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

BRIEF FOR ATLANTIC RICHFIELD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ELISABETH S. THEODORE
STEPHEN K. WIRTH
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000

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

Counsel for Amicus Curiae

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

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INTEREST OF THE AMICUS CURIAE

Atlantic Richfield Company has a significant interest in how this Court interprets section 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[1] In 1977, Atlantic Richfield acquired and later merged with The Anaconda Company, which for decades had operated copper and other mining and mineral processing sites throughout the United States. As a consequence, Atlantic Richfield found itself inheriting responsibility for cleaning up pollution in cooperation with the Environmental Protection Agency ("EPA") at CERCLA "Superfund" sites across the country. Atlantic Richfield was a party to this Court's most recent decision involving CERCLA, *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020). And Atlantic Richfield is also both the proponent and the target of contribution claims under § 113(f)(3)(B) of CERCLA for and against other private parties involved with cleanups at polluted sites. As both a party seeking contribution, and a party from whom contribution is sought, Atlantic Richfield has substantial financial and legal interests in the resolution of this case and an important, balanced perspective on the consequences the Court's ruling will have for private parties involved in environmental cleanups.

Atlantic Richfield also has a related case pending in this Court, *Atlantic Richfield Co. v. Asarco LLC*, Case No. 20-1142, the outcome of which will turn on the Court's decision here. Atlantic Richfield's case involves a lead smelting facility at the East Helena

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[1] All parties consented to the filing of this brief. Counsel for Atlantic Richfield authored this brief in whole. No one other than Atlantic Richfield funded the preparation of the brief.

Superfund Site in Montana that plaintiff Asarco and its predecessors owned and operated for more than 100 years. Atlantic Richfield's predecessor Anaconda had leased land from Asarco at the site to operate a zinc fuming plant between 1927 and 1972, and then sold the plant to Asarco, which continued to operate it for another decade. In 1998, Asarco entered a judicially approved Consent Decree with EPA that required it to perform a comprehensive cleanup at East Helena ("1998 Consent Decree"). But Asarco failed to perform the cleanup and entered bankruptcy in 2005. To resolve EPA's claims in the bankruptcy, Asarco committed to fund its obligations under the 1998 Consent Decree and turned the remediation over to a custodial trustee. In 2012—fourteen years after promising to clean up the site—Asarco brought a contribution claim against Atlantic Richfield.

Atlantic Richfield argued that the three-year statute of limitations in CERCLA § 113 barred Asarco's contribution claim because Asarco had "resolved" its "liability for some or all of a response action" in its 1998 Consent Decree. The district court agreed and dismissed Asarco's claim. But the Ninth Circuit reversed, holding that the 1998 Consent Decree, while requiring Asarco to perform multiple response actions, did not "resolve [Asarco's] liability" for some or all of a response action because one paragraph of the Decree released claims for civil penalties without releasing claims for injunctive relief. On remand, Asarco obtained a multi-million-dollar judgment against Atlantic Richfield based on its 14-year-old claim. Atlantic Richfield has now petitioned for certiorari and asked this Court to hold the petition pending the decision in this case. *See* No. 20-1142.

If this Court adopts the United States' proposed interpretation of § 113(f)(3)(B), Atlantic Richfield will prevail on remand in the Ninth Circuit. The United States correctly contends that "[a] settlement resolves a person's liability for a response action (or response costs) if it definitively requires the person to perform (or pay for) that action." U.S. Br. 11. It is undisputed that Asarco's 1998 Consent Decree did just that.

Atlantic Richfield thus has a direct interest in the outcome of this case. And Atlantic Richfield's case—as well as Atlantic Richfield's experience with CERCLA contribution claims more generally—provides an essential perspective that is missing in this dispute between two government actors: that of private parties which are most often subject to CERCLA contribution claims.

In particular, Atlantic Richfield's case underscores the adverse effects of Guam's proposed approach to § 113(f)(3)(B). It illustrates that deciding whether a party has resolved its liability based on the nuances of release language in a settlement agreement leads to unpredictable and inequitable results. And it illustrates the significant unfairness in letting contribution claims linger, with no statute of limitations running, even after a party has agreed to perform or pay for environmental cleanup in a settlement with the United States or a State. This brief will accordingly aid the Court in interpreting the words "resolve [its] liability."

