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**

## BRIEF OF *AMICI CURIAE* STATES AND TERRITORIES OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, ALASKA, ARKANSAS, THE DISTRICT OF COLUMBIA, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, SOUTH DAKOTA, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING


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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici* are several States and territories—the Commonwealth of the Northern Mariana Islands, Alaska, Arkansas, the District of Columbia, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, the Commonwealth of Massachusetts, Michigan, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Utah, the Commonwealth of Virginia, West Virginia, and Wyoming—with compelling interests in supporting the Government of Guam. To protect these interests, the States[2] ask the Court to interpret the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) consistent with its text and purpose. The decision below erroneously interprets CERCLA and stands at odds with all States' interests in at least three ways.

First, States have an interest in encouraging timely cleanup of contaminated sites within their borders. This interest is best served through cooperation and negotiation between regulators and responsible parties—which, in turn, is incentivized when cooperating parties can recover costs from other responsible parties. In *United States v. Atlantic Research Corp.*,

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[1] All parties consented to the filing of this brief. Nobody other than *amici* authored this brief in any part or funded its preparation or filing.

[2] Despite varying formal political classifications (state, commonwealth, district, territory), this brief refers to all the *amici* using the term "States." Those varying classifications are immaterial to this brief and this case.

551 U.S. 128 (2007), an expansive coalition of States as *amici curiae* urged this Court to interpret CERCLA to broadly permit cost-sharing among responsible parties. *See* Brief of Amici Curiae States of Washington et al., 551 U.S. 128 (2007) (No. 06-562). The Court agreed with the States in that case. Again here, States as *amici* ask the Court to broadly permit cost sharing, as plainly envisioned by CERCLA's text and purpose.

Second, States have an interest in ensuring the United States pays its fair share. Often as a result of military activity, the United States bears at least partial responsibility for high-priority contaminated sites in nearly every State. While federal use of land inures to the benefit of all Americans, the decision below allows the United States to dodge liability and place an inequitable share of costs on individual States and their residents.

Third, States have an interest in upholding their preferred State-law approaches to cleanup and contribution. The decision below jeopardizes that interest by raising the specter of preemption and upending CERCLA's "spirit of cooperative federalism." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1356 (2020) (citation omitted).

Rooted in an interpretation of CERCLA incompatible with the statute's text and purpose, the decision below threatens to discourage cooperation and settlement, sanction the United States' evasion of responsibility, and override State law—all contrary to States' interests.

## SUMMARY OF THE ARGUMENT

Reprising a theme this Court has "frequently grappled with" in the past, today's case asks "whether and how" parties responsible for contamination "may recoup" cleanup costs from others. *Atl. Research*, 551 U.S. at 131. CERCLA sets forth two avenues for recoupment: a generous "cost recovery" claim under Section 107(a), and a more restrictive "contribution" claim under Section 113(f). 42 U.S.C. §§ 9607(a), 9613(f); *see* Pet'r Br. 3–6. For present purposes, the parties agree that these claims are mutually exclusive. They also agree that a claim under Section 113(f)(3)(B) is triggered when a regulator and a responsible party enter into a settlement *under CERCLA* that *conclusively resolves liability*.

The parties diverge, however, over how wide Section 113(f)(3)(B)'s net casts. Defending the decision below, the United States contends that Section 113(f)(3)(B) stretches to reach settlements under non-CERCLA law, as well as settlements that contain limiting provisions such as a reservation-of-rights clause. The Government of Guam, by contrast, maintains that CERCLA's text and purpose require limiting Section 113(f)(3)(B) to settlements under CERCLA that conclusively resolve liability. For three reasons of interest to States, Guam is correct.

First, States' interest in encouraging cleanup of contamination supports limiting Section 113(f)(3)(B) to settlements under CERCLA that conclusively resolve liability. Among States' many duties to the public, few rival protecting public health, stimulating economic

development, and safeguarding lands and waters. These State interests align with CERCLA's purpose and are advanced when regulators and responsible parties cooperatively negotiate and enter into settlements. Such settlements, in turn, are incentivized when settling parties can recover costs from other responsible parties.

The decision below, however, constricts parties' ability to recover costs. Because "a party who *may* bring" the more restrictive Section 113(f) action "*must* use [that] action," Pet. App. 10a–11a (citation omitted), it follows that as more settlements are covered by Section 113(f)(3)(B), the less available claims under Section 107(a) become. The decision below overextends Section 113(f)(3)(B) to cover settlements under non-CERCLA law and settlements with limiting provisions that fail to conclusively resolve liability. As a result, Section 113(f) claims are triggered—and Section 107(a) claims are barred—for all those settling parties. Whereas settling parties clean up contamination faster and save themselves and regulators money, the decision below perversely constrains their ability to recover costs. Such constraint disincentivizes settlement and makes for slower, pricier cleanup contrary to CERCLA's purpose and antithetical to States' interests.

