24, 2021); Reply Brief of Petitioner at 9 (April 16, 2021). To decide the case the Court addressed virtually every argument offered by the United States, the losing party—except its reliance on state contribution statutes and state judicial decisions. Yet the Court also did not bolster its reasoning with the contrary state statutes and state judicial decisions Guam cited. The Court treated both lines of authority as immaterial.

The Court began and ended its analysis with the text of CERCLA: "[S]ubsection 113(f)…governs the scope of a 'contribution' claim under CERCLA." *Guam*, slip op., at 4; *see also id.* at 5 ("The most obvious place to look for [the contours of a CERCLA contribution claim] is CERCLA's reticulated statutory matrix…."); *id.* at 4 (focusing on "the totality of subsection 113(f)").

The Court's entire discussion of CERCLA's statute of limitations provisions focused on CERCLA's words and structure. *See id.* at 5 ("[S]tatutes must 'be read as a whole,'…an especially salient approach…given that CERCLA's very title reinforces that it is a 'Comprehensive' Act.") (internal citation

omitted); *id.* (examining "[t]he interlocking language and structure of the relevant text….").

The Court stressed that "there is no 'general federal right to contribution'" and criticized "the United States' invitation to treat §113(f)(3)(B) as a free-roving contribution right for a host of environmental liabilities arising under other laws." *Id.* (internal citation omitted). It further emphasized that "[r]emaining within the bounds of CERCLA is…consistent with the familiar principle that a federal contribution action is virtually always a creature of a specific statutory regime." *Id.*

And when the Court narrowed its focus to the statute of limitations for CERCLA contribution, it explained that its "straightforward [textual] inquiry has the additional 'benefit' of 'provid[ing] clarity' for the 3-year statute of limitations." *Id.* at 8 n.4 (internal citation omitted). In much the same way, interpreting "with respect to such costs" in section 113(g)(3)(B) according to its natural meaning is simpler, clearer, and more predictable than overlaying the words with concepts from state contribution statutes and state judicial decisions.

Instead of adopting that straightforward approach, the Ninth Circuit and respondents claim that the presence in CERCLA's text of the word "contribution" provides a springboard for courts to import into CERCLA procedural and substantive requirements drawn from purported "common-law" or "traditional" principles of contribution. But the Court's textual approach and plain-meaning interpretation of CERCLA in *Guam* show that the Ninth Circuit was wrong.

If the Ninth Circuit's approach were correct, after noting CERCLA's use of the word "contribution," *id.* at 4, the Court in *Guam* would have focused on what "liabilities" state statutes and judicial decisions treated as "common." But it didn't. Instead the Court turned to the words of CERCLA—the "obvious place," *id.* at 5, and the "natural referent," *id.* at 6—to start, and end, its inquiry.

Because the basis for the Ninth Circuit's decision is in conflict with *Guam*, certiorari should be granted, the decision vacated, and the matter remanded for reconsideration in light of *Guam*.

Alternatively, if by not discussing the use of purported common-law contribution principles to interpret section 113 the Court intended to reserve that question, this case presents the appropriate vehicle for resolving it. The answer has far-reaching implications: for the administration of CERCLA and uniformity in how CERCLA contribution works, *see id.* at 8 n.4 (discussing the proper functioning of the statute of limitations for CERCLA contribution), and for primacy of the text in statutory interpretation.

The Court does not limit itself to resolving direct conflicts among decisions of the courts of appeals. The Court also takes cases to clarify legal doctrine with systemic harmful practical consequences for critically important national policies. *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342, 358 (2013) ("Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor…. The proper interpretation and implementation of § 2000e–3(a) and its causation standard have central importance to

the fair and responsible allocation of resources in the judicial and litigation systems.").

Longstanding practice convenient to an administrative agency—the principal argument made by the Environmental Protection Agency ("EPA") as amicus in the Ninth Circuit supporting respondents—also does not prevent the Court from granting a petition. That is especially true when the agency practice is contrary to the statutory text, regardless of any tendency among the courts of appeals to acquiesce in the practice of convenience. *See AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341, 1349–51 (2021).

OPOG, of course, asks the Court to reject review by repeating the tired "factbound" mantra to characterize the Ninth Circuit's holding. Respondents' Brief in Opposition ("BIO") at 3, 12, 25. But its own description of the decision shows otherwise. The Ninth Circuit did not mention a single disputed historical or record fact in its key reasoning.

If the Ninth Circuit's decision is not vacated and remanded for reconsideration, for the reasons noted—and because of the conflicts identified in the petition—the case justifies full review.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH CONTROLLING AUTHORITY OF THIS COURT ON THE USE OF COMMON LAW TO INTERPRET STATUTES AND OVERLOOKS THAT NO COMMON LAW OF CONTRIBUTION EXISTS.

