No. 20-382

In the Supreme Court of the United States

GOVERNMENT OF GUAM,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

For nearly half a century, the United States Navy discarded toxic waste at a dump that the Navy created in the 1940s on the island of Guam, an unincorporated territory of the United States, without any environmental safeguards. The Navy then left Guam to clean up the site—a project that is likely to cost more than $160 million. Guam brought this suit to recover cleanup costs from the United States under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a), which allows parties to recover remediation costs from other responsible parties within six years of the initiation of a remedial action. The district court concluded that Guam's claim could proceed.

The D.C. Circuit, however, held that Guam's claim was precluded by CERCLA Section 113(f)(3)(B), in a decision that deepens two acknowledged circuit conflicts. Section 113(f)(3)(B) establishes a contribution remedy for any party that "has resolved its liability to the United States or a State for some or all of a response action" in a "judicially approved settlement," subject to a three-year statute of limitations. *Id.* § 9613(f)(3)(B). Here, the D.C. Circuit held that Section 113(f)(3)(B) was triggered by a decade-old consent decree settling claims under the Clean Water Act (CWA)—even though that decree did not mention CERCLA, explicitly disclaimed any finding of liability, and left Guam exposed to future liability. And given that Guam filed suit more than three years after the consent decree was entered, the court held that Guam's action is barred.

The questions presented are:

1. Whether a non-CERCLA settlement can trigger a contribution claim under CERCLA Section 113(f)(3)(B).

2. Whether a settlement that expressly disclaims any liability determination and leaves the settling party exposed to future liability can trigger a contribution claim under CERCLA Section 113(f)(3)(B).

RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

Guam v. United States, No. 19-5131 (Feb. 14, 2020), *reh'g denied* (May 13, 2020)

United States District Court (D.D.C.):

Guam v. United States, No. 17-cv-2487 (Oct. 5, 2018), *appeal certified* (Feb. 28, 2019)

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-26a) is reported at 950 F.3d 104. The district court's opinion certifying the case for interlocutory appeal (Pet. App. 27a-50a) is available at 2019 WL 1003606. The district court's opinion denying the United States' motion to dismiss (Pet. App. 51a-97a) is reported at 341 F. Supp. 3d 74.

JURISDICTION

The court of appeals entered its judgment on February 14, 2020, and denied rehearing on May 13, 2020. Pet. App. 1a, 98a-99a. The petition for a writ of certiorari was timely filed on September 16, 2020, and granted on January 8, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the addendum to this brief. Add. 1a-17a.

STATEMENT OF THE CASE

This case concerns when a settlement with the government triggers a contribution claim under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601 *et seq*. Sections 106 and 107(a) of CERCLA impose liability on responsible parties for cleaning up hazardous substances. *Id.* §§ 9606, 9607(a). Section 113(f) authorizes liable parties to seek contribution from other liable parties for cleanup costs in response to either a civil action under Sections 106 or 107(a), *id.* § 9613(f)(1), or a settlement with the United States or a State, *id.* § 9613(f)(3)(B).

Section 113(f)(3)(B)—the key provision at issue—states that "[a] 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 may seek contribution from any person who is not party" to such a settlement. *Id.* The first question presented is whether Section 113(f)(3)(B) is triggered by a settlement that does not resolve liability imposed by CERCLA. The second question is whether, regardless of the answer to the first question, a settlement "resolve[s]" liability when it explicitly disclaims any finding of liability and leaves the settling party exposed to future liability. The answer to both questions is no.

The dispute here involves a dump—the Ordot Dump—that the United States Navy created on the island of Guam during World War II and used for decades to dispose of munitions and toxic waste. After Guam took over the operation of the dump in its role as a Territorial Government and used it for various municipal purposes, the United States sued Guam under the Clean Water Act (CWA), for alleged permit violations in connection with the site. The United States and Guam ultimately settled the CWA claims in a 2004 consent decree that, among other things, explicitly disclaimed any finding of liability and preserved Guam's exposure to liability in the future.

Guam later filed this action to recover costs from the United States under CERCLA Section 107(a) for the Navy's role in creating and using the Ordot Dump. But the D.C. Circuit held that the 2004 CWA Consent Decree triggered a contribution claim under CERCLA Section 113(f)(3)(B), and that Guam's claim was time-barred by the shorter statute of limitations governing contribution claims under Section 113(f). That ruling leaves Guam, alone, to "foot the bill" (Pet. App. 26a)

for the estimated $160 million cleanup—a staggering sum for Guam and its people.

As explained below, the D.C. Circuit's decision is based on two separate errors in construing Section 113(f)(3)(B), each of which requires reversal.

A. Statutory Background

1. Congress enacted CERCLA in 1980 "to address 'the serious environmental and health risks posed by industrial pollution.'" *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1345 (2020) (citation omitted). Following on the heels of disasters like Love Canal, CERCLA established a "Superfund" to "facilitate government cleanup of hazardous waste," *Exxon Corp. v. Hunt*, 475 U.S. 355, 359-60 (1986), and a remedial scheme to "ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination," *Atlantic Richfield*, 140 S. Ct. at 1345 (alteration in original) (citation omitted).

CERCLA directs the President—acting primarily through the Environmental Protection Agency (EPA)—to designate and prioritize contaminated sites for cleanup. 42 U.S.C. §§ 9605, 9615. Once EPA has designated such a Superfund site, EPA can (1) undertake an appropriate "response" action itself using the Superfund to pay for it, *id.* § 9604; (2) compel, through an administrative order or a request for judicial relief, responsible parties to undertake a "response" action, *id.* § 9606; or (3) enter into an agreement with another party to perform a "response action" if EPA "determines that such action will be done properly," *id.* § 9622(a).

CERCLA defines "response" to mean "removal" and "remedial" actions. *Id.* § 9601(25). A "removal" action is "the cleanup or removal of hazardous

substances from the environment" as well any of several actions "taken in the event of . . . the release or threat of release of hazardous substances." *Id.* § 9601(23). A "remedial" action is an action "consistent with permanent remedy taken instead of or in addition to removal actions" that is designed "to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.* § 9601(24).

2. While the costs of cleaning up a Superfund site can be enormous, CERCLA establishes a comprehensive scheme to ensure that the liability for such costs is fairly allocated among responsible parties. Section 107(a) imposes "[l]iability" for certain response costs on four classes of "[c]overed persons," *id.* 9607(a), also known as "potentially responsible persons" or "PRPs," *Atlantic Richfield*, 140 S. Ct. at 1352 (citation omitted).[1] Under Section 107(a), PRPs are "liable" for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe," 42 U.S.C. § 9607(a)(4)(A); *see id.* § 9601(27) (defining "State" to include Guam), as well as "any other necessary costs of response incurred by any other person," including another PRP, *id.* § 9607(a)(4)(B). *See United States v. Atlantic Research Corp.*, 551 U.S. 128, 135-36 (2007).

These provisions render PRPs "jointly and severally liable for the full cost of the cleanup," *Atlantic Richfield*, 140 S. Ct. at 1346, subject to ordinary common-law apportionment principles, *see Burlington N. & Santa Fe Ry. Co. v. United States*,

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[1] CERCLA defines "person" to include "Guam" and the "United States Government." 42 U.S.C. § 9601(21), (27).

556 U.S. 599, 613-15 (2009). Claims to recover remediation costs under Section 107(a) are subject to a six-year statute of limitations that commences upon the "initiation of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2)(B).

As originally enacted, CERCLA did not expressly address whether a party that "had been sued in a cost recovery action . . . could obtain contribution from other PRPs." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162 (2004). In the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, Congress "clarifie[d] and confirm[ed]" that parties "liable under CERCLA [can] seek contribution from other potentially liable parties," H.R. Rep. No. 99-253, pt. 1, at 79 (1985), by expressly authorizing contribution claims in CERCLA Section 113(f), 42 U.S.C. § 9613(f).

Section 113(f)(1) authorizes contribution claims between "liable parties," and 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 [Section 106] or [Section 107(a)]." *Id.* § 9613(f)(1). Under Section 113(f)(2), a party that "has resolved its liability to the United States or a State in an administrative or judicially approved settlement" is immune from contribution claims by other parties. *Id.* § 9613(f)(2). And in Section 113(f)(3), Congress addressed the implications of a settlement on non-settling parties. *Id.* § 9613(f)(3). Section 113(f)(3)(B) confirms that settling parties can seek contribution from non-settling parties:

> 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 may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

Id. § 9613(f)(3)(B).

Claims seeking "contribution for any response costs" are subject to a three-year statute of limitations that commences upon either "the date of judgment in any action under this chapter for recovery of such costs," *id.* § 9613(g)(3)(A), or "the date of an administrative order under [CERCLA Sections 122(g) or 122(h)] or entry of a judicially approved settlement with respect to such costs," *id.* § 9613(g)(3)(B).

The remedies in Sections "107(a) and 113(f) complement each other by providing causes of action 'to persons in different procedural circumstances.'" *Atlantic Research*, 551 U.S. at 139 (citation omitted). In certain circumstances, however, the remedies can overlap. *See id.* at 139 n.6. And because Section 113(f) has stricter procedural requirements, including a shorter limitations period, the lower courts have concluded that Sections 107(a) and 113(f) are "mutually exclusive," such that "'a party who *may* bring a contribution action'" under Section 113(f) "'*must* use the contribution action, even if a cost recovery action would otherwise be available.'" Pet. App. 10a-11a (citation omitted); *see* BIO 3-4.

