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

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

The case for certiorari here is simple: The Sixth Circuit split with the First Circuit by incorrectly answering an exceptionally important question with far-reaching implications for CERCLA cleanups across the country. Despite their best efforts, Respondents undermine none of that.

On the split, Respondents' half-hearted attempts to distinguish *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004), fall flat. Respondents chiefly gesture to a *separate section* of that opinion addressing a *distinct question* from the one at issue here. In the relevant section, however, the First Circuit expressly held that a bare declaratory judgment does not trigger § 113(g)(3)(A)'s statute of limitations "*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.* at 12 (first emphasis added). There is thus a square conflict on the Question Presented.

On the merits, Respondents primarily argue that the key question is whether an underlying § 107(a) suit as a whole—rather than the judgment that actually triggers the statute of limitations—is "for recovery of such costs." But even Respondents do not seem to fully believe that argument, as Weyerhaeuser admits that § 107(a) cases typically proceed in phases and concedes that "the courts of appeals have uniformly held" that judgments resolving "particular portions of the overall response costs … trigger[] the § 113(g)(3) statute of limitations for contribution only for *those costs*." Weyerhaeuser BIO 31. In other

words, it is the scope of the judgment—not the suit as a whole—that matters.

Finally, on importance, Respondents suggest that the limitations period makes no meaningful difference because CERCLA parties should be able to quickly identify all other PRPs. That suggestion stands up to neither common sense nor the record in this case, which shows that—despite timely and diligently investigating—Georgia-Pacific did not learn the details of NCR's role in contaminating the site until far later. Let stand, the Sixth Circuit's rule will frustrate Congress's goal of ensuring that those responsible for pollution bear the costs of cleaning it up.

ARGUMENT

I. THE SPLIT BETWEEN THE FIRST AND SIXTH CIRCUITS IS CLEAR.

1. As Georgia-Pacific's petition explained (at 16-21), the decision below cannot be reconciled with *American Cyanamid*. The Sixth Circuit's suggestion that *American Cyanamid* "did not deal with a case in which one declaratory judgment purported to assign sitewide liability," Pet.App.21a, runs headlong into *American Cyanamid*'s own description of the underlying *O'Neil* litigation as involving a "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,'" 381 F.3d at 12 (emphasis added). The two cases' holdings thus directly conflict as to whether such a declaratory judgment triggers the statute of limitations.

Undeterred, Respondents muster different versions of the same flawed argument, attempting to evade and minimize the split by pointing to aspects of the First Circuit's opinion that distinguish between soil and groundwater cleanup. IP BIO 11-14; Weyerhaeuser BIO 15-18. But the vast majority of these references come from the separate section of *American Cyanamid* titled "[t]he judgment for past soil remediation costs," not the relevant section titled "[t]he declaratory judgment in *O'Neil*." *Am. Cyanamid*, 381 F.3d at 12-13. For example, in claiming that "*American Cyanamid* … makes its reliance on that distinction [between soil and groundwater remediation] crystal clear" and that "[t]he key fact on which *American Cyanamid* turns is that the initial action sought recovery for a different remediation than the later contribution action," International Paper exclusively cites (at 12-13) language from that separate section of the First Circuit's opinion. Weyerhaeuser, too, devotes a lengthy paragraph (at 16) to what it candidly admits is a separate section of *American Cyanamid*.

2. To be sure, *American Cyanamid*'s declaratory judgment section briefly mentions that "[t]he *O'Neil* judgment was an initial action for the recovery of costs associated only with the soil remediation." 381 F.3d at 13. But the very next sentence clarifies that, in *O'Neil*, "[t]he district court *also* entered a declaratory judgment [on liability] for *all future costs* of removal or remedial action incurred by the state *relative to the Picillo site*" without limitation. *Id.* (emphasis added). Indeed, the court could scarcely have been clearer that "[t]his declaratory judgment 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.* at 12 (emphasis altered).