Second, the decision below enables the United States to evade CERCLA liability and saddle individual States with a disproportionate financial burden. At 160 high-priority sites across the country, the United States shares at least partial responsibility for contamination. The lion's share of this contamination is the

result of military activity, which leaves behind everything from gasoline to Agent Orange—and an enormous cleanup bill to boot.

For all these sites, the United States acts in a "dual role" as both "a liable party" under CERCLA and as the law's "primary enforcer." *Atl. Research Corp. v. United States*, 459 F.3d 827, 837 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007). In this case, that dual role—together with its treasure trove of non-CERCLA regulatory tools and the D.C. Circuit's expansive reading of Section 113(f)(3)(B)—allowed the United States to avoid financial liability for cleanup. There is every reason to believe that affirming the decision below could inspire similar liability evasion in many other cases where the United States shares responsibility. But that evasion is hardly equitable, especially given how the United States' use of land (especially for military activity) benefits all Americans, not just those living in the particular State where the land is located.

Third, the decision below rings dissonantly with fundamental principles of federalism. In the American federal system, "States are independent sovereigns" that maintain "great latitude" to regulate in areas of traditional State concern. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996). Especially in environmental matters, where respective States' issues and needs inevitably vary, federalism facilitates innovative policymaking and boosts government accountability. Honoring federalism's principles, Congress enacted CERCLA to "supplement"—not "supplant"—States' traditional role in environmental regulation. *Atl.*

*Richfield Co.*, 140 S. Ct. at 1363 (Gorsuch, J., concurring in part and dissenting in part).

Although the federal EPA takes an active role at the most complex sites, States oversee efforts to clean up the majority of the country's contamination. In addition to CERCLA, States enact and enforce their own State-law cleanup and contribution regimes, under which they may settle with responsible parties. Some States' laws closely track CERCLA, while others' follow a different path. State law, for instance, may differ from CERCLA with regard to what costs a settling party can recover from other responsible parties, how recoverable costs are apportioned, and in numerous other ways.

The D.C. Circuit's misinterpretation of Section 113(f)(3)(B) extends far enough to reach settlements entered into solely under State law. Because Section 113(f)(3)(B) claims are "governed by Federal law," 42 U.S.C. § 9613(f)(3)(C), the decision below opens the door to arguments that State law must yield to monolithic nationwide standards in a vast swath of cleanup disputes. As a result, the decision threatens to chill responsible parties' willingness to cooperate and settle with State regulators, thereby thwarting States' interest in promoting quick and cost-effective cleanup.

CERCLA's text and purpose furnish no evidence to support the D.C. Circuit's threatened preemption of State law. Instead, CERCLA preserves a substantial role for States to implement their own policies for cleanup and contribution. And it leaves States ample discretion to negotiate and settle with responsible

parties without necessarily implicating an entirely different federal regime. The Court should reverse the decision below.

## ARGUMENT

### I. States' interest in encouraging cleanup supports limiting Section 113(f)(3)(B) to CERCLA settlements that conclusively resolve liability.

A. Congress enacted CERCLA to combat "the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). The Act seeks "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Atl. Richfield*, 140 S. Ct. at 1345 (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 4 (2014)). CERCLA incentivizes parties to "assume the financial responsibility of cleanup" by providing mechanisms for such parties to "seek recovery from others." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994). Where, as here, "statutory language and the legislative history clearly indicate the purpose of Congress," "that purpose must be upheld." *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 395 (1964); *see also W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 94 (2d Cir. 2009) (declaring that CERCLA's "text . . . mandates a statutory interpretation that also supports the[se] principal congressional concerns").

Unsurprisingly, States' interests align with CERCLA's purpose. States have a profound interest in

encouraging expeditious cleanup of contaminated sites within their borders. As traditional advocates for their residents' health, States have an interest in eliminating hazardous substances, many of which "are carcinogens with latency periods for the appearance of injury or disease likely to run for thirty years or more." *CTS Corp.*, 573 U.S. at 22–23 (Ginsburg, J., dissenting) (internal quotations and alterations omitted). As regulators of real property, States are duly concerned with maintaining property values and supporting economic development and redevelopment. *See, e.g.*, *Exxon Corp. v. Hunt*, 475 U.S. 355, 378 n.4 (1986) (Stevens, J., dissenting). And, as protectors of natural resources, States have an interest in preserving the integrity of their lands and waters. *See, e.g.*, *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960).