B. Factual Background

1. Guam is a 30-mile-long island in the west central Pacific, about 1400 miles from the Philippines and 6000 miles from California. *See* Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 314-15

(1989). The United States acquired Guam in 1898 following the Spanish-American War. *See* Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. II, 30 Stat. 1754, 1755. The United States then placed Guam under control of the Navy, which treated it as a ship—the "USS Guam"—and governed it under military rule. Pet. App. 5a. Aside from the period between December 1941 and July 1944, when the Japanese military invaded and brutally occupied the island, the Navy exercised exclusive control over Guam until Congress passed the Organic Act of Guam in 1950. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 186 (1990); Leibowitz, *supra*, at 318-19, 323-25.

The Organic Act purported to transfer power from the military to a civilian government and grant U.S. citizenship to Guam's residents. Even then, however, the Federal Government in Washington, D.C., retained a tight grip on the island. For example, visitors could not access the island without a security clearance until the 1960s, and the Governor of Guam was handpicked by the Federal Government until 1970. Pet. App. 5a; JA 65-66. Despite receiving U.S. citizenship in 1950, Guam's residents did not publicly elect their own governor until decades later in 1971. JA 66. The military continued to use the island during the Korean and Vietnam Wars, taking advantage of its strategic location in the Pacific.

Today, Guam remains an unincorporated territory of the United States, *see* 48 U.S.C. § 1421a, with nearly 170,000 residents. The United States military maintains a firm footprint on the island, occupying approximately 25% of its land mass and operating two separate bases (Naval Base Guam and Andersen Air Force Base), with a third (Marine Corps Base Camp Blaz) currently under construction.

2. a. In the 1940s, while the Navy had exclusive control over Guam, the Navy created the Ordot Dump for the disposal of municipal and military waste in a ravine that slopes into the Lonfit River, almost in the middle of the island. Pet. App. 5a-6a. In building the dump, the Navy omitted basic environmental safeguards. Unlined at the bottom and uncapped at the top, the Ordot Dump absorbed rain and surface water, which percolated through the site and mixed with waste. *Id.* at 6a. This toxic mixture would then flow into the Lonfit River and ultimately make its way into the Pacific Ocean at Pago Bay. *Id.*

Although the United States unilaterally transferred ownership of the contaminated land to Guam pursuant to the 1950 Act, the Navy continued to use the site as its own. Throughout the Korean and Vietnam Wars, the Navy used the Ordot Dump to dispose of munitions and toxic chemicals, including DDT and Agent Orange. *Id.* at 5a-6a. "And as the Navy continued to use the Ordot Dump, it continued growing"—turning "'[w]hat was once a valley'" into "'a 280-foot mountain'" of waste. *Id.* at 6a (alteration in original) (citation omitted). The Ordot Dump, which also received municipal waste from Guam's residents, was the only landfill on Guam until the 1970s and the only public landfill until its closure in 2011. *Id.*

b. Shortly after CERCLA's enactment in 1980, Guam requested that the Ordot Dump be remediated with federal funds drawn from the new Superfund. EPA opened a CERCLA investigation in 1982 and added the Ordot Dump to the Superfund list in 1983. *Id.*; *see* JA 26. In 1988, however, EPA determined "that remedial action at the Ordot Landfill site under [CERCLA]" was "inappropriate" and "unnecessary," and that the problems at the Ordot Dump would be

better addressed "through enforcement of the Clean Water Act." EPA, *Superfund Record of Decision: Ordot Landfill* 12-14 (Sept. 1988).[2]

Given the Navy's direct role in creating and contaminating the Ordot Dump, EPA unsurprisingly identified the Navy as a "potentially responsible party." *Id.* at 2. But EPA's decision to proceed under the CWA instead of CERCLA had a crucial impact on the United States' own liability for cleanup costs. While the United States is subject to liability under CERCLA (*see* 42 U.S.C. § 9620), it is immune from liability under the applicable CWA provision, 33 U.S.C. § 1319. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 624 (1992). Declining CERCLA remediation and proceeding instead under the CWA therefore allowed the United States to insulate itself from its own cleanup responsibilities.

Over the next decade, EPA filed several administrative complaints against Guam—solely under the CWA—demanding that Guam take certain actions with respect to the Ordot Dump. *See* JA 26-27. Guam struggled to comply in large part due to a lack of funding. *Id.* at 27. Unmoved by Guam's fiscal constraints, EPA continued to pile on penalties under the CWA. *Id.* at 27-28. All the while, EPA continued to maintain that "CERCLA remedial action [was] unnecessary" at the site. EPA, *Five Year Review of the No Action Decision at the Ordot Landfill Superfund Site in Guam* 3-5 (Sept. 1993).[3]

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[2] https://nepis.epa.gov/Exe/ZyPDF.cgi/9100OBTC.PDF?Dockey=9100OBTC.PDF.

[3] https://semspub.epa.gov/work/09/100002992.pdf.

3. In 2002, the United States filed a complaint against Guam in the District of Guam exclusively under Section 309 of the CWA, 33 U.S.C. § 1319, alleging that Guam violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants into the waters of the United States from the dump without a permit. Pet. App. 130a-37a. A few months later, EPA reiterated that no CERCLA action was being taken at the site. *See* EPA, *Second Five-Year Review: Ordot Landfill Site* 19, 26 (Sept. 2002).[4]

To advance "the public interest" and "avoid protracted litigation" over the CWA claims, Guam and the United States entered into a consent decree that the district court approved in 2004. Pet. App. 138a-73a (2004 CWA Consent Decree). The decree states that the parties agreed to "settle[]" only "the civil judicial claims as alleged in the Complaint"—i.e., the permitting claims brought under CWA Section 309. *Id.* at 139a, 166a; *see id.* at 134a-36a. The decree required Guam to pay a penalty, design and install a cover, and close the Ordot Dump. *Id.* at 141a-51a. But at the time, EPA again reiterated that it was taking "no . . . action under CERCLA." JA 26, 39.

The 2004 CWA Consent Decree also reserved the United States' right to bring suit for any claims not in the complaint, exposing Guam to future liability for any claims, under any statute, as to the Ordot Dump, including those based on the same allegations in the complaint. Pet. App. 166a. Even as to the CWA claims alleged in the complaint, the consent decree expressly disclaimed "any finding or admission of liability against or by the Government of Guam," *id.*

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[4] https://semspub.epa.gov/work/09/123074.pdf.

at 140a, and, at the same time, expressly conditioned the release of those claims on not only "[e]ntry of th[e] consent decree" but also "compliance with the requirements [t]herein," *id.* at 166a.

Despite acknowledging that Guam lacked the financial means to complete the work, *id.* at 150a-51a, the 2004 CWA Consent Decree adopted an aggressive schedule for the closure of the Ordot Dump—a massive undertaking given that it was the only municipal landfill on the island. Guam's financial constraints hampered its ability to meet the schedule, which eventually prompted the appointment of a receiver that ordered Guam to take out $202 million in bonds to pay for the projects. *See* C.A.J.A. 140-41. Meantime, EPA reiterated that "no remedial action" was being taken at the site "under CERCLA," and, instead, the project was solely "[u]nder Clean Water Act authority," as described in the consent decree. EPA, *Third Five-Year Review Report for Ordot Landfill Superfund Site* 7-1 (Sept. 2007).[5]

Guam closed the Ordot Dump and opened a new landfill in 2011. Pet. App. 6a. But the extensive remediation of the Ordot Dump, which began in December 2013, remains ongoing. JA 68. Total costs are expected to exceed $160 million. *Id.*

C. Proceedings Below

1. In 2017, Guam sued the United States under CERCLA Section 107(a) to recover the United States' share of the costs Guam incurred in remediating the Ordot Dump, based on the Navy's creation and decades-long use of the Ordot Dump to discard toxic waste. Pet. App. 7a-8a; *see* JA 69-70.

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[5] https://semspub.epa.gov/work/09/100002994.pdf.

The United States moved to dismiss, asserting that the 2004 CWA Consent Decree triggered a contribution claim under Section 113(f)(3)(B) that was now time-barred, because Guam's suit was filed more than three years after entry of that decree. *See* Pet. App. 8a. And because Sections 107(a) and 113(f) are mutually exclusive, the United States argued, the existence of this time-barred contribution claim required dismissal of Guam's action (including Guam's Section 107(a) claim, which was timely under Section 107(a)'s six-year limitations period). *See id.*

2. The district court denied the motion to dismiss. Pet. App. 51a-97a. Analyzing the "broad, open-ended reservation of rights, the plain non-admissions of liability, and the conditional resolution of liability that the agreement contains," the court concluded that the 2004 CWA Consent Decree did not "resolve liability within the meaning of CERCLA section 113(f)(3)(B)," and thus did not trigger that provision. *Id.* at 69a, 85a-96a. The United States' contrary position, the court stated, "warps the underlying text of CERCLA and/or the 2004 Consent Decree beyond recognition." *Id.* at 73a-90a. Accordingly, the district court held that Guam could pursue its timely Section 107(a) claim against the United States.

