No. 22-___

IN THE

Supreme Court of the United States

GEORGIA-PACIFIC CONSUMER PRODUCTS LP, FORT JAMES LLC, AND GEORGIA-PACIFIC LLC,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY AND WEYERHAEUSER COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

CERCLA's three-year statute of limitations for an "action for contribution for any response costs or damages" under § 113(f) begins running on "the date of judgment in any action under [CERCLA] for recovery of such costs or damages." 42 U.S.C. § 9613(g)(3)(A). Does a bare declaratory judgment that determines liability but imposes no "costs" and awards no "damages" trigger that statute of limitations?

PARTIES TO THE PROCEEDING

Petitioners Georgia-Pacific Consumer Products LP, Fort James LLC,[1] and Georgia-Pacific LLC (collectively, "Georgia-Pacific") were Plaintiffs-Appellees in the Sixth Circuit below. Respondent International Paper Company was a Defendant-Appellant in the Sixth Circuit below. Respondent Weyerhaeuser Company was a Defendant-Appellee in the Sixth Circuit below.[2]

CORPORATE DISCLOSURE STATEMENT

Petitioners Georgia-Pacific Consumer Products LP, Fort James LLC, and Georgia-Pacific LLC are each indirect, wholly owned subsidiaries of Koch Industries, Inc. Neither Petitioners nor their corporate parents are publicly traded corporations, and no publicly traded company owns 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

Current Case

United States District Court for the Western District of Michigan:

Georgia-Pacific Consumer Products LP, et al. v. NCR Corporation, et al., No. 11-cv-483 (order finding Defendants to be potentially responsible parties Sept. 26, 2013; motion for summary judgment on statute of limitations

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[1] Fort James LLC was formerly known as Fort James Corporation, including in the caption below.

[2] NCR Corporation ("NCR") was a Defendant in the district court proceedings, but was not a party to the Sixth Circuit proceedings and is not a party before this Court.

denied in relevant part Aug. 12, 2015; order allocating costs among the parties Mar. 29, 2018; judgment entered June 19, 2018)

United States Court of Appeals for the Sixth Circuit:

Georgia-Pacific Consumer Products LP, et al. v. NCR Corporation, et al., No. 18-1806 (reversing and remanding Apr. 25, 2022; adding appendix on denial of rehearing July 14, 2022)

Prior Related Litigation

United States District Court for the Western District of Michigan:

Kalamazoo River Study Group v. Rockwell International Corporation, et al., No. 95-cv-838 (judgments entered Dec. 8, 1998, June 5, 2000, and Aug. 29, 2002 (as amended June 9, 2003))

Pending Related Litigation

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The opinion of the Sixth Circuit (Pet.App.1a-27a) is reported at 32 F.4th 534. The phase I liability decision of the U.S. District Court for the Western District of Michigan (Pet.App.130a-168a) is reported at 980 F. Supp. 2d 821. That court's decision rejecting the Defendants' statute of limitations defense for the claims at issue (Pet.App.108a-129a) is unreported but available at 2015 WL 11236845. And that court's decision allocating liability (Pet.App.28a-107a) is reported at 358 F. Supp. 3d 613. The opinion of the Sixth Circuit denying Georgia-Pacific's rehearing petition but adding an appendix to its decision (Pet.App.169a-80a) is reported at 40 F.4th 481.

JURISDICTION

The Sixth Circuit issued its decision in this case on April 25, 2022, and denied a timely rehearing petition on July 14, 2022. On August 31, 2022, Justice Kavanaugh granted an extension of time to file this petition through November 14, 2022. No. 22A195 (U.S.). Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED[3]

Section 113(g)(3)(A) of CERCLA (42 U.S.C. § 9613(g)(3)(A)) provides:

> (3) Contribution
>
> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages

Additional relevant CERCLA provisions are set out in the Appendix to this Petition (Pet.App.181a-186a).

[3] This petition follows the decision below and this Court's recent cases in citing statutory provisions by CERCLA section number rather than U.S. Code codification. *E.g.*, Pet.App.5a n.2. CERCLA § 1xx corresponds to 42 U.S.C. § 96xx.

INTRODUCTION

Congress enacted CERCLA "in response to 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). Its complex provisions serve two primary goals: (1) "to promote the 'timely cleanup of hazardous waste sites,'" and (2) "to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Id.* At the heart of CERCLA's regulatory regime is § 113(f): a provision that allows parties who pay a disproportionate share of cleanup costs to recoup amounts paid above their fair shares from others who are also responsible for the pollution. In the decision below, the Sixth Circuit split from the First Circuit and held that a bare declaratory judgment of liability triggers the three-year limitations period for § 113(f) claims. Left uncorrected, the Sixth Circuit's atextual rule will impose arbitrary and draconian burdens on those who undertake environmental cleanups; incentivize a barrage of premature protective suits; and ultimately produce less accurate allocations of responsibility. This Court's review is urgently needed to resolve the split and prevent the Sixth Circuit's error from taking root in this critically important area of the law, which governs decades-long cleanup efforts involving enormous sums of money.

