No. 22-272

In The
Supreme Court of the United States

LIVINGSTON COUNTY ROAD COMMISSION,

Cross-Petitioner,

v.

GOULD ELECTRONICS, INC.,

Cross-Respondent.

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

GOULD ELECTRONICS, INC.'S RESPONSE TO LIVINGSTON COUNTY ROAD COMMISSION'S RULE 12(5) CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

RONALD A. KING
ZACHARY C. LARSEN
Counsel of Record
CLARK HILL PLC
215 S. Washington Sq., Ste. 200
Lansing, MI 48933
(517) 318-3053
rking@clarkhill.com
zlarsen@clarkhill.com

Counsel for Cross-Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioner Gould Electronics, Inc. ("Gould") voluntarily engaged in the assessment and remediation of a groundwater plume of trichloro-ethylene ("TCE") contamination and then filed an action against neighboring property owner the Livingston County Road Commission ("LCRC") seeking contribution to Gould's cleanup costs under the Comprehensive Environmental Response, Cleanup, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. due to TCE contamination emanating from LCRC's property. LCRC performed no actual "remedial action" or "response" activity and obstructed the State's investigation of the contamination. *See* 42 U.S.C. § 9601(24) & (25). After holding that LCRC had status-based liability under CERCLA but that Gould was the cause of the TCE contamination, the trial court allocated 5% of the shared (Gould and LCRC) costs to LCRC due to its recalcitrance and lack of cooperation with the investigating government agency and LCRC's overall slowness to address contamination concerns.

The questions raised in LCRC's conditional cross-petition are as follows:

1. Does a factual finding that another party is the "sole cause" of contamination relieve a CERCLA-liable party of its textually explicit obligation to establish that they used "due care" concerning the contamination in order to invoke the third-party defense under 42 U.S.C. § 9607(b)?

QUESTIONS PRESENTED—Continued

2. Under the contiguous-landowner defense of 42 U.S.C. § 9607(q), should courts ignore transactions between legally separate entities in determining whether a party was aware of the existence of contamination when it acquired property?

3. 42 U.S.C. § 9613(f)(1) allows courts to "allocate response costs among liable parties *using such equitable factors as the court determines are appropriate*." Is it "appropriate" for a trial court to consider a party's degree of cooperation with government officials and its promptness in investigating contamination when allocating response costs?

4. Should this Court rewrite CERCLA to blur textual distinctions in the statute between the facts that must be established for the third-party defense under 42 U.S.C. § 9607(b), the facts necessary for a contiguous-landowner defense under 42 U.S.C. § 9607(q), and the factors relevant to equitable allocation under 42 U.S.C. § 9613(f)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Cross-Respondent Gould Electronics, Inc. is an indirect subsidiary of Eneos Corp. (formerly "JXTG Nippon Oil and Energy Corp."), a company that is publicly traded in Japan. As an indirect parent, Eneos Corp. owns more than 10% of Gould Electronics, Inc.

Cross-Petitioner is the Livingston County Road Commission, a discrete public body corporate under Michigan law. Mich. Comp. Laws § 224.9(1).

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit, Case Nos. 20-2257 & 20-2267, *Gould Electronics, Inc.* v. *Livingston County Road Commission*, judgment entered on May 10, 2022.

U.S. District Court for the Eastern District of Michigan, Case No. 2:17-cv-11130-MAG-DRG, *Gould Electronics, Inc.* v. *Livingston County Road Commission*, final judgment entered November 19, 2020.

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DECISIONS BELOW

The district court's opinion and order following the bench trial in this matter and its final judgment effectuating the holdings of that opinion are reprinted in Petitioner Gould's Appendix ("App.") at App. 26–166 in Docket No. 22-126.[1] The Sixth Circuit's opinion and judgment affirming the district court's judgment is reprinted in that Appendix at App. 1–25.

STATEMENT OF JURISDICTION

On May 10, 2022, the Sixth Circuit issued its opinion that, in relevant part, affirmed the trial court's allocation of 5% of liability for both parties' costs to LCRC. The lower courts had jurisdiction under 42 U.S.C. § 9613(b), 28 U.S.C. § 1331, & 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C. § 9607(b)(3) states, in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance

[1] All references to the Appendix throughout this Response to LCRC's Conditional Cross-Petition are to Gould's Appendix in Docket No. 22-126.

> of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant . . . *if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned*, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

[Emphasis added.]

42 U.S.C. § 9607(q) states:

> A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(*i*) the person did not cause, contribute, or consent to the release or threatened release;

(*ii*) the person is not—

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(*iii*) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(*iv*) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any

complete or partial response action or natural resource restoration at the vessel or facility);

(*v*) the person—

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(*vi*) the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(*vii*) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(*viii*) at the time at which the person acquired the property, the person—

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

42 U.S.C. § 9613(f)(1) states, in relevant part:

> 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. . . . *In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.*

[Emphasis added.]