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental policy objectives of CERCLA are to promote timely cleanup of contaminated Sites and

to ensure that parties that caused contamination pay for its cleanup. The fundamental policy objective of a statute of limitations is to ensure that claims are promptly pursued so that parties have certainty and access to relevant evidence.

As Atlantic Richfield's case and others illustrate, Guam's proposed rule undermines all of these policies. It will lead to uncertainty regarding parties' rights to contribution, and it will allow settling parties to delay indefinitely before pursuing contribution, prejudicing non-settling PRPs and jeopardizing the availability of the evidence necessary to fairly determine parties' relative contributions.

First, the facts of Atlantic Richfield's case illustrate the folly of deciding whether a party has resolved its liability based on the nuances of the specific terms of a particular settlement agreement. Adopting a rule that allows different results based on immaterial differences in parties' respective settlement agreements will create uncertainty as to when parties have a right to seek contribution, and as to when their statutes of limitations have run. That uncertainty, in turn, will frustrate CERCLA's goal of incentivizing early settlements to fund environmental cleanups. All parties would benefit from a simple test to determine when a CERCLA contribution claim arises and the statute of limitations on that claim begins to run.

Second, Atlantic Richfield's case illustrates the problems caused by letting contribution claims linger with no statute of limitations running. Statutes of limitations exist to ensure certainty about parties' potential liabilities and access to the witnesses and evidence necessary to fairly decide cases. By the time

Asarco filed its complaint in 2012, forty years had passed since Atlantic Richfield had conducted any operations at the Site; thirty years had passed since EPA started its investigation of the Site; and fourteen years had passed since Asarco had entered a judicially approved settlement with EPA, in which Asarco promised to perform a complete and comprehensive cleanup of the Site. By the time the case was finally tried in 2018, Atlantic Richfield was handicapped by its inability to undertake its own investigation of the Site before significant remedial work was done, as well as its limited access to witnesses and documents.

In light of these considerations, Atlantic Richfield urges the Court to adopt the United States' position and hold that a party has "resolved [its] liability" for a specific response action when it enters a judicially approved settlement that conclusively determines its obligation to perform or pay for that response action. This simple rule will promote certainty regarding the existence of contribution claims, as well as the timely resolution of those claims. Because many remediations take place in phases, however, the Court should make sure to clarify that a party that settles its responsibility for one particular response action or part of a response action—for example, cleaning up one portion of a site—does not trigger the statute of limitations for contribution for *other* response actions it has not yet agreed to perform or pay for in its settlement agreement.

ARGUMENT

I. The United States' Proposed Rule Provides Critical Clarity and Consistency to Private Parties With Potential Contribution Liability.

The United States urges the Court to adopt a straightforward rule: when a party enters a judicially approved settlement agreement that conclusively determines the party's obligation to perform a particular response action, the party has resolved its liability for that response action and has a right to seek contribution for it. If the parties have entered into a "conclusive agreement about what [one] party must do," U.S. Br. 38, the settlement has resolved that party's liability for at least "some" of a response action.

By contrast, Guam urges this Court to hold that whether a party has "resolved its liability" is a record-intensive inquiry that requires examining lengthy settlement documents and evaluating myriad provisions, including the existence and extent of any "release," the contours of any reservations of rights, the extent of a party's admission of liability, and presumably many other provisions that might appear in a settlement agreement. Pet. Br. 41. Indeed, Guam argues that any of many "magic words" can defeat the resolution of liability, including disclaimers or non-admissions of liability; reservations of rights by EPA to enforce compliance with the agreement, to require the Potentially Responsible Party ("PRP") to take additional response actions not addressed in the agreement, or to ensure the PRP complies with other applicable laws; or release terms that provide less than a

complete release for the PRP, or delay such release until the PRP's work is complete.