Under § 113(g)(3)(A), claims under § 113(f) for "contribution for any response costs or damages" must be brought within three years of "the date of judgment in any action under [CERCLA] for recovery of such costs or damages." The First Circuit has

recognized that a bare declaratory judgment that assigns liability—but neither quantifies nor actually awards any "costs or damages"—does not trigger this limitations period because it is not a "judgment … for recovery of such costs or damages." *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 12-13 (1st Cir. 2004). In the decision below, however, the Sixth Circuit held that a declaratory judgment of liability, standing alone, is enough to trigger § 113(g)(3)(A)'s statute of limitations. The Sixth Circuit's interpretation of § 113(g)(3)(A) is contrary to the text of the limitations provision itself, to a nearby statutory provision on which the panel erroneously relied, to background common-law principles of contribution, and to common sense. As the First Circuit correctly recognized, a judgment is not "for recovery of such costs or damages" unless it actually quantifies and awards those costs or damages.

The implications of the Sixth Circuit's contrary holding are staggering. Here, for example, the district court found on an extensive factual record that Petitioner Georgia-Pacific is equitably entitled to recoup tens of millions of dollars representing other entities' fair share of the cleanup costs Georgia-Pacific incurred. But under the Sixth Circuit's rule, Georgia-Pacific has no way to recover those funds because it did not sue early in the process, long before the extent of the pollution and the necessary cleanup activities were known, long before Georgia-Pacific incurred most of those costs, and long before the identities of all those who should equitably share those costs were known. To avoid Georgia-Pacific's fate going forward, a party faced with a declaratory judgment early in the cleanup

process will have to file scores of highly speculative lawsuits—or else risk forever losing its ability to recoup costs it should not have to bear. Those premature lawsuits will clog up dockets for years, even decades, while the cleanup proceeds and the proportionate liability of responsible parties becomes clear. And parties without any actual responsibility for pollution will be forced to defend complicated and expensive CERCLA suits, all without the benefit of evidence that would have been uncovered throughout the course of further investigation. Unfair and inaccurate cost allocations will invariably result.

Given the square split, the Sixth Circuit's manifest error, and the importance of the question presented to environmental cleanup efforts nationwide, the need for this Court's intervention could hardly be clearer. The petition should be granted.

STATEMENT OF THE CASE

A. Statutory Background

1. First enacted in 1980, CERCLA "was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington*, 556 U.S. at 602 (internal quotation marks omitted). To achieve these purposes, Congress laid out a "complex statutory scheme" governing the imposition and allocation of liability for cleanup costs at Superfund sites. *Territory of Guam v. United States*, 141 S. Ct. 1608, 1611 (2021).

Under that scheme, "the Federal Government may clean up a contaminated area itself, or it may compel responsible parties to perform the cleanup." *Cooper*

Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 161 (2004) (internal citation omitted). "In either case," § 107(a) authorizes "the Government [to] recover its response costs" from what CERCLA calls "potentially responsible persons" or "PRPs." *Id.* (citing § 107(a)). A private party that incurs cleanup costs directly can also bring a § 107(a) cost-recovery action against other PRPs. *United States v. Atl. Rsch. Corp.*, 551 U.S. 128 (2007).

CERCLA "defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs." *Id.* In particular, PRPs include anyone who owns or previously owned facilities that contributed to the contamination and anyone who disposed or agreed to dispose of hazardous substances at such facilities. *Id.* at 136; *see* § 107(a). And where pollution on a site constitutes a "single, indivisible harm," liability for cleanup costs is joint and several, meaning that any PRP can find itself on the hook for *all* cleanup costs, regardless of its share of sitewide responsibility. *Burlington*, 556 U.S. at 614.

2. As relevant here, however, Congress tempered that harsh initial result by providing for contribution actions to correct "an inequitable distribution of common liability among liable parties." *Atl. Rsch.*, 551 U.S. at 132, 139. An inequitable distribution can arise in at least two ways: one or more PRPs can have a money judgment entered against them to reimburse another party's response costs under § 107(a) or other CERCLA provisions; or one or more PRPs can settle with the federal or state government for an amount that exceeds their fair share of responsibility. In either case, § 113(f) authorizes PRPs to "seek contribution from any other [PRP]"

that shares responsibility for the costs or damages at issue. § 113(f)(1) (providing that a PRP may seek contribution "during or following any civil action"); § 113(f)(3)(B) (providing that a PRP may seek contribution after resolving its liability "to the United States or a State … in an administrative or judicially approved settlement").

Such contribution actions, however, are subject to a three-year statute of limitations. For § 113(f) claims based on an inequitable distribution effected by a judgment, § 113(g)(3)(A) provides that "[n]o action for contribution for any response costs or damages may be commenced more than 3 years after … the date of judgment in any action under [CERCLA] for recovery of such costs or damages." For claims based on an inequitable distribution effected by a settlement, § 113(g)(3)(B) provides that the limitations period runs from "the date of an administrative order under [§ 122(g) or § 122(h)] or entry of a judicially approved settlement with respect to such costs or damages."

B. Factual and Procedural Background

As is common in CERCLA cleanup cases, the events giving rise to this dispute span many decades. But only a limited, well-defined set of facts—none of which were challenged before the Sixth Circuit—is relevant to the purely legal question before this Court.

