No. 20-382

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

ARGUMENT

Throughout this case, the United States has advanced a series of "bewildering" arguments to evade responsibility for its fair share of cleanup costs at the Ordot Dump, "warp[ing] the underlying text" of both CERCLA Section 113(f)(3)(B) and the 2004 CWA Consent Decree "beyond recognition." Pet. App. 90a-91a. The United States' latest brief doubles down on that approach in trying to defend the decision below.

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

The parties agree that the first question presented "turns on the meaning of the phrase 'liability * * * for * * * a response action'" in Section 113(f)(3)(B). U.S. Br. 12 (ellipses in original) (quoting 42 U.S.C. § 9613(f)(3)(B)). The core dispute is whether "liability" refers to the liability imposed by CERCLA itself (as Guam argues) or liability under any law (as the United States argues). As Guam explained, all traditional tools of statutory interpretation compel the conclusion that Section 113(f)(3)(B) requires the resolution of CERCLA liability. The United States' contrary interpretation lacks merit.

A. The United States' Interpretation Subverts Both Text And Context

1. The United States essentially ignores the "'fundamental canon of statutory construction'" that a statutory provision must be read in light of "the text and context of the statute as a whole." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (citation omitted). When it comes to the source of the "liability" referenced in Section 113(f)(3)(B), however, "context is determinative." *United States v. Briggs*, 141 S. Ct.

467, 470 (2020). Section 113(f)(3)(B) must be read in light of the surrounding provisions in Section 113(f), which establish an integrated contribution provision anchored by paragraph (f)(1). Pet. Br. 16-20. Paragraph (f)(1) specifies that the liability for both parties to the contribution equation is CERCLA liability, 42 U.S.C. § 9613(f)(1), and the references to "liability" in Section 113(f)'s subsidiary provisions, *id.* § 9613(f)(2)-(3), follow the liability identified in paragraph (f)(1). Section 113(f)(3)(B)'s inclusion of CERCLA-specific terms of art that track CERCLA's liability provisions—"response action" and response "costs"—bolster that conclusion. Pet. Br. 17, 19-20.

2. Rather than interpreting Section 113(f)(3)(B) as an integrated component of Section 113(f), the United States urges the Court to "view" Section 113(f)(3)(B) as an island—a "pure stand-alone provision," U.S. Br. 27—such that its reference to "liability" means liability under *any* law. But this Court does not "read [statutes] as a series of unrelated and isolated provisions," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995), and the United States offers no plausible justification for doing so here.

a. It is truly remarkable how little attention the United States devotes to Section 113(f)'s structure as a whole. The United States seems to agree (at 17) that the liability spelled out in paragraph (f)(1) is liability under CERCLA, and it does not dispute that, as to *every other* paragraph in Section 113(f)—apart from subparagraph (f)(3)(B)—the references to "liability" follow the liability spelled out in paragraph (f)(1). But the United States singles out subparagraph (f)(3)(B) for special treatment, reasoning (at 25-26) that paragraph (f)(1) and subparagraph (f)(3)(B) operate "separately" in

"differ[ent]" circumstances—in civil actions and settlements, respectively.

Of course the provisions address different circumstances—that is why there are two provisions instead of one. But "it does not follow that [the Court] should treat these [provisions] as islands unto themselves." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 289-90 (2010); *see, e.g.*, *United States v. Atlantic Research Corp.*, 551 U.S. 128, 135-36 (2007) (respecting the "structural" "symmetry of [CERCLA Sections] 107(a)(4)(A) and (B)" despite textual differences). Congress enacted Section 113(f) as one integrated provision designed to address one common subject—CERCLA contribution. Pet. Br. 5-6. Section 113(f) must be interpreted "as a whole," *Atlantic Research*, 551 U.S. at 135 (citation omitted), and in light of—rather than in spite of—its anchor provision in paragraph (f)(1).[1]

b. Having plucked Section 113(f)(3)(B) from its context, the United States argues (at 12-13, 24) that the referenced "liability" should be read to implicitly import the liability under *any* statute that might call for an act that could meet CERCLA's definition of "response." That argument fails.

