No. 23-687

In the Supreme Court of the United States

MRP PROPERTIES COMPANY, LLC, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States "operated" petroleum-refining facilities within the meaning of Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607(a)(2), by imposing federal regulation of the petroleum industry during World War II.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-14a) is reported at 72 F.4th 166. A prior order of the court of appeals (Pet. App. 15a-19a) is not published. Opinions of the district court (Pet. App. 20a-31a, 32a-106a) are reported at 607 F. Supp. 3d 747 and 583 F. Supp. 3d 981.

JURISDICTION

The amended judgment of the court of appeals was entered on June 29, 2023. A petition for rehearing was denied on July 26, 2023 (Pet. App. 107a-108a). On October 2, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including December 22, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or the Act), 42 U.S.C. 9601 *et seq.*, "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry.* v. *United States*, 556 U.S. 599, 602 (2009) (*Burlington*). "The Act seeks 'to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts are borne by those responsible for the contamination.'" *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1345 (2020) (citation and brackets omitted).

Section 107(a) of CERCLA, 42 U.S.C. 9607(a) (Section 9607(a)), imposes liability for such cleanup costs on four categories of persons commonly referred to as "potentially responsible parties." *Burlington*, 556 U.S. at 605, 608-609; see *Atlantic Richfield Co.*, 140 S. Ct. at 1352; see also 42 U.S.C. 9601(21) (defining "person" to include the federal government). Under the Act's second category—the category relevant here—liability extends to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. 9607(a)(2). The Act defines "'disposal'" to include not only the "discharge, deposit, injection, [or] dumping" of any hazardous waste, but also the "spilling" or "leaking" of such waste, "into or on land or water." 42 U.S.C. 6903(3); see 42 U.S.C. 9601(29). CERCLA separately defines "[t]he term 'owner or operator'" to mean, in the context of a facility, "any person owning or operating such facility." 42 U.S.C. 9601(20)(A)(ii).

In light of the latter definition's textual "circularity," *United States* v. *Bestfoods*, 524 U.S. 51, 56 (1998), this

Court has concluded, based on dictionary definitions reflecting the ordinary meaning of the verb "'operate,'" that "a facility's 'operator'" is one "who directs the workings of, manages, or conducts the affairs of a facility." *Id.* at 66 (citations omitted). The Court in *Bestfoods* further "sharpen[ed] the definition for purposes of CERCLA's concern with environmental contamination." *Ibid.* The court noted that CERCLA's imposition of liability on any person who "operated" a facility "at the time of disposal of [the] hazardous substance," 42 U.S.C. 9607(a)(2), ensures that "those actually 'responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions.'" *Bestfoods*, 524 U.S. at 55-56 (citation and brackets omitted). The Court concluded that, under CERCLA, "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

2. The dispute in this case concerns whether the federal government's wartime regulation involving production directives, rationing schemes, and wartime inspections caused the United States to be the "operator" of 12 private-sector facilities that refined petroleum during World War II. See Pet. App. 3a-4a.

To address shortages during World War II, Congress authorized the President "to ration essential materials, to set wages and prices, to prioritize production of critical war products, to inspect defense contractors' facilities, and to requisition property for military use." Pet. App. 2a. As described by the court of appeals, the government applied that authority to the wartime oil-refining industry by "regulat[ing] the quantities and

grades of crude oil each refinery could process, ration[ing] capital goods such as steel piping, and seiz[ing] several refineries temporarily after labor disputes threatened production." *Id.* at 3a. The court also stated that, as relevant here, the government "told refiners what to make and for whom to make it." *Ibid.*[1]

The process of refining oil produces "sludge, slop, and other waste products." Pet. App. 3a. Throughout World War II, refineries continued their pre-war practices for handling such waste, which they "burned," "buried," "impounded * * * in landfills," and (through "[l]eaks and spills") otherwise "released * * * into the environment." *Ibid.* "[R]efineries sometimes changed their manufacturing techniques" to "produce what the government requested using the crude oil it allotted," which "led to more waste production and corroded refinery equipment, increasing leakage and spillage." *Ibid.* The court of appeals also noted that the problem of leaks and spillage was exacerbated by the "rationing of steel and other construction materials," which "delayed repairs." *Ibid.*

