No. 20-382

In the Supreme Court of the United States

TERRITORY OF GUAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JONATHAN D. BRIGHTBILL
ERIC GRANT
Deputy Assistant Attorneys General
JENNIFER SCHELLER NEUMANN
EVELYN YING
RACHEL HERON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), provides a cause of action for contribution to any "person who has resolved its liability to the United States or a State for some or all of a response action * * * in an administrative or judicially approved settlement." 42 U.S.C. 9613(f)(3)(B). The questions presented are as follows:

1. Whether a judicially approved settlement in a non-CERCLA case can give rise to a contribution action under Section 113(f)(3)(B).

2. Whether a judicially approved settlement that conclusively determined Guam's obligation to perform response actions "resolved" Guam's "liability" for "some or all of a response action."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 20-382

TERRITORY OF GUAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 950 F.3d 104. The opinion of the district court (Pet. App. 51a-97a) is reported at 341 F. Supp. 3d 74.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2020. A petition for rehearing was denied on May 13, 2020 (Pet. App. 98a-99a). The petition for a writ of certiorari was filed on September 16, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2017, petitioner brought this action against the United States under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* Pet. App. 7a-8a. The

district court denied the United States' motion to dismiss, *id.* at 51a-97a, but certified its order for interlocutory appeal under 28 U.S.C. 1292(b), Pet. App. 27a-50a. The court of appeals accepted the certification, reversed the district court's denial of the government's motion, and remanded with instructions to dismiss. *Id.* at 1a-26a.

1. Congress enacted CERCLA, also known as the Superfund statute, to promote the cleanup of sites containing hazardous substances. See *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1345 (2020). CERCLA makes certain broad classes of persons, known as "potentially responsible parties" or "PRPs," strictly liable for costs related to contaminated sites. 42 U.S.C. 9607(a)(1)-(4).

This case involves two CERCLA provisions that allow persons who spend money responding to contaminated sites to recover some or all of their costs from potentially responsible parties. The first provision, Section 107(a)(4)(B), allows "any" person to recoup certain "necessary costs of response" from a potentially responsible party. 42 U.S.C. 9607(a)(4)(B). It also allows the United States or any State to recoup "costs of a removal or remedial action" from a potentially responsible party. 42 U.S.C. 9607(a)(4)(A); see 42 U.S.C. 9601(27) (defining "State" to include Guam).

The second provision, Section 113(f), authorizes certain persons to seek contribution—that is, an equitable share of costs—from other potentially responsible parties in specified circumstances. Most relevant here, Section 113(f)(3)(B) provides that a "person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the

costs of such action in an administrative or judicially approved settlement" may obtain contribution from potentially responsible parties. 42 U.S.C. 9613(f)(3)(B); see 42 U.S.C. 9601(21), (27) (defining "person" to include Guam).

Each of those provisions is subject to its own statute of limitations. As relevant here, claims under Section 107 to recoup costs of a remedial action must be brought "within 6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C. 9613(g)(2)(A)-(B). In contrast, claims under Section 113 for contribution must be brought within three years after "the date of judgment in any action under this chapter for recovery of such costs" or the "entry of a judicially approved settlement with respect to such costs." 42 U.S.C. 9613(g)(3)(B). Every court of appeals to have addressed the question has agreed that, when a party seeks to recover cleanup costs that it has incurred in complying with a court judgment or covered settlement, it must pursue a Section 113 contribution claim and may not circumvent Section 113(g)(3)(B)'s three-year statute of limitations by suing for response costs under Section 107. See Pet. App. 11a; *Niagara Mohawk Power Corp.* v. *Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010); *Agere Systems, Inc.* v. *Advanced Environmental Tech. Corp.*, 602 F.3d 204, 229 (3d Cir.), cert. denied, 562 U.S. 1062 (2010); *ITT Industries, Inc.* v. *BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007); *Bernstein* v. *Bankert*, 733 F.3d 190, 206 (7th Cir. 2013), cert. denied, 571 U.S. 1175 (2014); *Morrison Enterprises, LLC* v. *Dravo Corp.*, 638 F.3d 594, 603-604 (8th Cir. 2011), cert. denied, 565 U.S. 879 (2011); *Asarco LLC* v. *Atlantic Richfield Co.*, 866 F.3d 1108, 1117 (9th Cir. 2017); *Solutia, Inc.* v. *McWane, Inc.*, 672 F.3d 1230, 1236-1237

(11th Cir.) (per curiam), cert. denied, 568 U.S. 942 (2012).

