No. 22-465

# In the Supreme Court of the United States

GEORGIA-PACIFIC CONSUMER PRODUCTS LP, ET AL., PETITIONERS

*v.*

INTERNATIONAL PAPER COMPANY, ET AL.

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes persons who have been ordered to pay more than their fair share for an environmental cleanup to obtain contribution from other persons responsible for the contamination. See 42 U.S.C. 9613(f). The Act contains a three-year statute of limitations for an "action for contribution for any response costs or damages." 42 U.S.C. 9613(g)(3). That limitations period begins to run on "the date of judgment in any action under [the Act] for recovery of such costs or damages." 42 U.S.C. 9613(g)(3)(A). The question presented is as follows:

Whether a judgment that declares a particular entity to be liable under CERCLA, but does not order payment of any response costs or damages, can trigger the three-year limitations period for a contribution action.

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## INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, "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) (brackets and citation omitted).

Under Section 107(a)(4) of CERCLA, potentially responsible parties (PRPs) are strictly liable for expenses that include the costs of the cleanup (response costs)

and damages for the loss of natural resources. 42 U.S.C. 9607(a)(4). PRPs include owners and operators of facilities that disposed of hazardous substances, as well as persons who arranged for disposal of hazardous substances at those facilities. 42 U.S.C. 9607(a)(1)-(4). Under Section 107(a), the federal government or another party can clean up the site itself and then sue PRPs to recover its costs. *Atlantic Richfield*, 140 S. Ct. at 1346. Alternatively, under Section 106(a), the federal government can pursue judicial actions or issue administrative orders to require a PRP to clean up the site. 42 U.S.C. 9606(a).

The burdens of a CERCLA cleanup can fall disproportionately on a particular PRP. To address that problem, CERCLA "provide[s] two clearly distinct remedies," set out in Sections 107(a) and 113(f). *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 138 (2007) (citation and internal quotation marks omitted). A PRP that has "incurred" cleanup costs without being sued under Section 106 or Section 107(a) can file a cost-recovery action under Section 107(a) against other PRPs. 42 U.S.C. 9607(a)(4)(B); see *Atlantic Research*, 551 U.S. at 139. A PRP "may recover under § 107(a) without any establishment of liability to a third party." *Atlantic Research*, 551 U.S. at 139.

By contrast, a PRP that reimburses another person's response costs after being sued under Section 106 (by the federal government) or Section 107(a) (by the federal government or another plaintiff) "has not incurred its own costs of response and therefore cannot recover under § 107(a)." *Atlantic Research*, 551 U.S. at 139. Instead, the PRP may seek contribution under Section 113(f). 42 U.S.C. 9613(f)(1) and (3)(B). Contribution under CERCLA carries its traditional, common-law

meaning: the "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." *Atlantic Research*, 551 U.S. at 138 (citation omitted). In *Atlantic Research*, this Court reserved the question whether costs incurred pursuant to a consent decree entered in a Section 106 or 107(a) action "are recoverable under § 113(f), § 107(a), or both." *Id.* at 140 n.6. Since that time, however, the government has argued that such costs are recoverable in a Section 113(f) contribution action, and courts of appeals have consistently agreed. See, *e.g.*, *Solutia Inc.* v. *McWane Inc.*, 672 F.3d 1230, 1235-1236 (11th Cir.) (citing cases), cert. denied, 568 U.S. 942 (2012).

Cost-recovery actions under Section 107(a) and contribution actions under Section 113(f) have different limitations periods. See 42 U.S.C. 9613(g)(2) and (3). The provision at issue here, Section 113(g)(3), sets a three-year limitations period for an "action for contribution for any response costs or damages." 42 U.S.C. 9613(g)(3). For a contribution claim based on a judgment, that period runs from "the date of judgment in any action under this chapter for recovery of such costs or damages." 42 U.S.C. 9613(g)(3)(A). For a contribution claim based on a settlement, that period runs from "the date of an administrative order * * * or entry of a judicially approved settlement with respect to such costs or damages." 42 U.S.C. 9613(g)(3)(B).

2. a. For a prolonged period, several paper mills, including a mill now owned by petitioners, disposed of waste produced during the manufacture of carbonless copy paper into the Kalamazoo River in southwestern

Michigan. Pet. App. 29a. That waste included polychlorinated biphenyls (PCBs). *Ibid.* In 1990, the U.S. Environmental Protection Agency (EPA) designated 80 miles of the Kalamazoo River and surrounding areas for inclusion on the National Priorities List (NPL) as a site requiring priority cleanup under CERCLA, see 42 U.S.C. 9605, commonly known as a Superfund site. Pet. App. 39a, 133a, 139a.