3. The D.C. Circuit granted the United States' petition for interlocutory review and reversed. Pet. App. 1a-26a. The court acknowledged that Guam's Section 107(a) claim would be timely. *Id.* at 2a. But after noting that Sections 107(a) and 113(f) are "mutually exclusive," the court found Guam's Section 107(a) claim precluded on the ground that the 2004 CWA Consent Decree triggered a contribution claim under Section 113(f)(3)(B). *Id.* at 10a-11a, 16a-26a. And because Guam's suit was not filed within the

shorter, three-year limitations period governing contribution claims, the court held that Guam's suit is time-barred. *Id.* at 1a-2a, 26a.

In reaching this "harsh" result, *id.* at 26a, the court rejected Guam's argument that the 2004 CWA Consent Decree—which was limited to CWA claims and did not purport to resolve any CERCLA liability—did not trigger Section 113(f)(3)(B), *id.* at 16a-18a. After observing that the "'circuits'" are "'split'" on the question whether a non-CERCLA settlement can trigger Section 113(f)(3)(B), the court joined the circuits holding that Section 113(f)(3)(B) "does not require a CERCLA-specific settlement." *Id.* at 16a-17a (citation omitted). In reaching that conclusion, the court relied solely on a negative inference it drew from the presence of "CERCLA-specific" language in Section 113(f)(1). *Id.* at 17a-18a.

The court next held that the terms of the 2004 CWA Consent Decree "'resolve[d]' Guam's liability" for a response action because Guam agreed to take an act that would qualify as a response action, namely to "design and install a 'dump cover system.'" *Id.* at 21a (alteration in original) (citations omitted). The court rejected the district court's conclusion that the decree's express liability disclaimer, conditional release, and reservation-of-rights clauses precluded a finding that it "resolve[d]" liability. *Id.* at 22a-25a. Although the court agreed that these provisions would have precluded a Section 113(f)(3)(B) claim in "other circuits," the court held that these provisions could not "overcome" Guam's agreement to construct a cover for the Ordot Dump. *Id.*

The D.C. Circuit denied rehearing, *id.* at 98a-99a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

For two independent reasons, the D.C. Circuit erred in concluding that the 2004 CWA Consent Decree triggered Section 113(f)(3)(B).

I. The D.C. Circuit first erred in holding that Section 113(f)(3)(B) reaches non-CERCLA settlements, like the 2004 CWA Consent Decree.

The text of Section 113(f)(3)(B) and surrounding context establish that a settlement must resolve liability under CERCLA to trigger Section 113(f)(3)(B). Congress linked the term "liability" with "response action" and response "costs"—CERCLA-specific terms. Those terms correspond to CERCLA Sections 106 and 107(a), which impose liability for response actions and response costs. And those are the same sources of liability that are expressly identified in Section 113(f)'s anchor provision, Section 113(f)(1). The subsequent references to "liability" in Section 113(f), including the one in paragraph (f)(3)(B), naturally refer back to the same liability.

Several other considerations support this reading. The traditional understanding of the "contribution" remedy, which Congress presumably transplanted when it borrowed that term, requires that two or more parties share a *common* liability; yet a non-CERCLA settlement lacks the discharge of a common liability necessary to support the contribution remedy. It also follows that the most natural referent for a remedy prescribed within CERCLA's highly reticulated framework is liability created by CERCLA itself, not liability created by other statutory schemes. Indeed, extending Section 113(f)(3)(B) to reach non-CERCLA liability would disrupt the remedial frameworks

contained in other comprehensive environmental programs, both at the federal and state level.

The D.C. Circuit's contrary conclusion rests solely on a negative inference that contrasts, rather than harmonizes, the references to liability in Section 113(f)(3)(B) and Section 113(f)(1). The D.C. Circuit's analysis overlooks that Section 113(f)(3)(B) *does* include CERCLA-specific language—its references to a "response action" and response "costs." The D.C. Circuit's reliance on a negative inference ignores the context in which the key language appears in Section 113(f)(3)(B) as well as the interlocking nature of Section 113(f) as a whole. Indeed, the United States itself acknowledges that the same negative inference cannot be applied to other portions of Section 113(f).

II. The D.C. Circuit also erred in holding that Section 113(f)(3)(B) reaches settlements, like the 2004 CWA Consent Decree, that disclaim any determination regarding liability and preserve the settling party's exposure to liability in the future.

For a settling party to "resolve[] its liability" for a "response action" or response "costs" in a settlement, the settlement must conclusively decide an independent liability for undertaking a response action or paying response costs. The ordinary meaning of "resolve[]," as informed in this context by traditional principles of contribution, delineate two conditions. First, the issue of liability must be decided finally—with no contingency. And second, the decided liability must arise independent of the settlement itself; the settlement cannot create the very liability it purportedly resolves.

Several provisions in the 2004 CWA Consent Decree make clear that Guam did not resolve its

liability for a response action. The decree explicitly disclaimed "any finding or admission of liability against or by [Guam]." The decree also preserved Guam's exposure to liability for any violation of federal law, and it conditioned the release of the CWA permitting claims on Guam's successful compliance with the decree's terms. These provisions confirm that the parties left the issue of liability unresolved. The D.C. Circuit's contrary holding warps the plain meaning of both the statutory text and the terms of the 2004 CWA Consent Decree based largely on policy considerations. It also drains the statutory phrase "resolved its liability" of meaning by equating it with mere entry into a settlement agreement.

For either of these reasons, the D.C. Circuit's decision should be reversed.

ARGUMENT

I. SECTION 113(f)(3)(B) DOES NOT REACH NON-CERCLA SETTLEMENTS

The D.C. Circuit erred in holding that Section 113(f)(3)(B) extends to non-CERCLA settlements.

A. Section 113(f)(3)(B) Requires The Resolution Of CERCLA Liability

1. The Statutory Text And Context Tie Section 113(f)(3)(B) To The Liability Imposed By CERCLA

The text of Section 113(f)(3)(B), understood in terms of "both 'the language itself [and] the specific context in which that language is used,'" *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (alteration in original) (citation omitted), compels the conclusion that Section 113(f)(3)(B) requires the resolution of CERCLA liability.

a. Section 113(f)(3)(B) authorizes contribution by "[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). Like any statutory term, "liability" must be construed in the "context" of "[i]ts neighboring terms." *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017); *see Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("[A] word is known by the company it keeps." (citation omitted)). Here, the word "liability" is closely connected to "response action"—a "CERCLA-specific term." *Consolidated Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 95-96 (2d Cir. 2005), *cert. denied*, 551 U.S. 1130 (2007).

CERCLA defines a "response" action to mean a "removal" or "remedial" action, 42 U.S.C. § 9601(25), which CERCLA then further defines as certain actions taken in response to "a release or threatened release of a hazardous substance," *id.* § 9601(24); *see id.* § 9601(23). CERCLA also imposes liability for undertaking response actions, *id.* § 9606, and for the "costs of removal or remedial action" and "any other necessary costs of response," *id.* § 9607(a)(4)(A)-(B). Accordingly, Section 113(f)(3)(B)'s reference to "liability" for a "response action" or response "costs" naturally means the liability for response actions or response costs imposed by CERCLA itself.[6]

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[6] Although CERCLA has an entry for "liability" in its "Definitions" section, that provision merely identifies the applicable "*standard* of liability," 42 U.S.C. § 9601(32) (emphasis added), which is "strict liability," *Price Trucking Corp. v. Norampac Indus., Inc.*, 748 F.3d 75, 81 (2d Cir. 2014).

b. This interpretation also comports with the interlocking structure of Section 113(f), which like any statute "must 'be read as a whole.'" *United States v. Atlantic Research Corp.*, 551 U.S. 128, 135 (2007) (citation omitted); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole . . . in view of its structure and of the physical and logical relation of its many parts."). Section 113(f)'s provisions—which were all enacted as a single subsection in 1986 titled "Contribution"—work together to ensure that parties liable under CERCLA are able to obtain contribution from other parties liable under CERCLA and obtain protection from contribution claims through settlements.

At a high level, Section 113(f) works as follows:

- Paragraph (f)(1) authorizes one liable party to seek contribution from another party who is liable or potentially liable under CERCLA Section 107(a), "during or following a civil action under [Sections 106 or 107(a)]."
- Paragraph (f)(2) grants a settling party—a party that "has resolved its liability to the United States or a State" in a settlement—protection from contribution claims by other liable parties for the matters in the settlement.
- And paragraph (f)(3) addresses the effect a settlement may have on *non*-settling parties, and provides in subparagraph (f)(3)(B) that a settling party—again, a party that "has resolved its liability to the United States or a State" in a settlement—may seek contribution from non-settling parties.

Section 113(f)(1) identifies, at the outset of Section 113(f), the source of liability for both of the "liable parties" in the contribution equation—the "person" seeking contribution must be liable as determined in a "civil action under [CERCLA Sections 106 or 107(a)]," and the person against whom contribution is sought must be "liable or potentially liable under [Section 107(a)]." 42 U.S.C. § 9613(f)(1). And each subsequent provision in Section 113(f) generally references a person who has "resolved its liability," without explicitly restating the source of the liability. But context makes plain that Section 113(f)(1) is the anchor, such that each unadorned reference to "liability" in Section 113(f)'s subsequent provisions must be read in light of the liability identified in Section 113(f)(1)—liability under CERCLA. Put differently, the "statute's sequencing" demonstrates that the liability referenced in Section 113(f)(1) "define[s] the field in which Congress was legislating" in the remainder of Section 113(f). *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (citation omitted); *see also, e.g.*, *Mid-Con Freight Sys., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 440, 447-48 (2005).