INTRODUCTION

LCRC's Conditional Cross-Petition for a Writ of Certiorari neither identifies any circuit split nor points to any conflict with this Court's existing CERCLA caselaw. Indeed, LCRC relies very little on caselaw at all—citing just one of the numerous cases where this Court has interpreted CERCLA. Instead, LCRC claims only that both the trial court and the U.S. Court of Appeals for the Sixth Circuit erred by *misapplying* the plain text of CERCLA. It claims those courts misapplied the law in three ways: (1) by failing to blur the distinction between the separate "due care" and "sole cause" requirements of the "third-party" defense, 42 U.S.C. § 9607(b)(3); (2) by giving full effect to the acts of legally distinct entities when applying the "contiguous landowner" defense, 42 U.S.C. § 9607(q); and (3) by taking into account a party's failure to promptly

respond to contamination and cooperate with government officials when equitably allocating responsibility.

There was no error. *First*, when writing the third-party defense of 42 U.S.C. § 9607(b)(3), Congress explicitly required *both* that a party prove that "the release or threat of release" was "caused solely by" a third party *and* that "defendant . . . exercised due care with respect to the hazardous substance concerned. . . ." Those are distinct elements. The trial court made no mistake by reading them that way—just like every circuit that has addressed this defense has done. *See United States* v. *Mottolo*, 26 F.3d 261, 263–64 (1st Cir. 1994); *State of N.Y.* v. *Lashins Arcade Co.*, 91 F.3d 353, 360 (2d Cir. 1996); *United States* v. *CDMG Realty Co.*, 96 F.3d 706, 721–22 (3d Cir. 1996); *Westfarm Associates Ltd. Ptp.* v. *Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 682 (4th Cir. 1995); *United States* v. *150 Acres of Land*, 204 F.3d 698, 703–04 (6th Cir. 2000); *Kerr-McGee Chemical Corp.* v. *Lefton Iron & Metal Co.*, 14 F.3d 321, 325 n.3 (7th Cir. 1994); *Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863, 883 (9th Cir. 2001); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.2d 1489, 1507–08 (11th Cir. 1996).

Second, this Court has long recognized that legally distinct entities are distinct. *See*, *e.g.*, *Samantar* v. *Yousuf*, 560 U.S. 305, 315 (2010). Nothing in either CERCLA's definition of "person" nor elsewhere in 42 U.S.C. § 9607(q) counsels courts to ignore those distinctions in applying the "contiguous landowner" defense. *See*, *e.g.*, 42 U.S.C. § 9601(21) (defining "person" consistent with its traditional legal meaning, including

"corporation" and "political subdivision of a State"). So, the trial court did not err in recognizing transactions between legally distinct bodies.

Third, trial courts have broad discretion to "allocate response costs among liable parties using such equitable factors *as the court determines are appropriate*." 42 U.S.C. § 9613(f) (emphasis added). The uniformly accepted "Gore factors" recognize that both the degree of care exercised by a party concerning contamination and the degree of a parties' cooperation with the government are relevant considerations in that equitable balance. *Environmental Transport Systems, Inc.* v. *ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992).

Unsatisfied with these straightforward answers, LCRC lastly invites this Court to ignore the textual requirements of 42 U.S.C. § 9607(b)(3), 42 U.S.C. § 9607(q), and 42 U.S.C. § 9613(f) and form a more sensible order from the "perplexing" CERCLA text. That request exceeds the scope of this Court's duty to faithfully apply laws that Congress adopts. *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). And, while courts generally agree that CERCLA is an obscure statute, *see*, *e.g.*, *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993), there is no lack of clarity on the disputed texts here. Thus, while the Sixth Circuit erred and created a circuit split in deciding what constitutes "necessary costs of response" (as argued in Gould's petition), LCRC's rewriting of these defenses is indefensible. This Court should grant

Gould's Petition for Writ of Certiorari but deny LCRC's Conditional Cross-Petition.

STATEMENT OF THE CASE

Gould adequately framed the statement of the case in its own Petition for Writ of Certiorari in Docket No. 22-126. Rather than belabor that history again, Gould incorporates by reference its Statement from that matter. Only a few aspects of that history need to be highlighted here.

A. LCRC Obstructs the State of Michigan's Investigation

Gould's environmental consultant the Mannik & Smith Group ("MSG") identified TCE on LCRC's property in 2007. Thereafter, the Michigan Department of Environment, Great Lakes, and Energy ("EGLE")[2] designated the LCRC Property first as an area of interest and then as a "facility" in August 9, 2007. App. 36 & 121; R. 202–13. Gould later filed a CERCLA cost-recovery suit against LCRC but then dismissed it without prejudice by agreement. App. 2 & 29; R. 1–3 Page.ID.21. Despite EGLE's designation, LCRC was recalcitrant in supplying site investigation data requested by the state agency responsible for the

[2] The former Michigan Department of Environmental Quality was renamed the Department of Environment, Great Lakes, and Energy ("EGLE") by Executive Order 2019-06. For simplicity, Gould will refer to the agency as EGLE throughout this brief.

investigation. App. 39–40 & 123; R. 213–8. Instead, LCRC sought exoneration from the agency and submitted a "No Further Action" request to EGLE. *Id*. But LCRC's request neither delineated the contamination nor included any proposed plan of remediation to address the contamination. App. 39 & 123; *see also* R. 259, 125:19–126:25. Rather, LCRC simply argued against its liability for the TCE contamination, asking EGLE to bless its view that Gould was responsible for the release. App. 39; R. 259, 130:8–131:8. LCRC later withdrew its request when it became apparent that it would be denied. App. 123; R. 201–9.