The United States initially points (at 13) to sporadic cross-references to other laws within CERCLA's multi-layered definition of "response." It

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[1] Section 113(f) differs markedly from the statutes in the United States' examples (at 26-27), which had "distinct" clauses plainly structured to "be understood completely without reading any further." *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 344 & n.4 (2005); *Loughrin v. United States*, 573 U.S. 351, 357 (2014).

is not unusual for Congress to cross-reference other laws in defining a term, but that does not make the term "response action" itself any less CERCLA-specific. "[R]esponse action" is a well-known CERCLA term of art, uniquely defined in CERCLA through a set of provisions that distinctively focus on addressing "release[s]" of "hazardous substance[s]," as defined by CERCLA. 42 U.S.C. § 9601(14), (22)-(25). Section 113(f)(3)(B)'s use of that CERCLA-specific term of art simply confirms that the source of "liability" is CERCLA itself, just as Congress specified in paragraph (f)(1). Pet. Br. 17.

Equally irrelevant is the fact that "actions taken under [other] laws" might also fall within "[CERCLA's] definition of 'response.'" U.S. Br. 12-13. Congress's use of broad terms in crafting CERCLA's unique definition of "response" does not somehow sever the definition's inextricable link to CERCLA. And more to the point, it does not suggest that, in referring to "liability" for a "response action" in Section 113(f)(3)(B), Congress meant to sweep in liability under other laws. CERCLA's definition of "response" simply identifies the kinds of actions that trigger CERCLA's various provisions; it does not incorporate the liability under other laws.

c. The United States next invokes (at 13-14, 16-19) an amalgam of "[o]ther CERCLA provisions" scattered about the Act. This fares no better.

The United States first cites snippets of other CERCLA provisions that expressly "refer[] to 'any liability . . . under any Federal law'" and liability "'under this Act *or any other law*.'" U.S. Br. 13-14 (citations omitted). These provisions, ripped from context, have little to do with Section 113(f). To the extent that they are relevant at all, they simply

underscore that Section 113(f)(3)(B) does *not* refer to liability "under this Act *or any other law*"—something Congress clearly knew how to say when it wanted to. On the United States' own logic, "Congress's failure to include th[ose] words" in Section 113(f)(3)(B) should doom its interpretation. U.S. Br. 16.

Next, the United States cites other CERCLA provisions that "include the words 'under this Act'" and urges the Court to "'assume[]'" that, because Section 113(f)(3)(B) "omit[s]" those words, it must encompass liability imposed under any law. U.S. Br. 16-19 (citation omitted). But when Section 113(f) is read as a whole, Congress had no need to use "under this Act" in Section 113(f)(3)(B). Congress spelled out the applicable liability in Section 113(f)(1), and the subsequent references to "liability" in Section 113(f) should be read in *that* light—not in light of random isolated provisions in other parts of CERCLA.

The bottom line is that Congress did not use *either* "under this Act" *or* "under this Act or any other law" in Section 113(f)(3)(B). Instead, it used "the general term[] 'liability'" (U.S. Br. 16), which underscores that Section 113(f)(3)(B) must be read in the "specific context" of the surrounding provisions, *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 890 (2019). That context confirms that the source of the referenced "liability" is CERCLA.

d. Significantly, the United States all but ignores the anomalies produced by its interpretation of "liability." For example, Section 113(f)(2) also refers to "liability" without specifying the legal source. 42 U.S.C. § 9613(f)(2). As Guam explained, isolating and contrasting Section 113(f)'s integrated provisions would untether Section 113(f)(2) from environmental regulation entirely given that, unlike Section

113(f)(3)(B), Section 113(f)(2) does not even refer to a "response action." Pet. Br. 35. The United States does not even try to respond to this problem.

The United States' approach also contradicts its argument below that, to trigger Section 113(f)(3)(B), the *non*-settling party's liability must arise under CERCLA. Gov't C.A. Suppl. Br. 10; *see* Pet. Br. 34. There is no textual basis for requiring the non-settling party's liability to arise under CERCLA—while allowing the settling party's liability to arise under any law. Pet. Br. 34-35. Apparently recognizing this problem, the United States now claims (at 27) that Section 113(f)(3)(B) applies even if *neither* party's liability arises under CERCLA. But the United States offers no justification for this abrupt change in position, which also conflicts with its position in other cases—not to mention the uniform rule in the lower courts. Pet. Br. 22-23.[2]

Saying that *neither* party's liability must arise under CERCLA just exacerbates the problem. Read in light of Section 113(f)(1), the "source of [the] liability" in Section 113(f)(3)(B) is clear—it is the "liability created by CERCLA." *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1516-17 (10th Cir. 1991).