The Court should adopt the clear, bright-line rule proposed by the United States. That rule is consistent with the statutory text, U.S Br. 34-38, and advances CERCLA's underlying purposes. And the rule offers critical advantages to the private sector parties who most often find themselves at odds over CERCLA contribution claims. It offers certainty and predictability, not only to parties asserting claims for contribution, but also for third parties who have potential liability for a site and must evaluate their own exposure to contribution claims based on agreements to which they are not parties and over which they have no say.

It is easy to figure out whether a PRP has committed to EPA that it will undertake a particular response action: the consent decree will say so on its face. Thus, for example, no one disputes that Guam conclusively agreed to undertake response actions in its settlement with the EPA. Likewise, in Atlantic Richfield's dispute with Asarco, no one disputes that Asarco conclusively agreed to undertake particular cleanup activities—response actions—in the 1998 Consent Decree. A PRP that enters such a settlement will know when its right to contribution arises and expires under the United States' rule with perfect clarity. Likewise, a third party like Atlantic Richfield will know when the time has passed for a settling PRP to pursue contribution claims; it will not be perpetually waiting for the hammer to drop.

Guam's proposed rule, by contrast, is exceptionally malleable and unpredictable. Cases from courts

applying that rule or versions of it illustrate as much—as Guam put it in its petition for certiorari, the courts are "expressly divided" on what sort of language in a Consent Decree or settlement defeats contribution. Pet. 17. Thus, for example, the Seventh Circuit held in one case that a settlement did not resolve liability within the meaning of § 113(f) because it did not "immediately resolv[e] all liability," *Bernstein v. Bankert*, 733 F.3d 190, 213 (7th Cir. 2012), while concluding in another case that a covenant not to sue *did* resolve a party's liability even though it was "not comprehensive," *see Refined Metals Corp. v. NL Indus.*, 937 F.3d 928, 931 (7th Cir. 2019); *see also Fla. Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1004 (6th Cir. 2015) (holding a consent order stating satisfaction of its requirements "shall . . . resolve" the responsible party's "liability to EPA" nevertheless did not resolve "some or all" of that party's liability for purposes of § 113(f) because of the "context in which the reference [to resolution of liability] [was] made"); *ITT Indus. v. BorgWarner, Inc.*, 506 F.3d 452, 459-60 (6th Cir. 2007) (holding liability was not resolved where EPA had reserved the right to adjudicate liability for failure to comply with the terms of the settlement agreement itself).

In Atlantic Richfield's case, the Ninth Circuit followed a basic approach similar to that advocated by Guam. The court first acknowledged that Asarco's 1998 Consent Decree "clearly required Asarco to take response actions to clean up hazardous waste at the Site," *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1114 (9th Cir. 2017), meaning that it would have triggered the statute of limitations under the rule the United States proposes. But the court held that

Asarco's agreement to undertake response actions was not enough, and instead engaged in an intensive analysis of various collateral provisions of the settlement agreement—agreeing with its sister circuits about the import of certain particular terms, and disagreeing about others. For example, the Ninth Circuit rejected the Sixth Circuit's conclusion in *ITT* that a reservation of the right to enforce the settlement itself defeated contribution. But the Ninth Circuit also rejected the Seventh Circuit's conclusion in *Refined Metals* that a settlement release need not be "comprehensive" to trigger contribution.

Ultimately, the Ninth Circuit held that Asarco's 1998 Consent Decree did not trigger contribution because Paragraph 209 of the Decree released only claims for civil penalties, but not claims for injunctive relief. *Asarco*, 866 F.3d at 1126 (noting that Paragraph 209 "is expressly limited to liability with regards to the United States' claims for civil penalties"). But Paragraph 214 of the agreement barred EPA from initiating "a separate action under Sections 3008(h) and 3013 of RCRA … for work to be performed at the Facility," App. 252, ¶ 214[2]; in other words, EPA *did* release its claims for injunctive relief so long as Asarco performed the corrective action work it agreed to undertake.[3]

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[2] "App." citations refer to Atlantic Richfield's appendix to its Petition for Certiorari in *Atlantic Richfield Co. v. Asarco LLC*, Case No. 20-1142.

