

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRITORY OF GUAM, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 20-382  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Pages: 1 through 57  
Place: Washington, D.C.  
Date: April 26, 2021

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TERRITORY OF GUAM, )  
Petitioner, )  
v. ) No. 20-382  
UNITED STATES, )  
Respondent. )  
- - - - -

Washington, D.C.

Monday, April 26, 2021

The above-entitled matter came on  
for oral argument before the Supreme Court of the  
United States at 11:47 a.m.

APPEARANCES:

GREGORY G. GARRE, ESQUIRE, Bethesda, Maryland; on  
behalf of the Petitioner.

VIVEK SURI, Assistant to the Solicitor General,  
Department of Justice, Washington, D.C.; on behalf  
of the Respondent.

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1 P R O C E E D I N G S

2 (11:47 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 20-382, Territory of Guam  
5 versus United States.

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE PETITIONER

9 MR. GARRE: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 The United States made a strategic  
12 decision to steer the cleanup of the Ordot Dump  
13 away from CERCLA and to sue Guam -- and sue Guam  
14 under the Clean Water Act instead, no doubt to  
15 insulate itself from liability for its own role  
16 in building and using the dump. Yet, now the  
17 United States claims that the parties' Clean  
18 Water Act settlement nevertheless triggered a  
19 CERC -- a CERCLA contribution claim, a claim  
20 under the very statute it sought to avoid.

21 That's wrong for two independent  
22 reasons. First, Section 113(f)(3)(B) of CERCLA  
23 requires a resolution of CERCLA liability to  
24 trigger a CERCLA contribution claim.  
25 Section 113(f)(3)(B) is part of an integrated

1 CERCLA contribution provision. Read in context,  
2 the phrase "resolved its liability" naturally  
3 refers to CERCLA liability, and that reading  
4 squares with traditional contribution  
5 principles, which require the resolution of a  
6 common liability. The common liability that  
7 triggers a CERCLA contribution claim is CERCLA  
8 liability.

9           The United States' contrary  
10 interpretation depends upon construing  
11 Section 113(f)(3)(B) as if it were an island  
12 ripped from its context. It creates the  
13 untenable result that the meaning of the phrase  
14 "resolved its liability" changes from one  
15 paragraph of Section 113(f) to the next. And it  
16 manufactures an unprecedented contribution right  
17 that does not require a common liability and can  
18 be triggered even when the defendant is immune  
19 from liability in the settled claim, as the  
20 United States was here. None of that makes any  
21 sense.

22           And, second, the United States'  
23 position also fails because the parties' Clean  
24 Water Act settlement simply does not resolve  
25 Guam's liability for a response action. Under

1 the plain terms of the decree, Guam was just as  
2 exposed to liability for a response action after  
3 the decree as it was before, including under  
4 CERCLA itself.

5 I welcome the Court's questions.

6 CHIEF JUSTICE ROBERTS: Mr. Garre,  
7 under -- the position of the United States  
8 points out -- points out an incongruity in -- in  
9 your position, which is that you want to imply a  
10 term like "under CERCLA" into Section 113, but  
11 you're bringing this -- the case under  
12 Section 107 yourself, where you don't want to  
13 imply such a term.

14 I just wanted to make sure I have your  
15 response to that.

16 MR. GARRE: Well, the question is  
17 whether the settlement of the Clean Water Act  
18 triggered a contribution right under  
19 Section 113(f)(3)(B), and that depends on  
20 whether or not it resolves liability under  
21 CERCLA.

22 I don't think there's any  
23 inconsistency in our view. Everybody agrees  
24 that if the settlement didn't trigger 113(3) --  
25 (f)(3)(B), then we are entitled to proceed under

1 Section 107(a) for the recovery of costs.

2 CHIEF JUSTICE ROBERTS: You articulate  
3 this theory of statutory interpretation that  
4 centers upon what you call an anchor provision,  
5 and I'm -- I'm not quite sure where that fits in  
6 our sort of list of statutory guidelines.

7 I -- I gather it's not quite a defined  
8 term, but it's also not a term of art. What's  
9 the best authority that you can point me to  
10 where you have the kind of analysis that you're  
11 asking us to adopt here?

12 MR. GARRE: Well, I would point you to  
13 the cardinal rule that provisions have to be  
14 construed in context and in light of their  
15 surrounding provisions. So, here, 113(f)(3)(B)  
16 is part of an integrated CERCLA contribution  
17 provision, and it makes sense to read the  
18 language, the key phrase "resolved its  
19 liability," and how that is used throughout the  
20 statute.

21 And if you look at 113(f), it starts  
22 by establishing in (f)(1) the liability that --  
23 that matters, and that's CERCLA liability. And  
24 then, in each provision thereafter, it uses the  
25 phrase "resolved its liability."

1                   And the government doesn't dispute  
2                   that "resolved its liability" in (f)(2) means  
3                   CERCLA liability, and there's no reason it would  
4                   have any different meaning in (f)(3)(B).

5                   And I think that's perfectly  
6                   consistent with the rule of context, that this  
7                   always applies, and that the abnormal rule here  
8                   is the one asserted by the government, which is  
9                   that you should just take this provision and  
10                  construe it as if it were an island in a vacuum  
11                  without regard to its surround -- surrounding  
12                  provisions.

13                  CHIEF JUSTICE ROBERTS: Justice  
14                  Thomas.

15                  JUSTICE THOMAS: Thank you, Mr. Chief  
16                  Justice.

17                  Mr. Garre, is there any other instance  
18                  in which -- that you can think of where the  
19                  parties reach a settlement and then they turn  
20                  around and sue each other over the very same  
21                  problem?

22                  MR. GARRE: Well, I mean, there --  
23                  there's certainly other instances that trigger a  
24                  contribution claim, Your Honor, and -- and I  
25                  think, you know, one of the incongruities here



1 is that the -- the United States is not subject  
2 to suit under the Clean Water Act. So the whole  
3 notion that that settlement would trigger a  
4 contribution claim is at war with basic  
5 principles of contribution, which this Court has  
6 recognized Congress adopted in Section 113(f).

7 JUSTICE THOMAS: But aren't you going  
8 to have a problem even if you get beyond the  
9 statute of limitations? If you say that CERCLA  
10 is contained, then why would you bring a Clean  
11 Water Act claim under CERCLA?

12 MR. GARRE: Well, I mean, you couldn't  
13 -- I mean, certainly -- I don't think that  
14 situation would arise, Your Honor, if I  
15 understand the question. I mean, here, the  
16 United States has -- it could have certainly  
17 pursued a claim under CERCLA. It didn't in  
18 order to insulate itself from liability. And so  
19 it brought the claim under the Clean Water Act.

20 And our position is consistent with  
21 traditional principles of contribution that the  
22 settlement of that claim didn't trigger a CERCLA  
23 contribution right, which we think follows from  
24 the terms of the statute as well.

25 JUSTICE THOMAS: Have there been other

1 instances in which other -- claims under other  
2 provisions were then brought under CERCLA for  
3 contribution purposes?