Eventually, the LCRC sought what lower-level EGLE employees termed an "end run" around their review by meeting with upper-level management in a lobbying effort. R. 201–18, Page.ID.67040. On June 14, 2017, EGLE issued a "notice of insufficient information" identifying numerous "data gaps" regarding evaluating the origin of TCE. App. 40; R. 201–12, Page.ID.67021. EGLE "reminded" LCRC of identified petroleum, metals, and salt contamination "not attributable to release" by Gould for which LCRC had "not completed delineation of these known releases. . . ." R. 201–12, Page.ID.67022. And EGLE "urge[d] that [LCRC] settle its differences with [Gould] so that it may cooperatively address the commingled groundwater releases. . . ." *Id*.; App. 40. Importantly, EGLE's letter said it was *not* making a liability determination either way concerning LCRC's responsibility for the contamination. App. 65; R. 201–12, Page.ID.60721. About a week later, EGLE issued a

"clarification" noting that it was "not requesting the performance of more sampling or report submittals by [LCRC] concerning" the TCE contamination and had "no further regulatory interest" in the origin of the TCE contamination on that property. App. 40–41; R. 201–13, Page.ID.67024.

B. The Trial Court Finds that LCRC Obstructed the State's Investigation, Holds that the Third-Party and Innocent Landowner Defenses are Unavailable, and Allocates a 5% Share of Liability to LCRC Due to Its Obstruction

On April 11, 2017, Gould filed this renewed action. Immediately, LCRC sought to dismiss the case based in part on EGLE's decision in response to the LCRC's "No Further Action" request and its subsequent lobbying. R. 11, Page.ID.68. The trial court denied that motion, and the case proceeded to a remote, video-conferencing trial in July 2020. R. 19.

Four months following the trial, the district court issued an Opinion and Order. App. 26–166. On the merits, the district court found in Gould's favor on its CERCLA cost recovery claim, concluding Gould had met its evidentiary burden, which entitled Gould to recover all of its over $4.2 million in costs expended on response actions at the site. App. 66–75 & 164. In doing so, however, the court also opined that Gould was the "sole cause" of the TCE contamination as between LCRC and Gould. App. 159. Conversely, the court found in

LCRC's favor on a CERCLA contribution counterclaim, allowing LCRC to recover $1,236,640.44 as "necessary costs of response" of its own and to equitably allocate Gould's costs. App. 142–48 & 164.

In doing so, the court found that "[a]lthough [LCRC] has undertaken some investigation of the contamination, *its efforts were aimed at exonerating itself from liability* as opposed to mitigating the spread of the contamination." App. 130 (emphasis added). Indeed, the court explained that "*[d]enying responsibility* has been a constant theme throughout [LCRC's] submissions to" the state agency. App. 39 (emphasis added). Further, the trial court concluded that, "[t]aken as a whole," the evidence "*demonstrate[d] a fervid resistance and lack of cooperation on [LCRC's] part to investigate the TCE contamination* as directed by" EGLE. App. 131 (emphasis added). More particularly, even though LCRC submitted a number of "Response Activity Plans" ("RAPs") to the state agency between 2013 and 2016, throughout these submissions "*it never proposed any plans to remediate the contamination*, instead denying that it was a source of the contamination" and arguing against its liability. App. 39 (emphasis added). Altogether, the court observed that LCRC's review of documents, its response activity plans, and its consultants' meetings with the agency sought to achieve a determination from EGLE that it was not responsible for the contamination. App. 39 & 163.

Although the trial court had earlier in its opinion conceded that no "reasonable basis of apportionment"

had been presented in evidence or existed to divide the liabilities, the court allocated 95% of both Gould's costs and LCRC's costs to Gould based on its "sole cause" determination and 5% to LCRC in recognition of LCRC's recalcitrance in the investigation. App. 159–61 & 168. The court therefore entered a Final Judgment allocating 95% of both parties' costs to Gould and 5% of those costs to LCRC. App. 168. That resulted in a money judgment in Gould's favor in the amount of $212,664.85 (or 5% of Gould's $4.25 million in cleanup costs incurred in responding to the TCE contamination). App. 164 & 168. But it also meant a money judgment in LCRC's favor in the amount of $1,174,817.92 plus interests and costs (or 95% of the LCRC's "response costs" incurred in arguing against its liability with EGLE and Gould). *Id*. And the district court made LCRC "responsible for 5% of all future response costs incurred by Gould in connection with the site." App. 165 & 168.