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[1] The government explained below that the wartime federal agency most relevant here, the Petroleum Administration for War (PAW), occasionally issued binding directives ordering refineries to take certain actions, but that the PAW more often utilized non-binding letters and telegrams to request action that facilities could then either voluntarily take or decline to take. See U.S. C.A. Br. 13 n.3, 48 n.10; see *id.* at 6-14. The government also explained that the 12 refineries at issue in this case, which are at different locations across the country and thus would have been subject to different regional regulatory requests, have distinct histories and took distinct actions during World War II. See *id.* at 15-21. The court of appeals resolved this case without addressing the nature of particular regulatory requests or the distinct histories of the various refineries.

3. Petitioners filed this CERCLA action in federal district court, seeking contribution from the United States for cleanup costs for the 12 petroleum-refining facilities in this case. Petitioners argued that, through its "production directives, rationing schemes, and wartime inspections," "the government 'operated' each site during World War II." Pet. App. 4a; see *id.* at 21a, 38a. After bifurcating the case into liability and damages phases, *id.* at 38a, the district court, as relevant here, granted partial summary judgment to petitioners on the question of the government's "operator" status under Section 9607(a)(2). *Id.* at 32a-106a. The court agreed with petitioners that "the Government 'operated' 12 of their refineries before and during W[orld War II]," *id.* at 38a, and it therefore determined that "the Government is liable as an operator of all 12 facilities." *Id.* at 105a.

The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b) and stayed further proceedings pending appeal. Pet. App. 20a-31a. The court explained that its determination that "the Government 'operated' 12 of [petitioners'] refineries," *id.* at 21a, presented a controlling question of law on the proper "standard of operator liability" under CERCLA, *id.* at 24a. The court of appeals likewise granted the government's petition for permission to appeal under Section 1292(b) (*id.* at 15a-19a) to decide whether the "government's control of the domestic petroleum industry during World War II" could subject the United States to liability under CERCLA as the facilities' "operator." *Id.* at 15a.

4. The court of appeals reversed. Pet. App. 1a-14a. The court held that the government had not "'operated'

[the 12 petroleum-refining] facilities during World War II." *Id.* at 7a.

The court of appeals observed that, in *Bestfoods*, this Court had construed CERCLA's definition of a facility's "[o]perator" to require that "'an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.'" Pet. App. 5a (quoting *Bestfoods*, 524 U.S. at 66-67). The court explained that, under that interpretation, the operators of a facility include persons who conduct the facility's "day-to-day work with hazardous waste" as well as those who "make strategic decisions about waste management, say by choosing to store waste onsite rather than offsite or by adopting processes that lead to leakage or spillage." *Id.* at 5a-6a. The court also explained that a person will "'"manage[]" activities "specifically related to pollution,"' and thus qualif[y] as an operator, where she 'exercises control over the waste disposal process,'" but that "run-of-the-mill regulators, lenders, and suppliers do not amount to 'operators.'" *Id.* at 6a (citation omitted).

The court of appeals concluded that, "for several reasons," the United States had not "'operated' [petitioners'] facilities during World War II." Pet. App. 7a. The court explained that, "[d]uring the war, the refineries, not the government, made the key management decisions related to waste and implemented those decisions." *Id.* at 8a. The court observed that the "refineries, not the government, worked 'day-to-day' with petroleum's hazardous byproducts," and that the "[e]mployees of [each such] refinery, not the government, manned refinery control rooms," "maintained the refin-

eries and monitored them for leaks or spills," and "burned and buried [the] toxic waste." *Ibid.* The court further explained that, "[f]ar from 'exercising control' over routine 'waste disposal processes,' government officials had little to do with them." *Ibid.* (citation and brackets omitted).