Sections 113(f)(1) and 113(f)(3)(B) also demonstrate a structural "symmetry" with respect to contribution plaintiffs and so may "be understood only with reference to" one another. *Atlantic Research*, 551 U.S. at 135-36. Section 113(f)(1) identifies two sources of liability—Sections 106 and 107(a); while Section 113(f)(3)(B) identifies two kinds of liability—for a "response action" and for response "costs." And the dual references track one another: As noted above, Section 106 imposes liability for response actions, and Section 107(a) imposes liability for response costs. Read in context, therefore, the

"liability" referenced in Section 113(f)(3)(B) tracks the liability spelled out in more detail in Section 113(f)(1)—and, for both, the source of liability is CERCLA. Or, as the United States has previously told this Court, Sections 113(f)(1) and 113(f)(3)(B) together authorize contribution when a party "satisfies its *CERCLA liability* to the government," either "during or following a Section 106 or 107(a) action or after a *CERCLA-based* settlement." U.S. Amicus Br. 23, 26, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 354181 (*Cooper* U.S. Br.) (emphasis added).

In short, the interlocking nature of Section 113(f) as a whole supports the reading that follows from Section 113(f)(3)(B) itself—the "liability" referred to in Section 113(f)(3)(B) is CERCLA liability.

2. Traditional Contribution Principles Confirm That Section 113(f)(3)(B) Requires The Resolution Of CERCLA Liability

Congress's use in Section 113(f)(3)(B) of "contribution"—a well-known term of art describing an age-old remedy—confirms that the statute is limited to settlements resolving CERCLA liability.

a. Congress is presumed to be aware of the law in the area in which it legislates, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988), and when Congress "transplant[s]" a term with a long-settled legal understanding, the term "brings the old soil with it," *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation omitted); *see, e.g.*, *FAA v. Cooper*, 566 U.S. 284, 292 (2012) ("[I]t is a 'cardinal rule of statutory construction' that, when Congress employs a term of

art, 'it presumably knows and adopts the cluster of ideas that were attached to [it].'" (citation omitted)).

"Contribution" is a longstanding and familiar legal term, and "Congress used the term" in its "traditional sense" in Section 113(f). *Atlantic Research*, 551 U.S. at 138. Traditionally, "a right to contribution is recognized when two or more persons are [jointly] liable" for the same injury and one of them "has paid more than his fair share of the common liability." *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 87-88 (1981) (citing Restatement (Second) of Torts § 886A (1979)); *see Black's Law Dictionary* 328 (6th ed. 1990) (defining "[c]ontribution" as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear"). In that instance, the overpaying party can "collect from others responsible" for the common liability in terms of their "percentage of fault." *Atlantic Research*, 551 U.S. at 138 (citation omitted).

This contribution remedy accordingly has two related elements relevant here. First, the party seeking contribution must establish a "common liability." *Id.* at 138-39; *see* Restatement (Third) of Torts: Apportionment of Liability § 23 cmt. j (2000). Contribution is thus not available against a party who does *not* share a common liability—whether because that party is not liable under the substantive law or is immune from suit. *See* Restatement (Second) of Torts § 886A cmt. g; Dan B. Dobbs et al., *The Law of Torts* § 489 (2d ed. 2020, Westlaw); *see also Northwest Airlines*, 451 U.S. at 87-88 & n.20 (contribution defendant and contribution plaintiff must be subject to liability for violating the same statute).

Second, the party seeking contribution must "discharge[]" the common liability by paying more than its fair share, thereby "extinguish[ing]" both its own liability and "the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment." Restatement (Third) of Torts: Apportionment of Liability § 23(a)-(b) & cmt. b; *see* Restatement (Second) of Torts § 886A(2); Uniform Contribution Among Tortfeasors Act § 1(d), 12 U.L.A. 193, 202 (2008) (1955 Revised Act); Dobbs, *supra*, § 489. Contribution is therefore "contingent upon an inequitable distribution of common liability among liable parties." *Atlantic Research*, 551 U.S. at 139.

b. Applying those principles here confirms that the "contribution" available in Section 113(f)(3)(B) is linked to the liability imposed by CERCLA. Sections 106 and 107(a) impose joint liability for response actions and response costs according to ordinary common law principles. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613-15 (2009). Section 113(f) provides liable parties a corresponding statutory right to seek contribution from other parties who share their common liability, and they may do so either during or following a civil action, 42 U.S.C. § 9613(f)(1), or after a settlement with the government, *id.* § 9613(f)(3)(B).

The "source of [the] liability" referenced in Section 113(f)(3)(B) is thus "the common liability created by CERCLA." *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1516 (10th Cir. 1991). As the United States has argued, Section 113(f)(3)(B) authorizes a contribution claim against a non-settling party "only" if the non-settling party would otherwise be "liable for clean-up costs *under [CERCLA] Section 107*." Gov't C.A.

Suppl. Br. 10 (emphasis added); *accord, e.g.*, *Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 352 (3d Cir. 2018); *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1269 (10th Cir. 2017); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 132 (2d Cir. 2010); *Tinney*, 933 F.2d at 1516.

To obtain contribution from a non-settling party, therefore, the settling party must extinguish the non-settling party's liability under CERCLA, such that the liability has been "inequitabl[y] distribut[ed]." *Atlantic Research*, 551 U.S. at 139. But that liability will be "common," *id.*, only if the settling party extinguishes its own CERCLA liability as well. Thus, a settlement that does not resolve the settling party's CERCLA liability does not resolve the *common* liability necessary to support the contribution remedy. *See Tinney*, 933 F.2d at 1516.

This case sharply illustrates the point. The 2004 CWA Consent Decree did not extinguish Guam's CERCLA liability, and thus did not extinguish any common CERCLA liability the United States might have shared with Guam. Indeed, the decree could not have extinguished the United States' liability *at all*: The decree settled only permitting claims under CWA Section 309, *see* Pet. App. 134a-36a, 138a-40a, and the United States enjoys sovereign immunity from suit under that provision—meaning that CWA Section 309 "does not authorize liability against the United States," *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 624 (1992). Guam could not possibly have resolved a common liability it *shared* with the United States by settling claims brought solely under a provision that does not even authorize liability against the United States in the first place.

c. Having conceded that the resolution of the non-settling party's *CERCLA* liability is necessary for a Section 113(f)(3)(B) claim, the United States suggested at the certiorari stage that the "common liability" resolved in the 2004 CWA Consent Decree was the United States' "independent duty to take response actions." BIO 12. It neglected to identify the source of this "independent duty" if not CERCLA. But the critical point is that Section 113(f)(3)(B) does not create some "independent," "general federal right of contribution" divorced from the liability imposed by CERCLA. *Tinney*, 933 F.2d at 1516-17. Guam's "theory of the case" (BIO 12) is that the United States is liable *under CERCLA*, and that liability was not extinguished in the 2004 CWA Consent Decree.

3. Interpreting Section 113(f)(3)(B) To Reach Only CERCLA-Based Settlements Comports With CERCLA's Regulatory Scheme

Section 113(f)(3)(B) also must be interpreted "with a view to [its] place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (citation omitted). Interpreting Section 113(f)(3)(B) to require the resolution of CERCLA liability harmonizes that provision with CERCLA's comprehensive scheme—while avoiding disruption of other environmental schemes.

a. "As its name implies, CERCLA is a comprehensive statute"—it prescribes a highly reticulated regime that "Comprehensive[ly]" governs the "Response," "Compensation," and "Liability" involved in cleaning up hazardous substances. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). As part of that regime, Section 106 allows

EPA to compel responsible parties to undertake response actions, Section 107(a) imposes potential liability for the recovery of response costs, and Section 113(f) provides a mechanism for contribution among liable parties. *See* 42 U.S.C. §§ 9606, 9607(a), 9613(f). The statute works as a cohesive whole, with "[Sections] 107(a) and 113(f)" designed to "complement each other by providing causes of action 'to persons in different procedural circumstances.'" *Atlantic Research*, 551 U.S. at 139 (quoting *Consolidated Edison*, 423 F.3d at 99).

Interpreting Section 113(f)(3)(B) to reach beyond CERCLA and authorize contribution based on non-CERCLA settlements would put that provision on an island of its own. Every other component of the remedial scheme is linked to the liability imposed by CERCLA. Nothing in CERCLA warrants such an aberrant treatment of Section 113(f)(3)(B), particularly given that Section 113(f)(1) makes clear that the "liability" covered by Section 113(f) is limited to *CERCLA* liability. *See supra* at 19. Because CERCLA's comprehensive regime is designed to regulate hazardous-substance cleanup and liability "'from top to bottom,'" the most "natural referent" for a contribution "provision within [CERCLA] is other law in [CERCLA] itself." *United States v. Briggs*, 141 S. Ct. 467, 470 (2020) (citation omitted).

b. Limiting Section 113(f)(3)(B) to the resolution of CERCLA liability also ensures that this provision does not interfere with *other* regulatory schemes. CERCLA, while comprehensive, is not the exclusive scheme Congress has enacted to address environmental contamination. The CWA, for instance "establish[es] 'a comprehensive program for controlling and abating water pollution,'" *City of*

Milwaukee v. Illinois, 451 U.S. 304, 318-19 (1981) (citation omitted); and the Resource Conservation and Recovery Act "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste," *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Congress took great care to ensure that CERCLA would not displace those distinct statutory programs: "Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d).