C. The Sixth Circuit Affirms Those Holdings

On appeal, the Sixth Circuit reasoned that the district court appropriately "relied on two of the Gore factors when it found the Commission to be 5 percent liable: degree of care exercised and degree of cooperation with officials." *Id*. at 22. It noted that LCRC's "actions to 'frustrat[e]' [EGLE's] 'efforts to determine the source of the TCE plume' were sufficiently reprehensible and damaging that it should bear 5 percent of the liability." *Id*. at 22–23. This was within the trial court's discretion, the Sixth Circuit reasoned, because "[a]

party cannot ignore hazardous waste on its property and refuse to cooperate with regulatory authorities simply because it claims that it did not cause the spill." *Id*. at 24. Thus, the Sixth Circuit affirmed the trial court's allocation. App. 20–24.

REASONS FOR DENYING THE WRIT

I. LCRC's request that this Court blur the "sole cause" and "due care" elements of CERCLA's third-party defense is misguided.

LCRC first argues that it should have prevailed on its third-party defense under 42 U.S.C. § 9607(b) merely because the trial court held that Gould was the "sole cause" of the TCE contamination. In other words, LCRC asks this Court to blur the separate "sole cause" and "due care" textual requirements of the third-party defense in 42 U.S.C. § 9607(b)(3), wholly subsuming "due care" under the "sole cause" requirement. LCRC is mistaken.

These two elements of the third-party defense are distinct and explicitly mandated by the statutory text. And there has been no dispute on this point by any of the circuit courts that have applied 42 U.S.C. § 9607(b)(3). *See*, *e.g.*, *Mottolo*, 26 F.3d at 263–64 (First Circuit); *Lashins Arcade Co.*, 91 F.3d at 360 (Second Circuit); *CDMG Realty Co.*, 96 F.3d at 721–22 (Third Circuit); *Westfarm Associates Ltd. Ptp.*, 66 F.3d at 682 (Fourth Circuit); *150 Acres of Land*, 204 F.3d at 703–04 (Sixth Circuit); *Kerr-McGee Chemical Corp.*, 14 F.3d at

325 n.3 (Seventh Circuit); *Carson Harbor Vill., Ltd.*, 270 F.3d at 883 (Ninth Circuit); *Redwing Carriers, Inc.*, 94 F.2d at 1507–08 (Eleventh Circuit). LCRC has not justified its request that this Court overhaul the established framing of the third-party defense contrary to its uniform application across all circuits.

Moreover, as a factual matter, the trial court was justified in its finding that LCRC did not exercise "due care" here. Ample evidence demonstrates LCRC failed to take any steps to investigate or address the TCE contamination on the property for nearly 20 years and then vigorously fought and inhibited the State's investigation. Because neither the trial court nor the Sixth Circuit erred in determining that LCRC failed to prove its third-party defense, this Court should deny leave on LCRC's conditional cross-petition.

A. Due care is an essential element of the third-party defense that cannot be written out of the statute.

CERCLA's third-party defense provides that "[t]here shall be no liability under subsection (a) . . . for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance. . . . were *caused solely by* . . . (3) an act or omission of a third party other than an employee or agent of the defendant. . . . *if the defendant establishes by a preponderance of the evidence that* (a) *he exercised due care with respect to the hazardous substance concerned*, taking into

consideration the characteristics of such substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." 42 U.S.C. § 9607(b)(3) (emphasis added).

Based on this language, those lower courts who have established a test have held that the third-party defense requires proof "(1) that another party was the 'sole cause' of the release of hazardous substances and the damages caused thereby; (2) that the other, responsible party did not cause the release in connection with a contractual, employment, or agency relationship with the defendant; and (3) that the defendant exercised due care and guarded against the foreseeable acts or omissions of the responsible party." *Westfarm Associates Ltd. Partnership*, 66 F.3d at 682. Each of these elements must be proven by a preponderance of evidence. *Id*. And "Congress intended the defense to be very narrowly applicable, for fear that it might be subject to abuse." *Carson Harbor Vill., Ltd.*, 270 F.3d at 883.

As noted above, the "due care" requirement is an explicit textual demand. A party asserting the third-party defense must establish by a preponderance of evidence that "he exercised due care with respect to the hazardous substance concerned." 42 U.S.C. § 9607(b)(3). "Due care" is not defined by statute. *Bob's Beverage, Inc.* v. *ACME, Inc.*, 169 F.Supp.2d 695, 716 (N.D. Ohio 1999); 42 U.S.C. § 9601. Nonetheless, caselaw explains that "due care" requires a person to

"demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances." *Lashings Arcade Co.*, 91 F.3d at 361. That "include[s] those steps necessary to protect the public from a health or environmental threat. . . ." *Id*. Accordingly, due care usually cannot be established unless affirmative measures have been taken to address the pollution. *See*, *e.g.*, *Kerr-McGee Chem. Corp.*, 14 F.3d at 325 n.3.

"Due care" and "sole cause" are distinct elements. *Westfarm Associates Ltd. Partnership*, 66 F.3d at 682. The former is required by the language mandating that a person "exercise[d] due care with respect to the hazardous substance concerned. . . ." 42 U.S.C. § 9607(b)(3)(a). The latter is based on the language requiring a party to establish "that the release or threat of release of a hazardous substance. . . . were *caused solely by* . . . (3) an act or omission of a third party other than an employee or agent of the defendant. . . ." 42 U.S.C. § 9607(b)(3). Moreover, the elements of the third-party defense may not be blurred together—"each" element "must be proven by the defendant by a preponderance of the evidence. . . ." *Westfarm Associates Ltd. Partnership*, 66 F.3d at 682.