2. The United States acquired the island of Guam from Spain during the Spanish-American War. Pet. App. 5a, 54a-55a. From 1898 to 1950, Guam was subject to the jurisdiction of the United States Navy. *Id.* at 55a. Petitioner's complaint alleges that, at some point before 1950, the Navy began dumping waste at the site now known as the Ordot Dump. *Ibid.*

In 1950, the newly established civilian government of Guam (petitioner here) took over the island—and ownership of the Ordot Dump—from the Navy. Pet. App. 5a, 55a. Petitioner continued to operate the dump for the next sixty years, accepting waste and storing it in open ravines long after the enactment of laws that prohibited open dumping, and long after the dump had exceeded its capacity. See *id.* at 55a; *United States* v. *Government of Guam*, No. 02-22, 2008 WL 216918, at *1 (D. Guam Jan. 24, 2008). Petitioner's actions allowed contaminants from the dump to leach into adjacent rivers and the Pacific Ocean. Pet. App. 56a. Eventually, "what was once a valley became at least a 280-foot mountain of trash." *Id.* at 55a-56a (brackets and citation omitted).

The Ordot Dump has long attracted the attention of the Environmental Protection Agency (EPA). Pet. App. 6a. Starting in 1986, EPA issued a series of administrative orders under the Clean Water Act of 1977 (CWA), 33 U.S.C. 1251 *et seq.*, that directed petitioner to halt further discharges of contaminants from the dump. Pet. App. 56a. Petitioner did not take the steps required by those orders. *Id.* at 56a-57a.

In 2002, the United States sued petitioner under the CWA, seeking injunctive and declaratory relief to stop the ongoing discharge from the dump. Pet. App. 57a.

In 2004, the parties settled the suit in a court-approved consent decree. *Ibid.* The decree, which constituted a final judgment, required petitioner to pay a civil penalty, to take actions to close the Ordot Dump, to halt the discharge of contaminants from the dump, and to build a new municipal landfill to replace the dump. *Ibid.* The consent decree stated that the United States reserved the right to pursue claims for violations unrelated to the claims in its complaint; that petitioner would be released from the United States' claims when it complied with the settlement's requirements; and that the parties had entered the agreement "without any finding or admission of liability against or by the Government of Guam." *Id.* at 24a (citation omitted); see *id.* at 22a-24a.

3. Thirteen years later, petitioner filed this suit in the United States District Court for the District of Connecticut. Petitioner alleged that the United States is a potentially responsible party under CERCLA and that it is liable for some of the costs of complying with the 2004 consent decree. Pet. App. 59a. Petitioner asserted two causes of action: a claim under Section 107 for recovery of response costs, and an alternative claim under Section 113(f) for contribution. *Id.* at 8a.

After the suit was transferred to the United States District Court for the District of Columbia, the United States moved to dismiss the complaint. The United States argued that petitioner's claim was properly viewed as one for contribution under Section 113(f); that the claim therefore was barred by Section 113(g)(3)(B)'s three-year limitations period; and that petitioner could not circumvent that limitations period by invoking Section 107 instead. Pet. App. 53a.

The district court denied the motion to dismiss, rejecting the United States' premise that petitioner's

claim fell within the scope of Section 113(f). Pet. App. 51a-97a. The court observed that Section 113(f)(3)(B) provides a cause of action to any party that has "resolved its liability to the United States * * * for some or all of a response action." *Id.* at 69a-70a (quoting 42 U.S.C. 9613(f)(3)(B)) (emphasis omitted). The court held that "the 2004 Consent Decree did not resolve Guam's liability for the Ordot Landfill cleanup given the broad, open-ended reservation of rights, the plain non-admissions of liability, and the conditional resolution of liability that that agreement contains." *Ibid.* The court concluded that "the statutorily prescribed conditions for bringing a contribution claim under section 113(f)(3)(B) have not been satisfied, which means that Guam is not precluded from maintaining its section 107(a) claim against the United States." *Ibid.* At the United States' request, the court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 27a-50a.

