No. 22-465

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 Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL PAPER COMPANY

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QUESTION PRESENTED

CERCLA § 107 authorizes parties that have incurred response costs to bring an "action for recovery of costs" against other potentially responsible parties. In turn, § 113 authorizes a party held liable for response costs to bring an "action for contribution" against other potentially responsible parties provided that it is "commenced [no] more than 3 years after…the date of judgment in any action under [CERCLA] for recovery of such costs or damages." The question presented is whether a declaratory judgment in a § 107 cost-recovery action triggers the three-year statute of limitations for contribution actions.

RULE 29.6 STATEMENT

Respondent International Paper Company is a publicly held company that has no parent corporation. The Vanguard Group is the only shareholder owning 10% or more of International Paper Company.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The petition presents an obscure procedural question concerning an aspect of the statute of limitations for contribution claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that has been addressed in a sum-total of one appeals court decision, the one below. That decision correctly holds that a judgment of liability in an action for recovery of CERCLA response costs triggers the running of the limitations period for a § 113(f) contribution action.[1] That holding was the inevitable result under the statutory text, which provides that a § 113(f) contribution claim must be filed no "more than 3 years after…the date of judgment in any action under [CERCLA] for recovery of such costs or damages." Petitioner was adjudged liable in a prior action for recovery of response costs at the subject site, the Kalamazoo River Superfund Site, and so that judgment started the running of the clock for contribution claims. Petitioner, however, waited more than a decade to file suit. This petition is its last-ditch attempt to evade the consequence of its decision to delay bringing suit against Respondents for a decade after that judgment and *two decades* after it was first identified as a potentially responsible party (PRP) for the Site.

The decision below, while confronting an issue of first impression, was entirely consistent with the

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[1] Following the Court's practice, *see Territory of Guam v. United States*, 141 S. Ct. 1608, 1611 n.1 (2021), this brief cites CERCLA's provisions by their sections in the Act itself. The Act is codified at 42 U.S.C. § 9601, *et seq*.

handful of other cases to address related issues. That includes the First Circuit decision Petitioner contends held to the contrary. In fact, that decision, like the one below, recognized that judgment in an action for recovery of response costs for a type of remediation starts the clock running for contribution claims for that same type of remediation. That was not only the understanding of the court below, but also of the two previous appeals court decisions to consider that First Circuit decision. There is no conflict in authority.

The question presented is also utterly inconsequential beyond the confines of this case. The petition identifies precisely zero instances in which other parties held liable in cost-recovery actions have chosen to sit on their hands for years and then contended that their belated contribution claims for the same remediation satisfy the statute of limitations because the amounts they seek were subject only to a declaration, but not a dollar-and-cents award, in the earlier judgment. That appears to have happened in this instance only because Petitioner mistakenly assumed that it could avail itself of further § 107 claims, subject to a more generous statute of limitations. But an unbroken line of appeals court decisions in the years since the initial judgment here has made clear that a party held liable for response costs has recourse only through § 113(f) contribution claims, subject to a stricter limitations period. Although Petitioner concedes that to be "the uniform view of the courts of appeals," Pet.11, it ignores the upshot of this clarifying case law: Petitioner's evident mistake will not be repeated.

Nor is there any basis for the parade of horribles—a barrage of premature suits, clogged judicial dockets, even chaos—portended by the petition. Appeals court decisions dating back 16 years have applied essentially the same rule as the decision below for contribution actions premised on CERCLA settlements, without any noticeable uptick in litigation, let alone clogged dockets or chaos. By contrast, Petitioner's statutory position would threaten disordered delay by effectively eliminating the statute of limitations for many CERCLA contribution claims. Permitting liable parties as long as they like to seek contribution is the only way that Petitioner sees to avoid the consequences of its ill-conceived litigation strategy. But Congress expressly rejected that policy in favor of a three-year limitations period that it expected would bring PRPs to the negotiating table early in Superfund clean-ups, not decades down the line.

The petition should be denied.

STATEMENT

A. Statutory Background

Congress enacted CERCLA "'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.'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 4 (2014) (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009)). "Under CERCLA, the Federal Government may clean up a contaminated area itself, see § 104, or it may compel responsible parties to perform the cleanup, see § 106(a)." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004) (citation

omitted). "These actions typically require private parties to incur substantial costs in removing hazardous wastes and responding to hazardous conditions." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994).