Reading Section 113(f)(3)(B) to permit contribution for non-CERCLA settlements would undoubtedly "affect" those other liability regimes. CWA Section 309—the provision invoked in the 2004 CWA Consent Decree—is a great example. This Court has squarely held that the CWA's "unusually elaborate enforcement provisions" are exclusive: "Congress provided precisely the remedies it considered appropriate," and "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies" beyond those specified. *Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). Section 309 of the CWA does not expressly authorize contribution claims. As a result, "the United States [has] argue[d]"—successfully—"that a CWA defendant [cannot] assert a claim for contribution" in an action "brought by the United States" under CWA Section 309. *United States v. Savoy Senior Hous. Corp.*, No. 6:06-cv-031, 2008 WL 631161, at *4-7 (W.D. Va. Mar. 6, 2008). Allowing a CWA settlement to trigger CERCLA contribution in that instance, as the United

States now insists, would bulldoze the CWA's tailored remedial scheme and authorize contribution when it would not otherwise be authorized.

There is no reason to conclude that Congress intended Section 113(f)(3)(B) to disrupt other regulatory regimes in this indirect way. After all, "when Congress wishes to 'alter the fundamental details of a regulatory scheme,'" this Court usually "expect[s] it to speak with the requisite clarity to place that intent beyond dispute." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020) (citation omitted). Nothing in Section 113(f)(3)(B) remotely suggests (let alone says with "clarity," *id.*) that this provision—and this provision alone—was designed to alter the remedies available under other statutory schemes.

c. Interpreting Section 113(f)(3)(B) to reach beyond CERCLA also would have "striking implications for federalism." *Cowpasture River*, 140 S. Ct. at 1849. Section 113(f)(3)(B) authorizes contribution for a party that "has resolved its liability to the United States *or a State*" in a settlement. 42 U.S.C. § 9613(f)(3)(B) (emphasis added). This reference to "a State" recognizes that States have a right of action under CERCLA for cost recovery, *see id.* § 9607(a)(4)(A), and parties routinely settle CERCLA liability with state regulators, *see, e.g.*, *Niagara Mohawk*, 596 F.3d at 125-26.

Many States, however, have enacted their own hazardous-substance cleanup programs under state law, with cost-allocation and contribution regimes that can "differ[] markedly from CERCLA['s]." *Morristown Assocs. v. Grant Oil Co.*, 106 A.3d 1176, 1188 n.7 (N.J. 2015); *see, e.g.*, Env't Law Inst., *An Analysis of State Superfund Programs: 50-State*

Study, 2001 Update 33-34, 43 (Nov. 2002).[7] Under the United States' proposed interpretation of Section 113(f)(3)(B), a settlement with a State can trigger CERCLA's federal contribution regime even if the settlement resolved *only* state-law liability. In other words, a party settling purely state-law claims could seek contribution under CERCLA—which is "governed by Federal law," 42 U.S.C. § 9613(f)(3)(C)—and sidestep the State's own contribution regime. *See Niagara Mohawk*, 596 F.3d at 138 n.27.

Yet, this Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Cowpasture River*, 140 S. Ct. at 1849-50; *see, e.g.*, *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020). CERCLA's language says the opposite. From start to finish, CERCLA reflects a model of "cooperative federalism," *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1356 (2020) (citation omitted), that preserves States' regulatory autonomy over hazardous-substance cleanup and "leaves untouched States' judgments about causes of action" and "the scope of liability," *CTS Corp. v. Waldburger*, 573 U.S. 1, 12, 18 (2014); *see* 42 U.S.C. §§ 9614(a), 9652(d). This preservation of state autonomy, particularly over matters concerning liabilities, powerfully confirms that CERCLA's contribution regime under Section 113(f)(3)(B) is derivative of—and limited to—the resolution of CERCLA liability. *See* Ronald G. Aronovsky, *A Preemption Paradox: Preserving the*

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[7] https://www.eli.org/sites/default/files/eli-pubs/d12-10a.pdf.

Role of State Law in Private Cleanup Cost Disputes, 16 N.Y.U. Envtl. L.J. 225, 314-16 & n.406 (2008).

4. Section 113(f)(3)(B)'s Statutory History Reinforces The Requirement Of A CERCLA-Based Settlement

The statutory history of Section 113(f)(3)(B) also supports the conclusion that the provision requires the resolution of CERCLA liability.

As originally enacted, CERCLA did not "expressly provid[e]" PRPs with a right of action to "obtain contribution from other PRPs." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162 (2004). Lower courts inferred an "implied[]" contribution claim under Section 107, *id.*—a claim necessarily linked to the liability imposed by CERCLA itself. But this implied right was "debatable" in light of this Court's decisions "refus[ing] to recognize implied or common-law rights to contribution in other federal statutes." *Id.* Congress accordingly resolved the uncertainty in Section 113(f) by codifying an express "right of contribution . . . for persons alleged or held to be liable *under section 106 or 107 of CERCLA*," thereby "clarif[ying] and confirm[ing] the right of a person held jointly and severally liable *under CERCLA* to seek contribution from other potentially responsible parties." H.R. Rep. No. 99-253, pt. 1, at 79 (1985) (emphasis added); *see* S. Rep. No. 99-11, at 44 (1985) (same). Section 113(f) retained the link between CERCLA contribution and CERCLA liability.

Congress did not abruptly abandon that CERCLA-focused approach in Section 113(f)(3)(B). To the contrary, Section 113(f)(3)(B) was included as one of several provisions aimed at encouraging "[s]ettlement with the government *under CERCLA*" by "expressly

provid[ing] to settlors the right to seek contribution from nonsettlors." H.R. Rep. No. 99-253, pt. 3, at 19-20 (emphasis added). Indeed, requiring non-administrative settlements to be "judicially approved"—a requirement that appears in every paragraph of Section 113(f)(2)-(f)(3)—ensured that settling parties would cement their agreement in a "consent decree *under CERCLA*" and satisfy a federal judge that the decree is "consistent with the purposes that *CERCLA* is intended to serve." *Id.* at 19 (emphasis added); *cf. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) ("[A] federal consent decree must . . . further the objectives of the law upon which the complaint was based."). Section 113(f)'s history thus "leaves no doubt that Congress's object was to provide contribution during or following a Section 106 or 107(a) action or after a *CERCLA-based* settlement." *Cooper* U.S. Br. 12 (emphasis added); *see id.* at 23-24.

5. Limiting Section 113(f)(3)(B) To CERCLA-Based Settlements Accords With The Presumption Of Fair Notice

Because it implicates the shorter limitations period for contribution claims, Section 113(f)(3)(B) also must have a clearly defined scope that gives settling parties fair notice of their rights—i.e., notice that entering into a settlement will trigger a *CERCLA* contribution claim. Just as it is "reasonable to presume that clarity" and "certainty" are "objective[s] for which lawmakers strive" when it comes to limitations periods, *Briggs*, 141 S. Ct. at 471, it is reasonable to presume that Congress strives for clarity when it designs interlocking provisions that trigger varied limitations periods.

Interpreting Section 113(f)(3)(B) to apply to settlements that do not resolve CERCLA claims is fundamentally at odds with that principle. Parties settling under other statutes may not know at the time of settlement whether CERCLA remediation is necessary at the site. Indeed, in this case, EPA repeatedly told Guam that it was *not* proceeding under CERCLA and that CERCLA remediation was *not* appropriate. *See supra* at 8-11. The United States instead brought suit over, and settled, only alleged permitting violations under the CWA. In these circumstances, Guam hardly had fair notice that entering into the 2004 CWA Consent Decree would trigger a contribution claim under the very statute EPA went out of its way to say was *not* implicated.

Holding that Section 113(f)(3)(B) extends to non-CERCLA settlements creates a trap that Congress could not have intended, and approving that trap here will just invite agencies to find others. *See* Pet. 23.

B. The D.C. Circuit's Contrary Interpretation Is Fundamentally Flawed

The D.C. Circuit did not grapple with the textual, contextual, and structural evidence discussed above. Instead, it relied exclusively on a purported negative inference. Citing the "'presum[ption] that Congress acts intentionally and purposely'" when it "'includes particular language in one section of a statute but omits it in another,'" the court observed that Section 113(f)(1) "expressly requires that a party first be sued under CERCLA," while Section 113(f)(3)(B) "contains no such CERCLA-specific language." Pet. App. 17a-18a (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). That inference buckles on examination.

1. For starters, there is no foundation for invoking the *Russello* principle at all because there is no "omi[ssion]"—*both* Section 113(f)(1) and Section 113(f)(3)(B) contain "CERCLA-specific language." Section 113(f)(1) authorizes contribution by "[a]ny person . . . during or following any civil action under [Sections 106 or 107(a)]," 42 U.S.C. § 9613(f)(1), while Section 113(f)(3)(B) authorizes contribution by "[a] person who has resolved its liability . . . for some or all of a response action," *id.* § 9613(f)(3)(B). The D.C. Circuit focused on the absence of any specific reference to *Section 106 or Section 107(a)* in Section 113(f)(3)(B). But it failed to appreciate that "response action" itself is a CERCLA-defined term. *See id.* § 9601(25). Thus, both Section 113(f)(1) and Section 113(f)(3)(B) use CERCLA-specific language.