B. Both CERCLA's purpose and States' corresponding interests are advanced by cooperative negotiation between regulators and responsible parties. *Cf.* Hearings Before the Subcomm. on Commerce, Trade and Hazardous Materials of the Sen. Comm. on Commerce (July 18, 1995), (Serial No. 104-54) (statement of EPA Assistant Administrator Steven A. Herman) ("[R]esponsible parties play a vital, and in our view, irreplaceable role in cleaning up the nation's Superfund sites."). Such cooperation by responsible parties, in turn, flourishes when responsible parties have maximal ability under the statute to recover costs from other responsible parties. Conversely, the harder it is for responsible parties to recover costs, the less incentive they have to cooperate with regulators. And that

means "fewer Superfund cleanup actions will occur," with "the public fisc [] bear[ing] the enforcement costs of those that do." Michael P. Vandenbergh, *The Private Life of Public Law*, 105 Colum. L. Rev. 2029, 2089–90 (2005).

Generally speaking, Section 107(a) affords a greater possibility of recovery than does Section 113(f). As highlighted in this case, a core difference between the sections (though not the only one) is their respective statutes of limitations. Not only is Section 107(a)'s limitations period twice as long, but "there can [also] be very different timing regarding when the statute of limitations begins to run." James Graziano & Pete Jamison, *Better Safe Than Sorry: CERCLA Contribution Actions and the Operative Statute of Limitations*, N.J. Law., Oct. 2016, at 24, 26–27; *compare* 42 U.S.C. § 9613(g)(2)(B) *with id.* § 9613(g)(3)(B).

In *Atlantic Research*, where the question was whether responsible parties could *ever* rely on Section 107(a), a diverse coalition of 38 States, the District of Columbia, and the Commonwealth of Puerto Rico argued that "[a]llowing liable persons to pursue cost recovery claims under Section 107(a)(4)(B) advances CERCLA's purpose." Brief of Amici Curiae States of Washington et al. at 16, *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) (No. 06-562). Restricting Section 107(a)'s availability, by contrast, "frustrates CERCLA's fundamental plan of promoting cleanups by allowing equitable sharing of cleanup costs[,]" *id.* at 16, and leaves more "contaminated property" "unused and unproductive" for a "longer time[,]" *id.* at 3. This Court agreed with the States in *Atlantic Research*, interpret-

ing Section 107(a) broadly enough to provide a cause of action in that case. 551 U.S. at 141. With the same concerns in play yet again, the States as *amici* here seek to maintain the broad availability of Section 107(a) claims compelled by CERCLA's text and purpose.

C. Assuming for argument's sake that Sections 107(a) and 113(f) are "mutually exclusive" and that "a party who *may* bring a [Section 113(f)] action . . . *must* use [that] action," Pet. App. 10a–11a (citation omitted), Section 113(f) claims and Section 107(a) claims have an inverse relationship. As Section 113(f)'s applicability grows, Section 107(a)'s shrinks. One event that triggers a Section 113(f) claim is the entry of an "administrative or judicially approved settlement" that "resolve[s] . . . liability." 42 U.S.C. § 9613(f)(3)(B). Consequently, drawing more settlements—such as non-CERCLA settlements or settlements that fail to conclusively resolve liability—into Section 113(f)(3)(B)'s orbit concomitantly limits the availability of claims under Section 107(a).

States and their residents frequently enter into environmental settlements with the United States. These settlements may require various actions to protect human health and the environment under the authority of statutes other than CERCLA, including the Clean Water Act (CWA), the Resource Conservation and Recovery Act, the Safe Drinking Water Act, or other federal law. States also enter into environmental settlements with their respective residents under State law. Whether under federal or State law, moreover, settlements often include limiting provisions (including

liability disclaimers, conditional releases, reservation-of-rights clauses, and the like) that withhold conclusive resolution of liability. According to the logic of the decision below, any of these settlements—under non-CERCLA federal law, under State law, or with limiting provisions—can trigger Section 113(f)(3)(B).

By interpreting Section 113(f)(3)(B) to encompass non-CERCLA settlements and settlements that fail to conclusively resolve liability—thus triggering a Section 113(f) claim and barring a Section 107(a) claim—the decision below curbs settling parties' ability to "seek recovery from others." *Key Tronic*, 511 U.S. at 819 n.13. Yet it is settling parties who "save[] [themselves] and the government litigation costs, and presumably also limit[] ongoing contamination by promptly remediating the site." *W.R. Grace*, 559 F.3d at 94. Answering such positive cooperative behavior by restricting cost recovery disincentivizes cooperation and settlement. *See id.* ("To disallow a party who has entered into [a settlement with a regulator] to seek recovery of expenditures from other [responsible parties] would discourage cooperation with [regulators]."). Lesser cooperation and fewer settlements, in turn, tend to delay cleanup efforts and increase their overall cost. Lingering contamination harms the environment, negatively affects public health, inhibits economic development, and depletes public resources.

There is "no basis"—textual, purposive, or otherwise—to "interpret[] CERCLA in a way that would discourage parties from entering agreements . . . to ensure a proper cleanup." *Id.* at 90, 95. But that has not stopped the United States from inviting this Court

to indulge in peak irony: adopt an interpretation of CERCLA (designed to help the environment) that allows environmental settlements (intended to help the environment) to undermine CERCLA's purpose (thereby harming the environment). Because it compromises incentives for responsible parties to cooperate, settle, and promptly clean up contaminated sites, the Court should rebuff the United States' invitation.

