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 OF AMICUS CURIAE CONSERVAMERICA INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

ConservAmerica Inc. is a 501(c)(3) organization focused on addressing conservation, environmental, and energy challenges through market-based solutions.[1] Our core mission is to advocate for sound laws and public policies that produce clean air, clean and safe water, and healthy public lands. More specifically, ConservAmerica promotes wise management of our nation's public lands and water resources through responsible stewardship, rule of law, and holding polluters responsible for environmental pollution and degradation.

ConservAmerica promotes policies that incentivize landowners and third parties to clean up properties caused by legacy polluters. In most cases, the landowners did not cause or contribute to the pollution but desire to voluntarily clean up legacy pollution, such as that caused by historic mining and resource extraction industries. For example, America's gold rush in the 1800s resulted in thousands of abandoned hardrock mines. The U.S. EPA has estimated that over 500,000 of these abandoned mines litter the western landscape. And thousands of miles of U.S. streams and rivers are

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the ConservAmerica or its supporters made any monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), counsel for amicus also represents that the parties have consented to the filing of this brief.

polluted and lifeless due to toxic, acid mine drainage from these legacy mines. Many third parties, including innocent landowners, desire to clean these watersheds under Good Samaritan agreements with landowners and state resource agencies.

These Good Samaritan agreements provide greater certainty regarding the scope of the work and potential liability of these third parties, including the landowners who by virtue of their ownership status are potentially responsible parties (PRPs) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and liable under Clean Water Act (CWA) for unpermitted discharges. As discussed *infra*, the D. C. Circuit opinion adds greater uncertainty and confusion involving the outcome of Good Samaritan cleanups.

ConservAmerica has an abiding interest in preserving the vibrant growth of Good Samaritan cleanups that are needed to restore America's polluted lands. Any uncertainty regarding the scope and implications of cleanup agreements will certainly result in fewer voluntary cleanups in the future.

SUMMARY OF ARGUMENT

Section 113(f)(3)(B) of CERCLA states that a settlement agreement triggers a contribution claim when a settling party has "resolved its liability to a State or the United States for some or all of a response action" in a qualifying settlement. In evaluating the section 113(f)(3)(B) contribution

trigger, the D.C. Circuit Court of Appeals joined a majority of circuits that look to the terms of the settlement agreement at issue under basic principles of contract law to determine whether the agreement meets the requirements of the statute and do not necessarily require that the settlement agreement specifically reference CERCLA.

The majority of the Circuits have found that a case-specific, fact-specific, settlement-specific inquiry is appropriate. After correctly stating the appropriate standard, however, the D.C. Circuit focused its evaluation simply on whether the obligation contained in the settlement agreement at issue could be considered a response action, as that term is broadly defined in CERCLA, rather than giving weight to the numerous other provisions in the 2004 Consent Decree, based on the intent of the parties and the four corners of the agreement that limit the scope and finality of the agreement. The Court failed to apply traditional principles of contract law to uphold the terms of the agreement between the parties.

CERCLA was enacted to serve the dual purposes of expediting cleanups and holding polluters accountable. The D.C Circuit's opinion serves neither goal and also risks a chilling effect in agency cooperation with landowners to expedite the cleanup of polluted lands. The Court even acknowledges its "harsh" result that has the practical effect of shielding from any responsibility the party that here "deposited dangerous munitions and chemicals at the Ordot Dump for decades and left Guam to foot

the bill." *Gov't. of Guam v. United States,* 950 F.3d 104, 118 (D.C. Cir. 2020).

In overturning the District Court, the D.C. Circuit created a precedent that makes settlement more difficult and uncertain, thus delaying cleanups, and allowing polluters to walk free at the expense of the settling party, thereby endangering both public and private lands.

ARGUMENT

I. THE D.C. CIRCUIT COURT CORRECTLY FOLLOWED THE MAJORITY VIEW THAT CERCLA SECTION 113(F)(3)(B) DOES NOT REQUIRE A SETTLEMENT TO RESOLVE CERCLA SPECIFIC LIABILITY IN ORDER FOR THE SETTLEMENT TO TRIGGER A CONTRIBUTION ACTION.

Petitioner Guam first addresses whether Section 113(f)(3)(B) is triggered by a non-CERCLA settlement that does not resolve liability imposed by CERCLA. Guam argues that in order for a settlement or consent decree to trigger a contribution claim, there must be an express reference to CERCLA liability. This view has been rejected by a majority of the Circuits that have considered it, and appropriately so.