LCRC's attempt to blur these two elements ignores the separate statutory language supporting these elements of the third-party defense. It is a basic canon of construction that a statute should not be read in a manner that renders any provision surplusage. *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("It is our

duty 'to give effect, if possible, to every clause and word of a statute. . . .' "); Scalia and Garner, "Reading Law: The Interpretation of Legal Texts," p. 174 (West 2012) (" . . . it is no more the court's function to revise by subtraction than by addition."). Yet by subsuming the "due care" mandated of 42 U.S.C. § 9607(b)(3)(a) within the "sole cause" language of 42 U.S.C. § 9607(b)(3) and effectively eliminating one of the three distinct elements of this defense, LCRC's position would render statutory language nugatory contrary. The Court cannot accept that reading.

As an alternative to excising this statutory language, LCRC advocates that this Court should import language from the contiguous property defense of 42 U.S.C. § 9607(q)(1) into the due-care standard of 42 U.S.C. § 9607(b)(3). That fares no better. This Court equally disdains writing language *into* as writing language *out of* a statute. *Puerto Rico* v. *Franklin California Tax-Free Tr.*, 579 U.S. 115, 130 (2016) ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.' ") And LCRC offers no valid reason for transposing 42 U.S.C. § 9607(q)(1) over 42 U.S.C. § 9607(b)(3). There is none. Instead, the language LCRC asks this Court to transplant from 42 U.S.C. § 9607(q)(1)(D) is expressly limited to "subparagraph [42 U.S.C. § 9607(q)(1)](A)(*iii*)."

B. LCRC did not establish that it exercised due care because it failed to take timely precautions and failed to comply with the State's orders.

Not only is due care an explicitly required element of the third-party defense, but the district court here gave ample reasons for its finding that LCRC did not exercise due care. R. 265, Page.ID.83260–83270. Principally, the trial court relied on two legal bases: (1) LCRC's failure to take timely precautions indicated a lack of due care; and (2) LCRC's frustration of EGLE's investigative efforts reflected a lack of due care. *Id*., Page.ID.83267.

As to the first, courts have acknowledged that the timeliness of a party's response to known contamination is relevant to whether it exercised "due care." *See*, *e.g.*, *Redwing Carriers, Inc.*, 94 F.3d at 1508 (evaluating the timeliness of a response in the determination of "due care"). In particular, a party's delay in responding supports a finding that it did not exercise due care. *PCS Nitrogen, Inc.* v. *Ashley II of Charleston, LLC*, 714 F.3d 161, 181 (4th Cir. 2013) ("Ashley's inactions clearly show that it failed to exercise 'appropriate care.' "); *United States* v. *A & N Cleaners & Launderers, Inc.*, 854 F.Supp. 229, 243 (S.D.N.Y. 1994) (failure to make inquiries after being put on notice of contamination on property owned by defendants indicated a lack of due care). The Sixth Circuit has previously reached the same conclusion.

For example, in *Franklin County Convention Facilities Authority* v. *American Premier Underwriters, Inc*., 240 F.3d 534 (6th Cir. 2001), the Sixth Circuit held that a landowner failed to exercise due care as a result of a little over a year of inaction. The court noted that the party "played no role in placing the hazardous substance at the site. . . ." *Id*. at 548. Yet its inaction for "more than a year" after discovering the presence of a hazardous substance and "more than eight months" after being notified that the substance may have been migrating were reasons to conclude that the party did not exercise "due care." *Id*.

In this case, LCRC became aware of the TCE contamination on its property in 1991. R. 265, Page.ID.83268; R., 261, 94:16–95:22. It did nothing. EGLE later formally notified LCRC of the contamination in August 2007. R. 265, Page.ID.83268; R. 261, 29:9–21. This time, it did next to nothing. After EGLE's 2007 notice, LCRC spent the next three years *solely* "disputing whether it caused the releases on the LCRC Property" and not conducting any response activities or any independent investigation. R. 265, Page.ID.83268. Moreover, "even after LCRC began performing its own investigations in 2010, its activities were insufficient under the circumstances as it consistently resisted complying with EGLE's requests to undertake certain investigations." R. 265, Page.ID.83268. Though LCRC performed some requested work, EGLE concluded "that LCRC's response activities were insufficient to meet its due care obligations under NREPA." *Id*., Page.ID.83269. Far more egregious than

the eight-month delay in *Franklin County Convention Facilities Authority*, LCRC's inaction for 20 years while contaminated groundwater migrated toward the nearby public Thomson Lake indicated an absence of the statutorily required "due care." 42 U.S.C. § 9607(b)(3). Consequently, the trial court correctly concluded that LCRC failed to prove this element of the third-party defense, and the Sixth Circuit properly affirmed.