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[2] In a tortuous footnote (at 27 n.2), the United States tries to paper over its flip in litigating position, but its brief below speaks for itself: "Section 113 claims will lie *only* against persons who are liable for clean-up costs *under Section 107*." Gov't C.A. Suppl. Br. 10 (emphasis added); *accord, e.g.*, U.S. Amicus Br. 13 n.5, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc) (No. 00-10197), 2002 WL 32099835; U.S. Br. 6-7, *Chevron Mining Inc. v. United States*, 863 F.3d 1261 (10th Cir. 2017) (No. 15-2209), 2016 WL 1642974.

3. The United States offers a hodgepodge of other arguments to justify its isolationist reading of Section 113(f)(3)(B). None works.

a. The United States declares (at 17) that Section 113(f)(3)(B) "bespeaks breadth" because it contains "five 'or's'." But none of these "or's" sheds any light on the substantive terms at issue ("liability . . . for . . . a response action") and they provide no reason to ignore the powerful contextual evidence that Congress was referring to CERCLA liability in Section 113(f)(3)(B).

b. The United States argues (at 20) that Guam's interpretation renders "Section 113(f)(3)(B)'s reference to 'judicially approved settlement[s]' largely redundant" given Section 113(f)(1), which authorizes contribution after "the resolution of CERCLA civil actions." But once again, the United States ignores how Section 113(f) works as a whole. Congress understandably addressed "civil actions" in one provision and "settlement[s]" in another, since the contribution protection in paragraph (f)(2) operates, like subparagraph (f)(3)(B), based exclusively on settlement. And it is not surprising that Congress addressed "judicially approved" settlements alongside "administrative" settlements. 42 U.S.C. § 9613(f)(3)(B). Congress's inclusion of "judicially approved settlement[s]" in Section 113(f)(3)(B) makes perfect sense. In any event, any overlap reflects the "belt and suspenders approach" that "Congress employed" throughout Section 113. *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020).

Indeed, the United States' argument creates the real problem. According to the United States, Congress used the exact same phrase—"judicially approved settlement[s]"—to mean two different things in Section 113(f): In subparagraph (f)(3)(B), it

means *only* non-CERCLA settlements (since CERCLA settlements are covered by paragraph (f)(1)); while in paragraphs (f)(2), (f)(3)(A), and (f)(3)(C), it means *both* CERCLA and non-CERCLA settlements. This Court does "not lightly assume that Congress silently attaches different meanings to the same term in the same statute." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1845 (2020) (citation and internal alteration omitted).

c. Finally, the United States argues that Guam's interpretation "negate[s]" the statutory "combination" of "State" and "response action," violating a supposed "presum[ption]" that a statute reaches "*every* combination of its antecedents and consequents." U.S. Br. 19-20 (emphasis added). But no such presumption exists. That a statute *can* "cover[] *any* combination of its nouns, gerunds, and objects," *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (emphasis added), does not mean that it *must* cover *all* such combinations. The statute in *Encino Motorcars*, in fact, had multiple null sets, such as a "mechanic" engaged in "selling" automobiles. *Id.* at 1141. Any other rule would hamstring Congress's ability to succinctly address multiple alternative pairs in a single provision.[3]

All told, the United States' interpretation amounts to a series of "innuendoes [from] disjointed bits of a

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[3] The United States is simply wrong about its other supposedly "negate[d]" combination: "State" and "administrative" settlements. U.S. Br. 20. As the United States well knows, parties routinely resolve CERCLA liability to States in administrative settlements that trigger Section 113(f)(3)(B). *See, e.g.*, *Cranbury Brick Yard, LLC v. United States*, 943 F.3d 701, 707-12 (3d Cir. 2019).

statute," divorced from any "coheren[t]" understanding of "all the parts together." Henry J. Friendly, *Benchmarks* 207 (1967) (citations omitted). That is not how this Court reads statutes.

B. The United States' Interpretation Upsets Traditional Contribution Principles

The United States agrees (at 28, 37) that Section 113(f)(3)(B) must be interpreted in light of "the background law of contribution," which "requires" the extinguishment of "a 'common liability.'" As Guam explained, the extinguished liability will be common between the settling and non-settling parties in this context only if the settlement extinguishes liability imposed by CERCLA. Pet. Br. 20-24.

