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

SUPPLEMENTAL BRIEF OF PETITIONERS

AMANDA K. RICE
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

MICHAEL R. SHEBELSKIE
DOUGLAS M. GARROU
GEORGE P. SIBLEY, III
HUNTON ANDREWS KURTH LLP
951 East Byrd Street
East Tower
Richmond, VA 23219

NOEL J. FRANCISCO
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

MATTHEW J. RUBENSTEIN
JONES DAY
90 South 7th Street
Suite 4950
Minneapolis, MN 55402

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The bulk of the Government's brief is consistent with Georgia-Pacific's petition—and, in fact, confirms that certiorari is warranted. In particular, the Government agrees a real split exists between the First and Sixth Circuits on the Question Presented. U.S. Br. 18-20. And the Government agrees that the "court of appeals below erred in holding that the 1998 declaratory judgment in the *KRSG* litigation triggered Section 113(g)(3)(A)'s limitations period." U.S. Br. 8. Those two points alone warrant this Court's intervention, given the sprawling nature and scope of CERCLA liability, the overwhelming incentives to settle, and the practical reality that the Sixth Circuit's erroneous rule will effectively govern nationwide unless the Court intervenes now.

The Government's suggestion that certiorari is nevertheless unwarranted is simply wrong, because the two supposed vehicle problems the Government identifies are nothing of the sort. *See* U.S. Br. 20-23. Neither implicates a live dispute. And in any event, neither would prevent this Court from simply resolving the Question Presented and leaving any dispute on those points for the lower courts to address on remand. Indeed, absent review now, the Question Presented could evade this Court's review for years, if not indefinitely.

The Court should therefore grant the petition, reverse the Sixth Circuit's ruling, and vindicate the rights of PRPs that perform their cleanup duties in good faith by holding that a bare declaratory judgment does not trigger the statute of limitations under § 113(g)(3)(A).

ARGUMENT

I. THE GOVERNMENT'S BRIEF UNDERSCORES THE NEED FOR THIS COURT'S REVIEW.

The Government agrees with Georgia-Pacific that there is a real split on the Question Presented, *see* U.S. Br. 18-20, and that the Sixth Circuit is on the wrong side of it, *see* U.S. Br. 8-18. Given the massive stakes of CERCLA cases and the implications of the Sixth Circuit's rule, this Court should grant Georgia-Pacific's petition and correct the Sixth Circuit's serious error while it has the chance.

1. As Georgia-Pacific has explained, the Sixth Circuit's opinion below conflicts with the First Circuit's decision in *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004), on the critical question of whether a bare declaratory judgment that determines liability but imposes no costs and awards no damages triggers § 113(g)(3)(A)'s statute of limitations. *See* Pet. 16-21; Reply 2-5.

The Sixth Circuit and Respondents have all tried to wish away that split primarily by distinguishing a *separate* section of *American Cyanamid*. *See* Pet.App.20a-21a; IP BIO 11-14; Weyerhaeuser BIO 15-18. But the Government sees through that shell game. Like Georgia-Pacific, the Government correctly focuses on the First Circuit's analysis of "the declaratory-judgment component" of the underlying litigation. U.S. Br. 19. And it "agree[s] with [Georgia-Pacific] that the Sixth Circuit's decision in this case conflicts with that aspect of the First Circuit's decision." U.S. Br. 19-20.

2. On the merits, too, the Government is in full agreement with Georgia-Pacific. Indeed, it devotes the majority of its brief to a lengthy explanation of "contextual considerations [that] weigh heavily in favor of" the statutory interpretation shared by Georgia-Pacific and the First Circuit, and against that shared by Respondents and the Sixth Circuit. U.S. Br. 9; *see* U.S. Br. 8-18.

For example, the Government endorses Georgia-Pacific's argument that "Section 113(g)(3)(A)'s reference to '*the* date of judgment,' … rather than 'a date' or 'any date,' reinforces the inference that a single judgment is involved." U.S. Br. 9; *see* Pet. 22. And it points out that the provision's use of the word "such" further supports that reading, in that "[t]he 'judgment … for recovery of *such* costs or damages'" refers most naturally to "the judgment that addresses those costs." U.S. Br. 9 (emphasis added).

By contrast, the Government observes that the Sixth Circuit's interpretation yields nonsensical and problematic results. "[I]f the phrase 'for recovery of such costs or damages' were understood to modify only 'action,'" the Government reasons, "Section 113(g)(3)(A) would literally encompass *every* judgment entered in a suit seeking recovery of the costs or damages for which the Section 113(f) plaintiff ultimately seeks contribution." U.S. Br. 11; *see* Reply 7. That would mean that "the three-year limitations period for a particular contribution action could begin to run, and indeed that period could expire, even before the Section 113(f) plaintiff's right to contribution existed." U.S. Br. 11-12; *see* Pet. 24. And as the facts of this case make clear, the Sixth Circuit's

rule has a host of other unpalatable consequences as well. *See* Pet. 26-29.