The work at the Site has proceeded in phases, involving investigation and cleanup of different media (soil and water) and of several "operable units" covering different geographic areas. Pet. App. 40a-45a, 109a. Petitioners have entered into a series of agreements to perform investigation and cleanup work during the different phases. *Id.* at 109a-113a. Those agreements include 1990 and 2007 administrative consent orders with various Michigan agencies; three administrative agreements with EPA entered in 2006 and 2007; a 2009 administrative agreement with EPA; and a 2009 federal consent decree. *Ibid.* Petitioners claim to have incurred approximately $100 million in response costs for work performed voluntarily and/or under those agreements. See *id.* at 109a-113a; First Am. Compl. ¶¶ 29-30.

After the Site was designated, petitioners and other paper companies formed an unincorporated association, the Kalamazoo River Study Group (KRSG). Pet. App. 5a. In 1995, KRSG sued several other companies—not including respondents—seeking to recover costs its members had incurred under the 1990 administrative consent order. *Ibid.* Two of the defendants in the *KRSG* litigation (Rockwell International Corporation and Eaton Corporation) filed counterclaims, invoking both Sections 107(a) and 113(f). D. Ct. Doc. 741-14, at 7-14 (Mar. 15, 2015); D. Ct. Doc. 741-15, at 12-16 (Mar.

15, 2015). In those counterclaims, Rockwell and Eaton (a) denied that they were liable parties under CERCLA and (b) alleged that they would be entitled to reimbursement from KRSG and its members if Rockwell and Eaton incurred their own response costs or were held liable in connection with the Site. D. Ct. Doc. 741-14, at 9-10; D. Ct. Doc. 741-15, at 14-15. In 1998, the *KRSG* district court issued an "Order and Partial Judgment" in which it, *inter alia*, entered "judgment as to liability * * * in favor of Defendants Eaton and Rockwell and against Plaintiff KRSG on Defendants' counterclaims." D. Ct. Doc. 741-17, at 2 (Mar. 15, 2015) (some capitalization omitted). That judgment did not order any KRSG member to pay any amount to Rockwell or Eaton or to any other entity or to incur any particular costs.

In 2000 and 2003 the *KRSG* district court entered two additional judgments. The first judgment did not allocate any response-cost obligation to Rockwell; the second judgment ordered Eaton to pay KRSG $62,261.58, reflecting a small portion of KRSG's investigative costs. D. Ct. Doc. 741-18, at 22 (Mar. 15, 2015); *KRSG* v. *Eaton Corp.*, 258 F. Supp. 2d 736, 761 (W.D. Mich. 2003); see Pet. App. 7a.

b. In 2010, petitioners filed this CERCLA action, seeking to recover a portion of their cleanup costs from respondents International Paper Company and Weyerhaeuser (as well as NCR Corporation, which is not a party in this Court, see Pet. ii n.2). See Pet. App. 7a.

Petitioners' complaint invoked both Sections 107(a) and 113(f)(1) of CERCLA. First Am. Compl. ¶¶ 160-214; see Pet. App. 7a-8a. The district court determined that petitioners had a Section 107(a) cause of action as to costs incurred pursuant to the 1990 administrative

consent order, and a Section 113(f) cause of action as to other costs triggered by subsequent settlement agreements. See Pet. App. 126a, 128a. Respondents argued that petitioners' entire action was subject to the Section 113(g)(3)(A) limitations period for contribution claims, based on the counterclaims and the 2003 district-court judgment in the *KRSG* litigation. *Id.* at 120a. The district court "disagree[d]," explaining that "the ostensible section 107 counterclaims asserted by the defendants in the *KRSG* litigation" did not "obligate[] [petitioners] to assert section 113 contribution claims." *Ibid.* Applying the Section 113(g)(3)(A) limitations period, the court observed, would "effectively bar some contribution claims even before they would normally accrue." *Id.* at 121a.

The district court then determined that the statute of limitations had not run for costs incurred under the 1990 administrative consent order or under agreements entered in 2009, but that it had run for costs incurred under agreements entered in 2006 and 2007. See Pet. App. 126a-129a. After trial, the court allocated the non-time-barred costs that petitioners had incurred at the Site through 2014. The court allocated 40% of those costs to petitioners, 40% to NCR, 15% to International Paper, and 5% to Weyerhaeuser. *Id.* at 92a.

c. The court of appeals reversed. Pet. App. 1a-27a.