OPOG argues that petitioners "fault the court of appeals for giving this undefined word [contribution] its ordinary legal meaning." BIO at 17. Petitioners anticipated and rebutted that exact contention, without

acknowledgment in OPOG's response. Pet. at 11. That courts ordinarily assume "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," BIO at 17, is a point on which in fact "everyone agrees," *id.* at 20. But "contribution" is just a concept—sharing responsibility for a common liability—not the process for how to share. As petitioners showed, Pet. at 10–11, again without contradiction by OPOG, the common law could not have addressed how to sue, where to sue, for what to sue, who could sue or be sued, and most importantly for this case, when to sue—because the common law did not allow claims for contribution.

Answering the critical "how to sue, where to sue, for what to sue, who may sue whom, and when to sue" questions has instead occurred as a result of nearly every state legislature enacting statutes to override the common law's rejection of contribution.[1] In other words, the transformation of contribution from a concept rejected by the common law to an accepted remedy with detailed and complex rules governing when it can be sought and how it is recovered has been nearly entirely statutory and mostly in connection with common-law negligence claims. So neither the fundamental legal context nor the legal rules for enforcing the claim are suited for importation wholesale into CERCLA, especially in light of Congress's goal that responsible parties undertake clean-up through

[1] *See* Donald A. Smith, *A Survey of Contribution: Equal or Fault-Based Shares*, 14 Loy. U. Chi. L.J. 649, 650–51 (1983). And what the Restatement of Torts seeks to coherently explain is almost exclusively those statutes. *See* Pet. App. 12 n.2, 15 n.3 (Ninth Circuit discussing the Restatement).

settlements rather than obtain monetary restitution through judgments.

Disputes about CERCLA contribution in reported cases almost always turn on the "how, where, for what, who, and when" questions not on the meaning of the word "contribution." And, as petitioners just noted, there are no common-law or traditional answers to those questions. That practical reality distinguishes CERCLA from those statutes where the Court has held that the text must be treated as imbued with common-law meaning:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of *centuries of practice*, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Morissette v. United States, 342 U.S. 246, 263 (1952) (emphasis added). The word "contribution" is the opposite of such a "term[] of art." Its mere presence in a statute therefore provides no warrant for assuming that any "cluster of ideas" is attached to it, much less adopting any such ideas into statutory text that does not mention them.

As petitioners have already demonstrated, Pet. at 12–13, 15–16, the text of CERCLA answers the "how, where, for what, who, and when" questions about the claims for contribution created in section 113. And it provides enforcement rules tailored to the unique paradigm created by CERCLA to deal with damage to the environment from releases of hazardous substances.

Thus, even if there were—or could have been—anciently settled common-law or traditional contribution answers, in CERCLA Congress has "otherwise instructed." *Morissette*, 342 U.S. at 263. "[W]hen a statute intervenes, and displaces the common law, we are brought to a question of words, and are bound to take the words of the statute as law." *Amy v. City of Watertown*, 130 U.S. 301, 316 (1889).

OPOG claims that the Ninth Circuit did take the words of CERCLA as law. That court, OPOG asserts, "started with, and focused intensely on, the text." BIO at 2. But the assertion is immediately exposed as a mirage: "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." *Id.* That is, without even a reference to the rest of CERCLA's text the Ninth Circuit used the dictionary meaning of the word "contribution" to choose from among a welter of state statutory requirements for having and prosecuting a claim for contribution, mainly in negligence actions, *see* Pet. App. at 12 n.2, 15 n.3,[2] based on ideas borrowed from the EPA about sound enforcement policy.[3]

---

[2] The very high degree of indeterminacy associated with what is meant by "common-law" and "traditional" contribution gives courts the flexibility to pick from a smorgasbord of available principles and traditions, *see* https://www.mwl-law.com/wp-content/uploads/2018/02/JOIN-AND-SEVERAL-LIABILITY-AND-CONTRIBUTION-LAWS.pdf, allowing statutory text to be bent to judicial policy preferences as well as undercutting the uniform application of section 113 as enacted by Congress.

[3] U.S. Amicus Br., *17–20, *Arconic Inc. v. APC Inv. Co.*, No. 19-55181, 2019 WL 3430370 (9th Cir. July 22, 2019).

If the Court does not vacate and remand the Ninth Circuit's decision, full review is warranted here because the Ninth Circuit failed to acknowledge much less follow this Court's decisions about the relationship between statutory text and the common law, with implications not just for CERCLA but for text-based interpretation generally.