3. While correctly recognizing that "a circuit split exists" and the decision below is wrong, the Government incorrectly deems it "questionable" whether this Court should resolve the split, because it is "shallow" and because the "two decisions issued eighteen years apart." *See* U.S. Br. 18. As Georgia-Pacific has explained, however, CERCLA's particular characteristics—including sprawling liability leading to overwhelming settlement pressure—often justify this Court's review on relatively narrow splits, or even on no split at all. *See* Pet. 25-26 (citing cases including *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004)).

Indeed, this Court has recently and repeatedly granted certiorari in the face of narrow or lopsided CERCLA splits—even where the Government advocates against granting review. In *Territory of Guam v. United States*, for example, the Government as respondent conceded that a "circuit conflict" existed, but opposed certiorari in part because there was only a "sole court of appeals in the minority." Br. for the United States in Opp., *Territory of Guam v. United States*, 141 S. Ct. 1608 (2021) (No. 20-382), 2020 WL 7231902, at *10. Similarly, in *Atlantic Richfield Co. v. Christian*, the Government as invited amicus opposed review despite acknowledging that an aspect of the decision below was "erroneous and conflict[ed] with decisions of multiple federal courts of appeals." Br. for the United States as Amicus Curiae, *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020) (No. 17-1498), 2019 WL 1932661, at *11. In both

cases, the Court granted review anyway. The Court should do the same here.

If anything, the need for this Court's intervention is even more acute in this case than it was in those. That is because the consequences of missing the statute of limitations on a contribution claim are so harsh that, if this Court allows the Sixth Circuit's decision to stand, rational PRPs will have no choice but to treat the Sixth Circuit's erroneous rule as controlling. Whenever faced with a bare declaratory judgment of liability, they will race off and sue every other party who might conceivably be liable for contribution—burdening the courts and other parties with unnecessary and premature litigation. As a result, the Sixth Circuit's mistaken rule will de facto govern nationwide. And unless and until a PRP fails to identify another PRP within the Sixth Circuit's unduly restrictive timeframe *and* resists settlement incentives to litigate the issue through appeal, this Court will not get another opportunity to correct it.

In short: Between the conceded split, the conceded error, and the fact that the Court may not have another chance to resolve that split and correct that error, the case for certiorari is clear.

II. THE GOVERNMENT'S PURPORTED VEHICLE PROBLEMS PROVIDE NO REASON TO DENY REVIEW.

Having agreed with Georgia-Pacific regarding the existence of the split and error below, the Government suggests that two supposed vehicle problems nonetheless justify denying the petition. *See* U.S. Br. 20-23. The record confirms that the Government is wrong on both scores. Neither issue the Government

raises is actually live. And equally important, they are at most issues for resolution on remand. Neither would prevent this Court from simply resolving the Question Presented. They therefore do not remotely warrant this Court ignoring an important question that, absent review now, may evade its review for years or even indefinitely.

1. The Government's first complaint is that Georgia-Pacific's petition "do[es] not specify what judgment, settlement, or administrative order has given [it] a right to seek contribution in the first place." U.S. Br. 20. The Government's concern appears to be that Georgia-Pacific might have no contribution right at all, thus making determination of the proper statute of limitations applicable to contribution claims a purely academic exercise. But the record makes perfectly clear that the Court's decision on the Question Presented will be outcome determinative for at least some, if not all, of the costs awarded.

For starters, the Government itself acknowledges that "[t]he district court identified other orders and agreements [beyond the *KRSG* judgment] pursuant to which petitioners have incurred costs." U.S. Br. 21 (citing Pet.App.109a-113a). The Government asserts that "neither the petition nor the court of appeals' opinion contains any meaningful discussion of those potential sources of contribution rights." U.S. Br. 21. But that is for good reason: The district court fully addressed the sources of Georgia-Pacific's contribution right, and no party appealed that portion of the district court's ruling.

In particular, after the district court rejected the argument that the *KRSG* declaratory judgment started the limitations period running for *all* of Georgia-Pacific's contribution claims, it engaged in a granular analysis of *each* of the various categories of costs for which Georgia-Pacific sought contribution. Pet.App.119a-128a. The district court ultimately concluded that, of the approximately $100 million in past costs Georgia-Pacific had sought to recoup, approximately $50 million were time barred because they arose from agreements that predated Georgia-Pacific's suit by more than three years. *See* Pet.App.121a-128a (statute of limitations analysis); Pet.App.53a-54a (charts reflecting the specific costs the district court deemed time barred and the specific costs it did not). Among the costs the district court held were *not* time barred were approximately $23 million that arose from consent orders or judgments entered in 2009. Pet.App.111a-112a. Accordingly, in the district court, "[a]part from their argument that all of Georgia-Pacific's costs are time-barred due to the *KRSG* litigation, [Respondents did] not contend that Georgia-Pacific's claims for [these costs were] untimely." Pet.App.128a. Nor did Respondents challenge that conclusion on appeal, where the statute-of-limitations argument was confined to the effect of the *KRSG* judgment. *See* Pet.App.10a (Sixth Circuit explaining that it addressed that question "alone"). At the very least, then, resolution of the Question Presented in Georgia-Pacific's favor will mean that the contribution claim for this $23 million is not time-barred. And as the undisputed record shows, Georgia-Pacific is expected to incur hundreds of millions of dollars in the future as the clean-up

continues, none of which can be recouped under the Sixth Circuit's erroneous rule. Pet. 12 n.6 (citing Pet.App.48a n.5 and *United States v. NCR Corp.*, No. 19-cv-1041, 2020 WL 8574835, at *4 (W.D. Mich. Dec. 2, 2020)).