4. The court of appeals accepted the certification, reversed the district court's denial of the United States' motion to dismiss, and remanded with instructions to dismiss the complaint. Pet. App. 1a-26a.

Like every other court of appeals that has addressed the issue, the court of appeals here held that, if a party seeks the type of relief that is available in a contribution action under Section 113(f)—*i.e.*, recovery of cleanup costs that the party has incurred in complying with a covered court judgment or settlement agreement—it may not proceed under Section 107(a) instead. Pet. App. 10a-11a. The court observed that "[t]he entire purpose of section 113(f)(3)(B) is to 'permit private parties to seek contribution after they have settled their liability with the Government.'" *Id.* at 11a (brackets and

citation omitted). The court explained that "[a]llowing a PRP that has settled with the government to instead seek recoupment through a section 107 cost-recovery claim would render section 113(f)(3)(B) superfluous; if a PRP could choose whether to sue under section 107 or section 113, 'a rational PRP would prefer to file an action under § 107(a) in every case.'" *Ibid.* (brackets and citation omitted).

The court of appeals rejected petitioner's argument that the 2004 consent decree fell outside the scope of Section 113(f)(3)(B) because the decree resolved only CWA claims, not CERCLA claims. Pet. App. 16a-18a. The court observed that "another provision of section 113—paragraph (f)(1)—expressly requires that a party first be sued under CERCLA * * * before pursuing contribution." *Id.* at 17a. It noted that "section 113(f)(3)(B) contains no such CERCLA-specific language." *Ibid.* Invoking the presumption that "'Congress acts intentionally and purposely in the disparate inclusion or exclusion'" of language in a statute, the court concluded that "a settlement agreement can trigger section 113(f)(3)(B) even if it never mentions CERCLA." *Id.* at 18a (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Petitioner also argued that the 2004 consent decree had not "resolved [petitioner's] liability to the United States * * * for some or all of a response action," 42 U.S.C. 9613(f)(3)(B), and that the decree therefore fell outside the scope of Section 113(f)(3)(B). The court of appeals rejected that contention. See Pet. App. 18a-25a. Parsing the statutory terms "resolved," "liability," and "some or all of a response action," 42 U.S.C. 9613(f)(3)(B), the court explained that, in order to trigger a potential contribution claim, a consent decree

must have "decided, determined, or settled, at least in part," a party's "obligation" to undertake some action that falls within CERCLA's definition of "response action." Pet. App. 19a (brackets, citations, and emphasis omitted). Based on its analysis of the relevant CERCLA definitions, see *id.* at 20a-21a (discussing 42 U.S.C. 9601(21), (23), (24), and (25)), the court concluded that "EPA's [CWA] lawsuit * * * sought injunctive relief for Guam to take action that qualified as a 'response action,' and the 2004 Consent Decree released Guam from legal exposure for that claim in exchange for Guam's commitment to perform work that qualified as a 'response action,'" *id.* at 21a.

Based on various provisions of the 2004 consent decree, petitioner contended that the decree had not resolved petitioner's liability for some or all of a response action. The court of appeals rejected those arguments. Pet. App. 22a-25a.

Petitioner relied on a clause in the consent decree that reserved the United States' right to pursue claims for violations unrelated to the claims in the complaint. Pet. App. 22a. The court observed that Section 113(f)(3)(B) "requires merely the resolution of liability for 'some' of a response action"; "a decree need not decisively determine every action that a party may one day be required to perform at the relevant site." *Ibid.*

Petitioner also argued that entry of the consent decree here did not trigger a potential right to contribution under Section 113(f)(3)(B) because the decree by its terms releases petitioner from the United States' claims only when the decree's requirements have been fully implemented. Pet. App. 23a. The court observed that petitioner's reading of the pertinent CERCLA language would "nullify section 113(f)(3)(B) in a

host of cases." *Ibid.* The court explained that Section 113(g)(3)(B)'s three-year statute of limitations for contribution actions begins to run when a judicial settlement is entered, but that full implementation of a settlement's requirements often takes more than three years. *Ibid.* The court observed that petitioner's reading therefore would produce the "absurd result" that "most [potentially responsible parties] would find themselves barred by the statute of limitations by the time they gained the ability to sue." *Ibid.*