The court of appeals also observed that it was the "individual refineries, not the government, [that] made broader, strategic decisions about waste disposal." Pet. App. 8a. The court explained that the government "did not tell [the refineries] how to handle their waste," did not "tell them how to supervise maintenance or refining activities," and "did not instruct them about where they should locate waste disposal sites." *Ibid.* The court also noted that, although the government had "influence[d] refineries' business decisions during the war," its "influence did not extend to refinery facilities' waste-related features." *Ibid.*

The court of appeals added that "[d]ecisions from other circuits" and "[a] dose of common sense" confirmed its conclusion that "the government did not 'operate' [petitioners'] refineries during the war." Pet. App. 9a-10a. The court noted that regulations requiring that the "production of key products" be "prioritize[d]"; "[e]mergency rationing"; and "mandatory inspection regimes" are all "paradigmatic regulatory tool[s]." *Id.* at 9a. "By wielding these powers," the court stated, "regulators do not 'operate' the industries they regulate any more than '"extensive regulation" of a private company' makes the regulated party a state actor." *Id.* at 9a-10a.

The court of appeals noted petitioners' contention that their "refineries altered their operations in ways that increased waste production" in order to follow the government's instructions regarding "what [petroleum

products] to produce." Pet. App. 10a. Petitioners argued that "the nature of the government's wartime regulations * * * left refineries with little choice about usage and production decisions." *Id.* at 11a. But the court explained that "manufacturers often reorganize production in order to meet their end-users' needs," and that this "reality does not turn end-users into 'operators.'" *Id.* at 10a. The court also noted that "many regulatory regimes"—such as public-utility regulation—"create such pressures without making regulators 'operators.'" *Id.* at 11a-12a. And the court observed that, although the refineries had made "engineering decisions about how to rejigger their plants" to make the products that were needed during the war, the government had left such "production decisions to the refineries" and "did not become their 'operator'" by declining to "second-guess" the refineries' decisions. *Id.* at 12a.

In support of their argument that the government was liable as a CERCLA "operator," petitioners also relied on the government's regulation of a refinery's inputs (like the supply of crude oil) and on wartime "ration[ing] [of] steel and other necessary capital goods" that led to refineries' "deferred maintenance and increases in leakage." Pet. App. 10a-11a. The court of appeals explained, however, that "CERCLA regulates 'the waste *disposal* process,' not the supply of products leading to the production and disposal of waste," and that "controlling a facility's supply of inputs does not make the supplier an 'operator.'" *Ibid.* (citations omitted). The court also observed that "[m]any wartime industries relied on steel and thus were affected by such rationing," and that petitioners' theory "would make the government, implausibly, an operator of each of those facilities." *Id.* at 11a.

ARGUMENT

Petitioners contend (Pet. 28-33) that the court of appeals misconstrued the scope of "operator" liability under Section 9607(a)(2). Petitioners further contend (Pet. 13-26) that the decision below conflicts with decisions of other circuits and warrants this Court's review. The Sixth Circuit's decision in this case is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the government had not "'operated' [petitioners' 12] facilities during World War II" through its regulation of the petroleum industry. Pet. App. 7a; see *id.* at 7a-14a.

a. In *United States* v. *Bestfoods*, 524 U.S. 51 (1998), this Court interpreted CERCLA's definition of an "operator" of a "facility," 42 U.S.C. 9601(20)(A)(ii), that is liable for cleanup costs under Section 9607(a)(2). In construing the term "operator," the Court considered both the ordinary meaning of the verb "'operate'" and "CERCLA's concern with environmental contamination." *Bestfoods*, 524 U.S. at 66. The Court observed that Section 9607(a)(2)'s imposition of liability on any person who "operated" a facility "at the time of disposal of [the] hazardous substance," 42 U.S.C. 9607(a)(2); see 42 U.S.C. 6903(3), 9601(29), ensures that "those actually 'responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions.'" *Bestfoods*, 524 U.S. at 55-56 (citation and brackets omitted). The Court therefore held that "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

The court of appeals correctly applied that understanding of "operator" liability, Pet. App. 5a, in concluding that the government's regulation of the petroleum industry during World War II did not render it an "operator" of petitioners' 12 refineries, *id.* at 7a-14a. The government did not manage, direct, or conduct "operations *specifically related to pollution*, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations," because the government played no such role with respect to either the "leakage or disposal of hazardous waste" or "decisions about compliance with environmental regulations." *Id.* at 5a (quoting *Bestfoods*, 524 U.S. at 66-67) (emphasis added). The government's regulation of wartime petroleum production had "little to do" with the refineries' "waste disposal processes" because the refineries and their employees—not the government—made and implemented the decisions about how to handle waste and leakage. *Id.* at 8a (brackets omitted). The government also "did not tell [the refineries] how to handle their waste" or even how to "supervise maintenance or refining activities." *Ibid.* Rather, those decisions and actions were left to, and taken by, the refineries themselves. Thus, as the court of appeals explained, "[a] dose of common sense" confirms that the government, as regulator, did not "operate" petitioners' facilities under CERCLA's governing definition. *Id.* at 9a.