CERCLA provides two private causes of action to establish liability for and recover response costs from third parties. Section 107 authorizes a party that has incurred "necessary costs of response" to recover them from potentially responsible parties. *See also Cooper Indus., Inc.*, 543 U.S. at 163 & n.3. In an "initial action for recovery of [] costs" under § 107, "the court 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). Section 107 claims are subject to a rolling limitations period triggered by the timing of response activities. *Id.*

In turn, § 113(f) authorizes a party facing "an inequitable distribution of common liability among liable parties" to seek contribution from other PRPs. *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 139 (2007). Specifically, as relevant here, a party that has been sued or held liable for response costs may "seek contribution from any other person who is liable or potentially liable" and thereby "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." § 113(f)(1). Section 113(f)(1) contribution actions must be commenced not "more than 3 years after…the date of judgment in any action under [CERCLA] for recovery of such costs or damages." § 113(g)(3).

B. Factual Background

The Kalamazoo River Superfund site (the "Site") is comprised of 80-plus miles of the Kalamazoo River in Southwest Michigan and its tributary Portage Creek, which are contaminated with polychlorinated biphenyls (PCBs) from paper mill discharges. Because of the PCB contamination, the EPA placed the Site on the National Priorities List in 1990. Pet.App.133a, 139a.

EPA identified Petitioner and two other owner/operators of paper mills as PRPs. In 1990, those companies formed an unincorporated association called the Kalamazoo River Study Group (KRSG) and started to perform remediation work at the Site. Pet.App.5a. KRSG's members included Allied Paper Company, which operated the Bryant Mill while it discharged PCBs. Pet.App.5a. Allied took over operation of the Bryant Mill from St. Regis Paper Company in 1956. Pet.App.135a. St. Regis was acquired by Champion Paper Company via a merger in 1984, and Respondent International Paper Company acquired Champion by merger in 2000. Pet.App.47a.

In 1995, the KRSG initiated an action against multiple parties—but *not* International Paper's predecessor, Champion—seeking cost recovery and declaratory relief under § 107 relating to the PCB contamination of the Site. Pet.App.5a–6a. Two defendants responded by filing cost-recovery counterclaims against Petitioner, "asserting that [it was] the KRSG members [that] were responsible for the PCB contamination at the site." Pet.App.6a. Following three years of litigation, the district court entered judgment on both sets of cost-recovery claims (the "1998

Judgment"). In that judgment, Petitioner and the other KRSG members were found liable "'for the PCB contamination of the [Site].'" Pet.App.6a. The trial court confirmed Petitioner's liability for "'the entire cost'" of PCB remediation at the Site in subsequent judgments entered in 2000 and 2003. Pet.App.7a.

Petitioner knew as early as 1990, when EPA listed the Site and identified Petitioner as a PRP, Pet.App.5a, that it needed to identify all other PRPs to share in the PCB remediation costs. Accordingly, Petitioner and the other members of the KRSG conducted an extensive search for other PRPs, which identified International Paper's predecessor St. Regis and many others. *See* CA6 Dkt. 95., App. Vol. VI, at 1714. Not that an extensive search was needed to identify St. Regis: KRSG member Allied took over operation of the Bryant Mill directly from St. Regis. Pet.App.135a.

C. Procedural History

After years of sharing in the cost of remediating the Site with Petitioner, Allied went bankrupt in 2009. Pet.App.33a, 104a. Petitioner then proceeded to file the present contribution action, more than a decade after entry of the 1998 Judgment holding it liable for response costs.

1. In 2010, Petitioner filed suit against International Paper and NCR Corporation and later amended its complaint to add Weyerhaeuser Company as an additional defendant.[2] Petitioner asserted § 107 cost-recovery claims and § 113(f)(1) contributions claims

[2] NCR settled while the case was on appeal. Pet.13.

against both International Paper and Weyerhaeuser in connection with the same PCB remediation and Site addressed in the *KSRG* litigation and the 1998 Judgment. Pet.App.7a–8a. The district court, following what Petitioner recognizes to be "the uniform view of the courts of appeals," held that Petitioner's ability to bring § 113(f) contribution claims precluded its claims under § 107. Pet.App.118a–19a.

International Paper pressed two primary defenses before the district court and on appeal. First, that Petitioner's § 113(f) contribution claim is time-barred because Petitioner waited much longer than the three years it had from the date of the 1998 Judgment to file its claim. And, second, that International Paper is not a "liable party" under CERCLA's secured-creditor exemption, *see* § 101(20)(A), because the Bryant Mill began discharging PCBs after Allied took over its operations, at which point International Paper's predecessor (St. Regis) only held title to the mill to secure payment under a 1956 lease transaction with Allied. Pet.App.159a, 162a.