## II. The decision below allows the United States to evade liability and saddle individual States with a disproportionate financial burden.

In this case, the United States unquestionably contributed to contamination at a site that needs to be remediated. Yet, if the Court accepts the United States' arguments, the Government of Guam will be forced to pay the entire cost of the cleanup, and the United States will get off scot-free. Unfortunately, Guam's situation is hardly unique.

A. Federal sites—sites where the United States bears at least some responsibility for contamination—exist in nearly every state and territory. *See* Superfund: Nat'l Priorities List, https://bit.ly/3dp165R (last updated Feb. 10, 2021); *see also* EPA, Solid Waste And Emergency Response, Publ. 9320.2-10FS, Pb95-963320, EPA 540/F-99/033, Clarifying The Definition Of "Site" Under The National Priorities List (1996), *available at* https://bit.ly/3dCMwrD. Indeed, there are 160 current or proposed federal sites on the EPA's National Priorities List (NPL), "a list of the most contaminated sites in the nation." *United States v. Asarco Inc.*, 214 F.3d

1104, 1104 (9th Cir. 2000); *see* Superfund: Nat'l Priorities List, https://bit.ly/3dp165R (last updated Feb. 10, 2021). The great majority of these sites are the responsibility of the Department of Defense, one of the world's largest polluters. *See* Gov't Accountability Office, GAO-13-633T, *Hazardous Waste Cleanup: Observations on States' Role, Liabilities at DOD and Hardrock Mining Sites, and Litigation Issues* 9 (2013) [hereinafter GAO-13-633T]; *see also* Benjamin Niemark et al., *The US Military Is a Bigger Polluter Than More Than 100 Countries Combined*, Quartz (June 28, 2019), https://bit.ly/2Zj3H96.

Military sites "represent some of the largest [and] most severely contaminated" sites in the country, accounting for "millions of acres" of polluted soil and water. Jennifer Liss Ohayon, *New Battlegrounds Over Science, Risk, and Environmental Justice: Factors Influencing the Cleanup of Military Superfund Sites* 34 (2015), *available at* https://bit.ly/3qD5BgI; GAO-13-633T, *supra*, at 9–10. This extensive pollution directly affects many Americans. Nearly 10-percent of the country's population, in fact, lives as close as 10 miles to an NPL-listed military site. Ohayon, *supra*, at 4. Comprised of myriad substances—from conventional industrial products like fuels and solvents, to unexploded ordnance, to napalm and Agent Orange—contamination at military sites often proves uniquely dangerous to human health. *See id.* at 1, 7; GAO-13-633T, *supra*, at 9–10. It makes sense, then, that military NPL sites are among the most costly to remediate, with a "daunting" estimated price tag in the hundreds of billions of dollars. Ohayon, *supra*, at 7–8.

Tacking on sites controlled by the Department of Energy (the federal government's other principal polluter) and all other federal sources, the United States' liability totals approximately $500 billion. *See* Gov't Accountability Office, GAO-19-157SP, *High-Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas* 138 (2019).

B. For all federal NPL sites, the United States occupies odd territory under CERCLA, playing a "dual role" as both "a liable party" and the law's "primary enforcer." *Atl. Research*, 459 F.3d at 837, *aff'd* 551 U.S. 128. At the same time, the United States cannot be held liable under most non-CERCLA law, such as the CWA. *Compare* 42 U.S.C. § 9620 *with* 33 U.S.C. § 1319; *see U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 624 (1992).[3] The interaction of these differing liability schemes can lead to incongruous results, as this case ably demonstrates. The United States chose to regulate the Ordot Dump and settle with Guam under the CWA, making no mention of CERCLA. Now that Guam has invoked CERCLA against the United States, however, the latter argues that the CWA-only settlement

[3] Although Section 120(a)(4) subjects the United States to liability under State cleanup law, courts have generally agreed that that section applies only to sites currently—but not formerly—owned or operated by the United States. *See, e.g.*, *City of Fresno v. United States*, 709 F. Supp. 2d 888, 909 (E.D. Cal. 2010); *Gen. Motors Corp. v. Hirschfield Steel Serv. Ctr., Inc.*, 402 F. Supp. 2d 800, 804 (E.D. Mich. 2005). *But see Tenaya Assoc. Ltd. P'ship v. U.S. Forest Serv.*, No. CV–F–92–5375 REC, 1995 WL 433290 (E.D. Cal. May 19, 1993).

triggered Guam's sole—and conveniently now-stale—claim under Section 113(f)(3)(B).