As a second and separate basis for this conclusion, the trial court also held that LCRC's failure to cooperate with and frustration of the state's investigative efforts militated against finding that it exercised "due care." R. 265, Page.ID.83268. Numerous courts have held that the failure to cooperate with a governmental agency's requests or orders can demonstrate a lack of due care. *See*, *e.g.*, *United States* v. *Domenic Lombardi Realty, Inc.*, 290 F.Supp.2d 198, 207, 211–12 (D.R.I. 2003) (failure to comply with EPA orders indicated lack of due care); *Interfaith Comm. Org.* v. *Honeywell Int'l, Inc.*, 263 F.Supp.2d 796, 826 (D.N.J. 2003).

Commenting on LCRC's obstruction, the trial court here observed that "even after LCRC began performing its own investigations in 2010, its activities were insufficient under the circumstances, as *[LCRC] consistently resisted complying with EGLE's requests to undertake certain investigations*." R. 265, Page.ID.83268 (emphasis added). The trial court thus concluded that "[t]he evidence demonstrates that LCRC *persisted in its reluctance to cooperate with EGLE's requests* for additional investigations through

August 2015 and the submission of it most recent [Response Activity Plan] in September 2016." *Id*., Page.ID.83269 (emphasis added). And it noted that:

> Although LCRC has undertaken some investigation of the contamination, ***its efforts were aimed at exonerating itself from liability as opposed to mitigating the spread of the contamination***. Denying responsibility for the TCE contamination has been a constant theme throughout LCRC's submissions to EGLE, including its most recent RAP . . . the 2016 RAP stated that the Gould Property was the sole source of TCE contamination and proposed LCRC undertake no further action or investigation with respect to the TCE contamination. ***Taken as a whole, this evidence demonstrates a fervid resistance and lack of cooperation on LCRC's part to investigate the TCE contamination as directed by EGLE***. [*Id*. (Emphasis added & citations omitted).]

In other words, the trial court justifiably concluded that LCRC's efforts were both far too late and simply self-serving.

LCRC has not detailed how any of the core facts supporting the trial court's conclusion were in error. Neither Gould nor this Court need make LCRC's arguments for it. Because "due care" is an express requirement of 42 U.S.C. § 9607(b)(3) and both rationales support a finding that LCRC did not prove that it exercised "due care," there is no reason for this Court to grant LCRC's conditional cross-petition.

II. LCRC was not entitled to the contiguous landowner defense when it is undisputed that LCRC acquired the property in 2011 with knowledge of the contamination.

LCRC next argues that the trial court erred in rejecting its "contiguous landowner" defense on the basis that LCRC knew the property was contaminated when it acquired the property in 2011. But LCRC indisputably knew the property was contaminated since at least 1991 when it first identified TCE contamination in unrelated testing. LCRC sold the property in 2002 and reacquired it in 2011 with full knowledge of the contamination. The "contiguous landowner" defense unambiguously requires that "*at the time at which the person acquired the property*, the person . . . (ii) *did not know or have reason to know that the property was or could be contaminated* by a release or threatened release. . . ." 42 U.S.C. § 9607(q)(1)(A)(*viii*)(II) (emphasis added). So LCRC is clearly disqualified, as the trial court held. R. 265, Page.ID.83270–83271.

In essence, LCRC asks this Court to disregard Michigan's statutorily engrained distinction between the legal entities of Livingston County and the LCRC. Mich. Comp. Laws § 45.3; Mich. Comp. Laws § 224.9(1). Alternatively, LCRC seems to be asking this Court to set aside the transactions that LCRC and the County engaged in with full knowledge of this pending litigation. Neither is justified.

As to the first, LCRC runs afoul of the basic notion that legally separate entities are to be treated as

separate persons. *Samantar*, 560 U.S. at 315. By Michigan law, "a county road commission draws its legal life from the county road law," and it is "a creature of that legislation." *Arrowhead Development Co.* v. *Livingston County Road Comm'n*, 322 N.W.2d 702, 706 (Mich. 1982). "[C]ounty road commissions are public entities," *County Road Ass'n of Michigan* v. *Governor*, 782 N.W.2d 784, 797 (Mich. App. 2010), and each commission constitutes "a body corporate" under Mich. Comp. Laws § 224.9(1). Counties are distinct legal entities, which are established as "a body politic and corporate" under Mich. Comp. Laws § 45.3. Because separate persons must be given separate personality, LCRC's request that this Court disregard an "intra-county" transaction is meritless.

Similarly, unfounded is LCRC's argument that this Court should ignore its own transactions that were performed with full knowledge of this litigation. LCRC cites no caselaw justifying this position. There is none. Instead, LCRC asks this Court to infer from the "all appropriate inquiries" language in 42 U.S.C. § 9607(q)(1)(A)(*viii*)(I) that transactions must be arms-length to count as an acquisition of the property relevant to 42 U.S.C. § 9607(q)(1)(A)(*viii*)(II). Nothing in the statute suggests this. Nor is there any caselaw that suggests that the only CERCLA-relevant transactions are arms-length transactions. Again, this Court may not rewrite the statute to add such language. *Puerto Rico*, 136 S. Ct. at 1949.