Finally, petitioner invoked the consent decree's statement that the parties' settlement had been reached "without any finding or admission of liability against or by the Government of Guam." Pet. App. 24a. Notwithstanding that language, the court of appeals concluded that entry of the consent decree had "'resolve[d]' [petitioner's] liability to the United States" within the meaning of Section 9613(f)(3)(B), and had thereby triggered a potential right to contribution, by requiring petitioner to engage in specific conduct that constitutes a CERCLA "response action." *Id.* at 24a-25a (citation omitted). The court noted that "parties often expressly refuse to concede liability under a settlement agreement, even while assuming obligations consistent with a finding of liability." *Id.* at 24a (citation omitted). The court concluded that "the disclaimer of liability, standing alone, cannot overcome the Consent Decree's substantive provisions." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 25-30) that a consent decree can give rise to a contribution claim under Section 113(f)(3)(B) only if the suit underlying the decree involved CERCLA claims. Petitioner also argues (Pet. 30-34) that its 2004 consent decree with the United

States does not give rise to a contribution claim because the decree did not "resolve[]" petitioner's "liability to the United States" as Section 113(f)(3)(B) requires.

The court of appeals correctly rejected both those arguments, and its decision does not conflict with any decision of this Court. Although the first question presented is the subject of a circuit conflict, the court below adopted the majority view, and the sole court of appeals in the minority has expressed doubt about the correctness of its approach. The second question presented does not implicate a circuit conflict, but rather involves a case-specific dispute about the interpretation of a particular consent decree. Further review is not warranted.

1. Petitioner contends that a judicially approved settlement can give rise to a contribution claim under Section 113(f)(3)(B) only if the underlying suit raised CERCLA claims. That argument lacks merit and does not warrant this Court's review.

a. Section 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any party who is not a party to a settlement referred to in [Section 113(f)(2)]." 42 U.S.C. 9613(f)(3)(B). That language does not require that the claims resolved by the settlement must have arisen under CERCLA. Rather, under the plain terms of that provision, the potential availability of a contribution remedy depends on whether a particular settlement with the United States or a State requires a settling party to incur the costs of a CERCLA "response action." The settlement here imposed such a requirement, even though the suit that

produced the consent decree arose under the CWA, since CERCLA broadly defines "response" to encompass any action to "remove" or "remedy" releases of substances. 42 U.S.C. 9601(25); see Pet. App. 20a-22a.

Comparing Section 113(f)(3)(B) to nearby CERCLA provisions reinforces that conclusion. Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a) of CERCLA], *during or following any civil action under [Section 106 of CERCLA] or under [Section 107(a) of CERCLA].*" 42 U.S.C. 9613(f)(1) (emphasis added). That provision makes a right of contribution available only to a person who has been sued under CERCLA. Other clauses within Section 113 likewise refer specifically to actions arising under CERCLA, a particular part of CERCLA, or a particular statute apart from CERCLA. See, *e.g.*, 42 U.S.C. 9613(b) ("controversies arising under [CERCLA]"); 42 U.S.C. 9613(e) ("any action by the United States under [CERCLA]"); 42 U.S.C. 9613(g)(1) ("action * * * for damages * * * under [CERCLA]"); 42 U.S.C. 9613(g)(2) ("action or actions under [Section 107 of CERCLA]"); 42 U.S.C. 9613(g)(2)(B) ("cost recovery action brought under this subparagraph"); 42 U.S.C. 9613(i) ("any action commenced under [CERCLA] or under the Solid Waste Disposal Act"). The provision at issue here, by contrast, contains no such restriction. That disparity implicates the established interpretive rule that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

b. Petitioner suggests (Pet. 25-26) that the cleanup activities for which it now seeks contribution do not involve a Section 113(f)(3)(B) "response action." In addition to being contrary to the statutory text, that argument is ultimately self-defeating.

In determining whether petitioner's suit should be dismissed, the courts below focused on whether the 2004 consent decree triggered a potential right to contribution under Section 113(f)(3)(B). The ultimate question before those courts, however, was whether petitioner can pursue a cost-recovery action under Section 107. The CERCLA provision on which petitioner affirmatively relies provides a cause of action for "necessary costs of response." 42 U.S.C. 9607(a)(4)(B).