Petitioner's years-long delay in seeking to recover response costs from International Paper complicated presentation of its secured-creditor defense. Two key witnesses who had represented St. Regis and Allied in negotiating the 1956 transaction died in 2004—six years after entry of the 1998 Judgment. CA6 Dkt. 78, App. Vol. III, at 965–66. International Paper was deprived of their testimony and forced to rest its defense on incomplete files of decades-old documents. *See generally* Pet.App.163a–67a.

2. The district court ruled against International Paper on both defenses. The court acknowledged that "[m]any potential witnesses, such as employees and officers of the mills, are no longer around to share memories of long-ago events." Pet.App.30a. But with respect to the secured-creditor exemption, the court found that, based on the available evidence, International Paper did not carry its burden. Pet.App.162a–64a.

The district court also held that § 113(g)(3)'s three-year statute of limitations did not bar this contribution action because International Paper was not a party to the *KRSG* litigation. Pet.App.120a–21a.

3. The Sixth Circuit unanimously reversed, holding that Petitioner's § 113(f) contribution claims against International Paper and Weyerhaeuser were time-barred. In so holding, the court rejected Petitioner's argument that the 1998 Judgment did not trigger § 113(g)(3)'s statute of limitations for contribution actions. Pet.App.22a–23a.

Looking first to CERCLA's text, the Sixth Circuit observed that § 113(g) requires entry of a "'declaratory judgment on liability for *response costs*'" in a § 107 action before "[i]mmediately" proceeding to require that a contribution action "'for *any response costs*'" be commenced no "'more than 3 years after…the date of judgment in any action under this chapter for recovery of *such costs* or damages.'" Pet.App.17a–18a (quoting statute) (emphases in original). Accordingly, "the 'declaratory judgment on liability for response costs' mentioned in § 113(g)(2) can also serve 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." Pet.App.18a.

Next turning to the case law, the Sixth Circuit explained that, while this was an issue of first impression in the circuit courts, it had previously reached the same conclusion in an analogous situation involving a CERCLA settlement that required a party to remediate a site without fixing the cost of doing so. Pet.App.18a–20a (discussing *RSR Corp. v. Com. Metals Co.*, 496 F.3d 552, 558 (6th Cir. 2007)).

Finally, the Sixth Circuit rejected Petitioner's argument that the First Circuit's decision in *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004), supported the opposite result. That case, the court explained, was inapt because it "involved judgments for two separate types of environmental remediation," soil remediation and groundwater remediation. Pet.App.20a. It therefore stands only for the proposition that a judgment in an action to recover one type of response costs does not trigger the limitations period applicable to a contribution claim for a different type of response costs. Pet.App.21a.

Having ruled for International Paper on the limitation issue, the Sixth Circuit declined to reach its secured-creditor defense. Pet.App.27a.

4. Petitioner sought rehearing and rehearing en banc. Notably, its petition did not raise the statute-of-limitations issue that Petitioner now contends is "exceptionally important" and presents an "urgent[] need[]" for review. Pet.25, 3. Rehearing was denied,

without any judge requesting a vote on the petition. Pet.App.170a.

REASONS FOR DENYING THE PETITION

The Petition presents an obscure procedural question that has arisen but once since Congress authorized CERCLA contribution claims in 1986. The decision below correctly decided that issue of first impression, holding that a § 107 judgment declaring a party liable for response costs triggers the running of § 113(g)(3)'s three-year limitations period for contribution claims concerning those response costs. That decision comports with CERCLA's text, which expressly recognizes a § 107 action to be an "action…for recovery of [] costs" triggering the limitations period. § 113(g)(3). It comports with Congress's purposes in enacting the statute of limitations for contribution claims of promoting timely remediation, encouraging early resolution of liability, and providing some measure of repose to potentially responsible parties. And it comports with the decisions of every appeals court to consider related issues, such as the effect of CERCLA settlements. That includes the First Circuit's decision in *American Cyanamid*, whose reasoning Petitioner distorts in an attempt to manufacturer a circuit split. There is no conflict in authority. And the issue presented here, while important to the parties, is unimportant outside the confines of this case and unlikely ever to arise again. Review should be denied.