The bottom line is that 42 U.S.C. § 9607(q)(1)(A)(*viii*)(II) requires that the Court

determine whether "at the time at which the person acquired the property"—here, when the deed transferred between the County and LCRC in 2011—"the person . . . (II) *did not know* or have reason to know *that the property was or could be contaminated by a release*. . . ." The trial court correctly held that LCRC knew of the contamination in 2011. Thus, it did not misapply 42 U.S.C. § 9607(q).[3]

III. The trial court did not abuse its discretion in allocating 5% of costs to LCRC due to LCRC's documented obstruction of EGLE's investigation and LCRC's status-based liability.

Finally, LCRC contends that the trial court erred in its discretionary, equitable allocation of fault under the Gore factors by allocating 5% of the liability to LCRC. LCRC argues that the trial court was precluded from allocating fault to LCRC because of its erroneous finding that Gould was the "sole cause" of TCE contamination at the RSF Property and LCRC Property.

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[3] Wholly aside from this basis for disqualification, the trial court's factual finding that LCRC failed to cooperate with EGLE would also separately disqualify LCRC from claiming the contiguous-landowner defense. *See* 42 U.S.C. § 9607(q)(A)(1)(*iv*) (requiring that "the person provides *full cooperation*, assistance, and access to persons that are authorized to conduct respond actions . . . at the . . . facility from which there has been a release or threatened release"); 42 U.S.C. § 9607(q)(1)(B) (noting that, to qualify for the defense, "a person must establish by a preponderance of the evidence that the conditions in clauses (*i*) through (*viii*) of subparagraph (A) have been met.").

LCRC's position ignores: (1) the broad discretion granted in allocating liability under the Gore factors; (2) CERCLA's imposition of status-based liability without regard to fault; and (3) the longstanding recognition that a party's failure to cooperate with a governmental agency in its investigation of contamination is a basis to allocate liability to a party. In light of these considerations, the trial court committed no error by allocating a mere 5% liability to LCRC for its obstruction. To the contrary, LCRC is fortunate the trial court did not allocate a much greater percentage. Thus, while the allocation severely understates LCRC's "fair share" of allocation, LCRC presents no basis to overturn it.

A. Trial courts hold broad discretion to account for any relevant factors in the equitable allocation of a contribution claim—including the status-based liability of an owner, its slowness to respond to contamination, and a party's failure to cooperate with an investigation.

Contribution claims under 42 U.S.C. § 9613(f)(1) broadly allow the trial court to "allocate response costs among liable parties *using such equitable factors as the court determines are appropriate*." (Emphasis added). Circuit courts have long recognized that "the court may consider any factor it deems in the interest of justice in allocating contribution recovery." *United States* v. *R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991).

That includes both the so-called "Gore factors"—factors proposed in legislation by then-Congressman Al Gore though the bill was never adopted—and the "critical factors" identified in *United States* v. *Davis*, 31 F.Supp.2d 45, 63 (D.R.I. 1998). *United States* v. *Consolidation Coal Co.*, 345 F.3d 409, 413 (6th Cir. 2003). But "[n]either of these lists is intended to be exhaustive or exclusive, and 'in any given case, a court may consider several factors, a few factors, or only one determining factor' "—or *other* factors deemed pertinent to equitable allocation—"depending on the totality of circumstances presented to the court." *Id*. at 413–14 (quoting *Environmental Transport Systems, Inc.*, 969 F.2d at 509. Because "Congress intended to invoke the tradition of equity under which a court must construct a flexible decree balancing all the equities in the light of the totality of the circumstances," *R.W. Meyer, Inc.*, 932 F.2d at 572, trial courts have "broad discretion" in their allocation. *Consolidated Coal Co.*, 345 F.3d at 413.[4] Accordingly, "[a] district court's allocation of response costs in a CERCLA contribution will not be set aside in the absence of a finding that the district court abused its discretion." *Id*. at 412.

Importantly, CERCLA is generally a strict liability statute that is premised on status-based liability. 42 U.S.C. § 9607(a) (imposing liability on certain persons "subject only to the defenses set forth in subsection

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[4] Though this Court has yet to adopt the Gore factors or otherwise address the balancing of considerations under 42 U.S.C. § 9613(f)(1), there is no disagreement among the circuit courts on this point.

(b). . . ." An owner of contaminated property is thus liable regardless of the owner's contribution to the contamination. *Kalamazoo River Study Grp.* v. *Menasha Corp.*, 228 F.3d 648, 656–57 (6th Cir. 2000) ("causation is not an element of liability"); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 264 (3d Cir. 1992) (noting that CERCLA "does not, on its face, require the plaintiff to prove" causation); *United States* v. *Township of Brighton*, 153 F.3d 307, 328 (6th Cir. 1998) (Moore, J., concurring). Prior to this case, the Sixth Circuit has recognized that the contribution of an *owner* based on its status as an owner is an appropriate consideration in determining an allocation of damages. *R.W. Meyer, Inc.*, 932 F.2d at 573 (observing that "the trial court properly considered here not only the appellant's contribution to the toxic slough described above in a technical causative sense, but also its moral contribution as the owner of the site"). Equitable allocation is thus not limited to strictly making a fault-based determination; a trial court may also consider any other appropriate factors, such as the actions giving rise to the status-based liability of a party. *Id.*; *Consolidation Coal Co.*, 345 F.2d at 413.