The D.C. Circuit correctly sided with the Third, Seventh and Ninth Circuits on the issue of whether the language in a settlement agreement or consent decree must specifically refer to CERCLA to trigger a possible contribution action under section

113(f)(3)(B). *See Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013); *Refined Metals Corp. v. NL Industries Inc.*, 937 F.3d 928, 932 (7th Cir. 2019); *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1117 (9th Cir. 2017).[2] The Courts recognize that section 113(f)(3)(B) does not contain language requiring that an action be taken under CERCLA whereas other sections such as section 107 do contain CERCLA specific references, leading to the conclusion that a settlement agreement can trigger 113(f)(3)(B) even if it never mentions CERCLA.[3]

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[2] The Second Circuit found references to CERCLA were necessary to trigger contribution because "response action" is a CERCLA-specific term in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.,* 423 F.3d 90, 95 (2d Cir. 2005). Later, the Court reinforced this position, finding references to CERCLA particularly relevant to state agency settlements in *W.R.Grace & Co.–Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 91 (2d Cir.2009). However, in a footnote, the Second Circuit later admitted "the force" of statutory arguments against this position. *Niagara Mohawk Power Corp. v. Chevron USA, Inc.*, 596 F.3d 112, 126 n.15 (2d Cir. 2010).

[3] Though not appropriate for a determinative universal rule based on statutory construction, however, the absence of any reference to CERCLA – particularly in a Clean Water Act settlement riddled with language specific to Clean Water Act permit violations – is strong evidence of a contractual intent not to resolve CERCLA response action liability, as discussed further herein. *See Hobart Corp. v. Waste Mgmt. of Ohio, Inc.,* 758 F.3d 757, 771 (6th Cir. 2014) (comparing settlement contracts containing CERCLA reference against those without it) (citing *W.R. Grace,* 559 F.3d at 91).

A. A Strict Requirement for CERCLA Specific Language Would Undermine Site-Specific Negotiations and Undo Existing Agreements.

Petitioner Guam's effort to create a universal standard by contending that section 113(f)(3)(B) requires a reference to CERCLA undermines site-specific negotiations. The proper inquiry should be based on an evaluation of the intent of the parties to meet the requirements of the statute at the time of the agreement under contract law.

Landowners and other interested parties have addressed various types of environmental remediation matters in the past by settlements pursuant to federal and state environmental laws, including those that left open the ability to pursue other responsible parties and other remedies at a later date after the scope and costs of remedial actions were more certain. Many settlements are old, before agency templates changed and the possibility of a CERCLA contribution claim became better understood. Creating a new requirement to reference CERCLA undermines these site-specific negotiations.

Settlements with state and federal environmental agencies often contain language specific to a cleanup that does not always fit neatly into a universal rule. "Response" actions are not limited to just CERCLA; such actions can be taken under other federal laws, including the CWA, the

Resource Conservation and Recovery Act ("RCRA"), the Toxic Substances Control Act (TSCA), and even the Safe Drinking Water Act, and parallel state laws. Language regarding the rights reserved by either settling party can vary based on the type of pollution involved, the number of other potentially responsible parties, the complexity of the anticipated cleanup and other site conditions, and the scope of the intended agreement. Creating a blanket rule requiring specific reference to CERCLA leaves these bargained-for provisions subject to reinterpretation and exposes settling parties to additional risk after they have come forward to mitigate environmental harm.

In the case of legacy mine cleanups, many parties, including Good Samaritans who engage in the voluntary cleanup of abandoned mines desire finality – and contribution protection – from a full resolution of response action liability. Other sites might require an open-ended agreement that lays the framework for cleanup but allows the settling party to reserve all of its rights against other polluters, particularly in complex cleanups where further litigation is expected but harm to the environment must be immediately mitigated.

Negotiations with state and federal agencies play a critical role in CERCLA. A universal rule – whether it is a reference to CERCLA as Guam argues, or whether any obligation might later be classified as a "response" as the United States argues – undermines these site-specific negotiations

and creates exposure for settling parties. This is particularly true of the landowners who ConservAmerica encourages to clean up contaminated properties they own. While some Good Samaritans certainly can receive contribution protection from final resolutions with environmental agencies that broadly resolve CERCLA response action liability, state resource agencies and Good Samaritan parties often set issues of historic liability aside in order to conduct the cleanup without further delay.[4] These voluntary cleanups under Good Samaritan agreements should not have the settlements reopened under a new, universal rule that may leave landowners and other third parties who voluntarily initiated cleanups exposed to further litigation or without a remedy to force the parties that contributed to polluting the land to take responsibility.

II. THE DC CIRCUIT ERRED BY FAILING TO APPLY TRADITIONAL PRINCIPLES OF CONTRACT LAW IN INTERPRETING THE 2004 CONSENT DECREE.