The court of appeals held that Section 113(g)(3)(A) barred petitioners' CERCLA claim in its entirety because that claim had been filed more than three years after the 1998 judgment in the *KRSG* litigation. The court described the 1998 judgment as a "bare-bones" declaratory judgment that had "awarded no specific amount of damages or costs, instead resulting in simply a determination of liability." Pet. App. 16a-17a. In find-

ing that such a judgment can trigger the statute of limitations for a CERCLA contribution claim, the court observed that CERCLA specifically provides for the entry in a cost-recovery action of a declaratory judgment addressing liability for future response costs. *Id.* at 17a (citing 42 U.S.C. 9613(g)(2)). The court inferred that, as a type of judgment specifically contemplated by the statute, a bare declaratory judgment on liability can "serve as" the judgment referenced in Section 113(g)(3)(A). *Id.* at 18a.

The court of appeals concluded that the 1998 judgment had "started § 113(g)(3)(A)'s statute of limitations running and established [Georgia-Pacific's] right to seek contribution for the PCB contamination of the NPL site." Pet. App. 27a (citation and internal quotation marks omitted). In reaching that conclusion, the court emphasized the language in the 1998 order granting judgment as to liability against KRSG on the defendants' counterclaims. See *id.* at 23a. The court also noted the *KRSG* district court's subsequent statement that Georgia-Pacific was required to pay "the entire cost of response activities relating to the NPL site." *Id.* at 22a (quoting *KRSG* v. *Rockwell Int'l*, 107 F. Supp. 2d 817, 840 (W.D. Mich. 2000)). The court of appeals further observed that petitioners' current suit would be time-barred even if the 2000 or 2003 *KRSG* judgment was viewed as the relevant triggering event, since petitioners' suit had been filed more than three years after those judgments as well. See *id.* at 24a.

In distinguishing the First Circuit's decision in *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6 (2004), which had held that a particular declaratory judgment did not trigger Section 113(g)(3)(A)'s limitations period for a subsequent contribution claim, the court of appeals

described that case as involving "judgments for two separate types of environmental remediation." Pet. App. 20a. The court rejected, as neither "bind[ing]" nor "persuasive," the First Circuit's statement that the Section 113(g)(3) limitations period does not begin to run until there has been an "'expenditure or fixing of costs for which a PRP may seek contribution.'" *Id.* at 21a n.4 (quoting *American Cyanamid*, 381 F.3d at 12).

**DISCUSSION**

Petitioners seek this Court's review of the question whether a "bare declaratory judgment of liability" (Pet. 15) that did not order them to pay any costs or damages triggered Section 113(g)(3)(A)'s three-year limitations period for a Section 113(f) contribution action. See Pet. 15-29. 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. But this case is a poor vehicle for clarifying Section 113(g)(3)(A)'s application to declaratory judgments because it is unclear whether and to what extent petitioners' current suit actually asserts claims for contribution and because of the atypical nature of the *KRSG* judgment. Further review is not warranted.

**A. The Court Of Appeals' Decision Is Incorrect**

Contrary to the court of appeals' holding, the 1998 declaratory judgment entered against petitioners on the defendants' counterclaims in the *KRSG* litigation did not trigger the limitations period set out in Section 113(g)(3)(A).

1. The limitations period for an "action for contribution for any response costs or damages" begins running on "the date of judgment in any action under this chapter *for recovery of such costs or damages*." 42 U.S.C.

9613(g)(3)(A) (emphasis added). As a matter of grammar, the phrase "for recovery of such costs or damages" could plausibly be thought to modify either the noun "action" or the noun "judgment." Taken together, however, several contextual considerations weigh heavily in favor of the second interpretation.

a. Section 113(g)(3)(A)'s reference to "*such* costs or damages," 42 U.S.C. 9613(g)(3)(A) (emphasis added), "trains [a court's] view on particular things." *Slack Techs., LLC* v. *Pirani*, 143 S. Ct. 1433, 1440 (2023). "The word 'such' usually refers to something that has already been 'described' or that is 'implied or intelligible from the context or circumstances.'" *Id.* at 1439-1440 (citation omitted). Here, the obvious referent for "such costs or damages" is the "response costs or damages" that the "action for contribution" seeks to recoup, see 42 U.S.C. 9613(g)(3). The "judgment * * * for recovery of such costs or damages" is the judgment that addresses those costs. Section 113(g)(3)(A)'s reference to "*the* date of judgment," 42 U.S.C. 9613(g)(3)(A) (emphasis added), rather than "a date" or "any date," reinforces the inference that a single judgment is involved. See Pet. 22. By "us[ing] the definite article," the statute references a "particular" judgment. *Slack Techs.*, 143 S. Ct. at 1440; see, *e.g.*, *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004).