The United States claims (at 29-30) that a "common liability" can arise from "different sources," as long it concerns the "same harm." But for support, the United States relies on cases involving general state-law causes of action for contribution, untethered to any statutory scheme or particular kind of injury. By contrast, "[t]here is no general federal right to contribution." *Paroline v. United States*, 572 U.S. 434, 455 (2014). Instead, Congress has authorized only limited contribution rights within specific statutory regimes. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 & n.11 (1981). In that context, the harm is necessarily defined by the statutory violation. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014). Extinguishing common liability for the "same harm," therefore, requires extinguishing common liability for the same statutory violation. *See, e.g.*, *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 88-89 & n.20 (1981).

Tellingly, the United States never identifies the "same harm" here, alluding only in general terms (at 30) to "the dump's contaminated condition." That is because, even if violations occur at the same location, the CWA and CERCLA "harms"—the respective statutory violations—are distinct. The "harm" alleged in the CWA suit was the "discharge" of "pollutants" into waters of the United States without a permit. Pet. App. 57a; 33 U.S.C. § 1311(a). And the 2004 CWA Consent Decree is explicitly limited to those harms. Pet. App. 139a, 141a; *see Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (federal consent decree is limited to the pleadings).

By contrast, the harm addressed by CERCLA is the "release" of a "hazardous substance." 42 U.S.C. § 9601(23). The CWA decree did not even mention that distinct harm—and that is significant. Not all of the CWA's "pollutants" are hazardous substances, and no hazardous substances were identified in either the CWA complaint or decree. Pet. Br. 36-37. Moreover, the activities Guam agreed to undertake in the 2004 CWA Consent Decree were undertaken solely to address CWA harms and given as consideration for reduced CWA penalties. Pet. App. 57a. As a result, the 2004 CWA Consent Decree did not address (much less resolve) liability shared in common with the United States' CERCLA liability. Pet. Br. 21-24.

The United States also ignores the other requirement for contribution—the settlement must *extinguish* the common liability. *Id.* at 22-23. The United States nowhere explains how a settlement entered exclusively under *one* statutory regime implicitly extinguishes liability imposed by a *separate* statutory regime. Nor does the United States address

the untenable result of its position in this case: A decree entered under a CWA provision that does not even *authorize* liability against the United States somehow *resolved* the United States' liability. *Id.* at 23. The United States' position distorts traditional contribution principles beyond recognition.

C. The United States' Interpretation Upends Other Federal And State Laws

The United States' reading of Section 113(f)(3)(B) also upsets the carefully calibrated remedial regimes under other environmental laws.

1. Except for the Oil Pollution Act, 33 U.S.C. § 2709, no other major federal environmental statute has an explicit right to contribution. Yet as the United States admits (at 30-32), its reading selectively imports portions of Section 113(f)'s contribution regime into those statutes—anytime a settlement involves an action that happens to fall within CERCLA's definition of "response." Indeed, despite having advocated against contribution claims in the context of these other statutes (Pet. Br. 26), the United States now declares (at 30-31) that they are a "supplemental remedy." But this is a decision for Congress, not the Solicitor General.

The United States does not dispute that these other statutory schemes have comprehensive and detailed remedial regimes of their own. Pet. Br. 25-27. That itself counsels strongly against interpreting Section 113(f)(3)(B) to inject them with new, "supplemental" remedies. *See, e.g.*, *Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-15 (1981). And if there were any doubt about that, Congress removed it by explicitly minimizing CERCLA's interference with other laws.

42 U.S.C. §§ 9652(d), 9659(h). Congress's decision to exclude contribution claims from other comprehensive statutes should be respected.

2. The United States also ignores the significant federalism implications of its sweeping interpretation of Section 113(f)(3)(B), as underscored by the amici States. Pet. Br. 27-29; States Amici Br. 17-28.

The United States, amazingly, just dismisses these concerns (at 32) as "distinct" from "the interpretation of federal law." But this Court has repeatedly admonished that "[f]ederal statutes impinging upon important state interests 'cannot be construed without regard to [federalism] implications.'" *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 544 (1994) (citation and internal alteration omitted); *see, e.g.*, *Cowpasture River*, 140 S. Ct. at 1849-50. Thus, this Court has staunchly refused to "interpret" federal regulatory statutes—including CERCLA—in a way that would seriously "interfere" with "States' traditional regulatory authority" that Congress expressly "preserve[d]." *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020); *see CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014).