b. Petitioners contend that the court of appeals erred in limiting "'operator'" status to entities that "control[] or direct[] the disposal of hazardous waste." Pet. 28-33. Petitioners assert that, under "the test this Court set forth in *Bestfoods*," operator status may also result from an entity's control over a facility's "operations that

produce [the] hazardous waste." Pet. 28-29. That argument reflects a misreading of *Bestfoods* and CERCLA.

As petitioners recognize (Pet. i, 1, 7), the Court in *Bestfoods* held that an "operator" must manage, direct, or conduct "operations specifically related to pollution, *that is*, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67 (emphasis added). The Court in *Bestfoods* thus articulated a single standard for operator status under Section 9607(a)(2), which requires a showing that a purported operator managed, directed, or conducted a facility's "operations specifically related to pollution." *Id.* at 66. As the Court clarified in the language that immediately follows "that is," the phrase "operations specifically related to pollution" is synonymous with "operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67; see *Webster's Third New International Dictionary* 2367 (2002) (explaining that "*that is*" is "used to introduce or accompany an explanation or correction," which conveys that "the following or immediately preceding word or word group may express the intended meaning more understandably or more accurately than a previous word or word group"); *Webster's New International Dictionary* 2616 (2d ed. 1951) (explaining that "*that is*" "introduc[es] an explanation or correction," which conveys that "[t]he foregoing expression is equivalent to what follows").

Petitioners describe (Pet. 28) *Bestfoods* as teaching that an operator must manage, direct, or conduct "'operations specifically related to pollution' *or* 'having to do with the leakage or disposal of hazardous waste.'" *Ibid.* (selectively quoting *Bestfoods*, 524 U.S. at 66-67) (em-

phasis altered). Having replaced the Court's explanatory use of "that is" with a disjunctive "or," petitioners argue (Pet. 28-29) that "'operations specifically related to pollution'" need not be related to the leakage or disposal of pollution, but instead include a facility's productive operations that yield waste as a byproduct because such operations "are the source of that waste." Petitioners' disjunctive reformulation materially departs from the standard actually articulated in *Bestfoods*, which focuses on a facility's operations involving the disposal (including leakage) of waste. That focus reflects Section 9607(a)(2)'s reference to the "operat[ion]" of a facility "*at the time of* [*the*] *disposal* of [the] hazardous substance" at that facility, 42 U.S.C. 9607(a)(2) (emphasis added), and CERCLA's purpose to impose liability on those "actually 'responsible for any damage, environmental harm, or injury from chemical poisons.'" *Bestfoods*, 524 U.S. at 55-56 (citation omitted); see *id.* at 66 (adopting interpretation to reflect "CERCLA's concern with environmental contamination").

Petitioners also argue (Pet. 29) that the court of appeals "wrote th[e] 'leakage' part of the [*Bestfoods*] standard out of the statute," apparently because the court of appeals' decision sometimes refers to "disposal" without expressly mentioning "leakage." But the court recognized that, under CERCLA, the term "'disposal' includes 'leaking' and 'spilling' along with intentional removal or storage." Pet. App. 6a (citing 42 U.S.C. 6903(3), 9601(29)). And the court's decision repeatedly refers to "[l]eaks and spills" or "leakage and spillage," *id.* at 3a, dispelling any possible misconception that its analysis fails to account for such inadvertent disposals of waste. See *id.* at 5a-6a, 8a-9a, 11a, 13a.