III. THE ORDINARY MEANING OF THE WORDS USED IN SECTIONS 107(A)(4), 113(F)(1), AND 113 (G)(3)(B) DICTATE WHEN OPOG HAD A CLAIM FOR CONTRIBUTION FROM PETITIONERS AND WHEN THE STATUTE OF LIMITATIONS STARTED AND EXPIRED ON THE CLAIM.

OPOG submits that review by the Court is not appropriate because the Ninth Circuit's decision is "correct." BIO at 21. Although OPOG's suggestion is mistaken in that the Court does grant review and affirm, the bigger problem is that OPOG's premise is wrong: the Ninth Circuit's decision is not correct.

In 2004 OPOG asserted a claim for contribution against what the petition calls the Small PRPs. S. App. at 1.[4] In 2007 OPOG entered into a judicially approved settlement of the 2004 action. That settlement specifically provided that OPOG "shall assume each Settling Party's responsibilities for the Site." S. App. at 53.[5] As a result, and given the settling Small PRPs' presumptively joint and several liability, OPOG effec-

[4] For the Court's convenience a copy of the 2004 contribution complaint is included in the supplemental appendix.

[5] The 2007 settlement agreement is also included in the supplemental appendix.

tively accepted liability for all costs "across the Superfund site [all "operable units"]," BIO at 25, subject of course to their right to seek contribution from other PRPs. As characterized by OPOG itself, the 2007 settlement "was…an indemnification agreement by which respondents agreed to assume liability for the unrealized future liability the de minimis defendants [Small PRPs] might face *across the Superfund site*." BIO at 25 (emphasis added).

In the district court's view, Pet. App. at 24–73, the language controlling the reach of section 113(g)(3)(B), "with respect to such costs," requires only that "such costs" be referred to or addressed in a judicially approved settlement. OPOG agrees, as noted, that it assumed in the 2007 settlement of the 2004 contribution action liability for *all* costs at the Omega site. That necessarily includes "OU-1" and "OU-2" or, in OPOG's words, "liability the de minimis defendants might face across the Superfund site." BIO at 25. And it is undisputed that OPOG is suing petitioners for the costs addressed in the 2007 settlement. That was enough to make the settlement, in the district court's judgment, "with respect to" the costs OPOG now seeks to recover from petitioners. Pet. App. at 56–73.[6]

According to OPOG the phrase "with respect to such costs" has been construed in earlier cases to mean only costs addressed in a judicially approved settlement that have been "incurred," which OPOG says means "paid" or at least "imposed." BIO at 4, 9–

[6] In asking for judicial approval of the 2007 settlement, OPOG went to great lengths to establish that the settlement was fair by estimating that the cost of dealing with the problems in "OU-2" (part of *all* costs) would be over $100,000,000, and by estimating each settlor's volumetric share.

10, 18, 21–23. Costs simply mentioned or addressed in the settlement do not qualify, OPOG contends. If that were so, and petitioners do not concede OPOG's reading of the cited cases, those holdings contradict the "capacious," Pet. App. at 14, "with respect to" standard that Congress enacted.

But even if the words "with respect to" mean that the costs had to be "incurred" as OPOG claims, the "well-settled" and "precise" meaning of "incurred" includes to "bring on oneself…a liability or expense," as Justice Gorsuch wrote while a judge on the Tenth Circuit. *See* Pet. at 15–16 (discussing *In re Dawes*, 652 F.3d 1236, 1239 (10th Cir. 2011)). "Assume," the word OPOG itself used to describe its obligation in the 2007 settlement, means "The act of taking (esp. someone else's debt or other obligation) for or on oneself." *Assumption*, Black's Law Dictionary (Tenth ed. 2014). A closer match with the definition of "incurred" is difficult to imagine. In sum, by the terms of the 2007 judicially approved settlement, OPOG "incurred" liability for *all* costs "across the Superfund site" and its contribution claim against petitioners was time-barred as of 2010, four years before this lawsuit was filed.

The only way to avoid that conclusion is the path chosen by the Ninth Circuit and endorsed by OPOG: use "common-law principles" to add words ("operable unit," "extinguish," "paid," "imposed," "unrealized future") that Congress did *not* use in CERCLA to neuter the words that Congress *did* use ("with respect to" and "incurred"). But that transforms the statutory language "with respect to such costs" into "with respect to only such costs as are paid for a defined operable

unit, attributable to settlors, and addressed in a settlement with the United States." Congress could have said that in CERCLA. But it didn't.

CONCLUSION

The petition for a writ of certiorari should be granted, the Ninth Circuit's decision vacated, and the matter remanded for reconsideration in light of *Guam*, or alternatively granted for full review.