4 MR. GARRE: Well, I mean, there's some  
5 cases that have arisen in the circuits, Your  
6 Honor, but, I mean, up until relatively recent,  
7 I think the position was that you would expect a  
8 -- a CERCLA claim to trigger CERCLA liability.

9 I mean, it wasn't until, I think, 2013  
10 that a circuit first adopted the contrary rule,  
11 and it just throws in a wrench into the whole  
12 way in which this provision was intended to  
13 operate and creates numerous anomalies,  
14 including giving the phrase "resolved its  
15 liability" a different meaning throughout the  
16 statute.

17 JUSTICE THOMAS: But the contribution  
18 you're seeking comes from Clean -- the Clean  
19 Water Act. That's what I'm getting at. That's  
20 -- if -- if you're saying the statute of  
21 limitations shouldn't apply -- should be  
22 contained under CERCLA, then why would you be  
23 bringing a claim from the Clean Water Act for  
24 contribution under CERCLA?

25 MR. GARRE: We're not, Your Honor.

1 We're -- we're -- we're bringing a cost recovery  
2 claim under Section 107(a) of CERCLA. The  
3 government's position is that we were required  
4 to bring a contribution claim in the wake of the  
5 Clean Water Act settlement.

6 So it's really the government's  
7 position that creates the anomaly there.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Breyer.

11 JUSTICE BREYER: Thank you.

12 If we got to the second question, I  
13 think your position is that a settlement  
14 requires -- for the purposes of this Act, it  
15 requires that there be an express admission of  
16 liability. Why?

17 I mean, people settle cases all the  
18 time where -- where they're not going to admit  
19 they were liable, but they might agree to take  
20 actions of X, Y, or Z in the future, and they  
21 might -- somebody might without -- do the same  
22 thing here.

23 MR. GARRE: Right. And that's not our  
24 position, Justice Breyer. We don't make the  
25 argument that you have to admit that the claim

1 was valid. And -- and, here, you know, we don't  
2 have a modern issue clause.

3 JUSTICE BREYER: What is the argument?

4 MR. GARRE: What we have is a clause  
5 saying there was no finding of liability. But,  
6 fundamentally, on the second question, the  
7 problem with the settlement is it doesn't  
8 extinguish any liability.

9 The settlement explicitly gives the  
10 United States the option to pursue, you know,  
11 any and all claims under any law for the same  
12 conduct in the same actions that were settled  
13 here, and that's atypical. The United States  
14 modeled --

15 JUSTICE BREYER: So could they bring  
16 it under CERCLA again?

17 MR. GARRE: Excuse me, Your Honor?

18 JUSTICE BREYER: They could bring the  
19 CERCLA claim -- the CERCLA claim again?

20 MR. GARRE: Yeah. Yes. I mean, in  
21 paragraphs 47 and 48 --

22 JUSTICE BREYER: So then what did you  
23 get out of your agreement? Nothing?

24 MR. GARRE: Well, Your Honor, the one  
25 thing that it resolved was the Clean Water Act

1 penalties, which are statutory penalties that  
2 can add up. But it didn't resolve any liability  
3 with respect to a response action.

4 And, in fact, you know, once this  
5 action was taken to cap the dump, the United  
6 States in theory could come back and sue under  
7 CERCLA the next day and say, well, you know  
8 what, we thought about it some more, we think  
9 you should tear up and remove the waste  
10 altogether.

11 This settlement didn't resolve any  
12 liability. And, again, that's atypical because,  
13 if you look at the model consent decree, it  
14 includes a covenant not to sue, except for  
15 future unknown conditions.

16 But the settlement here left Guam  
17 exposed to liability under any law with respect  
18 to any claim involving a response action.

19 And so, for that reason alone, we  
20 would urge you to rule for us on the second  
21 question presented.

22 JUSTICE BREYER: I see. Okay. Thank  
23 you.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: I'd like to ask you a

1 question about what you see as the relationship  
2 between Section 113(f)(1) and 113(f)(3).

3 So 113(f)(1) provides contribution  
4 action to offset CERCLA liability and does so  
5 "during or following any civil action" under 106  
6 or 107.

7 Then paragraph 2 makes it clear that  
8 those who settle their liability won't be  
9 subject to a contribution action from the  
10 matters addressed in the settlement.

11 And then what does 113(f)(3)(B) add?  
12 Aren't judicially approved settlements already  
13 covered by the phrase "following any civil  
14 action" in paragraph 1?

15 MR. GARRE: Right. So, Your Honor,  
16 where -- it covers the situation where there's  
17 no pending litigation, the parties voluntarily  
18 agree to settle with the United States or a  
19 state, and then they go to court to judicially  
20 approve that. And so I think, in that instance,  
21 it would make sense for Congress to spell out  
22 what happens with respect to such a settlement.

23 And I would add, with respect to the  
24 superfluidity argument by the United States, I  
25 mean, this also covers administrative

1 settlements. And so that wouldn't be covered at  
2 all by (f)(1). There would be no pending  
3 litigation.

4 I think that, once Congress is going  
5 to spell out what happens in the case of  
6 administrative settlement, I think it only makes  
7 sense for it to spell out what happens in the  
8 case of a judicially approved settlement where  
9 there had been no prior litigation.

10 And if that's a little bit  
11 belts-and-suspender, that's something that this  
12 Court has recognized Congress has done elsewhere  
13 in CERCLA. And I think it made perfect sense,  
14 Your Honor.

15 JUSTICE ALITO: What should we make of  
16 the fact that paragraph 3(c), (f)(1)(3)(C),  
17 refers to -- I'm sorry, (f)(3)(C), refers to any  
18 contribution action brought under this paragraph  
19 and sets its own requirement that such actions  
20 "shall be governed by" federal law?

21 If Congress meant for all -- all the  
22 details in paragraph 1 to carry through to the  
23 other paragraphs, including 3, why would it have  
24 needed to include that language?

25 MR. GARRE: Well, I mean, I think what

1 it does is it tells you that the -- the -- the  
2 federal -- the -- the CERCLA contribution claim  
3 is a federal claim, and so it would other --  
4 override other provisions.

5 And that's one of the problems that  
6 the state amici addressed and that the  
7 government's interpretation would mean that,  
8 anytime you settle a non-CERCLA claim under  
9 state law, it would trigger this federal  
10 contribution claim and, therefore, override  
11 states' different cost recovery regimes, which  
12 is a direct intrusion that this Court would not  
13 presume that Congress intended unless it said  
14 so.

15 So I think the fact that Congress  
16 spelled out the contribution actions brought  
17 under federal law, you know, is quite  
18 significant in pointing to the conclusion that  
19 Congress didn't mean this strange contribution  
20 right the -- that the United States says it  
21 created.

22 JUSTICE ALITO: All right. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Sotomayor.

25 JUSTICE SOTOMAYOR: Mr. Garre, I think



1 it's your second question presented that may  
2 have created my colleague, Justice Breyer's  
3 confusion, because it was my own.

4 Your question asks whether a  
5 settlement that expressly disclaims any  
6 liability determination and leaves the settling  
7 party exposed to future liability can trigger a  
8 contribution claim under CERCLA, Section  
9 113(f)(3)(B).