I. There Is No Circuit Conflict

Petitioner's claim that the decision below creates a circuit split with the First Circuit's decision in *American Cyanamid* does not withstand scrutiny. As the decision below concluded, *American Cyanamid* did not implicate or decide the question presented here. While that decision contains language that, taken out of context, may seem to speak broadly on the application of § 113(g)(3)'s statute of limitations to declaratory judgments of liability, its holding on that point is inapplicable to (as here) a declaratory judgment entered in an initial action for the recovery of response costs for the same overall remediation as sought in a later contribution action. In fact, *American Cyanamid* recognizes that a § 107 judgment like the one here triggers § 113(g)(3)'s time-bar for subsequent contribution claims concerning the same type of remediation, contradicting Petitioner's statutory position.

American Cyanamid involved two separate actions. "*O'Neil*" was a § 107 action filed by Rhode Island to recover its response costs for a "soil cleanup" at the "Picillo site." 381 F.3d at 10, 13. In 1988, the trial court entered judgment against Rohm & Haas for those soil-remediation response costs and also declared it liable for future response costs. *Id.* at 10.

Seven years later, Rohm & Haas brought a § 113(f) contribution action against various other PRPs to recover "response costs related to groundwater cleanup" that it had paid pursuant to a consent decree with the United States. *Id.* at 11. Defendants in that action contended that it was time-barred as a result of the

1988 judgment's declaration of Rohm & Haas's liability for future response costs. *Id.* at 11–12.

The First circuit disagreed, holding that the initial "judgment did not trigger the statute of limitations for the groundwater cleanup." *Id.* at 12. *O'Neill*, it explained, "was an initial action for the recovery of costs associated *only with the soil remediation*." *Id*. at 13 (emphasis added). Accordingly, the *O'Neil* judgment was "not itself a judgment for the recovery of [] costs or damages" associated with groundwater remediation and so did not trigger § 113(g)(3)'s time bar for contribution claims for groundwater remediation. *Id.* In other words, a judgment in an action to recover response costs for a type of remediation triggers § 113(g)(3)'s time-bar for contribution claims concerning *that remediation*, but an accompanying declaration of liability does not trigger the time-bar for contribution claims concerning *other types of remediation*.

American Cyanamid subsequently makes its reliance on that distinction crystal clear. It recognizes that "[t]he *O'Neil* judgment regarding soil remediation triggered the statute of limitations for a contribution action regarding soil remediation." *Id*. at 14. By contrast, "at the time of the *O'Neil* judgment, R & H did not have a contribution claim, declaratory or otherwise," as to groundwater remediation, because it was uncertain "whether there was groundwater contamination at the Picillo site." *Id.* at 14–15. The court went so far as to spell out the relevant point of distinction: "the *O'Neil* judgment pertaining to soil remediation could not trigger the statute of limitations for a contribution action for groundwater remediation."

Id. at 15. The key fact on which *American Cyanamid* turns is that the initial action sought recovery for a different remediation than the later contribution action.

This understanding of *American Cyanamid* is not only plain on the face of the decision, but is the reading of all three appeals court decisions to consider it. The decision below read *American Cyanamid* to turn on the fact that it "involved judgments for two separate types of environmental remediation," a "crucial" distinction from this case, where both the initial and current actions involve only PCB remediation. Pet.App.20a–21a. Likewise, Judge Sutton's opinion in *RSR Corp.*, 496 F.3d at 559, followed *American Cyanamid*'s approach, on the understanding that it approved application of § 113(g)(3)'s time-bar to future response costs of the same type addressed in a prior § 107 recovery action. And the Ninth Circuit's decision in *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1214 (9th Cir. 2015), rejected Petitioner's reading of *American Cyanamid*, instead recognizing it to hold "that a new claim for contribution based on new settlement liability (groundwater) cannot be barred by an earlier settlement for a different contribution claim (soil)." No court has accepted Petitioner's view (at 4) that *American Cyanamid* restricts § 113(g)(3)'s time-bar to only contribution claims for the specific dollars and cents awarded in a § 107 judgment.

There is no conflict between *American Cyanamid* and the decision below because the *KRSG* litigation, the 1998 Judgment, and the present contribution action all address *the same remediation*. The *KRSG*

litigation was an action for the recovery of costs associated with PCB remediation of the Site. Pet.App.5a. The 1998 Judgment in that case held "the KRSG members—including [Petitioner]—liable 'for the PCB contamination of the [Site]'" and therefore liable for PCB remediation. Pet.App.6a. And now, in this action, Petitioner seeks contribution for the exact same PCB remediation, at the exact same Site, that was the subject of the *KRSG* litigation and 1998 Judgment. Consistent with the decision below, *American Cyanamid* recognizes that § 113(g)(3)'s time-bar properly applies to this sort of same-type-of-remediation claim under § 113(f). 381 F.3d at 14–15. The two decisions are not in conflict.