The D.C. Circuit, in similar language and reasoning to that used by a majority of the Circuits, correctly noted that whether or not liability is resolved through a settlement "is unanswerable by a

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[4] See Jonathan Wood, Prospecting for Pollution, The Need for Better Incentives to Clean Up Abandoned Mines, Property and Environmental Research Center, Feb. 2020, available at: https://www.perc.org/wp-content/uploads/2020/02/prospecting-for-pollution-abandoned-mines.pdf

universal rule" and the correct standard should require examination of "the terms of the settlement on a case-by-case basis." *Gov't. of Guam v. United States,* 950 F.3d 104, 114 (D.C. Cir. 2020) (quoting *Bernstein v. Bankert*, 733 F.3d 190, 213 (7th Cir. 2013)). The D.C. Circuit has previously found that "because a consent decree ... is essentially a contract, a court's construction of a consent decree is essentially a matter of contract law,'" *Id.* (quoting *Segar v. Mukasey*, 508 F.3d 16, 21 (D.C. Cir. 2007).[5]

A. After Articulating the Correct Standard, the D.C. Circuit Failed to Properly Apply Traditional Principles of Contract Law When Interpreting the 2004 Consent Decree.

Evaluating a settlement agreement is a fact-specific inquiry conducted pursuant to traditional principles of contract law. In evaluating the 2004 Consent Decree, the D.C. Circuit strayed from that standard in three ways.

First, the D.C. Circuit openly reinterpreted the context and purpose of a liability disclaimer by

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[5] "Where that consent decree binds the United States, that contract is 'governed exclusively by federal law[.]'" *Id.* at 114-115 (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). The federal common law of contracts largely "dovetails" with "general principles of contract law." *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 681 (D.C.Cir.1985). Thus, "the judicial task in construing a contract is to give effect to the mutual intentions of the parties." *Id.* at 682. "Contractual provisions are interpreted taking into account the contract as a whole, so as to give effect, if possible, to all of the provisions in the contract."

refusing to take the provision "at its word." In the absence of language to the contrary, the plain terms of a contract control and all terms must be given effect wherever possible. The parties agreed that the 2004 Consent Decree did not make a single finding of fact relevant to the critical issue of liability, and thus the parties cannot be said to have "resolved" any liability at all. Simply because the parties also agreed to start cleanup of a contaminated site does not change that analysis. Absent a countervailing clause of similar directness and force, "it is very difficult to say, in light of [such a disclaimer], that the agreement between the parties constituted a resolution liability." *Bernstein,* 733 F.3d at 212. As the District Court found, "taken together," numerous clauses go to the parties' mutual intent of leaving liability open-ended. *Guam v. United States,* 341 F.Supp.3d at 94. The broad disclaimer is in line with other substantive provisions of the agreement that show the 2004 Consent Decree left liability open-ended.

Second, the D.C. Circuit erroneously dismissed express reservations of rights and limitations on Guam's release that demonstrated the open-ended nature of the settlement. Such provisions fully align with the broad disclaimers of liability. The Court erred when it found that a reservation of the United States' unlimited rights to pursue Guam for any "violations unrelated to the claims in the Complaint" did not undermine the resolution of response action liability. *Guam v. U.S.,* 950 F.3d at 116. This provision clearly limits the scope of the 2004

Consent Decree *only* to claims in the underlying Complaint. The D.C. Circuit correctly noted that the liability released in the 2004 Consent Decree is limited to only "the claims as alleged in the Complaint." *Id.* The claims alleged in the underlying action are only for CWA permit violations relating to leachate discharge.

The parties never contemplated CERCLA nor should they since the Government's enforcement action was brought solely under the CWA. Accordingly, Guam does not have a release as to any of its CERCLA response action liability. *Asarco,* 866 F.3d at 1125 (finding no resolution of liability because "the release from liability covers none of the 'corrective measures' – i.e., response actions – mandated by the agreement"); *W.R. Grace*, 559 F.3d at 87 (finding no contribution claim where release was only for state law claims and did not include CERCLA claims). Guam has only a limited, conditional release for claims related to its leachate permit violations. CERCLA's historic, retroactive, strict liability regime is unrelated to a claim for CWA permit violations. Here, CERCLA liability is unaddressed by the scope of the narrow and conditional release and, as the District Court found, its exclusion is further emphasized by the United States' broad reservation of rights.

Before the D.C. Circuit issued its opinion, every Court to evaluate express reservations of rights and narrow releases like those in the 2004 Consent Decree gave those clauses effect. Those Courts found such provisions undermine the finality of the