10 Settlement agreements often can  
11 disclaim liability but resolve liability at the  
12 same time. Many settlement agreements will say,  
13 I don't admit liability, but I will resolve my  
14 liability under your claims under the Clean  
15 Water Act.

16 That's what happened here, correct?

17 MR. GARRE: Well, yes and no. I mean,  
18 they -- they did say that there was no finding  
19 of liability, Your Honor.

20 JUSTICE SOTOMAYOR: Right, but it --

21 MR. GARRE: But, fundamentally --

22 JUSTICE SOTOMAYOR: -- it still  
23 resolved the Clean Water Act claims, correct?

24 MR. GARRE: They didn't resolve  
25 liability, Your Honor, because the sudden --

1 JUSTICE SOTOMAYOR: It resolved the  
2 claims, counsel, not the liability, but the  
3 claims, correct?

4 MR. GARRE: Well, no. I mean, the  
5 claims themselves were conditioned on compliance  
6 with the decree. And that's in paragraph 45.

7 JUSTICE SOTOMAYOR: Counsel, you're  
8 quibbling with words. You got some value out of  
9 it. You got away from some damages that you  
10 were fearful of. So it resolved something,  
11 correct?

12 MR. GARRE: Well, that's -- you're  
13 absolutely right.

14 JUSTICE SOTOMAYOR: All right. Now,  
15 Mr. Garre, consider that, could I have, if that  
16 -- if that settlement had said this agreement  
17 resolves qualm -- Guam's legal obligations under  
18 all federal environmental statutes -- by the  
19 way, that was very comparable to most general  
20 releases. This settlement resolves all claims  
21 arising from, related to, whatever the complaint  
22 is, arise -- known or unknown. That's the  
23 typical general release.

24 If it had been a general release like  
25 that, would you have any arguments in this case?

1 MR. GARRE: The argument would be much  
2 different, and I think that probably would  
3 resolve liability. And that's what's missing  
4 here, Your Honor, is --

5 JUSTICE SOTOMAYOR: That never --

6 MR. GARRE: -- a general release --

7 JUSTICE SOTOMAYOR: -- resolves  
8 liability.

9 MR. GARRE: -- covenant not to sue  
10 and --

11 JUSTICE SOTOMAYOR: Those general --  
12 counsel, Mr. Garre, those general releases,  
13 that's your strongest argument, which is --

14 MR. GARRE: I agree. I mean, I think  
15 --

16 JUSTICE SOTOMAYOR: Yeah.

17 MR. GARRE: -- all the provisions work  
18 together, Your Honor, but I agree that release  
19 -- that the lack of any covenant not to sue and  
20 the way in which the -- the settlement preserves  
21 the right to bring suit under any claim, I mean,  
22 that's very unusual, and that defeats a finding  
23 that it resolves liability.

24 The resolution of liability is a  
25 two-way street. Guam agreed to do some things

1 here, but the United States never relinquished  
2 its claims to sue Guam for the very same  
3 conduct, the very same actions here, and that's  
4 made explicit in the decree.

5 The only thing that the settlement --  
6 JUSTICE SOTOMAYOR: That's your  
7 greatest -- that -- that's the great inequity  
8 here, which is the U.S. retained the right to  
9 sue you under the Clean Water Act.

10 So your argument is, we should have  
11 the right to sue them, correct, for  
12 contributions?

13 MR. GARRE: Not -- Your Honor, not  
14 just the Clean Water Act but under any law --

15 JUSTICE SOTOMAYOR: I'm sorry, the --  
16 the -- under CERCLA.

17 MR. GARRE: -- and not just paragraph  
18 48.

19 JUSTICE SOTOMAYOR: Right.

20 MR. GARRE: And it's inequity in that  
21 it --

22 JUSTICE SOTOMAYOR: Counsel, please.  
23 Thank you.

24 MR. GARRE: Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Justice Kagan.

1                   JUSTICE KAGAN: Mr. Garre, I guess I  
2 -- I'm wondering whether your anchoring argument  
3 is -- is -- is really just an effort to make  
4 lemonade out of lemons, and -- and the reason I  
5 say that is because it's usually considered a  
6 problem in statutory interpretation when one  
7 provision, especially very close to another  
8 provision, has very different language.

9                   So, you know, (f)(1) says liability  
10 under 9607 or 9606. And then (f)(3)(B) does not  
11 say that but instead uses a very different  
12 formulation, drops the section numbers, and says  
13 liability for some or all of a response action.

14                   So isn't the kind of obvious argument  
15 here that (f)(3)(B) meant something different  
16 from (f)(1)?

17                   MR. GARRE: Right, and that -- that's  
18 the reasoning of the D.C. Circuit, and what it  
19 said was (f)(1) uses CERCLA language and  
20 (f)(3)(B) doesn't. And it was incorrect about  
21 that because (f)(3)(B) does use CERCLA --  
22 CERCLA-specific language. It uses the terms of  
23 our response action and response costs, which  
24 actually track the references to 106 and 107 in  
25 (f)(1).

1                   But I think, Your Honor, you know,  
2                   fundamentally, what they skipped over is (f)(1)  
3                   spells out that the liability is under CERCLA.  
4                   And every other provision here within this  
5                   113(f) uses the phrase "resolved its liability."  
6                   And the government does -- doesn't dispute that  
7                   in (f)(2), when Congress said "resolved its  
8                   liability," it meant CERCLA liability.

9                   And then, when -- it's only when you  
10                  get to (f)(3) that the government says "resolved  
11                  its liability" doesn't mean CERCLA liability; it  
12                  means liability under any law you could think  
13                  of.

14                  JUSTICE KAGAN: But why --

15                  MR. GARRE: And that --

16                  JUSTICE KAGAN: -- why do we  
17                  necessarily think that (f)(2) is CERCLA  
18                  liability? (f)(2) says liability about matters  
19                  addressed in the settlement. I mean, you could  
20                  think that (f)(2) is more like (f)(3) than it is  
21                  like (f)(1).

22                  MR. GARRE: Well, I mean, you should  
23                  ask the government that question because it's  
24                  never disputed our position that it has to be  
25                  CERCLA liability. If it were otherwise, then

1 (f)(2) would create this extraordinarily broad  
2 immunity that a party could settle any claim  
3 under any statute and yet receive this immunity  
4 from contribution. The government has never  
5 taken that position.

6 I mean, look, (f)(1) tells you that  
7 the liability that matters is CERCLA when people  
8 are suing each other. And the other provisions  
9 deal with the question of what happens when  
10 there's a settlement. And all this is against  
11 the backdrop of common law contribution  
12 principles --

13 JUSTICE KAGAN: Is -- is it possible  
14 --

15 MR. GARRE: -- which require --

16 JUSTICE KAGAN: -- Mr. Garre, that --  
17 that it makes perfect sense to -- to understand  
18 (f)(1) differently from (f)(3)(B) just because  
19 CERCLA is a statute that's designed to encourage  
20 settlements, and if you take this settlement  
21 provision to be broad -- if (f)(3)(B) is  
22 broader, it would suggest that it would  
23 encourage more settlements?