[3] Lest there be any doubt, EPA confirmed this when it published its Public Notice of the Consent Decree in the Federal Register, explaining that the decree "resolve[d] civil penalty *and injunctive*

The Ninth Circuit further opined that the Consent Decree did not trigger contribution because it contained assorted "references to Asarco's continued legal exposure," including (1) a provision that did not limit Asarco's obligation to perform work outside the facility's boundaries, even if it lacked access (¶ 122); (2) a paragraph setting forth a limited covenant not to sue (¶ 214); and (3) other paragraphs setting forth the scope of the release (¶¶ 216-17). *Asarco*, 866 F.3d at 1126.

EPA consent decrees are notoriously long and complicated. Guam's petition asks this Court to hold that three specific features present in its own settlement—the absence of an admission of liability, the U.S.'s reservation of rights, and a release that is conditioned on successful completion of the response action—mean that the settlement did not resolve some or all of Guam's liability. Pet. Br. 41-43. But these are hardly the only potentially relevant features, as the Ninth Circuit's decision in Atlantic Richfield's case illustrates. Guam's fluid position would force litigants and the courts to interpret pages upon pages of EPA consent decrees—a daunting prospect that is further complicated by the fact that these agreements are subject to frequent revision and amendment. Adopting Guam's position thus dooms regulated businesses to continued uncertainty as to which magic words

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relief claims of the United States against ASARCO under RCRA." 63 Fed. Reg. 8473 (Feb. 19, 1998 (emphasis added); *see id.* ("The consent decree . . . resolves civil penalty claims of the United States against [ASARCO] under the CWA . . . [and] also resolves civil penalty *and injunctive relief claims* of the United States against ASARCO under RCRA...." (emphasis added)).

sufficiently describe the required degree of resolution, and thus to continued uncertainty about the extent of their ongoing exposure to CERCLA contribution actions.

This uncertainty is especially pernicious because the private parties that are most often the target of CERCLA contribution actions have no ability to affect the terms of the settlement agreement between another private party and the government. Atlantic Richfield had no ability back in 1998 to require Asarco and the EPA to include language that would have clarified whether the settlement triggered the statute of limitations for bringing contribution claims. And settling parties have no particular incentive to push for clarity, since they can always choose to bring a contribution action within three years. The parties with the greatest interest in clarity—the defendants in future contribution actions—have no seat at the table. Indeed, Asarco actually excluded Atlantic Richfield from its settlement negotiations with the EPA. ER003046.[4]

A bright-line rule that focuses on whether the settlement requires a response action also prevents the disparate treatment of similarly-situated parties based on minor, non-substantive discrepancies in the particular terms of their respective agreements. Contrasting the D.C. Circuit's decision in this case with the Ninth Circuit's decision in Atlantic Richfield's case shows why. In each of these cases, EPA ordered the primary PRP (Asarco and Guam) to investigate

[4] "ER" citations are to the Excerpts of Record ("ER") filed in Case No. 18-35934 (9th Cir.).

contamination at a Superfund site. In each case, EPA sued that PRP in a complaint seeking injunctive relief, and in each case the PRP entered a judicially approved consent decree with EPA. In each case, that decree required the PRP to pay civil penalties and to undertake specific response actions to clean up the respective sites. In each case, the consent decree also stated that the United States reserved the right to pursue claims for violations unrelated to the claims in its complaint; that the settling party would be released from the United States' claims when it complied with the decree's requirements; and that the parties had entered the decree without admitting liability.

Despite these materially identical facts, the Ninth Circuit's parsing of the scope of a few scattered provisions led to a different and unpredictable outcome. Thus, for example, the Ninth Circuit focused on whether Asarco used the specific word "release" with respect to injunctive relief, even though the Consent Decree in substance clearly released the claims for injunctive relief provided Asarco faithfully fulfilled its commitments.

And more generally, none of the provisions that Guam says should govern the inquiry have anything to do with the goals of the statutory provision for CERCLA contribution. The goal is to compensate settling parties who agree to perform remediations. So it makes sense to conclude that a settling party has resolved its liability for "some" of a "response action" or "some" of the "costs" of a "response action," once it has agreed to perform that response action or undertake that cost. And a settling party may then seek

contribution for that particular response action or cost. The manifest purpose of this language is to both allow and require the settling party, once it knows it will have to pay for any part of a response (either through direct performance or by funding EPA's cleanup), to seek contribution for that specific part of the response.