Just like in *Atlantic Research* (where the United States was sued by a co-responsible party under CERCLA for its role in contamination at a military site), the United States here proffers a reading of CERCLA that would exploit its "dual role" to "insulate itself from responsibility for its own pollution." 459 F.3d at 837, *aff'd* 551 U.S. 128; *see also* Kiersten E. Holms, *This Land Is Your Land, This Land Is Mined Land: Expanding Governmental Ownership Liability Under CERCLA*, 76 Wash. & Lee L. Rev. 1013, 1065 (2019) ("[T]he United States has made numerous attempts to elude CERCLA liability."). Choosing to regulate and settle claims under non-CERCLA law, such as the CWA, is of course the United States' prerogative. But the fact that the United States specifically chose to rely on non-CERCLA law here, when it could have relied on CERCLA, counsels against accepting its premise that non-CERCLA settlements trigger a Section 113(f)(3)(B) claim.

C. Interpreting Section 113(f)(3)(B) to reach non-CERCLA settlements would allow the United States to sidestep liability for many other sites where it shares responsibility, leaving the financial burden to fall entirely on unlucky parties like Guam. But federal use of land—especially for military activity—inures to the benefit of all Americans, not just those living in the particular State where the land is located. *See, e.g.*, U.S. Const. pmbl. (establishing the United States to "provide for the common defense"); *id.* art. I § 8. To that end, CERCLA's equitable purpose of "ensur[ing]

that the costs of [] cleanup efforts [are] borne by those responsible for the contamination," *Atl. Richfield*, 140 S. Ct. at 1345 (citation omitted) (alteration in original), supports interpreting CERCLA to call upon *all* American taxpayers to contribute to cleanup costs, *see United States v. Shell Oil Co.*, 294 F.3d 1045, 1060 (9th Cir. 2002) ("[C]leanup costs are properly seen as part of the war effort for which the American public as a whole should pay."); *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 846 (3d Cir. 1994) (explaining that holding the United States liable under CERCLA "simply places a cost of war on the United States, and thus on society as a whole," a result "neither untoward nor inconsistent with the policy underlying CERCLA"). Obliging any particular State or its residents to shoulder a disproportionate share of such of cleanup costs, by contrast, would be inequitable.

Ultimately, any interpretation of CERCLA that leaves a responsible party—like the United States here—to "bear no[ne]" of the cleanup costs, while placing all those costs on the party that "actually consented without litigation to remediate a contaminated site," would upend CERCLA's manifest purpose. *W.R. Grace*, 559 F.3d at 95; *see supra* p. 7. States—and all Americans—"rightfully expect" the United States Government "to abide by the same environmental laws and standards" as everybody else. Letter from Christine Todd Whitman, EPA, to James M. Jeffords, United States Senate (Oct. 4, 2001), *available at* https://bit.ly/37usrj4. The Court should therefore adopt Guam's reading of CERCLA, which comports with the

statute's text, its purpose, and States' interests by ensuring the United States pays its fair share.

## III. For sites addressed by State regulators under State law, the decision below threatens to run roughshod over federalism.

This case implicates federalism and respect for State sovereignty. *See* Pet'r Br. 27–29. Consistent with federalism, CERCLA preserves a substantial role for States to regulate in their traditional areas of concern. States routinely fulfill this role, tailoring policies to fit their particular circumstances and needs. Starting with common law and supplementing with legislation and regulation as appropriate, States have developed diverse approaches to environmental cleanup and contribution. Some States' laws resemble CERCLA; others' differ greatly. *See generally* Envt. L. Inst., *An Analysis of State Superfund Programs: 50-State Study, 2001 Update* (2002), *available at* https://bit.ly/3ussMN0. Enforcing their respective laws, States negotiate and settle with responsible parties. Settling responsible parties often then bring State-law claims against other responsible parties to recover a portion of their costs.

The decision below, however, misreads CERCLA and encroaches on the domain of State law. If, as the D.C. Circuit held, settlements "never mention[ing] CERCLA" can trigger a Section 113(f)(3)(B) claim, Pet. App. 18a, then that section could even reach settlements solely under *State* law. Because Section 113(f)(3)(B) claims are "governed by Federal law," 42 U.S.C. § 9613(f)(3)(C), the availability of that federal

claim raises the specter of preemption. But the D.C. Circuit's preemption-baiting interpretation finds no support in CERCLA's text or purpose. To the contrary, bedrock principles of federalism implore this Court to reverse the decision below.

### A. Consistent with federalism, CERCLA preserves a substantial role for State law to regulate cleanup and contribution.

"Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012). Because "States are independent sovereigns in our federal system," they have "great latitude" in exercising their police powers to regulate in areas of traditional State concern. *Medtronic*, 518 U.S. at 475, 485. Among these areas, perhaps none are more vital than the protection of the public health and the land and natural resources within a State's borders. *Huron Portland Cement*, 362 U.S. at 442 ; *accord Atl. Richfield*, 140 S. Ct. at 1362 (Gorsuch, J., dissenting) ("[T]he regulation of real property and the protection of natural resources is a traditional and central responsibility of state governments."). To operationalize federalism's envisioned balance of power, this Court "presume[s] that Congress does not cavalierly pre-empt state-law causes of action" or displace State laws' distinct contours. *Medtronic*, 518 U.S. at 485.