24 MR. GARRE: No, I don't think it's  
25 going to encourage more settlements, Your Honor,

1 if people have to be worried about settling  
2 non-CERCLA claims triggering CERCLA rights. And  
3 I think all this has to be construed against  
4 common law contribution principles, which  
5 require a common liability, and the common  
6 liability here is CERCLA liability.

7 And this Court has held that (f) --  
8 113(f) is construed against common law  
9 principles. And that rule itself requires the  
10 conclusion that Congress meant the obvious,  
11 which is --

12 JUSTICE KAGAN: Thank you, Mr. Garre.

13 MR. GARRE: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch.

16 JUSTICE GORSUCH: Mr. Garre, just to  
17 be clear, the -- there's no need for this Court  
18 to touch the 107 question, is there?

19 MR. GARRE: Well, no, Your Honor,  
20 there's not. I mean, that's a separate issue  
21 that would go forward on remand.

22 JUSTICE GORSUCH: And so whether you  
23 succeed or not is immaterial for the purposes of  
24 this appeal?

25 MR. GARRE: Right. The only -- the



1 fundamental question here is whether or not the  
2 Clean Water Act settlement required us to bring  
3 a claim under (3)(B) --

4 JUSTICE GORSUCH: Yeah, I know that.

5 MR. GARRE: -- 113(3)(B).

6 JUSTICE GORSUCH: Right. I -- I  
7 understand -- I understand why the SG wanted to  
8 inject it in this case, but I also want to just  
9 be clear that we don't have to touch it.

10 MR. GARRE: That's absolutely right,  
11 Your Honor.

12 JUSTICE GORSUCH: Okay. And then can  
13 you kind of explain for a moment your argument  
14 about the preemptive effect of -- of the  
15 government's position for state contribution  
16 laws and what that would look like?

17 MR. GARRE: Sure, Your Honor. I  
18 mean -- and it gets back to Justice Alito's  
19 point that in 113(3)(C), the Congress provided  
20 that a contribution action brought under this  
21 paragraph shall be governed by federal law. So  
22 that means that, if a person settles a claim  
23 other than under CERCLA, under a state  
24 provision, that that would trigger a federal  
25 contribution right, which would preempt the

1 alternative regimes that states across the  
2 country have adopted to deal with cost recovery  
3 in this situation.

4 And, you know, the amici brief filed  
5 by the states spells this out clearly. I mean,  
6 that's a direct intrusion into state autonomy  
7 that you wouldn't presume that Congress intended  
8 when it adopted a CERCLA contribution provision.

9 JUSTICE GORSUCH: Well, I guess I just  
10 want to understand better the magnitude of that,  
11 the consequences and -- and practical  
12 consequences of that and -- and why we wouldn't  
13 assume that CERCLA meant -- meant to do exactly  
14 that.

15 MR. GARRE: Well --

16 JUSTICE GORSUCH: So give me that in  
17 any order.

18 MR. GARRE: -- Sure, Your Honor, and,  
19 again, I think this gets back to what it means  
20 to have a contribution claim. I mean,  
21 ordinarily, you would try -- you would require a  
22 common liability, so you would settle liability  
23 for this, and you'd have a contribution claim  
24 under the same liability.

25 And what the government's

1 interpretation does here is to import this, you  
2 know, discrete CERCLA contribution claim as --  
3 you know, into other federal statutes and to  
4 override other state laws that deal with cost  
5 contribution.

6 I mean, Congress ordinarily doesn't  
7 create a contribution right, but, under the  
8 government's interpretation, the settlement of a  
9 claim other than CERCLA would trigger this  
10 contribution right under CERCLA and effectively  
11 import a contribution regime into other  
12 provisions, under federal law, as well as state  
13 law.

14 And that's very disruptive, and it's  
15 hard to believe that Congress intended it. And  
16 all of those problems are resolved by giving  
17 this contribution provision its, you know,  
18 normal meaning of requiring the resolution of a  
19 common liability, which here would be CERCLA  
20 liability.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief  
25 Justice.

1                   And good afternoon, Mr. Garre. Do you  
2                   -- or can you give me problems that you think  
3                   would result outside of this case if we adopted  
4                   the government's interpretation?

5                   MR. GARRE: Well -- well, sure, Your  
6                   Honor. I mean, first is the trap for the unwary  
7                   that, you know, is -- is epitomized by this  
8                   case, that you would be settling a claim under a  
9                   different statute to which the United States  
10                  itself enjoys immunity, which is through the  
11                  Clean Water Act, and that somehow that  
12                  settlement would trigger a CERCLA contribution  
13                  right. So -- so -- so that in itself is a -- is  
14                  a problem that I think you would avoid unless  
15                  Congress was clear.

16                  Another problem is, you know, the  
17                  problem with displacing contrary federal --  
18                  federal and state cost recovery regimes, which I  
19                  was discussing with Justice Gorsuch. I mean, I  
20                  think it also creates this unprecedented  
21                  contribution right, not known to the common law,  
22                  where you don't need a common liability where  
23                  the resolution of liability under one statute  
24                  somehow triggers a contribution right under a  
25                  different statute.

1                   I mean, all of that is problems that  
2 this Court can avoid by simply construing the  
3 CERCLA contribution provision to be tied to  
4 CERCLA liability.

5                   JUSTICE KAVANAUGH: Thank you,  
6 Mr. Garre.

7                   CHIEF JUSTICE ROBERTS: Justice  
8 Barrett.

9                   JUSTICE BARRETT: Good afternoon,  
10 Mr. Garre. I have a question just about how --  
11 and I'm sure this comes with my ignorance of  
12 CERCLA actions -- but how this works.

13                   So 113(f)(3)(B) refers to response  
14 action, you know, which is defined in, you know,  
15 106 and 107, which talks about the ability of --  
16 you know, the -- the section that you want to  
17 sue the United States under, your ability to  
18 recover action -- cost of an action.

19                   So, if there's not been an action, so  
20 there's been no judicially determined amount of  
21 response costs and there's been no  
22 administrative or judicially approved  
23 settlement, how does the court go about or -- or  
24 how do the parties go about deciding whether  
25 costs undertaken actually were response costs?

1                   MR. GARRE: Well, Your Honor, I -- I  
2                   -- I hope this is responsive, but what would  
3                   happen is, like, typically, you'd either have  
4                   litigation among the parties over CERCLA  
5                   liability, and that would trigger the  
6                   contribution right in that forum --

7                   JUSTICE BARRETT: Mm-hmm.

8                   MR. GARRE: -- or the parties could  
9                   voluntarily settle with a -- a state authority  
10                  or the United States, in which case they could  
11                  spell out specific actions. And, ordinarily,  
12                  the EPA model itself would spell out that those  
13                  actions are taken under CERCLA.

14                  Here, the United States proceeded  
15                  under the Clean Water Act, we think pretty  
16                  clearly, because it was immune from liability  
17                  itself under that Act, and that's really what  
18                  creates the, you know, unusual circumstances  
19                  leading to the United States' position here.

20                  JUSTICE BARRETT: Well, I guess what  
21                  I'm getting at is trying to figure out how  
22                  CERCLA-specific this term, you know, "response  
23                  costs," is, I mean, because, as defined in  
24                  CERCLA, you know, the United States is right,  
25                  it's pretty broad. It can encompass a lot of

1 different things.