II. The Issue Presented Lacks Importance

Petitioner claims to have raised an "exceptionally important question" and sounds alarm bells that, if the decision below is not overturned, a "chaotic rush of litigation" will ensue and "clog up dockets for years." Pet.25, 26, 5. Fortunately, there is no chance of that. Appeals courts decisions dating back 16 years have applied essentially the same rule as the decision below with respect to CERCLA settlements, without any noticeable uptick in "premature" contribution actions. The obscure procedural issue presented here was, as the court below recognized, one of first impression for an appeals court, reflecting its inconsequential status. Pet.App.18a, 20a. Indeed, the only reason that issue arose in this case was Petitioner's unusual decision to delay so long in filing suit—a decision unlikely to be repeated, given intervening precedents clarifying that parties held liable for response costs

may not take advantage of the rolling limitations period applicable to § 107 claims.

A. The issue Petitioner raises is unlikely to repeat because parties now understand what Petitioner apparently did not two decades ago: that a § 107 cost-recovery claim, with its more generous limitations period, is not available to a party that already has been held liable for response costs, including by way of a declaratory judgment. Instead, the *only* remedy available to such a party is a § 113(f)(1) contribution claim, which is subject to the clear three-year limitations period of § 113(g)(3).

Decisions over the past two decades have clarified the operation of CERCLA's remedial provisions and, specifically, the availability of § 107 versus § 113(f) claims. Guided by this Court's decision in *Atlantic Research*, the lower courts have recognized that the remedies provided by those sections are "mutually exclusive," such that a party subject to a § 113(f) "trigger"—*i.e.*, a party found liable in a § 107 cost-recovery action or that has settled with the government—may *only* proceed against other parties under § 113(f), with its strict three-year limitations period. *See*, *e.g.*, *Hobart Corp. v. Waste Mgt. of Ohio, Inc.*, 758 F.3d 757, 766 (6th Cir. 2014) ("[B]ecause Appellants could have sued for contribution, they could not file and cannot proceed with a § 107(a)(4)(B) cost-recovery action."); *Whittaker Corp. v. United* States, 825 F.3d 1002, 1007 & n.5 (9th Cir. 2016) (same; collecting cases); *cf. Atl. Rsch.*, 551 U.S. at 139 (stating that "§§ 107(a) and 113(f) complement each other by providing causes of action to persons in different procedural circumstances") (quotation marks omitted). Indeed,

Petitioner concedes that this is "the uniform view of the courts of appeals." Pet.11.

Accordingly, any party found liable under § 107 now knows that its sole recourse against other PRPs is a § 113(f) contribution action, subject to its strict three-year statute of limitations. As a result, the decision below stands to affect only a limited universe of parties: those that are sued for response costs, decline to file § 113(f) contribution claims against other PRPs at that time, are adjudged liable, and *then* decide to sit on their contribution claims beyond § 113(g)(3)'s three-year limitations period. In all likelihood, this is a class of one: Petitioner.

B. Petitioner's claim that requiring timely filing of CERCLA contribution claims will lead to chaos and unintended consequences is precisely backwards. It is Petitioner's statutory position, which the court below soundly rejected, that would wreak havoc.

Petitioner's doomsaying is belied by the fact that appeals court decisions going back 16 years have applied the same rule to § 113(f) contribution claims that follow CERCLA settlements, without prompting "a barrage of premature protective suits." Pet.3. In a 2007 decision, the Sixth Circuit held that a settlement placing "all liability" for "future response costs" on the settling party triggered the three-year limitations period for it to bring contribution claims against other PRPs. *RSR*, 496 F.3d at 558. In so holding, the court rejected the argument—paralleling Petitioner's argument here—that the statutory time-bar applies only to already-incurred response costs awarded in a settlement. *Id.*; *see also* Pet.22 n.7 (noting *RSR*'s

holding). In a 2015 decision, the Ninth Circuit adopted and applied the same rule. *ASARCO*, 792 F.3d at 1215. It too rejected the argument that "'such costs or damages' in the statute of limitations means that [a] claim for contribution only came about when 'such costs or damages' became fixed." *Id.* Settlements of response-cost liability are a ubiquitous feature of CERCLA remediations, *see generally* Caroline Broun & James O'Reilly, Superfund and Brownfields Cleanup § 13:1 (3d ed. 2022), and yet there is no indication that these decisions have led to even an uptick in cases, let alone a litigation "barrage." The petition's silence on this salient experience speaks volumes.