Respondents are thus simply wrong that "[t]he First Circuit's opinion is … best read to hold that the *O'Neil* declaratory judgment did not trigger the statute of limitations for groundwater costs *because* that judgment did not emerge from an action to recover those costs." Weyerhaeuser BIO 17-18 (emphasis altered); *see* IP BIO 11 (similar). After all, if *American Cyanamid*'s declaratory judgment section also turned on any soil versus groundwater distinction, no separate declaratory judgment section would have been needed; a single section focused on that distinction would have fully resolved the case.

3. Respondents' remaining split arguments fare no better. Both protest that other courts have understood *American Cyanamid* as Respondents do. IP BIO 13; Weyerhaeuser BIO 19. But the Sixth Circuit case International Paper cites discussed the portion of *American Cyanamid* awarding costs, not addressing the declaratory judgment. *RSR Corp. v. Com. Metals Co.*, 496 F.3d 552, 559 (6th Cir. 2007) ("In *American Cyanamid*, … the defendant claimed that a 1988 judgment … *for soil-cleanup costs* triggered the limitations period ….''). Moreover, both that case and the Ninth Circuit case Respondents cite involved the distinct limitations provision for contribution claims based on settlements, rather than the one that applies to judgment-based contribution claims. *Id.*; *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1214 (9th Cir. 2015); *see* Pet.22 n.7 (explaining the textual difference between the two provisions).

Weyerhaeuser also asserts without basis (at 19-20) that the First Circuit might "reconsider its position in light of *Atlantic Research*." But *Atlantic Research* held merely that PRPs can bring § 107(a) suits; it said nothing about the limitations question at issue here and in *American Cyanamid*. *See United States v. Atl. Rsch. Corp.*, 551 U.S. 128 (2007). There is thus no reason to think the First Circuit's rule is anything but settled.

4. Tellingly, even Weyerhaeuser can bring itself to claim only that "[t]here is no *meaningful* circuit conflict," Weyerhaeuser BIO 15 (emphasis added)—much like the decision below was ultimately unable to distinguish *American Cyanamid*'s "broader language" and so said only that the First Circuit's "position … d[id] not bind" the Sixth. Pet.App.21a n.4. Weyerhaeuser's implicit concession is correct. Whereas "*American Cyanamid* … endorse[d] 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," *id.* (quoting *Am. Cyanamid*, 381 F.3d at 12), the Sixth Circuit endorsed the opposite rule. So the conflict is clear.

II. RESPONDENTS AND THE SIXTH CIRCUIT MISINTERPRET CERCLA'S STATUTE OF LIMITATIONS.

Georgia-Pacific's petition demonstrated (at 21-25) that the text of § 113(g)(3)(A), the text of other CERCLA provisions, common-law principles, and important practical considerations all make clear that a bare declaratory judgment does not trigger

§ 113(g)(3)(A)'s statute of limitations. Respondents' counterarguments are unconvincing.

1. Consider first § 113(g)(3)(A)'s text: "No 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." Neither Respondent disputes *American Cyanamid*'s straightforward conclusion that a bare declaratory judgment "is not a judgment for the *recovery* of such costs." 381 F.3d at 12. For good reason. "[W]hile a '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.'" Pet.23 (quoting *Am. Cyanamid*, 381 F.3d at 13).

Instead, Respondents assert that the adjectival phrase "for the recovery of such costs or damages" modifies "action under [CERCLA]" rather than "judgment." Respondents contend, then, that the limitations question turns on the nature of the *action* in which a judgment is entered, rather than the nature of the *judgment* that—even on Respondents' own reading—actually triggers the statute of limitations. In support, Weyerhaeuser points (at 24-25) to the "nearest reasonable referent" or "last antecedent" canon. But the very case Weyerhaeuser cites acknowledges that "this rule is not an absolute and can assuredly be overcome by other indicia of meaning." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

Here, "other indicia of meaning" easily "overcome" any persuasive force the canon may have. Indeed, Respondents' interpretation makes a hash of the

statutory text—particularly the phrase on which the limitations period hinges: "the date of judgment." International Paper attempts to minimize that language, suggesting that Georgia-Pacific "wast[ed] its breath on a pointless meditation on the import of the word 'the.'" IP BIO 21. But "*the* date of judgment" makes clear that the limitations period for contribution claims arising from particular response costs begins to run on a singular date certain. Under Respondents' approach, apparently *any* judgment in an action that seeks to recover those response costs suffices. That result ignores Congress's use of the definite article "the," because an action can produce multiple judgments—as the three judgments in the underlying *KRSG* litigation here illustrate.