2           So what makes something a response  
3 cost to CERCLA as opposed to, you know, just a  
4 cost for something that wouldn't be covered by  
5 CERCLA? And how do you know --

6           MR. GARRE: Right.

7           JUSTICE BARRETT: -- given the broad  
8 definition of "response costs" and the fact that  
9 the costs are undertaken not pursuant to any  
10 sort of EPA rule necessarily?

11           MR. GARRE: Right. So you're right, I  
12 mean, response action and response costs is a --  
13 is a well-known CERCLA term of art. And our  
14 position under 13(b)(f) -- (f)(B) is, like,  
15 what's the liability for that?

16           But what I would say, Your Honor, one  
17 thing that's critical is, in order to qualify as  
18 a response action and response costs, the action  
19 or costs has to be incurred in connection with  
20 the release of hazardous substances.

21           And another thing that's unusual about  
22 the Clean Water Act settlement here is it never  
23 identified any hazardous substances included  
24 within the definition of "response costs" or  
25 action under CERCLA. It only identified

1 pollutants, the discharge of pollutants, under  
2 the Clean Water Act, which is a different term  
3 and doesn't necessarily include hazardous  
4 substances under CERCLA.

5 And that's another reason why the  
6 resolution of the parties' Clean Water Act  
7 claims could not have resolved liability for a  
8 response action, a term defined by CERCLA.

9 JUSTICE BARRETT: Thank you,  
10 Mr. Garre.

11 CHIEF JUSTICE ROBERTS: A minute to  
12 wrap up, Mr. Garre.

13 MR. GARRE: Thank you, Your Honor.

14 In our view, reading Section  
15 113(f)(3)(B) in context and in light of  
16 traditional principles of contribution compels  
17 Guam's interpretation.

18 But taking a step back, here's what's  
19 at stake: adopting Guam's interpretation would  
20 ensure that CERCLA's contribution rule is  
21 CERCLA-contained. It would give the phrase  
22 "resolved its liability" the same meaning  
23 throughout Section 113(f). It would ensure that  
24 certain -- that Section 113(f)(3)(B) does not  
25 indirectly override states' own cost recovery



1 rules. And it would eliminate a trap for the  
2 unwary among those settling non-CERCLA claims.

3           Conversely, it's hard to see any real  
4 negative impact to the United States from ruling  
5 in Guam's favor in this case, other than having  
6 to pay its fair share for the Ordot cleanup.  
7 Indeed, EPA's own model settlement agreements  
8 give the United States a ready-made solution  
9 should it lose this case.

10           In sum, Guam's interpretation is not  
11 only right but is far better for the  
12 implementation of CERCLA in the long haul.

13           Thank you.

14           CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16           Mr. Suri.

17           ORAL ARGUMENT OF VIVEK SURI

18           ON BEHALF OF THE RESPONDENT

19           MR. SURI: Mr. Chief Justice, and may  
20 it please the Court:

21           Section 113(f)(3)(B) can give rise to  
22 a contribution claim regardless of whether the  
23 underlying claim arose under CERCLA or some  
24 other statute. This follows most naturally from  
25 the meaning of the words "liability for a

1 response action." The term "response action" is  
2 defined in CERCLA in a way that does not depend  
3 on which underlying statute that action was  
4 undertaken in order to comply with.

5 In addition, CERCLA often uses the  
6 term "response action" to include acts taken  
7 under other statutes. If Congress wanted to  
8 limit this provision to CERCLA liability, it  
9 could easily have said so.

10 There are many other provisions of the  
11 Act that use terms such as "settlement under  
12 this Act," "liability under this Act," or  
13 "response action under this Act." There's no  
14 such limiting language in the provision at issue  
15 here.

16 Turning to the second question, the  
17 settlement here resolved Guam's liability. A  
18 party resolves liability if it settles its legal  
19 obligation to perform or pay for a response  
20 action. That's exactly what the settlement here  
21 did.

22 I welcome the Court's questions.

23 CHIEF JUSTICE ROBERTS: Counsel,  
24 looking at (f)(2) entitled Settlement, the first  
25 sentence there begins, "A person who has

1 resolved its liability to the United States."

2 Is that liability for anything, or is  
3 that liability under CERCLA?

4 MR. SURI: It's neither of those  
5 things, Mr. Chief Justice. It's liability for a  
6 response action.

7 Now I acknowledge that (f)(2) is  
8 probably the most difficult provision for us to  
9 deal with, but let me explain why it's justified  
10 to infer the term "for a response action" in  
11 (f)(2) in a way that is not justified in  
12 (f)(3)(B).

13 The first point --

14 CHIEF JUSTICE ROBERTS: Before you do  
15 that, just -- you're -- you're explaining the  
16 difference between two identical phrases, right?

17 MR. SURI: No, they're not --

18 CHIEF JUSTICE ROBERTS: The one -- the  
19 one "resolved its liability to the United  
20 States" under (2) and "resolved its liability to  
21 the United States" under (3)(B)?

22 MR. SURI: No, they're not identical  
23 phrases. (f)(2) is just "resolved its liability  
24 to the United States," and (f)(3)(B) is  
25 "resolved its liability to the United States for

1 some or all of a response action." That's the  
2 first difference I wanted to focus on, which is  
3 that phrase "for some or all of a response  
4 action" tells us what the nature of the  
5 liability must be in (f)(3)(B).

6 (f)(2), however, is simply silent  
7 about the nature of the liability. It contains  
8 a gap, and, therefore, it's justified to look at  
9 the context to fill the gap.

10 The second point is that it's almost  
11 -- there's an absurdity argument rather than a  
12 textual argument in (f)(2) because it seems  
13 unthinkable that "resolved its liability" means  
14 any liability whatsoever under the sun. There's  
15 no such concern in (f)(3)(B).

16 CHIEF JUSTICE ROBERTS: Well, in  
17 (f)(3)(B), it doesn't -- I mean, it has the  
18 language that you mentioned and (f)(2) doesn't  
19 because we're not talking about response actions  
20 under (2), right, although (3)(B) is talking  
21 about response actions?

22 MR. SURI: I agree, Mr. Chief Justice.  
23 What that proves is that the presumption that  
24 the disparate inclusion and omission of language  
25 suggests a difference in meaning is not

1 absolute. It can be overcome by competing  
2 indications in the opposite direction. And we  
3 do think there are competing indications in  
4 (f)(2), but there aren't in (f)(3)(B).

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Justice Thomas.

8 JUSTICE THOMAS: Thank you, Mr. Chief  
9 Justice.

10 Counsel, I'm -- I admit to being  
11 somewhat confused by this, primarily because of  
12 the earlier Clean Water Act settlement.

13 Do you think that you could have a  
14 CERCLA recovery for, say, penalties under other  
15 environmental provisions?

16 MR. SURI: No, Justice Thomas. The  
17 CERCLA recovery would only be for response costs  
18 or response actions, not for penalties under  
19 other statutes.