The United States' interpretation envisions an über-federal contribution regime under Section 113(f)(3)(B), overriding States' autonomy to adopt contribution regimes that are not only "above the federal remedy" (U.S. Br. 32) but also narrower than it. Pet. Br. 27-28; States Amici Brief 20-24.

D. The United States' Focus On Guam's Section 107(a) Claim Is A Red Herring

The United States suggests that Guam's interpretation of Section 113(f)(3)(B) is somehow inconsistent with its pending cost-recovery claim

under Section 107(a). U.S. Br. 14-15, 24, 28, 29-30. That suggestion is incorrect.[4]

The United States wrongly isolates the definition of "response" to change how CERCLA's substantive provisions work. *Supra* at 3-4. Sections 107(a) and 113(f) "provide two 'clearly distinct' remedies" that apply in different "'circumstances.'" *Atlantic Research*, 551 U.S. at 138-39 (citations omitted). Section 107(a) focuses on the costs "incurred" in undertaking a response "action," 42 U.S.C. § 9607(a)(4)(A), while Section 113(f)(3)(B) focuses on the "liability" resolved in a "settlement," *id.* § 9613(f)(3)(B). Those are two distinct inquiries, which occur at different points in time—Section 107(a), at the time costs are incurred; Section 113(f)(3)(B), at the time of settlement. There is no inconsistency in saying that a non-CERCLA settlement does not trigger Section 113(f)(3)(B) because—pursuant to its terms—the settlement does not resolve "liability" under CERCLA for a response action, but that a party incurring response costs may later seek cost-recovery under Section 107(a).

The United States also overlooks how this case maps onto the Section 113(f)(3)(B) and Section 107(a) inquiries. The United States sued Guam under the CWA for the discharge of pollutants without a CWA permit. *Supra* at 10. Neither the CWA complaint nor the CWA decree mentioned CERCLA or the presence of any CERCLA-defined "hazardous substance"—a prerequisite for meeting CERCLA's definition of "response." Pet. Br. 36-37. The United States'

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[4] Although the United States repeatedly refers to Section 107(a)(4)(B), Guam's cost-recovery claim arises under Section 107(a)(4)(A). JA-70; *see* 42 U.S.C. §§ 9601(27), 9607(a)(4)(A).

decision to proceed under the CWA did not prevent Guam from bringing a cost-recovery action under CERCLA, after incurring the costs at issue and alleging that the cleanup *did* address the release of "hazardous substances." JA-69.[5]

Really, what is unusual about this case is not Guam's cost-recovery claim but the United States' position that a non-CERCLA consent decree triggered CERCLA's contribution provision, even after EPA repeatedly told Guam that a CERCLA response was inappropriate at the Ordot Dump. Pet. Br. 8-11. The United States' interpretation sets a trap for the unwary among those settling non-CERCLA claims, and an invitation for government abuse.

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

The United States' position fares no better when it comes to the second question presented.

A. The United States' Position Contravenes The Statutory Text

To trigger Section 113(f)(3)(B), the settling party must have "resolved its liability" for a response action or response costs in the "settlement." 42 U.S.C. § 9613(f)(3)(B). That requires the settlement to

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[5] Likewise, the fact that the 2004 CWA Consent Decree did not identify any "hazardous substance" confirms that it could not have resolved liability for any "response" action. Contrary to the United States' assertion (at 40-41), Guam by no means forfeited this argument. *See* Pet. 28 n.8; Cert. Reply 8-9; Pet. Br. 36-37. And it is fairly included within the question whether a non-CERCLA settlement triggers Section 113(f)(3)(B).

conclusively deal with the settling party's preexisting liability for undertaking (or paying for) a response action. Pet. Br. 38-41. The United States, however, claims that Section 113(f)(3)(B) is triggered anytime a settling party agrees "to perform or pay for a response action." U.S. Br. 38. That interpretation drains "resolved its liability" of meaning.