The fact that Congress used *different* CERCLA-specific language in these provisions does not compel the D.C. Circuit's inference that the "liability" for a "response action" in Section 113(f)(3)(B) is not CERCLA-specific. After all, "there is no 'canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 845 (2018) (quoting *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013)). And here, the different CERCLA-specific words used in Sections 113(f)(1) and 113(f)(3)(B) reflect their different functions. It would make no sense for Section 113(f)(3)(B) to "require[] that a party first be sued under CERCLA," Pet. App. 17a, because Section 113(f)(3)(B) can apply following an "administrative . . . settlement," 42 U.S.C. § 9613(f)(3)(B), in which case there would be no

lawsuit.[8] Thus, rather than predicating contribution on a "civil action under [Sections 106 or 107(a)]" as Section 113(f)(1) does, Section 113(f)(3)(B) aptly refers to the kind of "liability" imposed by those provisions—liability for a "response action" and response "costs."

2. In any event, the *Russello* principle, like "any negative implication" drawn from statutory silence, "depends on context." *Marx v. General Revenue Corp.*, 568 U.S. 371, 381 (2013); *see Kapral v. United States*, 166 F.3d 565, 578-79 (3d Cir. 1999) (Alito, J., concurring) ("*Russello* . . . does not purport to lay down an absolute rule"). As explained above, the reference to "liability" in Section 113(f)(3)(B)—as in the other subsidiary provisions of Section 113(f)—is most naturally read in the context of the CERCLA liability spelled out in Section 113(f)(1), the anchor contribution provision. *See supra* at 19. The D.C. Circuit's crude application of *Russello* ignores the context in which "liability" appears in Section 113(f)(3)(B) and the structure of Section 113(f) as a whole. *Cf. S.D. Warren Co. v. Maine Bd. of Env't Prot.*, 547 U.S. 370, 380 (2006) (repudiating "uncritical use of interpretive rules" in "making sense of a complicated [environmental] statute").

This Court also has cautioned that *Russello* usually applies only when "the omission [is] the sole difference" between the provisions, and that any negative inference "grows weaker with each difference in the formulation of the provisions under inspection." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002); *see*

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[8] Nor would it make sense for Section 113(f)(1) to reference "resolved . . . liability" as Section 113(f)(3)(B) does, because Section 113(f)(1) can apply "during" an ongoing "civil action."

Clay v. United States, 537 U.S. 522, 530-32 (2003). The Court thus has repeatedly refused to draw a negative inference when, given many differences in formulation, the inference "proves too much." *Field v. Mans*, 516 U.S. 59, 67-68 (1995); *see, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009).

Applying a negative inference here proves far too much. Indeed, not even the United States embraces its consequences when it comes to the contribution *defendant* (i.e., the non-settling party). The United States agrees that, to be subject to a contribution claim under Section 113(f)(3)(B), the non-settling party must be "liable for clean-up costs *under Section 107*." Gov't C.A. Suppl. Br. 10 (emphasis added); *see supra* at 22-23. But Section 113(f)(3)(B) does not explicitly mention liability under Section 107; it simply permits contribution against "any person who is not party to a settlement referred to in paragraph (2)." 42 U.S.C. § 9613(f)(3)(B). Section 113(f)(1), by contrast, *does* expressly reference Section 107—it permits contribution against a person "liable or potentially liable under [Section 107(a)]." *Id.* § 9613(f)(1). Applying the same negative inference adopted by the D.C. Circuit would mean that, for purposes of Section 113(f)(3)(B), the non-settling party need *not* be liable under Section 107. Even the United States agrees that this cannot be correct.

Given that the negative inference cannot apply with respect to the non-settling party, it makes no sense to apply a negative inference with respect to the *settling* party. Selectively applying a negative inference to only some words in the statute but not others renders Section 113(f)(3)(B) "internally confusing." *Atlantic Research*, 551 U.S. at 136. Doing so also upends the traditional understanding of

contribution animating Section 113(f)(3)(B), which, as noted, requires the resolution of a *common* liability. *See supra* at 21-23. As this Court has explained, "it is dubious" to rely on a "negative implication" when it would "override the background rule" driving the statute. *Marx*, 568 U.S. at 381-82; *see Field*, 516 U.S. at 75-76 ("[*Russello*] is weakest when it suggests results strangely at odds with . . . common-law language at work in the statute[.]"). There is no reason to adopt such a dubious interpretation here.

It gets even stranger. Section 113(f)(2) precludes contribution claims against any "person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(2). By itself, this provision's reference to "liability" is even broader than that in Section 113(f)(3)(B), as it does not mention a "response action" at all. And that omission is the sole difference between Sections 113(f)(2) and 113(f)(3)(B) in terms of the kinds of settlements that fall within their scope; thus, the case for *Russello* should be even stronger here. But applying *Russello*, and contrasting Section 113(f)(2) with Section 113(f)(3)(B), would mean that a settling party is immune from contribution claims after resolving liability to the government for *anything*—regardless of whether the settlement has anything to do with CERCLA, a response action, or the environment. That cannot be right.

Likewise, Section 113(f)(1) directs courts to resolve contribution claims according to "equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Section 113(f)(3)(B) contains no such requirement. By including that requirement in Section 113(f)(1), Congress surely did not mean to

exclude it from Section 113(f)(3)(B), such that contribution claims under Section 113(f)(3)(B) need *not* be resolved according to appropriate equitable factors. Here again, the United States agrees: Because "[S]ections 113(f)(1) and 113(f)(3)(B) 'should be read *in pari materia*,'" the United States has argued, the "'equitable factors' addressed in section 113(f)(1) likewise apply to 113(f)(3)(B) actions." U.S. Amicus Br. 13 n.5, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc) (No. 00-10197), 2002 WL 32099835 (citation omitted).

In short, the D.C. Circuit's strained negative inference butchers the statute and create a nonsensical contribution regime. Especially in light of the strong textual, contextual, and structural evidence that Section 113(f)(3)(B) is limited to CERCLA-based settlements, the D.C. Circuit was wrong to "elevate[] [*Russello*] to the level of interpretive trump card." *Field*, 516 U.S. at 67.

C. The 2004 CWA Consent Decree Did Not Resolve CERCLA Liability

The 2004 CWA Consent Decree did not trigger Section 113(f)(3)(B) because it indisputably did not resolve any liability imposed by CERCLA. The underlying complaint raised only CWA permitting claims under 33 U.S.C. §§ 1311, 1319, *see* Pet. App. 134a-36a, and the decree concerned only those claims, *see id.* at 139a-40a. Neither filing makes any mention of CERCLA liability whatsoever.

Indeed, neither the complaint nor the decree even identified a "hazardous substance"—a statutory prerequisite for any CERCLA response action. To qualify as a "response" action, 42 U.S.C. § 9601(25), an action must be taken in response to "a release or

threatened release of a *hazardous substance*," *id.* § 9601(24) (emphasis added); *see id.* § 9601(23) (same). And CERCLA identifies the particular substances that qualify as "hazardous substance[s]" in detail. *Id.* § 9601(14); *see* 40 C.F.R. § 302.4. As a result, "liability" for a "response action" or response "costs" in Section 113(f)(3)(B) necessarily means, at a minimum, liability for an action involving a "hazardous substance." A settlement that does not so much as mention a hazardous substance within CERCLA does not trigger Section 113(f)(3)(B).[9]

Of course, the omission of any reference to a "hazardous substance" in the 2004 CWA Consent Decree is not surprising given that this settlement was not a CERCLA settlement. Indeed, the omission appears deliberate, because the CWA has its own provision regulating "hazardous substances," 33 U.S.C. § 1321, which the United States declined to invoke either in its CWA complaint or the 2004 CWA Consent Decree. Without identifying any "hazardous substance," therefore, the 2004 CWA Consent Decree could not possibly resolve any CERCLA liability, and thus could not trigger Section 113(f)(3)(B).

II. SECTION 113(f)(3)(B) DOES NOT REACH SETTLEMENTS THAT DISCLAIM ANY DETERMINATION OF LIABILITY AND PRESERVE FUTURE LIABILITY

Even if Section 113(f)(3)(B) does not require the resolution of *CERCLA* liability, the D.C. Circuit erred

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[9] Contrary to the D.C. Circuit's unsupported suggestion, "leachate" is not synonymous with "hazardous substances." Pet. App. 25a (citation omitted); *see, e.g.*, *Chem. Waste Mgmt., Inc. v. EPA*, 869 F.2d 1526, 1530 (D.C. Cir. 1989) (describing leachate).

in concluding that the 2004 CWA Consent Decree "resolved" liability at all.