20 JUSTICE THOMAS: Well, could you have  
21 brought a CERCLA action against Guam after the  
22 2004 settlement?

23 MR. SURI: We do not believe that the  
24 settlement here would have allowed us to bring  
25 such an action against Guam. And I could walk

1 you through the relevant provisions if you'd  
2 like. They're on --

3 JUSTICE THOMAS: Yeah, I would.

4 MR. SURI: They're on page 166a of the  
5 Petition Appendix, paragraphs 45, 46, and 48.  
6 Paragraph 45 says that the settlement settled  
7 the claims in the decree. And under the  
8 background law of preclusion and judgments, two  
9 claims are considered the same if they arise out  
10 of the same transaction or occurrence, even if  
11 they involve different statutes.

12 This is confirmed by paragraph 46,  
13 which says that the decree should not be  
14 interpreted to limit the United States' right to  
15 bring claims involving unrelated violations.  
16 That necessarily implies that the decree does  
17 limit the United States' right to bring claims  
18 for related violations.

19 There's also Justice Breyer's point  
20 that he raised in a question, which is the  
21 decree simply wouldn't make any sense if Guam  
22 didn't get anything out of it.

23 Now they're relying on paragraph 48,  
24 but the first words of paragraph 48 are "except  
25 as specifically provided herein." And as I just

1 explained, the decree does specifically provide  
2 herein for the elimination of the United States'  
3 right to bring related claims.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Breyer.

7 JUSTICE BREYER: Well, the trouble I'm  
8 having on your side is I can't get too far using  
9 the language of the statute. I mean, sure, you  
10 could read it your way, "response action" refers  
11 to any action, state or federal, brought under  
12 any statute dealing with a response action,  
13 which is defined in 23, 24. It could mean that,  
14 but it could also mean CERCLA actions, okay? It  
15 could mean either.

16 And if I look at the definition of  
17 "response," it starts by saying "for purposes of  
18 this subchapter." Then I look at the definition  
19 of "response" and it's about 450 to 500 words,  
20 including all kinds of things -- I'm tempted to  
21 say anything under the sun, that isn't quite  
22 true -- but all kinds of technical things,  
23 perimeter protection using dikes, you know,  
24 collection of leachate. How do I know whether a  
25 state has a collection of leachate law that has

1 nothing really to do with CERCLA?

2           And I don't know. But there could be  
3 a lot of lawyers who don't know. And when they  
4 go into any one of what could be thousands of  
5 cases that involve some of these 450 or 500  
6 words under some law of a state or other federal  
7 law, do they know they have only three years to  
8 ask for contribution?

9           I mean, this is a pretty tough  
10 reading, and a lot of people just won't know  
11 they have only three years. They might think  
12 they had seven or something else.

13           So what kind of a boundary is this if  
14 we read it your way? I mean, what statutes are  
15 involved? Have you looked up all the statutes  
16 in the states that might use words like any of  
17 the 450 or 500 that are there in the definition?  
18 You see the thrust of my question?

19           MR. SURI: Yes, Justice Breyer. Let  
20 me provide some reassurance that our position  
21 doesn't lead to the kinds of practical problems  
22 that you're worried about.

23           The first point is that while  
24 "response action" is, indeed, a broad term, it  
25 is not an unlimited term. The Court made that



1 point just last term in the Atlantic Richfield  
2 opinion when it said not everything under the  
3 sun qualifies as a response action.

4           The second answer is that a lot of  
5 these cases involve sophisticated parties:  
6 governmental entities, territorial or state  
7 governments, and large corporations. These are  
8 the kinds of entities that can be expected to  
9 have good legal advice about how environmental  
10 laws interact with CERCLA.

11           Finally, to the extent that there are  
12 case-by-case fairness problems, those should be  
13 addressed under a framework such as equitable  
14 tolling, not by distorting the meaning of the  
15 substantive statute itself.

16           JUSTICE BREYER: Thank you.

17           CHIEF JUSTICE ROBERTS: Justice Alito.

18           JUSTICE ALITO: Counsel, Guam's  
19 argument in very simple terms is basically this:  
20 We're a small island, and the only reason -- and  
21 while we may have contributed to part of the  
22 problem with this dump, the Navy contributed  
23 quite a bit too. But, in any event, all of this  
24 -- the respective liability of Guam and the  
25 United States should be adjudicated under

1 CERCLA, where the United States could bear some  
2 of the costs. But the United States has  
3 cleverly proceeded against us under the Clean  
4 Water Act for the purpose of avoiding that.

5 Do you have an answer to that?

6 MR. SURI: Yes, Justice Alito.

7 The first answer is that, although  
8 Guam gets a lot of mileage out of its  
9 allegations that the Navy contributed to the  
10 Ordot Dump, and although we're required to  
11 accept those allegations as true at this motion  
12 to dismiss stage, we don't actually think the  
13 allegations are true as a matter of fact.

14 Secondly, EPA had legitimate reasons  
15 in 1988 for deciding not to proceed under  
16 CERCLA. By that time, the Clean Water Act  
17 process had already been underway for a couple  
18 of years, and EPA explained how the Clean Water  
19 Act procedure would, as it were, kill two birds  
20 with one stone. It would solve both the CERCLA  
21 problem and the Clean Water Act problem, making  
22 CERCLA remedy unnecessary.

23 Now Guam says that it should be  
24 allowed to recover under CERCLA, and we agree  
25 with that. We just think the recovery should be

1 under the contribution provision rather than the  
2 cost recovery provision.

3 And if you step back and think about  
4 it, Guam's action, as it were, sounds in  
5 contribution. They said that they have been  
6 forced to bear an inequitable share of the costs  
7 and the United States should bear a portion of  
8 that responsibility. That fits to a tee what a  
9 contribution action is meant to be about.

10 Now --

11 JUSTICE ALITO: Let me -- let me come  
12 back to the -- the subsection 2 argument.  
13 Doesn't the -- the way that's worded show that  
14 all of these provisions are meant to operate  
15 together? Doesn't that substantiate Mr. Garre's  
16 anchoring provision argument?

17 Clearly -- and -- and you -- I guess  
18 you concede this -- (f)(2) doesn't refer to  
19 liability to the United States for -- by anybody  
20 for anything. It has to do, presumably, with  
21 liability under CERCLA 9607(a), right?

22 MR. SURI: I agree that these  
23 provisions are meant to work together. That  
24 doesn't override the fact, however, that the two  
25 provisions at issue here, (f)(1) and (f)(3),

1 have different language. One says under Section  
2 106 or 107, and the other doesn't. And the  
3 Court should give effect to that difference in  
4 language.

5 JUSTICE ALITO: Well, your -- your  
6 argument is that, if subsection 3 didn't refer  
7 to response costs, to a response action, it  
8 would be read like 2. But, by putting that in,  
9 that was a signal that Congress wanted to pick  
10 up liability under the Clear Water Act -- Clean  
11 Water Act, right?

12 MR. SURI: It's a signal that Congress  
13 wanted to pick up liability for response costs  
14 or response actions without regard to the  
15 statute under which that arose.

16 That makes sense because Congress was  
17 trying to encourage settlement. It makes sense  
18 that Congress would provide a broader  
19 contribution right for settling parties than for  
20 non-settling parties.