It is worth emphasizing that, when a party resolves its liability for only "some" of a response action or cost, it acquires a right of contribution only for that specific response action or cost. Resolving liability for "some" of a response action does not create a right of contribution for other potential response actions that are not required by the party's settlement. This is an important distinction for PRPs who, unlike Asarco or Guam, agree to undertake response actions specific to particular geographic areas, particular contaminants, or particular media (like groundwater or soil). Thus, for example, a PRP's agreement to undertake response actions to remediate soil at a site would not trigger its right to seek contribution for a groundwater cleanup that has not even begun and that might involve different responsible parties. Because many EPA remediation agreements at particular sites are phased, the contribution trigger in those cases must be specific to a particular response action, not site-wide.

The Court has long recognized the advantages of bright-line rules over fuzzy standards like that proposed by Guam. *See Bowsher v. Merck & Co.*, 460 U.S. 824, 841 n.18 (1983) ("Bright-line rules upon which the parties' expectations may be firmly established are preferable to . . . protracted litigation . . . ."); *Fla.*

Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 52 (2008) (noting the advantages of a "simple, bright-line rule instead of [a] complex, after-the-fact inquiry"). This Court should not endorse a rule that leads to idiosyncratic results that are impossible for parties to predict. This is even more critical where this determination impacts not just the rights of the parties to the Consent Decree, but also the rights of third parties from whom contribution may be sought. This Court should adopt the simple, clear, and decisive approach the United States proposes, a rule that is consistent with the text and the purpose of CERCLA.

II. Guam's Proposed Rule Will Undermine the Purposes of CERCLA's Statute of Limitations for Contribution Claims.

Guam's rule is also irreconcilable with the policy rationales underlying statutes of limitations generally, and CERCLA's contribution statute of limitations specifically. Guam's rule would indefinitely defer triggering the limitations period, allowing settling parties who know that they have contribution claims to delay bringing those claims. And because settling parties can negotiate the terms of their settlements, Guam's rule would create massive opportunities for gamesmanship and sandbagging. As Atlantic Richfield's case illustrates, allowing a settling PRP to delay bringing contribution claims for decades is fundamentally unfair to the defendants in those contribution actions. Delay leads to lost witnesses, evidence, and opportunity for investigation. Further, allowing parties to pursue contribution claims decades after promising to undertake response actions undermines

CERCLA's policy of incentivizing prompt cleanups and erodes judicial efficiency.

Civil statutes of limitations "represent a public policy about the privilege to litigate," and "their underlying rationale is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence . . . ." *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (internal citations omitted). Limitations periods "are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected, they promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared, and they are primarily designed to assure fairness to defendants." *Id.* (citations omitted). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* Statutes of limitations also ensure that courts are "relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Id.*

In the context of CERCLA contribution, it is the agreement to undertake or fund a response action—and *not* a release from liability—that reasonably puts a settling PRP on notice that it is time to seek contribution from other PRPs. The purpose of the contribution remedy is to obtain contribution for response actions, so it only makes sense that the claim would accrue when the settling PRP understands that it will be obligated to take a response action. Nothing about

the presence or absence of specific terms of a release from liability from the United States—or any of the other settlement provisions that Guam discusses—is at all relevant to the basic question of whether a settling PRP is aware that it has a contribution claim against a *different* entity.

Nor is the presence or absence of a release relevant to the prosecution of a settling PRP's contribution claim. CERCLA already contemplates that settling PRPs will litigate contribution claims before the final cost of response actions is known, and whether or not the United States has "cap[ped] the settling party's liability." *Cf.* Pet. Br. 39. That's clear from section 113(f)(3)(B) itself, which states that a PRP can bring a contribution claim once it has resolved its liability for "some" of a response action. CERCLA accordingly permits settling PRPs to litigate the liability *percentage* of each potential contributor to a particular response action, and then obtain a declaratory judgment requiring the contributor to pay, on an ongoing basis, that percentage of the ongoing response costs. 42 U.S.C. § 9613(g)(2). Thus, on the settling PRP's side of the balance sheet, there is no policy reason why Congress would have wanted to delay accrual of a contribution claim pending some supposed perfectly worded "release" from EPA.