A. To "Resolve[] Its Liability," A Settling Party Must Conclusively Decide A Preexisting Liability In The Settlement Agreement

To trigger Section 113(f)(3)(B), the settling party must have "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). Because CERCLA does not define the term "resolved," it must be given its "ordinary" meaning "at the time Congress enacted" Section 113(f)(3)(B). *New Prime*, 139 S. Ct. at 539 (citation omitted). The ordinary meaning of "resolve," in the sense in which it is used here, is "to deal with . . . conclusively," *Random House Dictionary of the English Language* 1639 (2d ed. 1987), or "to reach a firm decision about," *Webster's New Collegiate Dictionary* 978 (1980); *see also* 3 *Oxford English Dictionary* 723-24 (2d ed. 1989) ("[t]o decide, determine, settle"); *Webster's Third New International Dictionary* 1933 (1961) ("to reach a decision about," "settle").

To trigger Section 113(f)(3)(B), then, a settlement must meet two conditions. First, the settlement must *conclusively* deal with the liability, such that the matter "is not susceptible to further dispute or negotiation." *Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1122 (9th Cir. 2017). The need for finality is consistent with ordinary usage of "resolved." For example, a settling party has "*resolved* its liability to the United States" when it has

been "released . . . from further liability" in a settlement, *Key Tronic*, 511 U.S. at 811-12 (emphasis added); a government contractor has "*resolved* its disputes with [an] agency" by entering into a "'final and conclusive'" settlement, *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 9-10, 19 (1972) (emphasis added); and a taxpayer has "*resolved* [her] liability" to the IRS when the tax "proceeding has reached finality." *Rogers v. Commissioner*, 908 F.3d 1094, 1096 (7th Cir. 2018) (emphasis added); *see also Bernstein v. Bankert*, 733 F.3d 190, 212 (7th Cir. 2012) (additional examples), *cert. denied*, 571 U.S. 1175 (2014).

Requiring a final, conclusive decision on liability is also consistent with the traditional principles of contribution described above. *See supra* at 21-22. A party may seek contribution after "discharg[ing]" a common liability "by settlement," Restatement (Third) of Torts: Apportionment of Liability § 23(a), but the "settlement" must extinguish the prospect of "recovery outside the agreement for [the] specified injuries," *id.* § 24(a). CERCLA's settlement framework also embraces this finality principle by "authorizing EPA to include a 'covenant not to sue,' which *caps the settling party's liability*." *Atlantic Richfield*, 140 S. Ct. at 1355 (emphasis added); *see* 42 U.S.C. § 9622(c)(1). Thus, for purposes of Section 113(f)(3)(B), "liability [is] 'resolved' when the issue of liability is *decided*, in whole or in part, in a manner that carries with it at least some degree of certainty and finality." *Bernstein*, 733 F.3d at 212.

Second, there must be a preexisting liability for undertaking a response action or paying response costs separate and apart from the settlement itself—that is, there must be a liability *that needs to be*

resolved by way of the settlement. A settlement cannot create the very liability it resolves. This is part and parcel of the term "resolved"—an issue must exist before it can be resolved.

The United States has suggested that a settlement can at the same time "establish[]" the very liability that it purportedly "resolve[s]" merely because one of the settling parties agrees to do something that qualifies as a response action. BIO 16. This interpretation drains "resolved its liability" of meaning by "[e]quating signing a settlement agreement with the resolution of liability." *Bernstein*, 733 F.3d at 210. Under this view, *any* agreement involving conduct that would constitute a "response action" (in whole or part), by definition, "resolve[s] . . . liability." If that is what Congress intended, it would simply have authorized contribution by a party that agrees to perform some or all of a response action. *Cf.* 42 U.S.C. § 9622(a) (referencing a party that "enter[s] into an agreement . . . to perform any response action"). There would have been no reason to require "resolved . . . liability." *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) ("When legislators d[o] not adopt 'obvious alternative' language, 'the natural implication is that they did not intend' the alternative." (citation omitted)).

This interpretation is confirmed by the traditional principles of contribution discussed above: Contribution requires the resolution of a *shared* liability—one that both (or more) parties face. *See supra* at 21-22. Thus, even if a settlement could "establish[]" the relevant liability as the United States suggests, a settlement with one party would not establish a *shared* liability with a non-settling party. *Cf. Local No. 93, Int'l Ass'n of Firefighters v.*

City of Cleveland, 478 U.S. 501, 529-30 (1986) (noting that a consent decree "imposes no legal duties or obligations" on "a party that did not consent to the decree"). Rather, Section 113(f)(3)(B) authorizes contribution only when a party has entered into a settlement that conclusively deals with or decides that party's preexisting liability to undertake a response action or pay response costs.

B. Guam Did Not "Resolve[] Its Liability" In The 2004 CWA Consent Decree

Determining whether a settling party "resolved its liability" for purposes of Section 113(f)(3)(B) depends on an examination of the agreement's "precise terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Here, multiple provisions of the 2004 CWA Consent Decree make clear that, despite agreeing to clean up the Ordot Dump, Guam did not "resolve[]" any liability to take that action.

To begin with, the 2004 CWA Consent Decree states in no uncertain terms that the parties entered into the decree "without *any* finding or admission of liability against or by the Government of Guam." Pet. App. 140a (emphasis added). This language "plainly reflects the parties' intention *to leave the question of liability unresolved*, despite the fact that Guam was proceeding to consent to engage in the immediate cleanup of the Ordot Landfill by virtue of entering into the agreement." *Id.* at 86a. And this is the only provision in the entire decree that mentions "liability," save for one other provision specifying that the agreement was not relieving Guam of any "criminal liability." *Id.* at 166a.

The 2004 CWA Consent Decree also specifically preserved all of the United States' "rights [and]

remedies" for "any violation by [Guam] of federal and territorial laws and regulations." *Id.* This "broad reservation of rights" reinforces the conclusion that Guam's liability remained unresolved. *Id.* at 86a-87a. As the district court explained, the fact that "the United States retained its rights to sue Guam" in the future for "the response actions and costs relating to any cleanup at the Ordot Landfill" undermines the conclusion that the "settlement agreement resolved Guam's liability for any response costs or response actions." *Id.* at 87a-88a. This is particularly true given that the United States theoretically could have turned around and sued Guam under *CERCLA* itself.

Further, the 2004 CWA Consent Decree conditioned release of the CWA claims at issue on Guam's "compliance with the requirements" in the decree. *Id.* at 166a. The conditional nature of the release confirms that Guam did not resolve its liability in the decree. As the district court explained, the "agreement states that the resolution of Guam's liability for the specified claims does not occur until Guam has actually complied with all of the Consent Decree's requirements." *Id.* at 89a. If Guam were to fall out of compliance with the terms of the consent decree, it "would seemingly resuscitate the United States' CWA claims." *Id.* at 92a.

Whether considered individually or collectively, these provisions compel the conclusion that the 2004 CWA Consent Decree—while obligating Guam to take certain actions at the Ordot Dump—simply did not "resolve [Guam's] liability" within the meaning of Section 113(f)(3)(B). The settlement certainly

resulted in a final judgment ending the CWA lawsuit, but it did not resolve Guam's liability.[10]

C. The D.C. Circuit's Contrary Conclusion Flouts The Statutory Text And The 2004 CWA Consent Decree's Terms

The D.C. Circuit's conclusion that the 2004 CWA Consent Decree nevertheless triggered Section 113(f)(3)(B) rewrites both the statute and the decree.

1. As to the disclaimer expressly withholding "any finding . . . of liability," Pet. App. 140a, the D.C. Circuit refused "to take the disclaimer at its word," reasoning that "'parties often expressly refuse to concede liability under a settlement agreement, even while assuming obligations consistent with a finding of liability.'" *Id.* at 24a (citation omitted). This reasoning cannot withstand scrutiny.

For starters, it rewrites the statute. Section 113(f)(3)(B) does not encompass settlements where the parties merely "assumed obligations consistent with a finding of liability"—it requires the parties to have actually "resolved [the] liability" in the settlement itself. This does not mean the settling party necessarily must "*concede* liability," as the D.C. Circuit seemed to believe. *Id.* (emphasis added). Indeed, the United States routinely enters into settlements in which settling parties "do not admit

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[10] Even if Guam somehow resolved liability in the 2004 CWA Consent Decree, Guam certainly did not resolve liability for a "response action" as required by Section 113(f)(3)(B). As discussed, neither the United States' CWA complaint nor the decree settling that complaint identified any "hazardous substance" within the meaning of CERCLA. *See supra* at 36-37. The failure to identify a hazardous substance in the decree means the decree did not "resolve" liability for such substances.

any liability to [the United States]," but "agree" that they "ha[ve], as of the Effective Date [of the settlement], resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA." *United States v. Bridgestone Americas Tire Operations, LLC*, No. 3:18-cv-00054, 2018 WL 5621496, at *1, *33 (S.D. Ohio Oct. 30, 2018); *see, e.g.*, *United States v. Goodrich Corp.*, No. 5:20-CV-00154, 2021 WL 297577, at *3, *27 (W.D. Ky. Jan. 28, 2021); *In re Peabody St. Asbestos Superfund Site*, No. CERCLA-01-2015-0052, 2015 WL 13845559, at *2, *7 (EPA Dec. 4, 2015).[11] But a settlement that both expressly *disclaims* any liability determination and lacks language purporting to resolve liability plainly does not trigger Section 113(f)(3)(B).