21 JUSTICE ALITO: All right. Thank you.  
22 Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Sotomayor.

25 JUSTICE SOTOMAYOR: Counsel, I believe

1 I'm right, because I've been told this in the  
2 briefing, that the word "responsive action" is  
3 not used in any other statute, am I correct --

4 MR. SURI: No.

5 JUSTICE SOTOMAYOR: -- besides CERCLA?

6 MR. SURI: No, that's not quite  
7 correct. There are state statutes, baby  
8 CERCLAs, as they're sometimes called, that copy  
9 the term "response action." But our --

10 JUSTICE SOTOMAYOR: They copy it in  
11 their own statutes?

12 MR. SURI: Correct. But our position  
13 --

14 JUSTICE SOTOMAYOR: All right. Now,  
15 counsel, you know, one could be prompted to bid  
16 -- build a lid for a dump in response to CERCLA  
17 or one might do so in response to a nuisance  
18 claim in state court. Both would be response  
19 actions.

20 Why shouldn't it matter why a person  
21 initiates an activity? It -- it seems to me,  
22 just for the reasons Justice Alito just said,  
23 the simplest reason, if "response action" is  
24 CERCLA-specific in terms of all of the  
25 activities that can be, why should we build that

1 into a different act, like the Clean Water Act?

2 By the way, I thought that the harm  
3 addressed in the Clean Water Act was re-loosing  
4 -- releasing pollutants without a permit.  
5 That's a very different harm than what CERCLA  
6 looks to, which is releasing hazardous  
7 pollutants, with or without a permit, you're  
8 still prohibited from doing that.

9 So those -- aren't those two different  
10 harms, and why should one extinguish or create  
11 an obligation to claim under another?

12 MR. SURI: To take the first question  
13 first, the best answer is the list of provisions  
14 we've provided at pages 13 to 14 of our brief.  
15 These are provisions that show that CERCLA uses  
16 the word "response" to refer to actions taken  
17 under other statutes, including the Clean Water  
18 Act itself. This is on page 14, Section  
19 9604(k)(12).

20 Now, as for your question about the  
21 harms, we don't agree with the characterization  
22 that these harms are fundamentally different.  
23 EPA itself determined when deciding not to  
24 proceed under the -- under CERCLA that the Clean  
25 Water Act remedy would address both the CERCLA

1 harm and the Clean Water Act harm.

2 JUSTICE SOTOMAYOR: But the release  
3 didn't say that?

4 MR. SURI: I -- I agree. But the  
5 question is --

6 JUSTICE SOTOMAYOR: And you could have  
7 done that just as easily, correct?

8 MR. SURI: Certainly. But that's not  
9 what the statute requires.

10 JUSTICE SOTOMAYOR: Thank you,  
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Mr. Suri, I just  
14 wanted to make sure I understood your answer to  
15 the Chief Justice about the meaning of (f)(2).

16 If I understood you right, you  
17 acknowledge that there was a gap in (f)(2), in  
18 other words, liability for what. And you said  
19 that the way that gap should be filled is to say  
20 liability for a response action. Is that right?

21 MR. SURI: That's correct, Justice  
22 Kagan.

23 JUSTICE KAGAN: So you're essentially  
24 making (f)(2) the same as (f)(3)(B), is that  
25 right?

1                   MR. SURI: That's correct. And we  
2 think one contextual justification for that is  
3 (f)(3)(B) itself includes a reference back to  
4 (f)(2).

5                   JUSTICE KAGAN: And -- and -- and, Mr.  
6 Suri, I mean, I -- I asked Mr. Garre about this,  
7 and Mr. Garre says that your litigating position  
8 up until now has been the opposite, that (f)(2)  
9 was more like (f)(1), that it's CERCLA  
10 liability.

11                   MR. SURI: No, I think the truth of  
12 the matter is that we have not said anything  
13 about (f)(2) until this point. We certainly  
14 haven't conceded that (f)(2) is like (f)(1).

15                   JUSTICE KAGAN: Okay. So, if you're  
16 saying (f)(2) and (f)(3)(B) go hand in hand and  
17 they're different from (f)(1), I guess the  
18 question that follows is, why? What's the  
19 theory on which in (f)(2) and (f)(3)(B) Congress  
20 broadened out liability?

21                   MR. SURI: Why did Congress treat  
22 (f)(2) and (f)(3)(B) differently than (f)(1)?  
23 Is that the question?

24                   JUSTICE KAGAN: That's the question.

25                   MR. SURI: All right. The reason -- I



1 can think of a few plausible reasons, although I  
2 don't know which one is true as a matter of  
3 fact.

4 The first is that Congress meant to  
5 encourage settlements and, therefore, provided  
6 broader rights with respect to settlements than  
7 with respect to non-settling parties.

8 JUSTICE KAGAN: So, when I suggested  
9 that to Mr. Garre, Mr. Garre told me I was  
10 wrong, that it would discourage settlements if  
11 you read it your way because everybody would be  
12 completely uncertain about what they were liable  
13 for, so then they would never settle.

14 MR. SURI: No, I think that Congress  
15 clearly was providing a benefit in (f)(2) and  
16 (f)(3)(B). It was granting parties more rights,  
17 like protection from contribution claims and the  
18 ability to bring additional contribution claims.

19 Now it's true that, in the particular  
20 circumstances of this case, that may have turned  
21 out to be more than a -- more a curse than a  
22 blessing, but that's because of the particular  
23 factual circumstances of this case. That's not  
24 necessarily true as a general matter.

25 JUSTICE KAGAN: I -- I interrupted you

1 before. You were saying there were some other  
2 theories about why (f)(2) and (f)(3) would be  
3 different from (f)(1)?

4 MR. SURI: Yeah, there are two more.  
5 The second is that, when you have a court  
6 judgment, it's easy to determine which section a  
7 particular claim arose under. But, in the  
8 context of a settlement, that might not be  
9 something the settlement explicitly discusses.  
10 It might just say here are the actions that the  
11 party is required to take. It might be  
12 administratively easier, therefore, to focus the  
13 contribution inquiry on that rather than the  
14 section under which it arose.

15 And the final reason is that (f)(1)  
16 was written by the House Energy and Commerce  
17 Committee and (f)(3)(B) was written by the House  
18 Judiciary Committee. They may have simply had  
19 different ideas about how this provision should  
20 operate.

21 JUSTICE KAGAN: Thank you, Mr. Suri.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch.

24 JUSTICE GORSUCH: Good morning. I'd  
25 like to ask you a question about preemption. As

1 I understand the government's argument, (3)(B),  
2 reads (3)(B) as liability for response action to  
3 include settlements with states under state law,  
4 and then (3)(C), you read any -- all those  
5 settlements now have to be governed by federal  
6 law and, just like that, pretty much every state  
7 contribution regime is preempted.

8 We have a brief from, I think, about  
9 25, 26 states and territories, including some  
10 very different ones, everything from --  
11 everybody from Massachusetts to Wyoming, saying  
12 that that would seriously impair state cleanup  
13 efforts to federalize and preempt every -- every  
14 -- every -- every settlement, if you can read  
15 "response action" quite so broadly, and that  
16 this is going to wind up impairing cleanup  
17 efforts rather than advancing them.