Weyerhaeuser tries to escape this problem (at 25-26) by asserting that "an initial cost-recovery action will generally end in a single judgment." But by Weyerhaeuser's own admission, "Section 107 cases typically proceed by splitting the cleanup process into manageable phases, such as for particular pollutants or portions of a cleanup site." Weyerhaeuser BIO 30-31 (brackets and internal quotation marks omitted). Judgments in § 107(a) cases thus frequently address only a portion of the broader controversy before the court. *E.g.*, *New York v. Next Millennium Realty, LLC*, 160 F. Supp. 3d 485, 526 (E.D.N.Y. 2016) ("award[ing] judgment" on only some aspects of a § 107(a) claim). If Respondents' view of § 113(g)(3)(A) were right, the limited nature of such judgments would be irrelevant: Once "any action under CERCLA for recovery of response costs has gone to judgment," Weyerhaeuser BIO 25 (brackets and internal quotation marks omitted), the limitations period for

contribution claims arising from *any* response costs sought in that action would start—even if the judgment addressed only a subset of costs, or even if the judgment were in defendant's favor (but those costs were later awarded in a different § 107(a) suit brought by a different counterparty).

As Weyerhaeuser admits, however, no court applies § 113(g)(3)(A) in this bizarre fashion. To the contrary, Weyerhaeuser recognizes (at 31) that "the courts of appeals have uniformly held that … a judgment or settlement triggers the § 113(g)(3) statute of limitations for contribution only for *those* costs—not for any other response costs that might be adjudicated in any other phase" of the proceedings. That gives up the game. If what matters is whether the "*judgment*"—not the "action under [CERCLA]"—addresses the costs in question, then "for recovery of such costs or damages" must modify "judgment." And because even Respondents do not claim a bare declaratory judgment is itself "for recovery of such costs or damages," such a judgment cannot trigger the limitations period.

2. The broader statutory context reinforces this result. Respondents observe that § 113(g)(2) identifies an action under § 107(a) as "an initial action for recovery of the costs." IP BIO 20; Weyerhaeuser BIO 21-22. But again, the dispositive question is not whether the action is "for recovery of the response costs," but whether there is a "judgment … for recovery of such response costs." § 113(g)(3)(A). And as to that question, § 113(g)(2) shows that a bare declaratory judgment does not fit the bill, because § 113(g)(2) contemplates the existence of a

"subsequent action or actions to recover further response costs or damages." Pet.23.

3. Common-law contribution principles are in accord. While § 113(f)(1) authorizes contribution suits "during or following any civil action" under § 107(a), this Court has held 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. Neither the filing of a lawsuit seeking costs nor a bare declaratory judgment necessarily results in an inequitable distribution. Indeed, as Weyerhaeuser admits, a contribution claim requires "a predicate CERCLA *liability*." Weyerhaeuser BIO 26 (internal quotation marks omitted).

Respondents' interpretation, however, would mean that a judgment limited to a subset of a § 107(a) action triggers the statute of limitations for all contribution claims related to the entire action. That means that the limitations period could *expire* long before any "predicate CERCLA liability" for the relevant cleanup costs is determined. Only Georgia-Pacific's interpretation avoids that absurd result and harmonizes the statutory scheme with applicable common-law principles. *See Atl. Rsch.*, 551 U.S. at 139.

4. The balance of practical considerations also favors Georgia-Pacific's reading. While Respondents observe that one purpose of CERCLA is to encourage early negotiation and cleanup, another is to "ensure that the costs of … cleanup" are "borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602

(2009). Given the oftentimes enormous pollution at Superfund sites—and the complex scientific investigation required to trace its origins over decades of industrial activity—significant time and work will often be needed to discern exactly who is "responsible for the contamination," and to what degree.