To the extent that these decisions and the decision below prompt liable parties to file some contribution actions sooner rather than later, that is entirely consistent with Congress's design. It aimed to encourage liable parties to be *proactive* and seek out and name other PRPs *early* in the process to achieve 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 N. & Santa Fe Ry. Co.*, 556 U.S. at 602. Thus, it designed CERCLA's remedial provisions to "bring[] all…responsible parties to the bargaining table at an early date." H.R. Rep. No. 253(I), 99th Cong., 1st Sess., at 80 (1985). And it specifically anticipated that imposing an "explicit statute of limitations for the filing of cost recovery actions" would serve to prompt their "timely filing," "to assure that evidence concerning liability and response costs is fresh and to provide a measure of finality to affected responsible parties." *Id.*

at 79. That liable parties would bring contribution actions in a timely fashion is a feature, not a bug.

By contrast, Petitioner's position would eliminate the limitations period for contribution claims by a party held liable for the cost of ongoing and future remediation. *See infra* § III.C. Thus, a party held liable for response costs could wait years or even decades before alerting other PRPs of potential liability. That would drag out the assignment of liability for remediation costs, delay funding for cleanups, frustrate early negotiation and settlement, and place unsuspecting parties at risk of having contribution claims sprung on them decades after the commencement of remediation. In short, it is Petitioner's statutory position, and not that of the decision below, that would lead to the precise ills that Congress sought to avoid by imposing a statute of limitations for contribution claims.

III. The Decision Below Is Correct

The decision below follows CERCLA's statutory text, promotes CERCLA's purpose of encouraging the timely remediation of hazardous waste sites, and avoids the absurd result of Petitioner's position, which would effectively eliminate the statute of limitations for many contribution claims. It is correct in every dimension.

A. Begin with the text. Section 113(g)(3) requires that a contribution action "for any response costs or damages" be commenced no "more than 3 years after…the date of judgment in any action under [CERCLA] for recovery of such costs or damages." First, the *KRSG* litigation was indisputably *an action for recovery of response costs*—twice over. The KSRG,

including Petitioner, brought the action under § 107 to recover the response costs that it had incurred for PCB remediation. Pet.9; Pet.App.5a; Dist. Ct. Dkt. 741-17, at 5 (1998 Judgment) (discussing the "substantial past costs" the KSRG sought to recover). And then defendants in that action filed their own counterclaims against the KSRG and its members, seeking to hold them liable for response costs. Second, both sets of claims sought to impose liability *for response costs* for PCB contamination of the Site, Pet.App.5a–6a—the same response costs that are the subject of Petitioner's contribution claims here. Finally, the 1998 Judgment was *a judgment in that actio*n, holding "the KRSG members…liable 'for the PCB contamination of the [Site].'" Pet.App.6a; Dist. Ct. Dkt. 741-17, at 12 (1998 Judgment).

Petitioner evades this straightforward application of the statutory provision by effectively rewriting it. Rather than take the statutory text as it is, Petitioner's analysis treats the phrase "judgment in *any action under [CERCLA]* for recovery of such costs or damages" as if it read "judgment for recovery of such costs or damages." In fact, the Petition repeatedly elides the statutory text in that way. *See* Pet.4 (twice), 14, 21, 22, 23. But what triggers the § 113(g)(3)'s time-bar is not a "judgment for recovery of costs or damages," but a "judgment *in any action*…for recovery of such costs or damages." And the *KRSG* litigation, in which the 1998 Judgment was entered, was indisputably such an action, as the court below recognized. Pet.App.5a ("In 1995, KRSG initiated a cost-recovery action under CERCLA § 107…, seeking response costs…."). Petitioner's refusal to confront that fact, let

alone the actual statutory text, confirms that its statutory position is indefensible.

B. Statutory context points in the same direction. "The interlocking language and structure" of § 113, *Territory of Guam*, 141 S. Ct. at 1613, supports the interpretation of the court below and further contradicts Petitioner's position. Section 113(g)(2), which addresses limitation periods for § 107 actions, is entitled "Actions for Recovery of Costs." It divides up § 107 actions into two categories, with their own limitations periods: "[a]n initial action for recovery of the costs referred to in section [107]" and a "subsequent action or actions under section [107]…for further response costs." For cases in the former category, it requires the court 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."