Most of the United States' response (at 34-40) rests on the false premise that "Guam argues" that Section 113(f)(3)(B) requires the settlement to "determine whether the legal claim against the settling party was valid." But that is not Guam's argument; the word "valid" does not even appear in Guam's brief. Instead, Guam argues that, to trigger Section 113(f)(3)(B), a settlement must "conclusively" address a "preexisting liability." Pet. Br. 38-41. This does not require a determination of "the claim's validity" or an admission of wrongdoing. U.S. Br. 36, 38-39. It requires the settlement to extinguish the settling party's liability to the government—"valid" or not—in a way that is "not susceptible to further dispute or negotiation." *Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1122 (9th Cir. 2017).

The United States offers an interpretation unmoored from the statutory text. Despite professing agreement that the term "'resolve' connotes finality and conclusiveness," the United States ultimately replaces that requirement with a rule applicable whenever settling parties merely agree "to perform or pay for a response action." U.S. Br. 38. If Congress had wanted to refer to that broader set of persons, "it certainly could have said so," Pet. App. 81a, as it did elsewhere in the statute. *See* 42 U.S.C. § 9622(a) (referencing a person that "enter[s] into an agreement . . . to perform any response action"). But Congress,

instead, limited Section 113(f)(3)(B) to settling parties who have "resolved [their] liability."

The United States also claims (at 38-39) that the resolved liability need not preexist the settlement, likening a settlement to a "contract" that "both creat[es] new legal obligations and (simultaneously) defin[es] the scope and contours of those duties." That might be a correct description of a contract, but not of the statute's "resolved its liability" language. If Mary contracts with Bill to paint Bill's house, one might say that Mary has "created" an "obligation" to Bill to paint his house, but it would be strange to say that Mary has "resolved [her] liability" to Bill for painting his house—unless, say, Mary's agreement fulfilled a prior IOU of some kind. The term "resolved" requires something preexisting to resolve—here, a "liability" that preexists the resolution. Pet. Br. 39-41.

The United States' contract analogy also falls apart under black-letter principles of contribution, which the United States agrees (at 37) Congress incorporated into Section 113(f)(3)(B). Under those principles, a settlement must extinguish the prospect of "recovery *outside of the agreement*" to trigger a claim for contribution. Restatement (Third) of Torts: Apportionment of Liability § 24(a) (2000) (emphasis added); *see* Pet. Br. 39. A liability that is both created and resolved by the settlement itself does not satisfy that black-letter requirement.

Indeed, for all its focus on "prospective obligations," the United States ultimately seems to agree that there must be "doubt or dispute about the liability before the settlement," and that the settlement must "eliminate that *prior* doubt." U.S. Br. 37-39 (emphasis added). But the only "prior doubt" a settling party would have is the doubt about

its "legal responsibility for [the] contamination." *Id.* at 37-38. Thus, the fact that a settlement simply reduces "doubt" about whether a party will prospectively undertake a response action is insufficient—the settlement must *eliminate* the preexisting exposure to legal responsibility that would otherwise prompt that action.

B. The United States' Position Rewrites The 2004 CWA Consent Decree

Determining whether a party "resolved its liability . . . *in* [*the*] *settlement*," 42 U.S.C. § 9613(f)(3)(B) (emphasis added), depends, of course, on the terms of *the settlement*. At the certiorari stage, the United States seemed to agree. BIO 18-19. But the United States now abandons any fidelity to the 2004 CWA Consent Decree's terms, rewriting them or ignoring them altogether. Indeed, the only amicus supporting the United States favors "the United States' position" precisely because it treats the decree's "specific terms" as "folly." ARCO Amicus Br. 4-5.

1. The United States first takes aim (at 41-44) at the liability disclaimer, which explicitly provides that the parties entered into the decree "without any finding or admission of liability." Pet. App. 140a. Under any ordinary use of the English language, a settlement that explicitly disclaims any finding of liability does not *resolve* liability. Pet. Br. 41, 43-46.

In response, the United States rewrites the disclaimer out of the decree. First, the United States labels it (at 42) a "non-admission clause," ignoring that the clause disclaims "*any finding* or admission of liability," Pet. App. 140a (emphasis added). Then, having excised "any finding," the United States redrafts the remaining portion to mean, "roughly," an

"'acknowledgment of wrongdoing or of the validity of the plaintiff's claim.'" U.S. Br. 42. And "[o]n that understanding," the United States ultimately nullifies the disclaimer altogether by equating it to the "absence of a concession of liability." *Id.* at 42-44.