Petitioners suggest that the court of appeals' approach obscures the distinction between "operator" and "arranger" liability under CERCLA, see 42 U.S.C. 9607(a)(2) and (3), because "an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance." Pet. 30 (quoting *Burlington N. & Santa Fe Ry.* v. *United States*, 556 U.S. 599, 611 (2009)). That too is incorrect. Operator liability under Section 9607(a)(2) applies to a person who "operated [a] facility" "at the time of disposal" (including leakage) of waste at that "facility," 42 U.S.C. 9607(a)(2), so the requisite management, direction, and conduct of waste-disposal operations are operations of that "facility." Arranger liability, by contrast, applies to "any person who * * * arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person, by any other party or entity, at any facility * * * owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. 9607(a)(3).

An arranger thus is one who arranges for *someone else* to dispose of or treat the arranger's toxic waste at a facility owned or operated by a person *other than* the arranger. Petitioners' suggestion (Pet. 30) that Section 9607's operator-liability text does not include "language" concerning the "disposal" of waste overlooks Section 9607(a)(2)'s reference to the operation of a facility "at the time of disposal" of such waste. 42 U.S.C. 9607(a)(2). That language supports the Court's holding in *Bestfoods* that a purported operator must manage, direct, or conduct the facility's "operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67.

Petitioners repeatedly suggest (Pet. 3, 19, 20, 23) that the government advanced a different view of CERCLA operator liability in a 2002 brief in opposition. That brief addressed the distinction between operator liability and arranger liability by explaining that "the former inquiry focuses on the question of ownership or operation *of the facility*," whereas "the latter inquiry focuses on the question of arranging for the disposal *of the substances*." U.S. Br. in Opp. at 24, *Atlantic Richfield Co.* v. *United States*, 537 U.S. 1147 (2003) (Nos. 02-500 and 02-506) (*Atlantic Richfield* Opp.). The brief's citation for that proposition was followed by a parenthetical stating that "[t]he language related to operator liability * * * does not require any involvement in the disposal activities themselves." *Ibid.* (quoting *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1090 n.7 (8th Cir. 1995), cert. denied, 519 U.S. 808 (1996)). But that parenthetical simply reflects that such "operator liability [may] aris[e] out of the exercise of control by one entity over another"—*i.e.*, control over the entity that directly conducts the waste-disposal operations—even if the controlling party is not itself "involve[d] in [those] disposal activities." *TIC Inv. Corp.*, 68 F.3d at 1090 n.7. The government's brief further explained—consistent with our position here—that operator liability requires that one manage, direct, or conduct "operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Atlantic Richfield* Opp. at 26 (quoting *Bestfoods*, 524 U.S. at 66-67).

Petitioners contend (Pet. 30-31) that a conception of operator liability that excludes operations that produce the hazardous waste is inconsistent with principles that courts apply when allocating cleanup costs among mul-

tiple responsible parties. But facility operations that produce such waste will result in pollution only if the waste is then "dispos[ed]" of (by spillage or otherwise) into or on land or water or further into the environment. See 42 U.S.C. 6903(3), 9601(29). Standing alone, managing, directing, or conducting operations that produce waste therefore is not a sound basis for imposing liability under Section 9607(a)(2). But if a party is one of multiple responsible parties liable for cleanup costs—whether as an owner, operator, arranger, or otherwise—one of the equitable factors that a court may consider in allocating those costs is the party's degree of involvement in generating the waste that contributed to the pollution.[2]

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[2] Petitioners suggest (Pet. 31) that the government's district court brief in *Litgo New Jersey, Inc.* v. *Martin*, No. 06-cv-2891, 2011 WL 65933 (D.N.J. Jan. 7, 2011), aff'd on other grounds, 725 F.3d 369 (3d Cir. 2013), is inconsistent with that approach. The *Litgo* court addressed two distinct potential grounds for government CERCLA liability, concluding that (1) the government's relationship with an aircraft company, which likely released trichloroethylene (TCE) into the soil and groundwater at the Litgo site during World War II, did not give rise to liability; but (2) the government's unrelated arrangement in the 1980s for the disposal of its own TCE-containing waste by third parties, which then improperly disposed of that waste at the same site, resulted in arranger liability. *Litgo N.J., Inc.* v. *Martin*, No. 06-cv-2891, 2010 WL 2400388, at *5-*7, *11, *23-*27 (D.N.J. June 10, 2010). The court then allocated a total of 3% of the cleanup costs to the United States for arranging the disposal of chemicals that the United States itself had "generated." *Id.* at *38, *40. When other litigants asked the court to increase that allocation based on the government's relationship with the aircraft company, the government opposed their request on the ground that it would be "manifestly unjust to use the United States' wartime activities as equitable factors to increase its allocated share" because those activities had no relationship to the government's CERCLA "liability"