That provision addressing "actions for recovery of costs" is immediately followed by § 113(g)(3), which addresses contribution actions. It provides that contribution actions "for any response costs or damages" must be commenced no "more than 3 years after…the date of judgment in any action under this chapter for recovery of such costs or damages." The two provisions fit together hand-in-glove: the former controls the timing of § 107 "actions for recovery of costs," and the latter keys the timing for contribution actions based on a judgment in an "action…for recovery of such costs." As with § 113(f)'s "family of contribution provisions," § 113(g)'s family of limitations provisions must be "properly read in sequence as integral parts of a whole," *Territory of Guam*, 141 S. Ct. at 1613

(quotation marks and alteration omitted), a whole that sets an overall sequence and timeline for CERCLA cost recovery. Petitioner makes no attempt to reconcile these closely related provisions, instead wasting its breath on a pointless meditation on the import of the word "the." Pet.22–23.[3]

Petitioner also gives short shrift to the Sixth and Ninth Circuit decisions, discussed above, adopting the same interpretation of the § 113(g)(3)'s statute of limitations for contribution claims following CERCLA settlements. *See supra* § II.B. It does not even mention the Ninth Circuit's *ASARCO* decision, and it relegates discussion of the Sixth Circuit's *RSR* decision to a footnote (at 22 n.7) that does not contest that decision's statutory holding. Instead, Petitioner contends that § 113(g)(3)'s "*for recovery of* such costs or damages" language with respect to judgments meaningfully differs from its "*with respect to* such costs or damages" language with respect to settlements.

But this is just another iteration of Petitioner's familiar statutory sleight-of-hand. As noted, the provision does not refer to judgments "for recovery of such costs or damages," but to judgments "*in any action*…for recovery of such costs or damages." Without Petitioner's elision of the statutory text, it is plain that § 113(g)(3) operates identically on settlements and judgments, starting the three-year limitations period from "the date" of either a settlement or judgment. Petitioner identifies no reason why Congress would treat cost-recovery settlements—which

[3] Which once again relies on ignoring § 113(g)(3)'s "in any action" language. *See supra* § III.A.

Petitioner is prepared to concede always trigger the limitations period, *see* Pet.22 n.7—any differently from judgments in cost-recovery actions. None is conceivable.

C. The decision below furthers CERCLA's policy of achieving timely cleanup of Superfund sites by bringing PRPs to the table early in the process. *See supra* § II.B. Despite acknowledging that policy (at 3, 5, 29), Petitioner refuses to confront its position's most glaring practical defect on that score: as the court below observed, "if the statute of limitations does not begin running at the entry of the settlement/judgment, it is not clear when the limitations period *would* begin running." Pet.App.19a.

In Petitioner's view—the one it needs to avoid its own misfortune—the answer to that question is never, because response-cost liability not subject to a dollar-and-cents award does not even trigger the limitations period. A PRP could be held liable in a § 107 action for all future response costs for a Superfund site (as Petitioner was) and then wait until the time of its choosing, no matter how many years or decades in the future that may be, to bring contribution claims against other PRPs (as Petitioner did). No matter that, in the interim, PRPs may have been bought and sold under the impression that liability was long settled, key evidence may have gone stale or been discarded, and witnesses may have died. It doesn't take a master strategist to conceive of how this would be abused.

How can that result be squared with Congress's decision to impose a statute of limitations on

contribution claims? Petitioner does not say, but the answer is that it cannot. If Congress intended to create a statute of limitations with a hole big enough to fit an entire Superfund site, there would be some indication of that in the text. Instead, in a short, plain sentence, Congress imposed a three-year limitations period. That is what it meant. *See* H.R. Rep. No. 253(I), 99th Cong., 1st Sess., at 79 (1985) ("This section establishes a three-year statute of limitations for the filing of an action for contribution for response costs or damages.").

Likewise, Petitioner's position is impossible to square with the fact that Congress imposed limitations periods for § 107 cost-recovery actions keyed to the timing of remediation actions at the site. § 113(g)(2). Under Petitioner's view, the party actually doing the remediation is limited in terms of when it may bring suit against other PRPs, while reluctant parties who refuse to pitch in and ultimately wind up with a § 107 judgment against them for future response costs have all the time in the world to seek out and sue other PRPs. It is no overstatement to say that this turns the statutory scheme on its head: Congress made a considered choice to give PRPs who voluntarily undertake clean-up activities the "substantially more generous" limitations periods for § 107 actions, as opposed to the more restrictive period applicable to § 113(f) contribution claims. *Schaefer v. Town of Victor*, 457 F.3d 188, 198 (2d Cir. 2006) (quotation marks omitted); *see also Hobart*, 758 F.3d at 767. Petitioner's statutory position reverses that preference, which makes no sense.