But terms in a consent decree "must be construed as [they are] written," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), and the United States' admittedly "rough[]" rewrite is untenable. Not only must the United States erase the word "finding," but it must also deploy a different, apparently narrower "meaning[] of the word 'liability'" than that applicable to the statute, U.S. Br. 42, flouting the disclaimer's broad reference to "*any* finding . . . of liability." Pet. Br. 46 (quoting Pet. App. 140a). This Court has repeatedly rejected such "strained" interpretations of consent decrees, *Armour*, 402 U.S. at 683 (quoting *United States v. Atlantic Refin. Co.*, 360 U.S. 19, 22 (1959)), and it should do so here.

The United States also claims (at 42-43) that the disclaimer's clear terms "colli[de]" with "Congress's objective" in enacting CERCLA's settlement provisions, which provide contribution benefits for settling parties that "avoid admitting liability." But the "language of a consent decree" cannot be discarded "simply because another reading might seem more consistent with" an alleged statutory "purpose." *Atlantic Refin.*, 360 U.S. at 23-24. And contorting the language of the decree here to fit the supposed purpose of CERCLA's settlement regime would be truly absurd given that the 2004 CWA Consent Decree was *not* a CERCLA settlement.

In any event, even for CERCLA settlements, the United States is wrong. As Guam explained, settling parties routinely avoid admitting liability while also

resolving liability for purposes of contribution under Section 113(f)(3)(B)—indeed, EPA's model CERCLA settlements do just that, proving that the United States' policy concerns are imaginary. Pet. Br. 43-44 & n.11. Remarkably, despite its posturing about the "'custom[]' in consent decrees," U.S. Br. 43 (citation omitted), the United States never acknowledges EPA's own model decrees or the settlements cited by Guam following that model (Pet. Br. 44).

2. The United States also gives short shrift to the 2004 CWA Consent Decree's conditional release and reservations of rights. But these clauses—which are entitled to effect, just like the rest of the consent decree—confirm that Guam's exposure to liability remained the same both before and after the consent decree was signed. Pet. Br. 41-42. So how could it have possibly *resolved* Guam's liability?

The United States does not defend the D.C. Circuit's debunked theory about the limitations period. Pet. Br. 46-48. Instead, the United States asserts (at 44-45) that, regardless of these provisions, Guam's agreement to undertake certain actions at least "resolve[d] something." But even the United States admits (at 45) that Guam remained exposed to liability—not only for "further remedies beyond those" in the decree but also for the "promises in the decree" itself. Indeed, the United States never disputes the practical effect of the 2004 CWA Consent Decree's provisions: EPA could have immediately turned around and sued Guam under any other statute—including CERCLA—for the very same obligations underlying the decree. Pet. Br. 42. Guam thus remained exposed to liability not only "for additional response actions," U.S. Br. 11, but also for precisely the same actions covered by the decree.

The United States' position seems to confuse resolving liability "for *some* of a response action" (as Section 113(f)(3)(B) permits) with "resolv[ing] *some*[]" liability for a response action. U.S. Br. 44 (second emphasis added). While the response action can be partial, the resolution of liability for that action cannot. Thus, when, as here, the settlement contains clauses that expose the settling party to further liability for precisely the same action, the liability for the action has not been resolved.

Contrary to the United States' suggestion (at 45), that conclusion accords with CERCLA's settlement regime, which envisions settlements that "*cap*[] the [settling] parties' liability." *Atlantic Richfield*, 140 S. Ct. at 1355 (emphasis added). Thus, while CERCLA may "require[]" the United States to reserve the right to assert "claims that arise out of 'conditions which are unknown,'" U.S. Br. 45 (quoting 42 U.S.C. § 9622(f)(6)(A)), it does not contemplate the reservation of the far broader right to assert additional claims for "any violations" of federal law, even those arising out of *known* conditions, Pet. App. 166a. "In any event, if there is an anomaly it is one that has been created by Congress," *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 308 (2003), and one that EPA has successfully averted with clear language in its model settlements. Pet. Br. 44 n.11.

The United States' invitation to rewrite or erase the terms of the decree in this case should be rejected.