1. In 1954, NCR began selling carbonless copy paper ("CCP"), a product that permitted writing or typing in duplicate. Pet.App.35a. To produce CCP, NCR coated the back of the top sheet of paper with an emulsion that, up through 1971, included

polychlorinated biphenyls ("PCBs"). *Id.* In addition to usable CCP, NCR's process produced scraps called CCP "broke," which it sold to paper mills to recycle into new paper. Pet.App.36a. To facilitate these sales, NCR developed a process to wash the PCB-containing substance off the paper, which resulted in PCBs collecting in wastewater from the mills. *Id.* For at least a portion of the relevant period, NCR "actively attempted to conceal the hazards associated with CCP broke—from recyclers, the public, and even governmental entities." Pet.App.153a.

Some of the recycling mills to which NCR sold CCP broke were located on Michigan's Kalamazoo River and its tributary, Portage Creek. From the 1860s to the early part of this century, this area's ample water supply and "prime location for nationwide distribution" made it a hub of paper manufacturing. Pet.App.3a. Mills active at the time included (1) a mill owned by the Kalamazoo Paper Company, later acquired by Petitioner Georgia-Pacific LLC, Pet.App.32a; (2) the King Mill, owned by the Allied Paper Company, which has since gone bankrupt and is not a party to this case, Pet.App.33a; (3) the Plainwell Mill, owned and operated during the relevant time by Respondent "Weyerhaeuser or by companies for which Weyerhaeuser has assumed liabilities," Pet.App.35a; and (4) the Bryant Mill, owned by the St. Regis Company, which was later acquired by Respondent International Paper, Pet.App.33a. The first three of these mills were located on the Kalamazoo River

itself, while the Bryant Mill was located on the Portage Creek tributary.[4]

2. Georgia-Pacific has long worked with the State of Michigan and the EPA to clean up the Kalamazoo River and surrounding areas, which the EPA designated as the "Allied Paper Inc./Portage Creek/Kalamazoo River Superfund Site" in 1990. Pet.App.133a. The site consists of approximately 80 miles of the Kalamazoo River, approximately 3 miles of Portage Creek, and "disposal areas, adjacent river banks and contiguous flood plains." Pet.App.39a.

The same year the site was designated, Georgia-Pacific formed the Kalamazoo River Study Group ("KRSG") with several other paper companies. Pet.App.5a. The KRSG agreed with state regulators to investigate the extent of PCB pollution and study the feasibility of various cleanup options. And they got to work immediately.

In 1995, the KRSG sought relief under § 107(a) and § 113(f) for costs it had incurred investigating the site, as well as for future investigation and response costs. *Id.* Some of the defendants in that litigation, none of whom are parties to the present case, filed counterclaims. Pet.App.6a. The district court then entered a series of orders between 1998 and 2002 finding the KRSG's members and two of

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[4] Other mills along the Kalamazoo River, including a facility owned and operated by the predecessors of Fort James LLC and Georgia-Pacific Consumer Products LP, recycled either CCP broke or post-consumer CCP at some point in time. But the district court treated the four mills listed above as "the center of the case." Pet.App. 32a.

the defendants to be PRPs under CERCLA, but allocating "the entire cost of response activities" at the site to the members of the KRSG, and none to the defendants. Pet.App.7a (quoting *Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d 817, 840 (W.D. Mich. 2000)). This "bare-bones" declaratory judgment of liability for response costs did not identify or quantify what any of those costs would be, did not award any such costs, and did not order or otherwise require the KRSG or its members to perform any cleanup tasks. Pet.App.17a. It simply acknowledged that the members of the KRSG were PRPs and declared that the KRSG, and not the defendants, would be responsible for future response and remediation costs. In fact, the only costs or damages that the *KRSG* litigation actually awarded were approximately $62,000 *against one of the defendants* for past investigation costs. *Kalamazoo River Study Grp. v. Eaton Corp.*, 258 F. Supp. 2d 736, 761 (W.D. Mich. 2002).

3. By 2011, having continued to investigate and clean up the site under various agreements with the state and federal governments, Georgia-Pacific better understood the nature and sources of the contamination. In particular, Georgia-Pacific had uncovered evidence establishing the identity of additional PRPs—most notably including NCR, which had arranged for the disposal of PCB-contaminated CCP broke. Pet.App.155a-157a.

Georgia-Pacific therefore initiated the present suit seeking cost recovery under § 107(a) and contribution under § 113(f) from NCR, as well as from International Paper and Weyerhaeuser, which owned (or are the successors to companies that

owned) mills on the Kalamazoo River site at the time those mills recycled NCR's CCP broke. Pet.App.7a-8a. In the first stage of the proceedings, which concluded in 2013, the district court determined that all four litigants were PRPs; Georgia-Pacific and Weyerhaeuser had acknowledged as much, and the court rejected International Paper's and NCR's arguments to avoid PRP status. Pet.App.8a.