Finally, petitioners fault (Pet. 29; see Pet. 8) the court of appeals for failing to account for the fact that, shortly after World War II, "the government actually seized [one] refinery for half a year." Pet. 29. But the court of appeals granted permission to bring this interlocutory appeal to review the district court's "determin[ation] * * * that the federal government's control of the domestic petroleum industry during World War II rendered the United States liable as a former operator of [petitioners'] facilities." Pet. App. 15a; see *id.* at 1a, 4a, 21a, 38a. After noting petitioners' observation on appeal that "the government seized one plant for six months, after the war ended," the court stated that petitioners had failed to explain "why that seizure made the United States an 'operator' of *all* its plants, or even of the plant the government seized, during the wartime period at issue in this appeal." *Id.* at 13a-14a. Nothing in that discussion suggests any infirmity in the court's understanding of "operator" liability under Section 9607(a)(2).

2. Petitioners contend (Pet. 14-22) that the court of appeals' understanding of "operator" liability under Section 9607(a)(2) conflicts with two pre-*Bestfoods* decisions—*FMC Corp.* v. *United States Department of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc), and *TIC Investment Corp.*, *supra* (8th Cir.)—and with the Fifth Circuit's interpretation of a different statute in *United States* v. *Nature's Way Marine, L.L.C.*, 904 F.3d 416 (2018). Those decisions do not support petitioners' assertion (Pet. 1) that the "lower courts remain intractably divided" about the scope of "operator" liability un-

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that the allocation quantified. U.S. Joint Br. in Opp. to Mots. for Recons. at 7, *Litgo*, *supra* (July 19, 2010).

der CERCLA. In fact, no relevant division of authority exists that might warrant this Court's review.

a. The Third Circuit's 1994 decision in *FMC*, *supra*, contains some language identifying production-related matters as leading indicia of operator status. See Pet. App. 13a. But that language does not reflect a current disagreement among the courts of appeals. In 1998, the *Bestfoods* Court clarified that operator status does not turn on the mere production of waste (which itself need not result in environmental pollution) but rather on "operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67; see Pet. App. 13a (observing that "the Third Circuit decided *FMC* before [this] Court decided *Bestfoods*").

As the court below recognized, moreover, since *Bestfoods* the Third Circuit has "retreat[ed]" from *FMC*'s understanding of operator liability. Pet. App. 13a. In *PPG Industries, Inc.* v. *United States*, 957 F.3d 395 (2020), the Third Circuit declined a private litigant's request to "follow the standard outlined in *FMC*" and instead applied the "operator definition" set forth in *Bestfoods*. *Id.* at 402. While noting that *Bestfoods* was "consistent with *FMC*" to the extent that both decisions "focus[] on 'operations specifically related to pollution,'" *ibid.* (citation omitted), the *PPG Industries* court explained that "*Bestfoods* clarified that operator liability *only* extends to those who 'manage, direct, or conduct operations specifically related to pollution,'" so that "an operator *must* exercise control over '*operations having to do with the leakage or disposal of hazardous waste* or decisions about compliance with environmental regula-

tions.'" *Id.* at 403 (quoting *Bestfoods*, 524 U.S. at 66-67) (emphases altered).

Like the court below, the Third Circuit in *PPG Industries* held that the government was not the operator of the facility at issue there during World War II because "no evidence [showed] that the Government specifically controlled operations related to pollution," and nothing "suggest[ed] that the Government was involved with or responsible for the practice of stockpiling the waste outdoors, which is what led to the contamination" in that case. *PPG Indus.*, 957 F.3d at 403. While acknowledging that the government had "urged * * * all chromium chemical manufacturers to increase output" during the war, the court emphasized that this "Government directive to increase output" did not alter the fact that "it was [the facility's owner] that managed operations specifically related to pollution." *Id.* at 405. The court stated that "*FMC* was correctly decided" "even under the *Bestfoods* standard," but it based that conclusion on the fact that the government in *FMC* was "specifically involved with waste production and regulation." *Ibid.* The court explained that the government in *FMC* had "stepp[ed] in" to assist the manufacturer and had thereby become directly "involve[d] in waste disposal," so that "'wastes were generated and disposed of by the government-owned equipment that was installed at the facility.'" *Ibid.* (quoting *FMC*, 29 F.3d at 837-838).