Petitioner's suit can go forward only if it falls outside the scope of Section 113(f)(3)(B) *and* is authorized by Section 107(a)(4)(B). Petitioner's claim for judicial relief thus depends on the contention that petitioner's cleanup costs qualify as "necessary costs of response" under CERCLA, even though petitioner incurred those costs to satisfy the commitments it made in settling the United States' CWA suit. That argument cannot be reconciled with petitioner's suggestion that the same cleanup activities do not constitute a "response action."

c. Petitioner also argues (Pet. 26-28) that a settlement can give rise to a contribution claim only if it resolves a common liability. That is correct but beside the point. Section 113(f)(3)(B) permits contribution if the settlement resolves a common liability "for some or all of a response action." 42 U.S.C. 9613(f)(3)(B). Here, under petitioner's theory of the case, the United States had an independent duty to take response actions to address releases from the Ordot Dump. The 2004 consent decree resolved that common liability, at least "for

some" of the response actions, *ibid.*, by requiring petitioner to take specified actions. Petitioner appears to insist that a contribution action under Section 113(f)(3)(B) requires not just resolution of a common liability for some or all of a response action, but resolution of a common liability *in a suit under CERCLA*. But that is not what the statute says.

d. Petitioner also invokes (Pet. 28) a House committee report and the United States' brief in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, No. 02-1192 (Feb. 23, 2004). Neither source supports petitioner's reading.

In discussing what is now Section 113(f)(3)(B), the committee report states that the provision "was added * * * to expressly provide to settlors the right to seek contribution from nonsettlors" and to "encourage settlements." H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 19-20 (1985). The report does not say or suggest that the language now contained in Section 113(f)(3)(B) is limited to settlements of CERCLA lawsuits. And the court of appeals' broader reading of that language would more fully accomplish the stated objectives (*i.e.*, enhancing settlors' rights and encouraging settlements) than would petitioner's narrower interpretation. In describing *other* paragraphs within Section 113(f), the report refers to settlements and consent decrees "under CERCLA"; but those descriptions do not shed light on the meaning of the particular provision at issue here. *Ibid.* And the United States' brief in *Cooper Industries* focused on Section 113(f)(1), the separate contribution provision that contains CERCLA-specific language—not Section 113(f)(3)(B), the contribution provision that is at issue in this case. See U.S. Br. at 12-28, *Cooper Industries*, *supra* (No. 02-1192).

e. The first question presented is the subject of a (lopsided) circuit conflict. In addition to the D.C. Circuit in this case, three other courts of appeals—the Third, Seventh, and Ninth—have held that a settlement in a non-CERCLA case may give rise to a contribution claim 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. *Atlantic Richfield Co.*, 866 F.3d 1108, 1120-1121 (9th Cir. 2017); Pet. App. 16a-17a.

The Second Circuit, by contrast, has held that "section 113(f)(3)(B) does not permit contribution actions based on the resolution of liability for state law—but not CERCLA—claims." *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90, 96 (2d Cir. 2005), cert. denied, 551 U.S. 1130 (2007); see *W.R. Grace & Co.* v. *Zotos Intern., Inc.*, 559 F.3d 85, 90-91 (2d Cir. 2009) (stating that, under *Consolidated Edison*, Section 113(f)(3)(B) creates a right to contribution "only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved") (citation omitted). As other courts of appeals have recognized, see *Consolidated Edison*, 423 F.3d at 96; *Asarco*, 866 F.3d at 1120, the Second Circuit's decision in *Consolidated Edison* rested on a misreading of the legislative history: the court relied on a passage that specifically discussed Section 113(f)(1), which (unlike Section 113(f)(3)(B)) is limited by its terms to suits under CERCLA. See 42 U.S.C. 9613(f)(1) (granting potential contribution right "during or following any civil action under section 9606 of this title or under section 9607(a) of this title"). In a subsequent case, the Second Circuit acknowledged that

"there is a great deal of force" to criticisms of *Consolidated Edison* "given the language of the statute." *Niagara Mohawk Power Corp.* v. *Chevron U.S.A., Inc.*, 596 F.3d 112, 126 n.15 (2d Cir. 2010).

Although the Second Circuit has not overruled *Consolidated Edison*, neither has it cited that holding since its decision in *Niagara Mohawk*. Because the Second Circuit has signaled its willingness to reconsider its outlier decision, this Court should deny the petition for a writ of certiorari and allow an opportunity for the circuit conflict to resolve itself without the Court's intervention.