By contrast, letting settling PRPs wait years, or even decades, before pursuing claims for contribution will cause immense prejudice to defendants in contribution cases. Under Guam's proposal, settling PRPs essentially can elect to trigger the contribution period at their option. All they have to do is enter into a settlement agreement that requires response actions, but

decline to admit liability. Years down the line, if the settling PRP decides it is time to pursue a claim for contribution, it can enter into another agreement with the United States that admits liability, thus starting the statute of limitations.

This is not a farfetched scenario; when EPA works with private parties to remediate polluted sites, it is not a one-agreement-and-you-are-out situation. EPA and the private party often work hand-in-glove for years as EPA oversees the response actions, and enter into multiple successive Administrative Orders on Consent, Unilateral Administrative Orders, or judicial consent decrees governing the cleanups. Indeed, courts that follow Guam's proposed rule have acknowledged that it permits the settling party to essentially decide whether and when to trigger the statute of limitations. *See Bernstein,* 733 F.3d at 213 (stating that the settling party and the EPA "may choose to structure their contract" to resolve liability or not). A settlement that conditions a "release" on performance might not resolve liability, while a settlement that does not contain such a limitation could, *see Fla. Power Corp.*, 810 F.3d at 1003-04, even though the two settlements are substantively identical, because in the latter situation the EPA can still bring an enforcement action for nonperformance. Or a settling party might avoid resolving its liability simply by including language indicating that the settlement "shall not constitute any admission of liability." *Id.* at 1003.

The consequence for the unwitting nonparty is that years down the line, after documents are lost and memories have faded, it may be surprised with an untimely contribution action. That is exactly what

happened to Atlantic Richfield. Asarco had worked with EPA since the early 1980s to investigate the East Helena Site's environmental condition. Because Asarco had leased land to Atlantic Richfield, had acquired the zinc fuming operation in 1972, and had run the operation itself for at least a decade, it had extensive knowledge of any contribution the zinc fuming plant made to the Site's contamination. Throughout the 1980s and 1990s, Asarco conducted numerous Site investigations to characterize the contamination at the Site. Although EPA identified Atlantic Richfield as a PRP in the late 1980s, *Asarco*, 866 F.3d at 1114, neither EPA nor Asarco ever once identified the zinc fuming operation as a meaningful contributor of any contamination and never pursued any relief from Atlantic Richfield. ER003800 (Asarco's calculation of total percent of arsenic contamination attributable to Atlantic Richfield's zinc fuming operation was 0.710%).

With the knowledge gathered from its investigations, Asarco in 1998 entered a comprehensive settlement agreement with EPA, in which Asarco undertook to perform a complete remediation of the Site. At the time it entered this settlement, Asarco was of course well aware of Atlantic Richfield's operations at the Site.

Seven years after entering the 1998 Consent Decree, Asarco filed for bankruptcy. In the bankruptcy proceedings, Asarco fully acknowledged its obligations, undertaken in the 1998 Consent Decree, to perform response actions and clean up the Site and agreed to fund that cleanup with a cash payment of approximately $100 million. The Ninth Circuit held

that the bankruptcy settlement, unlike the 1998 Consent Decree, *did* resolve Asarco's liability.

In 2012, three years after entering its bankruptcy settlement, 14 years after committing to undertake a sitewide cleanup, and *forty years* after Atlantic Richfield had ceased operating at the Site, Asarco for the first time contended that Atlantic Richfield's operation of the zinc fuming plant had contributed to the pollution and demanded contribution from Atlantic Richfield for the work that Asarco had originally committed to perform in the 1998 Consent Decree.

Because Asarco waited decades before ever indicating that it believed Atlantic Richfield bore any responsibility for the contamination at the Site, Atlantic Richfield faced significant prejudice at trial:

- Atlantic Richfield never had the opportunity to conduct sampling at the Site to perform its own investigation of impacts from the zinc fuming plant because remedial work was already under way by the time Asarco brought its claim. Instead, Atlantic Richfield had to rely on isolated data points from Asarco's historical sampling.