b. Contrary to petitioners' suggestion (Pet. 19), the Eighth Circuit's 1995 decision in *TIC Investment Corp.*, *supra*, did not hold that operator liability "does not require involvement in waste-disposal activities." The relevant question in *TIC Investment Corp.* was whether a corporate officer was directly liable as an "arranger"

under Section 9607(a)(3) based solely on his "'authority to control'" the company. *TIC Inv. Corp.*, 68 F.3d at 1086 (citation omitted); see *id.* at 1086-1091. The court concluded that the standard governing a corporate officer's "direct arranger liability" requires not only that the officer had "authority to control" the company but also that he or she "in fact exercise[d] actual or substantial control * * * over the arrangement for disposal" of the company's hazardous waste. *Id.* at 1089-1090. That standard, the court noted, was different from the standard of "control" needed for an entity to incur direct "operator liability" for the operations of another. *Id.* at 1090 n.7. The court observed that "operator liability arising out of the exercise of control by one entity over another" does "not require any involvement [by the controlling entity] in the disposal activities themselves." *Ibid.* But that observation in no way suggests that operator liability is untethered to waste "disposal activities." To the contrary, it reflects an understanding that "disposal activities" are required, but that the "exercise of control" that triggers liability need not involve active participation in those activities. *Ibid.* In any event, even if the court in *TIC Investment Corp.* had held that operator liability does not turn on waste-disposal operations, that holding would be superseded by this Court's subsequent decision in *Bestfoods*.

c. Finally, *Nature's Way Marine*, *supra*, which addressed a tugboat owner's liability under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, does not speak to the question presented here. The tugboat in that case had been moving two oil-carrying barges (which lacked their own propulsion or steering) down the Mississippi River when the barges collided with a bridge, causing oil to be discharged from one of the

barges into the river. *Nature's Way Marine*, 904 F.3d at 418. The court concluded that the tugboat owner was liable for cleanup costs under OPA as a "responsible party," which OPA defines to include, "[i]n the case of a vessel [like the oil-spilling barge], any person * * * operating * * * the vessel," 33 U.S.C. 2701(32)(A). See *Nature's Way Marine*, 904 F.3d at 420-421.

To interpret the OPA term "operating," the Fifth Circuit invoked the portion of *Bestfoods*' analysis that surveyed dictionary definitions of the verb "operate." *Nature's Way Marine*, 904 F.3d at 420. The court concluded that those definitions reflect an understanding that an "operator" is one who "directs the workings of, manages, or conducts the affairs of" something. *Ibid.* (quoting *Bestfoods*, 524 U.S. at 66); see *ibid.* (noting that OPA and CERCLA contain "parallel language" and have "common purposes and a shared history"). In light of that understanding, the court determined that the tugboat's "act of piloting or moving the vessel"—the barge from which oil was discharged into the river—constituted "'operating' a vessel under the OPA," because the "ordinary and natural meaning of an 'operator' of a vessel under the OPA would include someone who directs, manages, or conducts the affairs of a vessel." *Id.* at 420-421. The court further observed that the barge owner "directed precisely the activity that caused the pollution—it literally was the party that crashed the barge into the bridge." *Id.* at 421.

That interpretation of OPA does not conflict with the court of appeals' CERCLA decision in this case. Determining who is an operator of a "facility" under CERCLA and determining who is an operator of a "vessel" under OPA require distinct legal inquiries. And although the Fifth Circuit borrowed from *Bestfoods*' dictionary-based

textual analysis when interpreting the ordinary meaning of the word "operator," see *Nature's Way Marine*, 904 F.3d at 420, the court did *not* adopt *Bestfoods*' CERCLA-specific holding that an "operator" under Section 9607(a)(2) "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67. *Nature's Way Marine* does not address that CERCLA-specific interpretation, which petitioners recognize (Pet. i, 1, 7) is the holding most directly relevant to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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