18 What -- what -- what do you -- what --  
19 what's your thoughts about that?

20 MR. SURI: Justice Gorsuch, the  
21 premise that our petition had that preemptive  
22 effect is incorrect, and there are two  
23 provisions of the statute that show that it's  
24 incorrect.

25 The first is the last sentence of

1 (f)(1), and the second is the last sentence of  
2 (f)(3)(C). So the last sentence of (f)(1) says  
3 nothing in this section -- that's the whole  
4 subsection, not just (f)(1) -- shall diminish  
5 the right of any person to bring an action for  
6 contribution.

7 JUSTICE GORSUCH: Oh, no, sure, I -- I  
8 know we have all these savings clauses  
9 everywhere. They're all throughout CERCLA, but  
10 -- but, as I understand your reading of -- of  
11 (B) and (C) under (3), you read (B) to be very  
12 broad and -- and (C) to then say they have to be  
13 governed by federal law. So maybe you could  
14 turn your attention there if you have some  
15 answer to that problem.

16 MR. SURI: Certainly do. Any  
17 contribution action brought under this paragraph  
18 shall be governed by federal law, is what (C)  
19 says, not any contribution action concerning  
20 this subject matter.

21 So, of course, if a contribution  
22 action is brought under this paragraph, it's  
23 governed by federal law, but --

24 JUSTICE GORSUCH: But you -- again,  
25 you've read the paragraph, which includes (B), I

1 think you mean include (B), very, very broadly.  
2 So, I mean, we're just bouncing through the  
3 statute, and I'm not getting to the core of the  
4 problem.

5 MR. SURI: No, Justice Gorsuch. Our  
6 point is simply, if a party wants to bring a  
7 state law action under state law, he can do that  
8 and it's governed by state law. If he wants to  
9 bring it under this paragraph, it's governed by  
10 federal law. There's no preemption there  
11 because they're both avenues that are open to  
12 those parties.

13 Now it's true a party could choose to  
14 bring a federal contribution claim with respect  
15 to a state law liability under our  
16 interpretation, but that doesn't preempt the  
17 state. That just means that there are two  
18 options open to the settling party.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Kavanaugh.

22 JUSTICE KAVANAUGH: Thank you, Chief  
23 Justice.

24 Good afternoon, Mr. Suri.

25 MR. SURI: Good afternoon.

1 JUSTICE KAVANAUGH: I think you said  
2 earlier that if Congress wanted to limit  
3 113(f)(3)(B) to CERCLA, it could have said so.  
4 And, obviously, as is often the case, you could  
5 flip that question around and say if they wanted  
6 to -- if Congress wanted to usher in your  
7 position, they could have said so.

8 So, in thinking about that framing of  
9 what's more likely here, what do you make of  
10 your opposing counsel's suggestion that you're  
11 cutting off a right to sue here, that there's a  
12 lack of fair notice, trap for the unwary?

13 And I think that picks up also on some  
14 of Justice Breyer's questions. In other words,  
15 in thinking about how to think about what you're  
16 characterizing as silence here, let's just  
17 assume for the second that it -- that it is --  
18 we should think about that consideration and how  
19 to interpret that here?

20 MR. SURI: Justice Kavanaugh, there  
21 won't be a trap for the unwary going forward  
22 because the rule established by this Court will  
23 apply across the country and everyone will know  
24 what they have to do.

25 JUSTICE KAVANAUGH: Do you agree that

1 it could be a trap for the unwary, though,  
2 having -- looking backwards?

3 MR. SURI: I agree that's a potential  
4 problem, but that's always the case with any  
5 case of statutory interpretation. You have  
6 uncertainty about what the statute means before  
7 a court comes in and resolves the uncertainty.  
8 That's no reason to adopt what we think is the  
9 less textually plausible argument.

10 If I could say one more word, however,  
11 contesting your premise of --

12 JUSTICE KAVANAUGH: Sure.

13 MR. SURI: -- statutory silence, if a  
14 provision is silent, the normal rule is to apply  
15 it according to its terms and not to infer an  
16 unstated limitation. So, if you think the  
17 textual arguments are in equipoise, you should  
18 go with what the most natural reading of the  
19 term "response action" is, and that doesn't  
20 include any qualifiers such as "under CERCLA."

21 JUSTICE KAVANAUGH: Thank you, Mr.  
22 Suri.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett.

25 JUSTICE BARRETT: I have no questions.

1 CHIEF JUSTICE ROBERTS: A minute to  
2 wrap up, Mr. Suri.

3 MR. SURI: I have nothing further, Mr.  
4 Chief Justice. Thank you.

5 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
6 Garre?

7 REBUTTAL ARGUMENT OF GREGORY G. GARRE  
8 ON BEHALF OF THE PETITIONER

9 MR. GARRE: Thank you, Mr. Chief  
10 Justice.

11 With respect to (f)(2), this is a  
12 brand-new argument, as counsel acknowledged  
13 today. We argued in our brief that (f)(2) had  
14 to be interpreted to mean resolve CERCLA  
15 liability. The government was silent on that in  
16 its brief, and with respect, I'm not sure it  
17 should be able to introduce new arguments at  
18 oral argument.

19 Having said that, its position is  
20 telling. It's asking this Court now to copy and  
21 paste words from (f)(B) -- (f)(3)(B) into  
22 (f)(2), which only makes the problem worse.

23 The key term is "resolved its  
24 liability." Is it CERCLA liability, or is it  
25 liability under any other law? Of course, it's



1 CERCLA liability in (f)(2), and my friend wanted  
2 to devolve into the statutory history here. If  
3 you want to go there, as we say on page 30 of  
4 our brief, the legislative history makes clear  
5 that Congress had in mind CERCLA liability.

6 Secondly, the consent decree  
7 explicitly reserves the United States' right to  
8 bring any claim under any law, including a  
9 CERCLA claim. And my friend skipped over  
10 paragraph 47 of the decree that explicitly says  
11 that.

12 I -- I couldn't agree more with  
13 Justice Sotomayor that the harm addressed by the  
14 Clean Water Act, the discharge of pollutants  
15 into the water in violation of a permit, is very  
16 different than the harm alleged by CERCLA --  
17 dealt with by CERCLA, which is hazardous  
18 substances in the ground, which itself is  
19 significant under common law contribution  
20 principles.

21 The bottom line is that the United  
22 States wants to have its cake and eat it too.  
23 It sued Guam under the Clean Water Act in order  
24 to insulate itself from liability for its own  
25 role at the Ordot Dump, allegations that must be

1 accepted as true, and now it wants to block  
2 Guam's actions to recover a portion of its  
3 cleanup costs by saying that the parties'  
4 settlement -- the Clean Water Act claims somehow  
5 barred a CERCLA contribution claim. There's no  
6 basis in CERCLA, the common law of contribution,  
7 or anything else the government relied upon in  
8 its brief or today at oral argument to allow the  
9 United States to get away with that ploy here.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. The case is submitted.

13 (Whereupon, at 12:40 p.m., the case  
14 was submitted.)

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