2. The court of appeals' determination that the 2004 consent decree "resolved" petitioner's "liability" for "some or all of a response action," 42 U.S.C. 9613(f)(3)(B), likewise does not warrant this Court's review.

a. Section 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action * * * may seek contribution." 42 U.S.C. 9613(f)(3)(B). The "commonly understood meaning of 'resolve' is 'to deal with successfully,' 'reach a firm decision about,' or to 'work out the resolution of' something." *Asarco*, 866 F.3d at 1122. "Liability," in turn, refers to the "quality, state, or condition of being obligated or accountable." *Black's Law Dictionary* (11th ed. 2019) (emphasis omitted). And "response action" is a defined term in CERCLA. See 42 U.S.C. 9601(24). Putting those elements together, Section 113(f)(3)(B) authorizes a contribution action where an administrative or judicially approved settlement determines a party's legal obligation to undertake conduct that fits within CERCLA's definition of "response action."

The court of appeals correctly held that the 2004 consent decree satisfies each of those elements. See Pet. App. 18a-22a. The decree establishes petitioner's legal obligation to take specific steps to halt the discharge of contaminants from the Ordot Dump. See p. 5, *supra*. Those steps fall within CERCLA's definition of "response action." See p. 8, *supra*. Because the decree determines petitioner's legal obligation to undertake response actions, it gives rise to a potential contribution claim under Section 113(f)(3)(B).

b. Petitioner's contrary arguments lack merit.

Petitioner asserts that the consent decree disclaims "any finding or admission of liability against or by the Government of Guam." Pet. 31 (citation and emphasis omitted). But petitioner's invocation of that disclaimer elides the key question: "liability for what?" Pet. App. 19a. The disclaimer makes clear that, by entering into the settlement, petitioner was not admitting that it had violated the CWA. But "section 113(f)(3)(B) kicks in where a party has resolved its liability for 'some or all of a *response action*.'" *Ibid.* (citation omitted). Petitioner did not disclaim liability for a response action; to the contrary, the decree's "substantive provisions" require petitioner to undertake such actions. *Id.* at 24a.

Petitioner also emphasizes (Pet. 31-33) that, under the decree, the United States' CWA claims are not released until petitioner has fully complied with the decree's requirements. Again, however, the question is whether entry of the decree resolves petitioner's liability for some or all of a response action, not whether it immediately and definitively resolves the CWA claims. The consent decree here resolved petitioner's liability for a response action by requiring petitioner to undertake such action.

Petitioner's contrary reading would render the three-year limitations period for Section 113(f) contribution claims unworkable. That three-year period commences upon the "entry of a judicially approved settlement." 42 U.S.C. 9613(g)(3)(B). If a consent decree did not "resolve" liability until performance of the decree's requirements is complete, the limitations period might begin to run, and in many cases would expire, before the contribution claim accrued—an "absurd result" that Congress could not have intended. Pet. App. 23a. Petitioner seeks to avoid that problem by arguing (Pet. 32-33) that a consent decree that conditions a benefit on performance of its terms will not give rise to a contribution right under Section 113(f)(3)(B) even after performance is complete. But that answer produces the same anomalous result (denying contribution in cases involving settlements containing conditional releases) under a different legal rationale. Under either theory, petitioner's reading would "nullify section 113(f)(3)(B) in a host of cases." Pet. App. 23a.

Finally, petitioner emphasizes (Pet. 33-34) that the consent decree here reserves the United States' right to bring claims unrelated to those raised in its CWA complaint. That argument likewise fails to account for the language of Section 113(f)(3)(B), which requires the resolution of liability "for some or all of a response action." 42 U.S.C. 9613(f)(3)(B). Notwithstanding the United States' reservation of the right to bring future lawsuits against petitioner, under CERCLA or any other statute, the consent decree settles petitioner's obligation to undertake at least the particular response actions that are identified in the decree. See Pet. App. 21a.

c. Petitioner argues (Pet. 17-21) that the second question presented is the subject of a circuit conflict. Even if that were true, that question would not warrant this Court's review. The question presented principally concerns the interpretation of the 2004 consent decree, not the interpretation of CERCLA. Consent decrees "have many of the attributes of ordinary contracts" and "should be construed basically as contracts." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975). This Court ordinarily does not grant certiorari to review decisions that apply general contract-law principles to specific contracts or consent decrees. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In previous cases, the Court has declined to review lower-court determinations that particular settlements did or did not resolve liability for a response action within the meaning of Section 113(f)(3)(B). See *Hobart Corp.* v. *Waste Mgmt. of Ohio, Inc.*, 135 S. Ct. 1161 (2015) (No. 14-575); *Bankert* v. *Bernstein*, 571 U.S. 1175 (2014) (No. 13-568).