The facts of this case illustrate both how CERCLA's timing provisions further Congress's policy of encouraging timely remediation and resolution of liability and how Petitioner's statutory position frustrates those ends. After EPA identified Petitioner as a PRP in the early 1990s, Petitioner and the other members of the KRSG both began remediation and did what PRPs typically do to mitigate their own potential liability: they retained consultants to conduct an extensive search for other PRPs. *See* CA6 Dkt. 95., App. Vol. VI, at 1714. Having begun remediation, they proceeded to file suit against the PRPs they identified so as to apportion liability at the earliest possible juncture, when remediation was still in its early phases. That is, as noted, what Congress intended to happen.

The same cannot be said of the KSRG's decision not to pursue International Paper's predecessor, Champion, when it sought to establish the liability of other PRPs in its 1995 suit. That omission was almost certainly deliberate, given that KSRG member Allied already bore liability from its operation of the Bryant Mill, Pet.App.162a, and risked more still if it sued a party whose defense would have involved putting on evidence of Allied's liability. In any event, that decision meant that International Paper was unaware of potential liability when it purchased Champion in 2000. And by the time Petitioner asserted its contribution claim against International Paper—15 years after filing the initial recovery action—evidence had been lost to time, as had key witnesses for its defense. These kinds of consequences are precisely what Congress sought to avoid by requiring that contribution

claims be filed within three years of a determination of liability. *See generally Bowen v. City of New York*, 476 U.S. 467, 481 n.13 (1986) ("Statutes of limitations…are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.") (quotation marks omitted).

Ultimately, as Judge Sutton observed, "there is little question that Congress intended to impose a limitations period on actions under CERCLA…and intended a limitations period to apply even *before* a site was fully cleaned up[.]" *RSR Corp.*, 496 F.3d at 559 (emphasis added). That is undisputedly how it treated § 107 cost-recovery claims: the statute of limitations runs from the *commencement* of the remedial process. There is no indication Congress intended a radically different approach for § 113(f) contribution claims, particularly when it made the trigger for those claims a judgment in a cost-recovery action.

D. Finally, Petitioner's claim (at 4) that a plain reading of CERCLA's statute of limitations will cause the limitations period to run "long before the identities of all those who should equitably share [response] costs [are] known" is unsupportable.

A party sued for response-cost liability has recourse to all the tools of civil discovery to identify other potentially responsible parties, which it can then join in that pending action—all *prior* to any judgment that triggers the limitations period. Further, once a judgment is entered—which usually takes years—a liable party has three additional years to

investigate other potentially responsible parties before filing a § 113(f) contribution action. Needless to say, parties facing CERCLA liability, and especially parties already held liable, have enormous financial incentives to identify other PRPs through diligent investigation. And it is not as if the evidence of other parties' liability for conduct that is often long in the past will somehow become more available with the passage of time; to the contrary, memories fade and evidence dissipates.

The facts of this case demonstrate the general point. Petitioner implies (at 4) that it could not possibly have known that International Paper's predecessor St. Regis was a PRP within three years of the 1998 *KRSG* Judgment. In fact, Petitioner investigated and was aware of St. Regis's status as a PRP even *before* the KRSG filed suit in 1995. CA6 Dkt. 95., App. Vol. VI, at 1714 (1991 report identifying St. Regis).

It would be ludicrous to contend that Petitioner could not have discovered the relevant parties within the *11 years* between the EPA's designation of the Site in 1990 and the expiration of the statute of limitations for contribution claims in 2001. And that is not an unusual timeline for CERCLA cases. If over a decade is not enough time to identify other PRPs, then no amount of time would suffice. Congress, sensibly enough, rejected the view that CERCLA cases should go on forever.

Finally, there is no merit to Petitioner's objection (at 24) that "the Sixth Circuit's limitations rule threatens to foreclose § 113(f)(1) claims before they fully mature." Even if a party held liable for response

costs has not incurred *any* response costs within *three years of the judgment*—which is itself unlikely—that party can nonetheless seek a declaratory judgment against any other PRPs for their shared liability in a § 113(f) contribution action commenced within the statutory limitations period. *See New York v. Solvent Chem. Co.*, 664 F.3d 22, 26–27 (2d Cir. 2011). After the initial liability determination is made, that party can then seek to prove up any later-incurred recoverable costs in subsequent actions against those PRPs. *Id.* at 27; *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 451 (6th Cir. 2004). This is, it should be noted, the same sequence that Congress prescribed for § 107 cost-recovery claims, where an "initial action" may be followed by a "subsequent action or actions" for "further response costs," with the issue of liability already determined. § 113(g)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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