agreement and preclude a contribution claim. *See, e.g, Asarco*, 866 F.3d at 1125-26 (finding, among other reservations, like here, there is no resolution where "the Decree's release from liability covers none of the 'corrective measures' – i.e., response actions – mandated by the agreement" and "is replete with references to . . . continued legal exposure"); *Fla. Power Corp.*, 810 F.3d at 1003 ("The parties to a settlement may choose to structure their contract so that liability is resolved immediately upon execution of the contract. Or, the parties may choose to leave the question of liability open through the inclusion of reservations of rights, conditional covenants, and express disclaimers of liability.") (quoting *Bernstein*, 733 F.3d at 214); *W.R. Grace & Co.–Conn. v. Zotos Intern., Inc.*, 559 F.3d 85, 91 (2d Cir.2009) (finding a broad reservation of rights in a settlement, "which makes no reference to CERCLA, establishes that the DEC settled only its state law claims against Grace, leaving open the possibility that the DEC or the EPA could, at some future point, assert CERCLA or other claims"); *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 137 (3d Cir.2013) (finding a contribution claim was triggered where CERCLA was built into state law standards, and thus "the resolution of [state law] claims necessarily means resolution of claims under CERCLA, alleviating the concern expressed by the Court of Appeals for the Second Circuit [regarding exposure to future claims through reserved rights]"); *Id.* at 137 n.3 (contrasting "considerably broader" release at issue with the narrow release and broad reservations of rights in W.R. Grace to find

contribution claim triggered due to lack of reserved rights).

The D.C. Circuit erroneously relied on the fact that the statute only requires resolution of liability for "some" of a response action to justify its rejection of the relevance of both the narrow release and the United States' broadly reserved rights. But this argument makes little sense. That only "some" liability must be resolved does not change the requirement that some response action liability be addressed with the requisite finality to actually be resolved. A release that does not cover CERCLA liability resolves no CERCLA liability. The same is true where a broad reservation of rights preserves ongoing legal exposure for the settling party. Without a resolution of liability, no contribution claim arises in such a settlement.[6]

Third, the D.C. Circuit focused too heavily on the nature of the response action contained in the settlement, and not the key issue, which is whether liability for that response action was actually resolved by the agreement. The fact that a settlement agreement simply includes a response or

[6] The "some" liability limitation is better read as instead tracking the scope of the contribution claims granted to a settling party, as resolving liability for a portion of a cleanup only grants a contribution claim proportionate to the scope of that obligation. It is entirely common for CERCLA cleanups to involve multiple, iterative settlements. *See e.g. Bernstein,* 733 F.3d 190 (involving two settlements covering different pieces of an iterative cleanup).

cleanup task that can later fit the broad definition of a CERCLA response is not enough to trigger a contribution claim. Such a provision is entirely inconsistent with other clauses demonstrating a desire to set aside issues of liability but nevertheless begin to conduct a response action.

Not every settlement addresses liability with the requisite finality to trigger a contribution claim. Prior to the D.C. Circuit's opinion, courts recognized that parties reaching a settlement involving a response action is not the end of the inquiry. *Asarco,* 866 F.3d at 1125. In contrast, the D.C. Circuit opinion prioritizes whether the obligation contained in a settlement can later be classified as a response action above all other clauses in the contract. Such an approach renders other material, bargained-for contractual clauses irrelevant and without effect.

The correct inquiry is not merely whether a settlement involves an obligation to conduct a response action, but instead, whether a settlement includes a resolution of liability for a response action pursuant to CERCLA. All of the clauses in the contract matter and must be given effect. The D.C. Circuit's standard suggests it is possible to set aside consideration of the underlying claims addressed, the scope of release, any reservations of rights, and even the express disclaimers that say the exact opposite of the Court's findings. The D.C. Circuit skipped the rest of the case-by-case, fact-specific, settlement-specific inquiry and jumped to the end after determining the cleanup could qualify as a CERCLA response. This approach undermines

the ability of the parties to reach an agreement resolving certain issues but not addressing future CERCLA liability. As such, it impinges upon the contractual rights of the parties.

B. The Court's Ruling Is Counter to the Goals of CERCLA and Will Allow Parties Responsible for Pollution to Escape Liability for the Pollution They Caused.

By not giving the relevant contractual clauses their proper weight, the D.C. Circuit undermined the two main goals of CERCLA – expediting cleanup and holding polluters accountable. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). In practice, the admittedly "harsh" result reached by the D.C. Circuit of allowing a polluter to walk free at a settling party's expense makes it more difficult for settling parties to clean up the environment without risking their rights against other PRPs.

This is particularly dangerous in large cleanups where all sources, parties, and contamination might not be known until years after the start of a cleanup. The D.C. Circuit's decision thus creates a chilling effect that inhibits agency cooperation and the mitigation of environmental harm. A party facing non-CERCLA litigation has little incentive to settle and begin cleanup if the parties cannot expressly limit the scope of that agreement as desired.

Under the United States and D.C. Circuit's interpretation of the 2004 Consent Decree, the easiest way for a party in Guam's position to protect

all of its rights is by simply doing nothing. The D.C. Circuit found that any settlement with a response action obligation resolves liability and triggers limitations, regardless of express disclaimers and reservations to the contrary. Indeed, pursuant to section 113(f)(1), even a judgment against Guam in the CWA action would not have barred its claims here – only its willingness to settle and begin cleanup put Guam at risk. Language protecting such a party must be given its full force and effect.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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