The D.C. Circuit's reasoning also impermissibly rewrites the parties' agreement here by refusing to take the "disclaimer at its word." Pet. App. 24a (citation omitted). A consent decree, like a "contract[]," "'must be construed as it is written,'" consistent with its unambiguous terms. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235-36 (1975) (quoting *Armour*, 402 U.S. at 682); *see, e.g.*,

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[11] In fact, the United States has amended its model CERCLA settlements to include language specifically stating that the settling party "resolved [its] liability" "for purposes of Section 113(f)(3)(B)." EPA & Dep't of Justice, Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f) at 3 (Aug. 3, 2005), https://www.epa.gov/sites/production/files/documents/interim-rev-aoc-mod-mem.pdf; *see also* Memorandum from EPA & Dep't of Justice, Revisions to 2009 *ARC* Memo and Issuance of Revised CERCLA Past Cost, Peripheral, *De Minimis*, De Micromis, and Municipal Solid Waste Settlement Models at 4-5 (Sept. 26, 2014), https://www.epa.gov/sites/production/files/2014-09/documents/payment-models-2014-mem.pdf.

Norfolk S. Ry. Co. v. James N. Kirby, Pty. Ltd., 543 U.S. 14, 32 (2004) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded." (citation omitted)). It "must [also] be so construed as to give meaning to all its provisions." *Burdon Cent. Sugar Refin. Co. v. Payne*, 167 U.S. 127, 142 (1897); *see, e.g.*, *Texas & Pac. Ry. Co. v. Clayton*, 173 U.S. 348, 359 (1899) ("[T]he court cannot hold that [a] clause is meaningless, or that it was inserted in the contract in ignorance of the meaning of the words [used]."); Scalia & Garner, *supra*, at 174-76.

The D.C. Circuit did precisely the opposite. While the 2004 CWA Consent Decree expressly disclaims "any finding . . . of liability," Pet. App. 140a, the D.C. Circuit nevertheless read that disclaimer as "consistent with a finding of liability" based on other provisions, *id.* at 24a (citation omitted). That interpretation renders the liability disclaimer—a bargained-for term—meaningless. And by focusing instead on other provisions, the court negated the only relevant provision in the entire agreement that specifically uses the word used in Section 113(f)(3)(B)—"liability." *See supra* at 41; *cf. Mitsui & Co. v. American Exp. Lines, Inc.*, 636 F.2d 807, 823 (2d Cir. 1981) (Friendly, J.) ("[A] specific [contract] provision should prevail over a general one.").

The D.C. Circuit's justification for doing so—intuiting the implications of what "parties often" do in other settlements, Pet. App. 24a (citation omitted)—is especially troubling. In interpreting an agreement, a court is obligated to give effect to the agreement's "'clear and unambiguous terms,'" not "its own suppositions about the [parties'] intentions." *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435, 439

(2015) (citation omitted). Allowing courts to gloss over bargained-for terms not only flouts basic interpretative principles but also threatens to disrupt the settlement process. Parties should have confidence that the provisions to which they agree will be enforced—i.e., taken "at [their] word," Pet. App. 24a—without fear that a court will later rewrite the agreement based on its own sensibilities.

The United States did not even try to defend this reasoning at the certiorari stage. Instead, the United States claimed that the liability disclaimer "makes clear" that Guam "was not admitting that it had violated the CWA" but "did not disclaim liability for a response action." BIO 16. But the United States plucks this distinction out of thin air: The provision disclaims "*any* finding or admission of liability against or by [Guam]." Pet. App. 140a (emphasis added). And as the Court frequently observes, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Norfolk S.*, 543 U.S. at 31 (citation omitted). Nothing in the liability disclaimer or surrounding provisions remotely suggests (let alone "makes clear," BIO 16) that the disclaimer is limited to the CWA or otherwise. To the contrary, the "plain language" of the provision demonstrates the parties' "intent to extend the liability [disclaimer] broadly," *Norfolk S.*, 543 U.S. at 31, and there is no reason to read into that provision a limitation that is not there.

2. The D.C. Circuit also ignored the provisions of the 2004 CWA Consent Decree preserving exposure to future liability and conditioning the release of the CWA claims on compliance with the decree's terms. According to the court, giving those provisions effect would "nullify section 113(f)(3)(B) in a host of cases"

given that the applicable limitations period set forth in Section 113(g)(3)(B) begins to run upon "entry of the settlement, not when liability is 'resolved.'" Pet. App. 23a. If liability is not resolved until years after the settlement's entry, the court reasoned, a "cause of action under section 113 would not accrue until after the statute of limitations runs." *Id.*

But this problem is a product of the D.C. Circuit's own invention. Section 113(f)(3)(B) applies only when the settling party "has resolved its liability . . . *in* [*the*] *settlement*" itself, 42 U.S.C. § 9613(f)(3)(B) (emphasis added), not sometime in the future. Indeed, Congress used the present perfect tense—"has resolved"—which "denot[es] an act that has been completed." *Carr v. United States*, 560 U.S. 438, 448 (2010) (citation omitted). As a result, the only kinds of settlements that trigger Section 113(f)(3)(B) are settlements that resolve liability when the limitations period begins to run—upon "entry of [the] settlement," 42 U.S.C. § 9613(g)(3)(B). If liability remains unresolved at that time, then Section 113(f)(3)(B) is not triggered, regardless of what may (or does) happen in the future.

There is thus no world in which a Section 113(f)(3)(B) claim could accrue "*after* the statute of limitations runs." Pet. App. 23a. To the contrary, the fact that the limitations period is keyed to the "entry of the settlement" simply reinforces the point that a settlement expressly conditioning the possibility of future liability on future events, as the decree did here, is not supposed to trigger Section 113(f)(3)(B). Only by misreading the statute to permit a gap between the "entry of the settlement" and the time "when liability is 'resolved,'" *id.*, did the D.C. Circuit arrive at its supposed anomaly between Sections

113(f)(3)(B) and 113(g)(3)(B). Stripped of that error, the provisions work just fine.[12]

3. Finally, the D.C. Circuit's apparent policy concern that settlements will never trigger Section 113(f)(3)(B) is incorrect. Parties may—and often do—agree to terms that explicitly resolve liability for a response action. *See supra* at 43-44 & n.11. In addition, the United States can and does insist on admissions of liability in some circumstances. *See, e.g.*, Consent Decree at 3, *United States v. Cytec Indus. Inc.*, No. 20-cv-06916 (S.D.N.Y. Aug. 26, 2020), ECF No. 3-1.[13] The United States can also seek to avoid the sort of conditional language and reservation of rights in the settlement here. But the fact that it is clearly *possible* for the United States, arguably the most powerful bargaining unit in the world, to negotiate settlements that plainly resolve a settling party's liability in no way provides a reason to rewrite the decree—or the statute—in this case. Indeed, the fact that other settlements contain provisions that unambiguously resolve liability simply underscores that the 2004 CWA Consent Decree in this case did *not* resolve Guam's liability. *See Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 633-34 (2013) (presence of language in similar agreements weighs

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[12] Accordingly, the 2004 CWA Consent Decree does not, as the D.C. Circuit suggested, simply "provide[] that it 'shall be in full settlement and satisfaction of the [United States'] civil judicial claims.'" Pet. App. 21a. The court skipped over the immediately preceding language conditioning that release on "compliance with the requirements herein." *Id.* at 166a.

[13] https://www.justice.gov/enrd/consent-decree/file/1309266/download.

"heavily" against interpreting agreement that lacks such language to achieve the same result).

* * * * *

The D.C. Circuit recognized that the result it reached was "harsh." Pet. App. 26a. As the court put it, "the United States deposited dangerous munitions and chemicals at the Ordot Dump for decades and left Guam to foot the bill." *Id.* To add insult to injury, the "practical effect" of the D.C. Circuit's "decision is that Guam cannot now seek recoupment from the United States for that contamination because its cause of action for contribution expired in 2007." *Id.* That is reason enough for pause—the costs that Guam alone now faces in cleaning up the Ordot Dump would be the equivalent of a nearly *trillion* dollar outlay for the United States government. Pet. 24.

Yet, Guam does not ask this Court to rule for it on the equities; it simply asks this Court to enforce the statutory text. The 2004 CWA Consent Decree did not trigger Section 113(f)(3)(B) under a plain-meaning construction of the statute. The D.C. Circuit thus erred in holding that Guam's action against the United States to recover costs attributable to the United States' own role at the site is time-barred.

CONCLUSION

The judgment of the court of appeals should be reversed.

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ADDENDUM

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42 U.S.C. § 9601

§ 9601. Definitions

For purposes of this subchapter—

* * *

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.]has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural

gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

* * *

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

(22) The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing

site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

(23) The terms "remove" or "removal" means[2] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].

(24) The terms "remedy" or "remedial action" means[2] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate

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[2] So in original. Probably should be "mean".

to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means[2] remove, removal, remedy, and remedial action;,[3] all such terms (including the terms "removal" and

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[2] So in original. Probably should be "mean".

[3] So in original.

"remedial action") include enforcement activities related thereto.

* * *

(27) The terms "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

* * *

(32) The terms "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act.

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous

substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

* * *

42 U.S.C. § 9606

§ 9606. Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus

interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate

costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

* * *

42 U.S.C. § 9607

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a

State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

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42 U.S.C. § 9613

§ 9613. Civil proceedings

* * *

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) 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 may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility

identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

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 under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry

of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

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42 U.S.C. § 9652

§ 9652. Effective dates; savings provisions

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(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.