The defendants then sought summary judgment in relevant part. On § 107(a), NCR and International Paper argued that Georgia-Pacific's cost-recovery claims could not survive because a PRP cannot bring a § 107(a) cost-recovery action for expenses that could have been subject to a § 113(f) contribution action. *See* Pet.App.117a-119a (citing *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014)). And on § 113(f), they argued that the declaratory judgment in the *KRSG* litigation had triggered the statute of limitations for Georgia-Pacific's contribution claims, such that those claims were time-barred.

The district court agreed, consistent with the uniform view of the courts of appeals, that Georgia-Pacific's potential remedy under § 113(f) precluded any claim under § 107(a). Pet.App.118a-119a; *see Whittaker Corp. v. United States*, 825 F.3d 1002, 1007 & n.5 (9th Cir. 2016) (collecting cases); *Atl. Rsch.*, 551 U.S. at 139 (§ 107(a) and § 113(f) "complement each other by providing causes of action to persons in different procedural circumstances" (internal quotation marks omitted)). But it rejected the defendants' argument that the *KRSG* declaratory judgment had triggered the statute of limitations for Georgia-Pacific's § 113(f) claims. Affording

CERCLA's limitations provision "such an expansive interpretation," the district court reasoned, "would require … read[ing] CERCLA to be broader than the typical reach of traditional res judicata principles." Pet.App.120a-121a. "Indeed, it would effectively bar some contribution claims even before they would normally accrue." Pet.App.121a. The district court thus "decline[d] the opportunity to read CERCLA so broadly." *Id.*[5]

The district court then undertook the intensive equitable process of determining how to allocate costs among the PRPs. By September 2014 (the cutoff date used at the allocation trial), Georgia-Pacific had incurred over $105 million in cleanup costs, of which approximately $50 million remained to be allocated following the district court's statute of limitations ruling and some other minor adjustments. Pet.App.52a-58a; *see supra* at 12 n.5. Weyerhaeuser, for its part, had spent approximately $10 million. Pet.App.60a. And NCR and International Paper have not claimed that they have incurred *any* cleanup costs.[6]

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[5] In rulings not challenged on appeal, the district court also granted in part and denied in part more targeted statute of limitations arguments premised on certain administrative agreements. Pet.App.121a-129a.

[6] Since the 2014 cutoff date, Georgia-Pacific has spent millions of dollars more, and the site-wide cleanup is projected to continue for at least another decade and cost at least hundreds of millions of additional dollars. Pet.App.48a n.5; *see United States v. NCR Corp.*, No. 19-cv-1041, 2020 WL 8574835, at *2 (W.D. Mich. Dec. 2, 2020).

After a 20-day trial involving thousands of exhibits, the district court concluded that "[n]o party is uniquely culpable for PCBs in the Kalamazoo River." Pet.App.64a. The court acknowledged the "physical reality that PCBs travel downstream, and not upstream"—meaning, for example, that "PCBs found in Portage Creek *must* be from the Bryant mill" owned by a predecessor to International Paper. Pet.App.82a (emphasis added). Nevertheless, the court declined to treat the pollution or cleanup costs as divisible, choosing instead to establish "one overall equitable allocation" to govern all cleanup costs incurred at the site through the 2014 cutoff date. Pet.App.77a, 84a-86a. In doing so, the court allocated 40% of those costs to Georgia-Pacific, 40% to NCR, 15% to International Paper, and 5% to Weyerhaeuser. Pet.App.92a.

4. All parties initially appealed. But after NCR settled its liability to the state and federal government by agreeing to perform or finance roughly $240 million in cleanup work and to pay the judgment in favor of Georgia-Pacific, *see NCR Corp.*, 2020 WL 8574835, at *2, Georgia-Pacific, Weyerhaeuser, and NCR all dismissed their appeals—leaving only International Paper's appeal of the district court's ruling. Pet.App.10a. The Sixth Circuit thus proceeded to address a single question "alone": "whether the … judgments of liability in the KRSG litigation started CERCLA's statute of limitations to run for contribution claims." *Id.*

In answering that question, the Sixth Circuit largely ignored the text of the limitations provision, § 113(g)(3)(A). Instead, the panel's textual analysis began and ended with § 113(g)(2), a neighboring

provision that directs district courts adjudicating cost-recovery actions under § 107(a) to "enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." Pet.App.17a. According to the Sixth Circuit, § 113(g)(2)'s reference to a "declaratory judgment on liability for response costs" means that such a declaratory judgment must qualify as a "'judgment in any action under this chapter for recovery of such costs or damages' causing the statute of limitations to begin to run" under § 113(g)(3)(A). Pet.App.17a-18a.

The court did not even attempt to explain how a bare declaratory judgment of liability—which requires that any actual recovery will occur in a "subsequent action or actions"—could itself qualify as a "judgment … for recovery of such costs or damages." Instead, the Sixth Circuit sought to "bolster" its conclusion with precedent applying the textually distinct statute of limitations for *settlement-based* § 113(f) contribution claims—despite admitting that there are "important contextual differences between judicially approved settlements and declaratory judgments." Pet.App.18a-19a.