The Government also expresses concern that this Court's decision in "*Atlantic Research* left open the question whether expenses sustained by a PRP in conducting cleanup activities under certain consent decrees 'are recoverable under § 113(f), § 107(a), or both.'" U.S. Br. 21 (quoting *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 140 n.6 (2007)). But for precisely that reason, Georgia-Pacific brought both kinds of claims here. Pet.App.7a. And the district court squarely held—in a ruling consistent with every court of appeals to have considered the issue—that § 113(f) was a proper basis for recovery of the costs it awarded to Georgia-Pacific. No party has challenged that ruling on appeal, so this Court need not address it here. *Cf. Territory of Guam*, 141 S. Ct. at 1612 n.2 ("Guam has not challenged other portions of the lower court's reasoning, so we express no opinion on them."). Instead, it can simply answer the Question Presented—just as the Government does in its invitation brief.

2. The Government next suggests that declaratory judgments are frequently paired with an actual award of costs, as happened in *American Cyanamid*. U.S. Br. 21-22. The implication of that argument seems to be that bare declaratory judgments like the one issued in the *KRSG* litigation are rare, and so not worth this Court's attention. As an initial matter, it is far from clear that the Government's suggestion is true as a descriptive matter. After all, the statute provides that

a court hearing a § 107 claim "shall enter a declaratory judgment of 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)(B); *see also* Weyerhaeuser BIO 6 ("A Section 107 action … frequently ends in 'a declaratory judgment on liability for response costs' that will be needed in the future." (quoting § 113(g)(2))). But even if the Government were descriptively correct, that would make no difference, because all agree that—as the non-declaratory-judgment portion of *American Cyanamid* held—an award of costs triggers the statute of limitations only for the specific costs awarded. *See Am. Cyanamid*, 381 F.3d at 13-16. Accordingly, regardless of whether an order containing a broad declaratory judgment also awards some specific costs, the effect of that declaratory judgment on the statute of limitations remains a live issue in urgent need of this Court's resolution.

In connection with this point, the Government also suggests that the Sixth Circuit may have misread the *KRSG* declaratory judgments and that, "[t]o the extent that resolution of the Section 113(g)(3)(A) question in this case turns on the precise meaning and legal import of the various *KRSG* judgments, disputes about those judgments would complicate the Court's analysis and provide a further reason to deny review." U.S. Br. 22-23. But the resolution of the § 113(g)(3)(A) question before this Court decidedly does *not* turn on the details of the *KRSG* judgments. The Sixth Circuit accurately described the judgment at issue as a "bare declaratory judgment of liability." Pet.App.20a; *see also* Pet.App.18a, 22a ("bare declaratory judgment"

(citing *Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d 817, 840 (W.D. Mich. 2000))). Respondents have not disputed that characterization of the judgment, and are now precluded from doing so by this Court's rules. S. Ct. R. 15.2 ("Any [non-jurisdictional] objection to consideration of a question presented based on what occurred in the proceedings below … may be deemed waived unless called to the Court's attention in the brief in opposition."); *see* Weyerhaeuser BIO 31 (referring to the "clarity" of the *KRSG* declaratory judgment).

3. Even if the two points the Government raises were still live issues, they would not complicate this Court's review of the Question Presented. In the decision below, the Sixth Circuit held that *all* of Georgia-Pacific's contribution claims were time-barred as a result of the *KRSG* declaratory judgment. *See* Pet.App.24a. If, as the Government agrees, the Sixth Circuit was wrong about that, this Court should grant certiorari, say so, and reverse the decision below. To the extent Respondents contend—contrary to the district court's findings, *see* Pet.App.121a-128a—that Georgia-Pacific is not entitled to recover for some *other* reason, they can raise that argument on remand (to the extent it has not been forfeited already). Either way, there is no barrier to this Court's resolution of the Question Presented, leaving any remaining issues for the lower courts on remand.

* * *

The facts and procedural history of this case are complicated, but Georgia-Pacific's petition raises a single, clean question. Neither of the two issues the Government raises implicates a live dispute. And

even if, contrary to the record, the Court believed otherwise, it should simply answer the Question Presented by Georgia-Pacific's petition and then remand for the lower courts to address any remaining issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 6, 2023

Respectfully submitted,

AMANDA K. RICE
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

MICHAEL R. SHEBELSKIE
DOUGLAS M. GARROU
GEORGE P. SIBLEY, III
HUNTON ANDREWS
KURTH LLP
951 East Byrd Street,
East Tower
Richmond, VA 23219

NOEL J. FRANCISCO
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

MATTHEW J. RUBENSTEIN
JONES DAY
90 South 7th Street
Suite 4950
Minneapolis, MN 55402

Counsel for Petitioners