Respectfully submitted,

JAMES BRIGGS HARRIS
Counsel of Record
STEPHEN F. FINK
THOMPSON & KNIGHT LLP
1722 Routh Street
Suite 1500
Dallas, Texas 75201
(214) 969-1700
james.harris@tklaw.com
stephen.fink@tklaw.com

CHRISTOPHER G. FOSTER
One South Orange Grove
Boulevard No.2
Pasadena, CA 91105
(626) 799-4950
cfoster910@gmail.com

Counsel for APC Investment Co., Associated Plating Company, Associated Plating Company, Inc., Gordon E. McCann, Lynnea R. McCann, Darrell K. Golnick, Clare S. Golnick, and Cheryl A. Golnick

TAMMY M. HONG
DEMETRIOU, DEL GUERCIO, SPRINGER & FRANCIS, LLP
915 Wilshire Boulevard
Suite 2000
Los Angeles, CA 90017
(213) 624-8407
tmjhong@ddsffirm.com

Counsel for Earl Mfg. Co. and Claudette Earl

GREGORY J. PATTERSON
MUSICK, PEELER & GARRETT LLP
2801 Townsgate Road
Suite 200
Westlake Village, CA 91361
(805) 418-3103
g.patterson@mpglaw.com

Counsel for Bodycote Thermal Processing, Inc.

EARL L. HAGSTRÖM
DANIEL TROWBRIDGE
BASSI EDLIN HUIE & BLUM LLP
500 Washington Street
Suite 700
San Francisco, CA 94111
(415) 397-9006
ehagstrom@behblaw.com
dtrowbridge@behblaw.com

JORDAN N. GRAY
GENERAL COUNSEL
PMC GLOBAL, INC.
12243 Branford Street
Sunnyvale, CA 91352
(818) 896-1101
jordangray@pmcglobal-inc.com

Counsel for Ferro Corp. and PMC Specialties Group, Inc.

MICHAEL E. GALLAGHER, JR.
BASSI, EDLIN, HUIE & BLUM LLP
515 South Flower Street
Suite 1020
Los Angeles, CA 90071
(213) 412-2661
mgallagher@behblaw.com

FARHEENA A. HABIB
BASSI EDLIN HUIE & BLUM LLP
500 Washington Street
Suite 700
San Francisco, CA 94111
(415) 397-9006
fhabib@behblaw.com

Counsel for Interveners Fireman's Fund Insurance Company; Federal Insurance Company, as Insurers for Palley Supply Company

WILLIAM D. WICK
ANNA L. NGUYEN
WACTOR & WICK LLP
3640 Grand Avenue
Suite 200
Oakland, CA 94610
(510) 465-5750
anguyen@ww-envlaw.com
bwick@ww-envlaw.com

Counsel for Halliburton Affiliates, LLC

MEGAN S. MEADOWS
JENNIFER F. NOVAK
LAW OFFICE OF JENNIFER F. NOVAK
500 Silver Spur Road,
Suite 206
Rancho Palos Verdes, CA 90275
(310) 693-0775
megan@jfnovaklaw.com
novak@jfnovaklaw.com

Counsel for Foss Plating Company, Inc.

VICTOR J. OTTEN
OTTEN LAW, PC
5857 Pine Avenue
Suite B
Chino Hills, CA 91709
(310) 378-8533
vic@ottenlawpc.com

Counsel for Kekropia, Inc.

ROBERT P. DOTY
COX, CASTLE & NICHOLSON LLP
50 California Street
Suite 3200
San Francisco, CA 94111
(415) 262-5100
rdoty@coxcastle.com

CATHY T. MOSES
COX, CASTLE & NICHOLSON LLP
3121 Michelson Drive
Suite 200
Irvine, CA 92612
(949) 260-4600
cmoses@coxcastle.com

Counsel for Palmtree Acquisition Corp.

DAVID R. ISOLA
STEPHEN B. ARDIS
ISOLA LAW GROUP, LLP
405 West Pine Street
Lodi, CA 95240
(209) 367-7055
disola@isolalaw.com
sardis@isolalaw.com

Counsel for Powerine Oil Company

ZACHARY WALTON
ROBERT B. MARTIN, III
SSL LAW FIRM LLP
505 Montgomery Street
Suite 620
San Francisco, CA 94111
(415) 814-6400
zack@ssllawfirm.com
rob@ssllawfirm.com

Counsel for Phibro-Tech, Inc. and First Dice Road Company, Inc.

DAVID E. CRANSTON
PETER A. NYQUIST
SEDINA L BANKS
SHERRY E. JACKMAN
GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP
2049 Century Park East, Suite 2600
Los Angeles, CA 90067
(310) 785-6897
dcranston@ggfirm.com
PNyquist@ggfirm.com
sbanks@ggfirm.com
sjackman@ggfirm.com

Counsel for Union Pacific Railroad Company

Dated: May 28, 2021