The Sixth Circuit acknowledged and disagreed with the First Circuit's contrary ruling in *American Cyanamid Co. v. Capuano*, 381 F.3d 6. Pet.App.20a-21a & n.4. There, the First Circuit ruled that a "declaratory judgment that had held a party 'jointly and severally liable for all future costs of removal or remedial action'" did *not* trigger § 113(g)(3)(A)'s statute of limitations because a "'declaratory

judgment … is not itself a judgment for the recovery of such costs or damages.'" Pet.App.20a (quoting *Am. Cyanamid*, 381 F.3d at 12-13). The Sixth Circuit attempted to distinguish the First Circuit's decision on the facts. Pet.App.20a-21a; *but see infra* at 19-21. But when it was ultimately unable to do so, the court concluded simply that it was not bound by the First Circuit's reasoning and did not find it persuasive. Pet.App.21a & n.4.

The upshot of the Sixth Circuit's ruling is that Georgia-Pacific cannot recoup any of the tens of millions of dollars it has spent on cleanup thus far, or any of the hundreds of millions of dollars it will likely spend in the future—even though the district court has already determined that other parties share significant responsibility for the pollution at the site.

5. The Sixth Circuit denied Georgia-Pacific's rehearing petition on two questions not at issue in this petition: the applicability of its holding to Weyerhaeuser despite Weyerhaeuser's failure to file a cross appeal, and the court's decision not to address an argument International Paper had made in the alternative. Pet.App.169a-180a. This petition followed.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's holding—that a bare declaratory judgment of liability triggers § 113(g)(3)(A)'s statute of limitations—opens a clean circuit split on a pure legal issue with enormous practical consequences. The Sixth Circuit's atextual rule makes it impossible for a PRP to recover any costs that it cannot—for lack of information or other

reasons—pursue in a contribution claim brought within 3 years of an initial declaratory judgment of liability. As a result, PRPs across the country (except in New England) will be forced to choose between pouring immense resources into premature litigation, on one hand, or risking losing their ability to *ever* recoup disproportionate cleanup costs, on the other. The result will be years of wasteful litigation and unfair, draconian liability for parties like Georgia-Pacific that commit early to clean up hazardous waste. This Court's intervention is urgently required.

I. THE SIXTH CIRCUIT'S READING OF § 113(g)(3)(A) CONFLICTS WITH THE FIRST CIRCUIT'S.

In holding that a "bare declaratory judgment cause[s] the limitations period [under § 113(g)(3)(A)] to begin to run," Pet.App.22a, the Sixth Circuit opened a deeply consequential split with the First Circuit's decision in *American Cyanamid*, which reached the opposite result on materially identical facts. While a bare declaratory judgment of liability does not trigger § 113(g)(3)(A)'s statute of limitations in the First Circuit, the decision below means that it now does in the Sixth.

1. *American Cyanamid* concerned the "Picillo site," a Rhode Island pig farm where toxic-waste disposal caused both soil and groundwater contamination. 381 F.3d at 9. The plaintiff, R & H, had generated some of the waste stored at the Picillo site. *Id.* at 10. In proceedings called the "*O'Neil* litigation," which centered on costs associated with the soil cleanup, a district court "found R & H and

two other companies jointly and severally liable for un-reimbursed past response costs of $991,937 and for 'all future costs of removal or remedial action incurred by the state [of Rhode Island] ….'" *Id.* (quoting *O'Neil v. Picillo*, 682 F. Supp. 706, 731 (D.R.I. 1988)).

Years later, "R & H entered a consent decree with the United States to pay $4,350,000 to compensate the United States for direct response costs related to groundwater cleanup," plus smaller amounts for other purposes. *Id.* at 11. R & H then sought contribution under § 113(f) for the groundwater cleanup costs. The defendants argued that § 113(g)(3)(A)'s statute of limitations barred R & H's claim because the *O'Neil* declaratory judgment had issued more than three years prior. *Id.* at 12. The First Circuit, however, concluded that the *O'Neil* "declaratory judgment holding R & H 'jointly and severally liable for all future costs of removal or remedial action incurred by the state relative to the Picillo site'" "did not trigger the statute of limitations for the groundwater cleanup because being held jointly and severally liable for all future costs of removal or remedial action is not a judgment for the *recovery* of such costs." *Id.*

The court further explained that § 113(g)(2) directs courts hearing § 107(a) actions to "enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to *recover* further response costs or damages." *Id.* at 12-13 (quoting § 113(g)(2)) (emphasis added by *American Cyanamid*). Thus, even though the declaratory judgment held R & H "'jointly and severally liable for *all future*

costs … incurred by the state *relative to the Picillo site*,'" and even though that "declaratory judgment is binding on subsequent actions to recover response costs or damages," the First Circuit held that the judgment did not trigger the statute of limitations because it "is not itself a judgment *for the recovery* of such costs or damages." *Id.* at 13 (emphasis added).

In a separate subsection of its opinion, the First Circuit also rejected the defendants' argument that the portion of the *O'Neil* judgment awarding specified damages for past soil remediation costs triggered the statute of limitations for potential future claims for other damages. *Id.* at 13-16. As the court explained, § 113(g)(3)(A)'s limitations period begins running "for any response costs or damages" only on "the date of judgment in any action … for recovery of *such* costs or damages." *Id.* at 13 (quoting § 113(g)(3)(A)) (emphasis and ellipsis added by *American Cyanamid*). Thus, the portion of the *O'Neil* judgment that actually awarded soil remediation damages started the statute of limitations running for claims seeking contribution towards *those specific damages*, but not for any other costs—including those that R & H subsequently incurred on groundwater cleanup.