A parties' degree of cooperation with government officials has also long been considered a relevant factor to equitable allocation as one of the Gore factors. *Kerr-McGee Chem. Corp.*, 13 F.3d at 326, n.4. Courts therefore often penalize a party for their lack of cooperation with officials. *See*, *e.g.*, *ASARCO, LLC* v. *Atlantic Richfield Co., LLC*, 975 F.3d 859, 870 (9th Cir. 2020); *Agere Systems, Inc.* v. *Advanced Envtl. Tech Corp.*, 602 F.3d

204, 235 (6th Cir. 2010); *Consolidation Coal Co*., 345 F.3d at 414–415. From an equity perspective, consideration of cooperation is appropriate because the degree of cooperation can impact the amount of costs incurred by potentially responsible parties. And cooperation in responding to contamination matters, too, because as the Sixth Circuit rightly observed "CERCLA concerns 'response' to pollution, not just the act of polluting." App. 21.

Lastly, some courts have recognized the propriety in allocating costs even where a party has been held not to have caused the contamination. *Valbruna Slater Steel Corp.* v. *Joslyn Mfg. Co.*, 298 F.Supp.3d 1194, 1203 (N.D. 2018) (allocating a 25% share of costs to a party determined not to have caused the contamination). As the trial court concluded, "[a] party is not insulated from shouldering an equitable share of the response costs simply because it did not cause or contribute to the contamination." R. 265, Page.ID.83291.

B. LCRC's failure to cooperate with EGLE's investigation justified allocating a portion of the party's costs.

Here, the trial court did not abuse its discretion in allocating a portion of costs to LCRC as a result of LCRC's obstruction of Gould and the State's investigation of the TCE contamination and in recognition of LCRC's status-based liability. Moreover, this issue presents a question of pure factual application that is not worthy of this Court's attention.

The trial court noted that apportionment under CERCLA should be "tied to the circumstances giving rise to a party's liability. . . ." R. 265, Page.ID.83273–83275. Because it is appropriate to consider status liability in the more exacting "legal" task of apportionment, *Township of Brighton*, 153 F.3d at 319, then it is likewise fair for a judge to consider the underlying basis for liability in the "equitable" task of allocation.

The trial court's allocation of a portion of costs to LCRC was also justified by its factual finding that LCRC "failed to exercise reasonable care in investigating the contamination and failed to fully cooperate with EGLE." *Id.*, Page.ID.83291–83292. LCRC undoubtedly drove up Gould's costs as well as its own through its "fervid resistance and lack of cooperation . . . to investigate the TCE contamination as directed by EGLE." R. 265, Page.ID.83269. The trial court was therefore justified in its equitable balancing in considering the impact of this resistance on Gould's and LCRC's remediation costs and in allocating those expenses between the two parties. Put another way, LCRC's pugilistic stance toward Gould and the state regulator contributed significantly to increasing both its own costs and Gould's costs, too. It is not unfair that the trial court required LCRC to share some of the burden of those increased costs.

LCRC argues that the trial court misapplied the "degree of care" factor, which it contends "is substantially similar to the 'due care' language in the CERCLA statutory defense." Condit. Cross-Pet, p. 42. It cites no law to support this claim. Regardless, the trial court

appropriately considered the impact of LCRC's lack of cooperation in the investigation as affecting the overall cleanup costs. *Environmental Transport Systems, Inc.*, 969 F.2d at 509. This Court should deny LCRC's conditional cross-petition on this issue.

IV. This Court lacks authority to rewrite CERCLA to blur distinct textual requirements under 42 U.S.C. §§ 9607(b), 9607(q), and 9613(f).

Finally, LCRC presents a question without tracking the issue in the body of its brief, inviting this Court to rewrite CERCLA in order to level any differences between 42 U.S.C. §§ 9607(b), 9607(q), and 9613(f). Little needs to be said here. This Court has routinely reminded litigants and the public of the limitations of its authority, noting its job is to interpret but not "rewrite" statutes. *See*, *e.g.*, *Franklin California Tax-Free Trust*, 579 U.S. at 130 ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'"); *Dodd*, 545 U.S. at 359 ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts. . . . is to enforce it according to its terms.") As explained above, there are plain textual differences between these three sections of CERCLA. LCRC's invitation to read 42 U.S.C. §§ 9607(b),

9607(q), and 9613(f) "uniformly" despite their textual distinctions must be rejected.

CONCLUSION

The Court should deny LCRC's conditional cross-petition for a writ of certiorari.

Respectfully submitted,

RONALD A. KING
ZACHARY C. LARSEN
Counsel of Record
CLARK HILL PLC
215 S. Washington Sq., Ste. 200
Lansing, MI 48933
(517) 318-3053
rking@clarkhill.com
zlarsen@clarkhill.com
Counsel for Cross-Respondent

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