III. THE UNITED STATES' POLICY ARGUMENTS ARE UNFOUNDED

The United States' policy arguments are best suited for Congress, not this Court. *See, e.g.*, *Intel*

Corp. Inv. Pol'y Comm. v. Sulyma, 140 S. Ct. 768, 778 (2020). But they are unavailing, too.

1. The United States claims (at 46) that Guam's position will "delay" cleanups by allowing parties to "'choose'" between the limitations periods under Sections 107(a) and 113(f). But the United States itself argues (at 15) that these provisions are "mutually exclusive." Parties cannot choose between them. And Congress presumably concluded that the limitations periods it specified for these separate actions were both appropriate. Pet. Br. 5-6. If a settling party's settlement does not trigger Section 113(f)(3)(B), there is no reason to bar that party from bringing a Section 107(a) claim. It is therefore not surprising that this Court rejected this precise argument when the United States made it in *Atlantic Research*, 551 U.S. at 137-39.

The United States also complains (at 46-47) about the prospect of "joint and several liability" under Section 107(a). But as *Atlantic Research* explains, contribution defendants in these circumstances can "blunt any inequitable distribution of costs by filing a [contribution] counterclaim" under Section 113(f)(1). 551 U.S. at 140. While the United States apparently finds this Court's solution "pointless[]," U.S. Br. 47, it has already asserted such a counterclaim in this case, *see* D. Ct. Doc. 39, at 22-23 (Oct. 15, 2018).

2. The United States claims that limiting Section 113(f)(3)(B) to CERCLA settlements will undermine Congress's "purpose" of "'encourag[ing] settlements.'" U.S. Br. 22 (citation omitted). Such generalized appeals to "purpose" cannot override statutory text. *See, e.g.*, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1172 (2021). And this case shows why.

While the United States now posits a congressional focus on settlements broadly, it previously had "no doubt" that "Congress's object was to provide contribution during or following a Section 106 or 107(a) action or after a *CERCLA-based* settlement." U.S. Amicus Br. 12, 23, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 354181 (emphasis added). And in *Cooper*, the United States did not, as its revisionist history now suggests (U.S. Br. 33-34), refer to only "Section 113(f)(1)." The quote above itself plainly tracks both Section 113(f)(1) and Section 113(f)(3)(B), and the surrounding discussion confirms as much.

In any event, settling parties have enormous incentive to explicitly resolve CERCLA liability at the first opportunity, both to minimize the potential for further enforcement actions against them and to get contribution immunity under Section 113(f)(2). Here, it was EPA that repeatedly *refused* to recommend CERCLA action at the Ordot Dump. Pet. Br. 8-11. The United States just ignores that history.

If anything, it is the United States' interpretation that will discourage settlements—across a broad spectrum of other environmental laws. Defendants in non-CERCLA actions will be less likely to settle if, despite their continued possible exposure to CERCLA liability, the settlement suddenly triggers an exclusive three-year timer to discover the full extent of the problem, identify all other responsible parties, and bring suits against them—or else forfeit any possible CERCLA recovery down the road.

The United States further asserts (at 23-24, 33) that Guam's interpretation would "create uncertainty." Compared to the United States' interpretation—which hinges Section 113(f)(3)(B)'s

applicability on a *post hoc* assessment of whether a settlement involved an action that happens to fall within CERCLA's complex definition of "response"—this argument is difficult to take seriously. Anyway, the United States' supposed uncertainties are nonexistent. Section 113(f)(3)(B) applies to settlements that resolve CERCLA liability for a response action or response costs, regardless of whether the settlement "specifically" cites "CERCLA" or also resolves "non-CERCLA liability." U.S. Br. 23.

3. The United States concludes by suggesting (at 47-48) that Guam simply got what it deserved. This effort is at best disingenuous. It was, to be clear, the United States (through the Navy) that built the Ordot Dump—without "even rudimentary environmental safeguards" (U.S. Br. 5). And while the United States suggests (at 5) that its use of the dump ended once Guam began using the site for municipal purposes in 1950, in fact the U.S. military *continued* to use the dump for decades thereafter to dispose of toxic wastes—DDT and Agent Orange among them—in connection with the Korean War, Vietnam War, and other operations. Pet. App. 5a-6a. Guam accepts that it bears responsibility for its own use of the site. All Guam asks is that the United States pay its fair share of clean-up costs based on its own role in building and using the site. Nothing in CERCLA strips Guam of its right to bring that cost-recovery claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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