- Although these limited data points indicated that the zinc fuming plant did not contribute to the contamination, the court noted the "sparse historical record" "which does not include . . . very much in the way of detailed information that would allow a fact finder to determine the precise nature and amount of pollutants that were released to

the environment by Asarco's and Anaconda's operations." App. 65 n.10.

- Asarco's expert admitted that the historical record was "meager" and incomplete such that his allocation method was calculated "on a more subjective basis." ER001683:1-6; 1717:23-25.

- Atlantic Richfield had no opportunity to obtain evidence from witnesses with knowledge of its historical operations or its communications with Asarco and EPA during the investigations of 1980s-90s. Atlantic Richfield's sole fact witness at trial had only ever visited the site one time, in 1971. App. 96.

- And, due to the passage of time, many relevant documents were lost—some destroyed in a fire, and many of those remaining deteriorated to the point they were illegible.

Asarco's delay of more than 14 years disadvantaged Atlantic Richfield by unfairly limiting the evidence and witnesses it had access to. By the time Asarco pursued its claim, the trustee responsible for the Site had already begun remediation efforts, App. 59, ¶ 67, making any current sampling irrelevant to establishing the parties' relative contributions. Had the case been brought no later than 2001, Atlantic Richfield would have had better access to data, witnesses, and documents, as well as an opportunity to investigate the Site itself.

Adopting Guam's proposed rule will lead to similar problems in other cases. As the Eighth Circuit has observed, an interpretation of § 113 under which a PRP could "be subject to new private-party claims for decades" would "frustrate Congress's intent to assure that evidence concerning liability and response costs i[s] fresh . . . and to provide some measure of finality to affected responsible parties." *See Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 610 (8th Cir. 2011) (internal citation omitted)); *Fla. Power Corp.*, 810 F.3d at 1001-09 (laboriously parsing the language of multiple successive Administrative Orders on Consent and concluding that a settling party's contribution claim was timely even though it was filed more than 10 years after remediation began); *see also* H.R. Rep. No. 99-253 pt. 1, at 138 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2920. As these cases illustrate, allowing parties to commit to perform response actions, and then to wait decades before alerting other PRPs of their potential liability for contribution undermines the purposes of statutes of limitations. It leads to surprise claims against the non-settling PRPs, and deprives them of access to evidence and witnesses to defend those claims.

In addition to undermining the purposes of the statute of limitations, the result in Atlantic Richfield's case also illustrates how Guam's proposed rule undermines CERCLA's policies of promoting prompt cleanups and encouraging responsible parties to settle. In that case, Asarco was rewarded for *not* performing the response actions it promised to undertake in 1998 and ultimately filing for bankruptcy. Had Asarco performed its obligations under the 1998 Consent Decree, the 2009 bankruptcy court Consent Decree—which

the Ninth Circuit determined was the trigger for Asarco's limitations period—never would have existed and Asarco would have had no basis on which to extend the limitations period. By contrast, a rule that gives a party an immediate right to seek contribution as soon as it enters a settlement agreement and commits to perform a response action *promotes* CERCLA's policies. A PRP that has stepped forward to commit to undertake response actions *should* have an immediate right to seek contribution from other PRPs for that response action so that it can know as soon as possible the extent of the liability it will bear and so that it can recover from those parties before time drags on and those other parties become insolvent or otherwise judgment-proof.

CERCLA's fundamental policy objectives are to promote timely cleanup of contaminated sites and to ensure that parties that caused the contamination pay for its cleanup. As illustrated by Atlantic Richfield's case and others cited above, Guam's proposed rule advances neither of these policies. Allowing a settling PRP to wait years before seeking contribution does not incentivize a prompt cleanup, and it may often result in a loss of evidence that precludes a reliable determination of which party caused the contamination. For these reasons, the Court should reject Guam's proposed rule.

CONCLUSION

The Court should hold that a claim for contribution accrues when a party agrees with the EPA that it will undertake a response action or cover the costs of a response action.

Respectfully submitted,

ELISABETH S. THEODORE
STEPHEN K. WIRTH
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000

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

Counsel for Amicus Curiae

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