Especially in environmental matters, federalism serves many salutary purposes. Environmental issues and needs inevitably vary by State, and federalism allows for policymaking "sensitive to the diverse needs

of a heterogenous society." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Capitalizing on that diversity and heterogeneity, federalism inspires innovation and experimentation in governance. *See id.*; Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130, 137 (2005). And "by putting the States in competition for a mobile citizenry," federalism fosters government responsiveness and accountability. *Gregory*, 501 U.S. at 458; *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987). It thus comes as no surprise that States have a "rich history" of "solving resource and environmental problems." Terry Anderson & P.J. Hill, *Environmental Federalism: Thinking Smaller*, PS-8 PERC Policy Series 10 (1996), *available at* https://bit.ly/2Md9UjW.

Through a framework of "cooperative federalism," CERCLA "supplement[s]"—but does not "supplant"—States' traditional role in environmental regulation. *Atl. Richfield*, 140 S. Ct. at 1356 (citation omitted); *id.* at 1363 (Gorsuch, J., concurring in part and dissenting in part); *see* 42 U.S.C. §§ 9614(a), 9652(d), 9659(h) (savings clauses); Pet'r Br. 27–29. Indeed, "[i]t is well-settled that Congress did not expressly or impliedly intend by enacting CERCLA to displace state law and occupy the field of contaminated site remediation." Ronald G. Aronovsky, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. Envtl. L.J. 225, 277 (2008). To that end, fundamental principles of American federalism "counsel[] against reading" CERCLA in a way that "restrict[s]" States' authority to regulate cleanup and

contribution in the way they choose. *CTS Corp.*, 573 U.S. at 12, 18.

### B. States approach cleanup and contribution in varying ways, sometimes similarly to, but often differently from, CERCLA.

Sites listed on the EPA's National Priorities List (NPL)—including federal military sites like the Ordot Dump—are often the most polluted and complex. *See supra* pp. 12–14. Yet the overwhelming majority of the country's hundreds of thousands of contaminated sites neither appear on the NPL nor feature the EPA's involvement. Instead, State regulators oversee cleanup efforts in most cases. *See, e.g.*, Brownfields Revitalization and Environmental Restoration Act, S. Rep. No. 107-2, at 15 (2001).

Although States can and do regulate directly under CERCLA, 42 U.S.C. § 9607(a)(4)(A), they also enact and enforce their own cleanup and contribution regimes, *see, e.g.*, *W.R. Grace*, 559 F.3d at 94–95. State regulators enter into settlements with responsible parties under State law, after which those settling parties invoke State law to recover costs from other responsible parties. Sometimes State statutory and common law mimics or resembles CERCLA; other times it "embrace[s] alternative policy choices for cleaning up contaminated property." Aronovsky, *supra*, at 228; *see W.R. Grace*, 559 F.3d at 94 (observing that the law governing environmental cleanup disputes "will undoubtedly vary from state to state and be subject to internal state modifications"). A sampling of comparisons follows.

First, State law may differ from CERCLA with respect to what costs are recoverable. Under Section 113(f)(3)(B), a responsible party can recover costs only if they were incurred consistent with the National Contingency Plan (NCP). *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1269 (10th Cir. 2017). The NCP is a set of "methods," "criteria," "standards," and "procedures" that requires, among other things, multiple detailed reports and public comment. 42 U.S.C. § 9605(a); *see* 40 C.F.R. Part 300. Intended primarily for NPL sites, the NCP's "cumbersome," "costly," and "complex" requirements can add years to the cleanup process. Becky L. Jacobs, *Basic Brownfields*, 12 J. Nat. Resources & Envtl. L. 265, 270 (1997); *accord* 4 William H. Rodgers, Jr., *Environmental Law: Hazardous Wastes and Substances* § 8.9 (1992 & Supp. 2007). For smaller, less complex sites—including the nearly half-million "brownfield" sites vital for urban redevelopment—the costs of NCP consistency often outweigh the benefits. *See* EPA, Overview of EPA's Brownfields Program, https://bit.ly/3qM3eIy (last updated Feb. 5, 2021); Aronovsky, *supra*, at 267–68.

States have taken varying approaches to whether NCP consistency is required to recover costs. Some have enacted cleanup programs that follow CERCLA and limit recoverable costs to those incurred consistent with the NCP. *E.g.*, Ky. Rev. Stat. § 224.1-400; N.J. Rev. Stat. § 58:10-23.11f(a)(3). In many other States, however, settling responsible parties can recover cleanup costs regardless of NCP consistency. *E.g.*, Ariz. Rev. Stat. § 49-285(B); Del. Code tit. 7, § 9105; Fla. Stat. § 403.727; Ga. Code § 12-8-96.1; Mich. Comp.