Taken together, these two sections of *American Cyanamid* stand for the proposition that § 113(g)(3)(A)'s limitations period is triggered by neither (1) a declaratory judgment of liability that awards no costs or damages nor (2) an award of costs or damages distinct from those at issue in the subsequent action.

2. The Sixth Circuit's decision below gave the opposite answer to the question whether a "bare-bones" declaratory judgment triggers § 113(g)(3)(A)'s statute of limitations. In the Sixth Circuit's view, the fact that § 113(g)(2) "discusses [a] 'declaratory judgment on liability for *response costs*'" in relative proximity to § 113(g)(3)'s limitation that "'[n]o action for contribution for *any response costs* or damages may be commenced more than 3 years after … the date of judgment in any action under this chapter for recovery of *such costs* or damages'" "strongly suggest[s]" that a declaratory judgment, standing alone, is enough under § 113(g)(3)(A). Pet.App.17a-18a. (emphasis and ellipsis in original). That is the case, the court reasoned, even if the judgment in question "award[s] no specific amount of damages or costs." Pet.App.16a.

The Sixth Circuit thus gave the opposite answer to the same "declaratory judgment" question the First Circuit answered in the first relevant portion of *American Cyanamid*. *See* 381 F.3d at 12-13. According to the Sixth Circuit—and contrary to the law in the First Circuit—a "bare declaratory judgment" requiring a PRP to "pay for 'the entire cost of response activities relating to [a] site'" is a judgment that "impose[s] … response costs or damages" on the PRP. Pet.App.22a.

3. The Sixth Circuit tried to elide the circuit split it had created by suggesting that the two cases were factually distinct. In particular, the Sixth Circuit said that "*American Cyanamid* did not deal with a case in which one declaratory judgment purported to assign sitewide liability." Pet.App.21a. It also asserted that the court in *American Cyanamid* "had

to consider whether a declaratory judgment entered as to soil remediation caused the statute of limitations to begin running as to contribution regarding groundwater remediation." *Id.*

Respectfully, however, there is no material difference between the facts of this case and the facts at issue in *American Cyanamid*. The Sixth Circuit's assertion that "*American Cyanamid* did not deal with a case in which one declaratory judgment purported to assign sitewide liability," *id.*, is simply wrong. The First Circuit unambiguously referred to the *O'Neil* declaratory judgment as "holding R & H 'jointly and severally liable for *all future costs* of removal or remedial action incurred by the state *relative to the Picillo site*.'" 381 F.3d at 12 (emphasis added). Both cases thus concerned a declaratory judgment that purported to assign sitewide liability.

And while the decision below is correct that *American Cyanamid* found that a damages award with respect to one category of costs (soil remediation) did not trigger the statute of limitations for a different category of costs (groundwater cleanup), *see* Pet.App.20a-21a, that analysis—which appears in a separate subsection of the opinion—had nothing to do with the First Circuit's assessment of the bare declaratory judgment, *Am. Cyanamid*, 381 F.3d at 13-16. It is no more relevant to the declaratory-judgment question presented here than the past investigation costs the KRSG members recouped from one of the defendants in the *KRSG* litigation.

Perhaps for these reasons, even the Sixth Circuit seemed unpersuaded by its efforts to distinguish

American Cyanamid. The court ultimately admitted that "*American Cyanamid* did endorse the position that, when 'there has been no expenditure or fixing of costs for which a PRP may seek contribution,' CERCLA's statute of limitations does not begin to run." Pet.App.21a n.4 (quoting *Am. Cyanamid*, 381 F.3d at 12). Unable to distinguish that "broader language," the Sixth Circuit said only that the First Circuit's "position … d[id] not bind" it and, in any event, had insufficient "persuasive value." Pet.App.21a & n.4.

The split on the question presented is thus square: Following the decision below, a bare declaratory judgment triggers § 113(g)(3)(A)'s statute of limitations in the Sixth Circuit, but not in the First Circuit. This Court should grant review to resolve that conflict.

II. THE SIXTH CIRCUIT'S HOLDING IS INCORRECT.

Intervention is further warranted because the Sixth Circuit's interpretation of § 113(g)(3)(A)'s limitation period is wrong. The text of the limitations provision itself, contextual clues from elsewhere in CERCLA, background common-law principles, and sheer common sense all make clear that only a judgment that actually awards the "costs or damages" at issue is a judgment "for recovery of such costs or damages," as required to trigger the statute of limitations. *See* § 113(g)(3)(A).