In any event, petitioner's assertion of a circuit conflict is inaccurate. This case concerns the interpretation of a particular consent decree—the United States' 2004 consent decree with petitioner. Petitioner does not argue that any other court of appeals has read that particular decree, or a materially identical decree, in a way that conflicts with the decision below. Petitioner instead identifies (Pet. 22-24) certain provisions of this decree and argues that other courts of appeals have

reached different results with respect to different decrees that contain similar provisions. That approach overlooks the fundamental principle that the meaning of a contract "is to be gathered, not from [a] single sentence [in isolation], but from the whole instrument read in the light of the circumstances." *Miller* v. *Robertson*, 266 U.S. 243, 251 (1924).

Petitioner asserts that the Sixth and Seventh Circuits have adopted a categorical rule that "a settlement does not resolve liability for purposes of Section 113(f)(3)(B) 'when (1) the settlement expressly states that the defendant companies did not admit any liability or the validity of EPA's findings; and (2) the covenants not to sue are not immediately effective, but instead are conditional on complete performance of the terms of the settlement.'" Pet. 18 (brackets, citation, and emphasis omitted). That argument reflects a misreading of Sixth and Seventh Circuit precedent.

Rather than adopting any categorical rule, the Sixth and Seventh Circuits have held that the meaning and legal effect of a consent decree turn on the details of that particular decree. See *Hobart Corp.* v. *Waste Management of Ohio, Inc.*, 758 F.3d 757, 770 (6th Cir. 2014) ("[T]his court must look to the specific terms of an agreement to determine whether it resolves a [potentially responsible party's] liability * * * 'The meaning of any particular contract is to be determined on a case-by-case and contract-by-contract basis, pursuant to the usual rules for interpreting written instruments.'") (brackets, citation, and ellipsis omitted), cert. denied, 135 S. Ct. 1161 (2015); *Bernstein* v. *Bankert*, 733 F.3d 190, 213 (7th Cir. 2013) ("Whether or not liability is resolved through a settlement simply is not the sort of question which can or should be decided by universal

rule. Instead, it requires a look at the terms of the settlement on a case-by-case basis."), cert. denied, 571 U.S. 1175 (2014). The Sixth Circuit has sometimes held that a settlor had "resolved [its] liability" within the meaning of Section 113(f)(3)(B) even though the settlement contained provisions similar to those on which petitioner relies. See *Florida Power Corp.* v. *FirstEnergy Corp.*, 810 F.3d 996, 1017-1018 (2015) (Suhrheinrich, J., dissenting) (discussing cases); see *Hobart*, 758 F.3d at 769; *RSR Corp.* v. *Commercial Metals Co.*, 496 F.3d 552, 558 (6th Cir. 2007). The Seventh Circuit has declined to "focus on the presence or absence of an admission of liability," *Refined Metals Corp.* v. *NL Industries Inc.*, 937 F.3d 928, 931 (2019), explaining that this "is not the central inquiry," *ibid.*, and has held that a consent order can resolve liability under Section 113(f)(3)(B) even if the covenant not to sue is conditioned on satisfactory performance, see *NCR Corp.* v. *George A. Whiting Paper Co.*, 768 F.3d 682, 692 (2014).