Laws § 324.20126; Mont. Code § 75-10-724; Or. Rev. Stat. § 465.257.

In addition, under Section 113(f)(3)(B), responsible parties can recover only past costs already incurred; any prospective relief is declaratory. *See* 42 U.S.C. §§ 9607(a)(4)(B), 9613(g)(2). States, by contrast, often authorize recovery of future costs. *See, e.g.*, Restatement (Second) of Torts § 929.

Second, State law may differ from CERCLA regarding how recoverable costs are apportioned. In Section 113(f) cases, federal courts have developed an extensive body of equitable factors for apportioning costs. *See, e.g.*, *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992); *United States v. Davis*, 31 F. Supp. 2d 45, 63 (D.R.I. 1998), *aff'd*, 261 F.3d 1 (1st Cir. 2001). *See generally* 2 *RCRA and Superfund: A Practice Guide* §§ 12:69–12:74 (3d ed. 2020). States adhere to varying common-law principles and statutory schemes for apportioning costs among responsible parties. *See generally* Restatement (Third) of Torts: Apportionment of Liability § 17 cmt. a; Aronovsky, *supra*, at 322 n.434 (collecting authorities).

Third, States and federal courts may also credit partial settlements differently. There are two primary options: the "pro tanto" approach and the "pro rata" (or "proportionate share") approach. The pro tanto approach credits a partial settlement according to the settlement amount; the pro rata approach credits a partial settlement according to the amount of the settling party's responsibility. *See, e.g.*, *Great Lakes Dredge & Dock Co. v. Miller*, 957 F.2d 1575, 1579 (11th

Cir. 1992) (illustrating approaches).[4] In Section 113(f) cases, federal courts have split over which approach—pro tanto, pro rata, or leaving the choice within the district court's discretion—governs partial settlement credit. *See, e.g.*, *AmeriPride Servs. Inc. v. Tex. E. Overseas Inc.*, 782 F.3d 474, 487–88 (9th Cir. 2015); *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 897 (10th Cir. 2000); *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 307–08 (7th Cir. 1999). States, likewise, have adopted varying approaches to crediting partial settlements in State-law actions, with some favoring pro tanto, others endorsing pro rata, and still others backing different methods. *See generally* Restatement (Second) of Torts § 886A cmt. m.

Fourth, States may elect to depart from CERCLA and from each other with regard to contribution protection. Under CERCLA, a responsible party that settles with a regulator receives protection from contribution liability. *See* 42 U.S.C. § 9613(f)(2) (declaring that a settling party "shall not be liable for claims for contribution regarding matters addressed in

[4] Imagine, for instance, a contaminated site with three responsible parties—A, B, and C, all equally responsible—and a total cleanup cost of $120 million. Suppose A settles with a regulator, cleans up the site, and sues B and C for contribution. Next, suppose A and B settle at the beginning of trial for $30 million, after which A obtains an $80 million verdict ($120 million minus its own share of responsibility). How much C owes A depends on the jurisdiction's chosen approach to crediting partial settlements. Under the pro tanto approach, A's verdict is reduced by $30 million (B's settlement amount), and C owes A the $50 million balance. Under the pro rata approach, A's verdict is reduced by $40 million (B's share of responsibility), leaving C with a $40 million bill.

the settlement"). States may choose to offer identical contribution protection, qualified or conditional protection, or no protection at all.

Finally, States may select alternative statutes of limitations. Section 113(f)(3)(B) has a three-year limitations period, triggered by the "entry" of settlement. 42 U.S.C. § 9613(g)(3)(B). States may set a longer or shorter period, triggered by any number of events, such as the entry of settlement, notice of harm, incurrence of costs, or completion of remediation.

### C. Interpreting Section 113(f)(3)(B) to reach State-law settlements risks overriding States' preferred approaches.

1. Contrary to federalism, the decision below could be read to "restrict" States' authority to regulate environmental liability. *CTS Corp.*, 573 U.S. at 12, 18. Per the D.C. Circuit's interpretation, Section 113(f)(3)(B) can reach non-CERCLA settlements. *See* Pet. App. 18a ("We therefore conclude that a settlement agreement can trigger section 113(f)(3)(B) even if it never mentions CERCLA."). By this expansile logic, not only can settlements under other *federal* law (such as the CWA) trigger a Section 113(f)(3)(B) claim, but so too could settlements entered into solely under *State* law. "[A] party who *may* bring a [Section 113(f)] action" "*must*" bring that action, Pet. App. 10a–11a (citation omitted),[5] and Section 113(f)(3)(B) claims are "governed

[5] This Court has never addressed whether or to what extent a Section 113(f)(3)(B) claims preempts a State-law contribution claim. Some lower courts have held that, at least in some (footnote continued)

by Federal law," 42 U.S.C. § 9613(f)(3)(C). The decision below, then, opens the door to arguments that all the unique State-law approaches catalogued above simply vanish upon entry of a settlement.