1. The proper interpretation of § 113(g)(3)(A) begins, of course, with the text of § 113(g)(3)(A). Under that provision, "[n]o action for contribution for any response costs or damages may be commenced

more than 3 years after … the date of judgment in any action under [CERCLA] for recovery of such costs or damages." The plain meaning of that language is that the 3-year statute of limitations begins running only on "the date of judgment … for *recovery*" of the costs or damages at issue—i.e., a judgment that quantifies and awards them such that they can be *recovered*. As *American Cyanamid* correctly recognized, a bare declaratory judgment of liability does no such thing, so it leaves the statute of limitations untriggered. *See* 381 F.3d at 12.[7]

Further textual evidence that the statute of limitations cannot rest on a "bare-bones" declaratory judgment comes from § 113(g)(3)(A)'s use of the definite article "the." By tying the statute of limitations to "*the* date of judgment"—not "*a* date of judgment"—the statutory text presupposes that only a single date of judgment will qualify. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("The [habeas statute's] consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition."). And a bare

[7] Section § 113(g)(3)(A)'s "*for recovery of* such costs or damages" language is meaningfully different from that governing the statute of limitations for settlement-based contribution claims, which begins to run on "the date of … a judicially approved settlement *with respect to* such costs or damages." § 113(g)(3)(B) (emphasis added). Accordingly, even if Sixth Circuit cases interpreting § 113(g)(3)(B) were correctly decided, that court should not have relied upon them to "bolster" its view of § 113(g)(3)(A). *See* Pet.App.18a-20a (citing *RSR Corp. v. Com. Metals Co.*, 496 F.3d 552, 554, 558 (6th Cir. 2007)).

declaratory judgment of liability cannot be that singular judgment, because such a declaratory judgment requires one or more later judgments in order to actually award any costs—judgments that unquestionably would be "for recovery of such costs or damages."

2. Textual clues from elsewhere in CERCLA confirm § 113(g)(3)'s clear meaning. In particular, both *American Cyanamid* and the decision below recognize that § 113(g)(2), a nearby provision that specifically references declaratory judgments, informs the interpretation of § 113(g)(3). Only *American Cyanamid*, however, properly accounts for those provisions' differences, not just their similarities.

Section 113(g)(2) provides that a court hearing a § 107(a) action "shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." § 113(g)(2). The decision below read the inclusion of the phrase "response costs" in both this provision and § 113(g)(3)(A) to "strongly suggest" that § 113(g)(2)'s declaratory judgment "can also serve as" the judgment that triggers § 113(g)(3)(A). Pet.App.16a-18a. That reasoning, however, ignores § 113(g)(3)(A)'s requirement that a triggering judgment must be "for the recovery" of such costs and damages. By contrast, *American Cyanamid* properly recognized that while a § 113(g)(2) "declaratory judgment is binding on any subsequent actions to recover response costs or damages, … it is not itself a judgment for the recovery of such costs or damages." 381 F.3d at 13.

3. If any doubt remained as to the meaning of CERCLA's text, common-law contribution principles would eliminate it. As this Court has explained, "[n]othing in § 113(f) suggests that Congress used the term 'contribution' in anything other than [its] traditional sense"—*i.e.*, "the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.'" *Atl. Rsch.*, 551 U.S. at 138 (quoting Black's Law Dictionary 353 (8th ed. 2004)). Under the common law, "a cause of action for contribution ordinarily accrues when one tortfeasor has discharged more than that tortfeasor's proportionate share of a common obligation." *Est. of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 729 (Iowa 2008). Accordingly, this Court has recognized that "a PRP's right to contribution under § 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties." *Atl. Rsch.*, 551 U.S. at 139. And a tortfeasor does not discharge more than its fair share of liability merely upon entry of a declaratory judgment of liability.

The combination of that bedrock common-law principle of contribution liability and the Sixth Circuit's limitations rule threatens to foreclose § 113(f)(1) claims before they fully mature. *See* Pet.App.120a-121a. After all, if a mere declaratory judgment of liability starts the limitations period running *before* common liability is actually distributed inequitably, then the three-year limitations period may expire long before any contribution claim actually ripens. *See id.*

4. This case epitomizes the serious practical problems the Sixth Circuit's interpretation creates. Georgia-Pacific voluntarily began investigation and cleanup work on the sprawling Kalamazoo River site in the 1990s, and the declaratory judgments in question issued in the late 1990s and early 2000s when the initial site investigation was still in its early stages. At those points, it was far from fully known which areas of the site would need to be remediated, what cleanup work would be necessary, how much that work would cost, who contributed to the pollution, how and to what extent they did so, which aspects of the cleanup Georgia-Pacific would be asked to undertake, whether others would play a role in the cleanup effort, and whether Georgia-Pacific would pay for more than its fair share of any cleanup. No sane statutory scheme would preclude a contribution suit unless brought at that premature stage. And there is no reason—least of all the language Congress actually used in § 113(g)(3)(A) or any background common-law principles—to think that Congress intended such an absurd result.