The court below followed the same approach. Like the Sixth and Seventh Circuits, the court acknowledged that "'[w]hether or not liability is resolved through a settlement' is unanswerable by a 'universal rule;' it instead requires examination of 'the terms of the settlement on a case-by-case basis.'" Pet. App. 18a (citation omitted). The court acknowledged that "a disclaimer of liability may weigh against the conclusion that the parties intended to resolve liability within the meaning of section 113(f)(3)(B)." *Id.* at 24a. The court concluded, however, that the probative force of the disclaimer here was outweighed by other provisions of the consent decree at issue in this particular case. *Ibid.*

Petitioner also argues (Pet. 19-20) that, with respect to the significance of the 2004 consent decree's reservation of the United States' right to bring future claims against petitioner, the decision below conflicts with the Ninth Circuit's decision in *Asarco*. But the Ninth Circuit, like the Sixth and Seventh Circuits, has declined to adopt any categorical rule concerning the effect of such a reservation on a potential contribution claim. Rather, that court has held that the effect of such a reservation "depends on a case-by-case analysis of a particular agreement's terms." *Asarco*, 866 F.3d at 1125. In addition, the Ninth Circuit's decision involved a decree providing that the settling party would not be released from any liability under any statute. See *id.* at 1126-1127. The decree in this case, by contrast, released petitioner from the claims asserted in the complaint, while reserving the United States' right to bring other, unrelated claims. Pet. App. 22a.

Contrary to petitioner's assertion (Pet. 12), the United States' earlier briefing in support of certification for interlocutory appeal does not suggest that the second question presented warrants this Court's review. The district court denied the United States' motion to dismiss in part because it believed that the 2004 consent decree was comparable to settlements discussed in the Sixth Circuit and Seventh Circuit decisions above, and it considered those courts' analysis persuasive. See Pet. App. 73a-85a. Accepting that framing of the issues, the United States argued in its motion requesting permission to take an interlocutory appeal that tension exists between those Sixth and Seventh Circuit decisions and the Ninth Circuit's analysis in *Asarco*. See Pet. 12. In its merits briefing, however, the United States made clear that, notwithstanding that

tension, the 2004 consent decree differs from the settlements at issue in those earlier cases. See U.S. Br. at 25-26, 32-33, 37-39, *Cooper Industries*, *supra* (No. 02-192). For that reason, the second question presented is not the subject of a circuit conflict, and there is no sound reason for this Court to review the court of appeals' fact-bound decision regarding this specific settlement.

3. Petitioner asserts (Pet. 22-25) that granting review is necessary to prevent the United States from evading its legal responsibilities under CERCLA. That argument lacks merit.

During this litigation, the United States has not disputed that CERCLA provides a mechanism by which petitioner could have sought to recover—either from the United States or from any other potentially responsible party—a portion of its costs of complying with the 2004 consent decree. The disagreement between the parties concerns *which* of CERCLA's remedial mechanisms is available under circumstances like these. The court of appeals agreed with the government that petitioner's claim is properly viewed as one for contribution; that Section 113(f)(3)(B) rather than Section 107(a)(4)(B) therefore provided the appropriate avenue for relief; and that petitioner's failure to bring suit within three years after entry of the consent decree rendered its suit untimely under 42 U.S.C. 9613(g)(3)(B). Those holdings will not insulate the United States from potential liability in future cases where settling parties assert their contribution claims in a timely manner. And while petitioner emphasizes (Pet. 24-25) the case-specific consequences of the holding below, statutes of limitations inherently carry the "potential for harsh results." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005).

Petitioner also fails to acknowledge its own responsibility for the Ordot Dump. Petitioner alleges that the Navy disposed of waste at the site decades ago, but since 1950, *petitioner* has used the site as a dumping ground for municipal and industrial waste, converting "[w]hat was once a valley" into a "mountain of trash." *United States* v. *Government of Guam*, No. 02-22, 2008 WL 216918, at * 1 (D. Guam Jan. 24, 2008). For decades, petitioner avoided its obligations under environmental laws, and it continued to avoid those duties for years after it entered into the 2004 consent decree. *Ibid.* Indeed, in 2008, the district court in Guam appointed a receiver to carry out petitioner's responsibilities under the decree, explaining that "there has been an historical and present lack of commitment by the island's leaders in addressing this solid waste crisis." *United States* v. *Government of Guam*, No. 02-22, 2008 WL 732796, at *1 (D. Guam Mar. 17, 2008). Contrary to petitioner's characterization (Pet. 25), this is not an exceptional case in which this Court's intervention is needed to prevent a "grossly unfair" result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JONATHAN D. BRIGHTBILL
ERIC GRANT
Deputy Assistant Attorneys General
JENNIFER SCHELLER NEUMANN
EVELYN YING
RACHEL HERON
Attorneys

DECEMBER 2020