For instance, interpreting Section 113(f)(3)(B) to reach State-law settlements could oust States' individualized approaches to the NCP. Even if a particular State chooses to allow responsible parties to recover all costs, the decision below could be read as disregarding that choice in favor of a uniform federal standard mandating NCP consistency. Never mind that "no evidence" exists to suggest "Congress intended to make the NCP the national model for toxic remediation procedure." Aronovsky, *supra*, at 293.

So, too, with future costs. The decision below could limit recovery to only those costs already incurred (as CERCLA dictates), even if State law would otherwise permit recovery of future costs. Yet just like with NCP

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circumstances, Section 113(f) preempts State law. *See, e.g.*, *Members of Beede Site Grp. v. Fed. Home Loan, Mortg. Corp.*, 968 F. Supp. 2d 455, 462 (D.N.H. 2013) (holding that "[p]laintiff's § 113 claim under CERCLA preempts its state law claims"); *cf. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 138 (2d Cir. 2010) (reasoning that CERCLA's text "does not compel the conclusion that Congress intended that parties who have settled their CERCLA liability should have both a federal and a state law based claim for recovery of the same response expenditures"). *But see, e.g.*, *The Durham Mfg. Co. v. Merriam Mfg. Co.*, 128 F. Supp. 2d 97, 103 (D. Conn. 2001) (holding that plaintiff's State-law statutory claim "is not preempted by § 113(f)(1)"). *See generally* Aronovsky, *supra*, at 308–21 (discussing Section 113(f)'s proper preemptive scope and collecting cases).

consistency, no evidence evinces any Congressional desire to displace State law on future costs. *Cf. California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989) ("Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.").

Similar observations apply across the board. However federal courts resolve the circuit split over partial settlement credit in Section 113(f) cases, the selection of one (say, pro rata) could override the judgment of States that have adopted the other (pro tanto). Likewise, the decision below could lock in Section 113(f)'s specific approaches to apportionment, contribution protection, limitations periods, and claim triggers.

Finally, by interpreting Section 113(f)(3)(B) such that it could reach State-law settlements, the decision below potentially excludes State courts as a venue. Federal courts have exclusive jurisdiction over all CERCLA claims, meaning a party cannot bring a Section 113(f)(3)(B) claim in State court. 42 U.S.C. § 9613(b). Although State-law claims to recover costs can be brought in State court, that option disappears if those State-law claims are superseded by Section 113(f)(3)(B).

2. Nothing in CERCLA's text or purpose countenances the D.C. Circuit's threatened displacement of State law. To the contrary, CERCLA's multiple savings clauses expressly leave "States' judgments about causes of action" and "the scope of liability" wholly "untouched." *CTS Corp.*, 573 U.S. at 12, 18; *see* 42 U.S.C. §§ 9614(a), 9652(d), 9659(h). Simply put,

contribution under Section 113(f)(3)(B) is "derivative of federal (CERCLA) liability, not state law liability." Aronovsky, *supra*, at 314–16 & n.406.

Importantly, not only does the decision below risk overriding State law in a doctrinal sense, but it also promises to influence how State regulators and responsible parties cooperate. Knowing that State-law settlements with State regulators trigger a Section 113(f)(3)(B) claim may alter both States' and responsible parties' calculus for negotiating and structuring settlements. Suppose, for example, that a responsible party owns a contaminated site in a State where State law permits recovery of costs regardless of NCP consistency. If settling with State regulators under State law would trigger a Section 113(f)(3)(B) claim, thereby limiting recovery to NCP-consistent costs, settlement may become comparatively less attractive.

Contrary to the D.C. Circuit's view, there is simply "no basis" to "interpret[] CERCLA in a way that would discourage parties from entering agreements with the states to ensure a proper cleanup." *W.R. Grace*, 559 F.3d at 90, 95. Instead, consistent with CERCLA's text and "spirit of cooperative federalism," *Atl. Richfield*, 140 S. Ct. at 1356 (citation omitted), States should be able to experiment with policies directed at cleanup and contribution. They should be able to implement those policies by negotiating and structuring settlements under State law. And they should be able to do all that without unwarranted—and textually indefensible—federal intrusion. Guam's reading of Section 113(f)(3)(B), with its "limited view" of CERCLA's preemptive potential, "encourages voluntary cleanups

by promoting litigation efficiency and remedial flexibility, and respects the role of state environmental and [contribution] law in a federalist system." Aronovsky, *supra*, at 230. To enforce federalism's demands and reinforce its positive effects, the Court should reverse the decision below.

## CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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