III. THIS CASE OFFERS A CLEAN VEHICLE TO RESOLVE THIS EXCEPTIONALLY IMPORTANT QUESTION.

1. CERCLA is an enormously consequential statute that governs decades-long cleanup projects costing hundreds of millions of dollars. It is unsurprising, then, that this Court has frequently stepped in to clear up confusion about its proper interpretation. *See, e.g.*, *Territory of Guam*, 141 S. Ct. 1608; *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020); *Burlington*, 556 U.S. 599; *Atl. Rsch.*, 551 U.S. 128; *Cooper Indus.*, 543 U.S. 157; *United States*

v. Bestfoods, 524 U.S. 51 (1998); *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994). Indeed, the Court has done so even in the absence of a split. *Cooper Indus.*, 543 U.S. 157; *see* Pet. for a Writ of Cert., *Cooper Indus.*, 543 U.S. 157 (No. 02-1192), 2003 WL 23015035 (asserting no split). For good reason: The expansive nature of CERCLA cleanups—and the strong incentives to settle, which can limit the opportunities for authoritative resolution of contested issues—mean that critical questions can take years or even decades to produce developed splits.

2. The importance of the question presented here, moreover, is beyond dispute. The Sixth Circuit's novel interpretation of § 113(g)(3)(A), which conflicts with the First Circuit's rule, presages a chaotic rush of litigation as parties seek to preserve their contribution claims under § 113(f)(1). The shotgun litigation approach that the Sixth Circuit's rule forces on any defendant subject to a bare declaratory judgment of liability will clog judicial dockets, impose substantial but needless litigation costs on a host of parties, and, ultimately, cause cleanup burdens to be allocated less equitably and accurately in contravention of CERCLA's basic purpose of "ensur[ing] that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Burlington*, 556 U.S. at 602.

Here, for example, Georgia-Pacific has spent over $100 million cleaning up the Kalamazoo River and surrounding area over the course of decades. The district court found, after an exhaustive factual and equitable inquiry, that Georgia-Pacific should be responsible for only 40% of the cleanup costs. Aside

from the argument—rejected by the district court and left untouched by the Sixth Circuit—that International Paper was not a PRP at all, the Respondents did not challenge that allocation of costs on appeal. And yet, according to the Sixth Circuit, the only way for Georgia-Pacific to have recouped *any* of those costs would have been to file suit by 2001—long before many of those costs had been incurred, long before it was at all clear what further work would be required, and long before the imposition of the "inequitable distribution of common liability among liable parties" upon which "a PRP's right to contribution under § 113(f)(1) is contingent." *Atl. Rsch.*, 551 U.S. at 139.

Even if Georgia-Pacific had somehow had the foresight to do so (despite § 113(g)(3)(A)'s plain text), such a suit would have faced enormous practical problems. When investigation and remedial work are only just beginning, parties and courts will often have no practical way of knowing the relative culpability of various PRPs. It can (and in this case did) take years for evidence necessary to allow for an accurate cost allocation to emerge.

In the early 2000s, it was entirely unclear how much active removal of contaminated sediments would be required. Pet.App.38a-45a (summarizing the history of cleanup efforts as of 2018 and noting that, by that point, many issues remained outstanding). Ultimately, EPA opted for targeted removal actions—including time-critical actions in specific areas and the decontamination of specific so-called hot spots. Pet.App.44a-45a. Those actions were vastly more expensive than other alternatives EPA might have chosen, like monitored natural

attenuation. Moreover, several areas targeted for physical removal are located where only *some* of the PRPs could have played any role in causing the contamination. For example, some of the hot spot areas are upstream of Portage Creek and thus almost certainly cannot be attributed to the Bryant Mill. Pet.App.40a. These sorts of factual details are critical to any reasonable allocation of responsibility for costs. But they can be impossible to ascertain until EPA actually orders parties to undertake specific cleanup tasks. Indeed, even by 2018, there was still "a high level of uncertainty as to the shape of what remedies will actually apply, and no real basis to assess costs without even knowing the remed[ial work]" that is yet to come. Pet.App.85a.

Nor was it clear at the time of the declaratory judgments exactly *who* the responsible parties would include. Despite its diligent investigation, Georgia-Pacific learned the details of NCR's direct connection to the site only shortly before Georgia-Pacific filed suit in 2011. If Georgia-Pacific had attempted to sue NCR in the early 2000s, it may not have been able to establish NCR's liability at all.

The Sixth Circuit's rule will also impose needless litigation costs on a host of parties. Because CERCLA defines the universe of PRPs so broadly, prudent PRPs seeking to protect their right to seek contribution would have to cast their net exceptionally widely, potentially sweeping in everyone with any arguable connection to the site. The deadweight loss of forcing such parties—whose lack of responsibility may well have otherwise become clear over the course of the cleanup—to defend complex CERCLA cases is plain. So too is the

enormous additional burden such unrestricted litigation would impose on the courts.

According to the Sixth Circuit, frequent, obviously premature lawsuits involving a host of parties are a feature, not a bug, of its rule, because such lawsuits purportedly "ensure that the responsible parties get to the bargaining—and clean-up—table sooner rather than later." Pet.App.14a. Contribution actions, however, serve this purpose only when the fact-gathering and associated cleanup are sufficiently advanced and the costs sufficiently known that they can be accurately allocated.

3. Finally, this case is an excellent vehicle to take up the question presented. The relevant facts are not in dispute. The Sixth Circuit decided only this pure legal issue. And at least as to Weyerhaeuser, there is not even the possibility that the Sixth Circuit's judgment could be affirmed on alternative grounds, as Weyerhaeuser did not advance any such grounds to the Sixth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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