Respondents pooh-pooh the idea that it might take more than three years after a declaratory judgment to discover the identity and responsibility of other PRPs. *E.g.*, IP BIO 25-26; Weyerhaeuser BIO 28. But they acknowledge that *in this very case* Georgia-Pacific tried to identify other PRPs immediately upon designation in the 1990s, *see* IP BIO 26; Weyerhaeuser BIO 9, and never dispute that Georgia-Pacific "learned the details of NCR's direct connection to the site only shortly before Georgia-Pacific filed suit in 2011," Pet.28. That is in part because NCR "actively attempted to conceal" its products' environmental consequences. Pet.App.47a. If Georgia-Pacific had been required to file suit before it understood NCR's role, NCR's ploy might well have succeeded—notwithstanding that the district court ultimately found NCR just as responsible for the contamination as any other party. Pet.App.9a-10a.

Nor is there anything to Weyerhaeuser's claim (at 23) that Respondents' interpretation produces greater certainty. It is far easier to determine whether a judgment has quantified or awarded particular costs—*i.e.*, whether it is "for recovery of such costs"—than to figure out whether particular costs are encompassed within the scope of an action more generally.

Finally, Respondents worry that if the statute of limitations does not run from the first judgment entered in an action, it may never run at all. *See* IP BIO 22; Weyerhaeuser BIO 23-24. They simply ignore, however, that—in rulings not challenged on appeal—the district court *did* find a significant portion of Georgia-Pacific's claims to be time-barred based on administrative orders that directed the company to take particular actions. *See, e.g.*, Pet.App. 121a-29a.

III. THE COURT SHOULD RESOLVE THIS IMPORTANT QUESTION.

1. Respondents cannot dispute that because CERCLA is both enormously consequential and enormously complicated, this Court frequently addresses its proper interpretation. Pet.25-26 (collecting cases). Nor can Respondents dispute that this Court has reviewed CERCLA questions that have not frequently reached the courts of appeals, because immense settlement pressure can limit opportunities for even critically important questions to percolate. Pet.26. Instead, Respondents characterize the Question Presented as "an obscure procedural question," IP BIO 1, that is "not likely to arise with any frequency," Weyerhaeuser BIO 4. Nothing could be further from the truth.

2. In attempting to minimize the Question Presented, Respondents baselessly speculate that Georgia-Pacific waited to file this case because it thought it could bring claims under § 107(a) in addition to § 113(f). IP BIO 15-16; Weyerhaeuser BIO 29. But as Georgia-Pacific explained, and Respondents again completely ignore, "Georgia-

Pacific learned the details of NCR's direct connection to the site only shortly before Georgia-Pacific filed suit." Pet.28. That makes sense. Here, as is often the case, the cleanup spans many decades and an expansive geographic area. Uncovering all potential PRPs requires analysis of both historical data (*e.g.*, property ownership and use) and scientific data (*e.g.*, water currents and sediment deposits). That makes it exceedingly difficult to identify all potential PRPs quickly—and a short statute of limitations that rewards PRPs for keeping quiet about their role will not help matters.

To be sure, responsible parties can try to minimize these harms by filing barrages of protective lawsuits against any party who might conceivably have been involved. *See* Pet.28-29. But the costs of that approach—on parties undertaking cleanup efforts, on innocent parties who might be targeted, and on the courts—are massive. Allocations of responsibility made before all relevant information is uncovered will be less accurate. And even then, some PRPs may evade responsibility altogether, just as NCR could have done under Respondents' position.

3. Finally, Respondents insist that a rule similar to the one they advocate has proven workable in the settlement context. IP BIO 16-17; Weyerhaeuser BIO 27. But while International Paper claims (at 22) that there is no "conceivable" difference between settlements and judgments, even the decision below recognized that, "[o]f course, there are important contextual differences between [them]," Pet.App.19a. For one, settlements are voluntary, so a defendant can forgo entering one until it has enough information about other parties it may need to pursue under

§ 113(f). For another, Congress dictated that a judgment must be "for recovery of such costs" to trigger the three-year statute of limitations, while a settlement must only be "with respect to such costs" to have the same effect. § 113(g)(3)(A)-(B).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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