b. A party that incurs clean-up costs "voluntarily" can recover its costs through a Section 107(a) cost-recovery action, not a contribution action under Section 113(f). *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 140 n.6 (2007); see *id.* at 139 ("A private party may recover under § 107(a) without any establishment of liability to a third party."). By contrast, a party that pays "reimbursement to another person pursuant to a

legal judgment or settlement" may seek contribution, but it may not pursue a cost-recovery action because it "has not incurred its own costs of response." *Id.* at 139, 140 n.6. Thus, if A "voluntarily" (*i.e.*, without suit or settlement) incurs $10 million in cleanup costs and sues B in a Section 107(a) cost-recovery action, and the court enters judgment ordering B to pay $5 million, B can seek contribution for that sum from other PRPs under Section 113(f). It is the legal compulsion to pay or incur specific costs, here to reimburse another party for that party's own cleanup costs, that gives rise to a Section 113(f) claim. *Id.* at 138-140 & n.6; see pp. 2-3, *supra*.

c. Interpreting "for recovery" to modify "judgment" in Section 113(g)(3)(A) is consistent both with that provision's focus on a specific judgment and with the CERCLA prerequisites to a contribution right. 42 U.S.C. 9613(g)(3)(A). That reading appropriately ensures that the only judgments that will trigger the three-year limitations period are "judgment[s] * * * for recovery of * * * costs or damages," *i.e.*, judgments that *order the payment* of costs or damages and thus create a contribution right. And Congress's inclusion of the word "such" ensures that the judgment that triggers the three-year period for seeking contribution is the *same* judgment that creates a right to recover in contribution for the particular costs involved.

That approach is consistent with this Court's analysis in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), in which the Court relied on Section 113(g)(3)'s limitations provisions in determining the prerequisites for a contribution action under Section 113(f). The Court observed that Section 113(g)(3)'s limitations period can be triggered either by a judgment (Section 113(g)(3)(A)) or by a settlement (Section

113(g)(3)(B)), but that "[n]otably absent from § 113(g)(3) is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup." *Id.* at 167. The Court inferred that "[t]he lack of such a provision supports the conclusion that" Section 113(f)(1)'s and Section 113(f)(3)(B)'s terms provide prerequisites "to assert[ing] a contribution claim under § 113(f)." *Ibid.* A contrary approach, under which CERCLA contribution claims could proceed notwithstanding those requirements, would have effectively created contribution rights that were subject to *no* limitations period, because there would be no Section 106 or Section 107(a) judgment or settlement to trigger Section 113(g)(3)(A) or (B). For similar reasons, the specific judgment or settlement that triggers the limitations period in a particular case ought to be the same one that creates the Section 113(f) plaintiff's right to recover contribution.

By contrast, if the phrase "for recovery of such costs or damages" were understood to modify only "action," 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. That would include judgments that do not order the payment of *any* response costs or damages, and thus do not create any contribution right. It would also include judgments that award costs or damages different from those for which a plaintiff subsequently seeks contribution. Cf. *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 13-16 (1st Cir. 2004) (holding that a money judgment covering soil-remediation costs did not trigger the Section 113(g)(3)(A) limitations period for a contribution action concerning costs of groundwater cleanup). Under that approach, 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.*

d. Interpreting "for recovery" to modify "judgment" in Section 113(g)(3)(A) is also consistent with "[t]he interlocking language and structure" of Section 113(g)(3) as a whole, *Territory of Guam* v. *United States*, 141 S. Ct. 1608, 1613 (2021). The second trigger for the limitations period for a contribution action, contained in the adjoining Section 113(g)(3)(B), is "the date of an administrative order * * * or entry of a judicially approved settlement with respect to such costs or damages." 42 U.S.C. 9613(g)(3)(B). Sections 113(g)(3)(A) and 113(g)(3)(B) "are adjacent and have remarkably similar structures." *Atlantic Research*, 551 U.S. at 135-136. Section 113(g)(3)(B) starts the limitations period upon the entry of an order or settlement "with respect to such costs or damages," namely an order or settlement imposing the specific costs or damages that the

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* Section 113(f) "permits suit before or after the establishment of common liability" in a Section 106 or Section 107(a) action, thereby allowing a Section 106 or Section 107(a) defendant to *file* a Section 113(f) claim to bring other PRPs into the proceeding before the Section 106 or Section 107(a) action concludes. *Atlantic Research*, 551 U.S. at 138-139; see 42 U.S.C. 9613(f). But the ultimate "right to contribution" requires "an inequitable distribution of common liability," which exists only after a judgment or settlement in the Section 107(a) action awards the relevant costs. *Atlantic Research*, 551 U.S. at 139; see *id.* at 138-139. Section 113(g)(3)(A)'s directive that the limitations period begins to run on "the date of judgment," 42 U.S.C. 9613(g)(3)(A), is consistent with usual limitations principles. See *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 105 (2013) ("a statute of limitations begins to run when the cause of action 'accrues'—that is, when 'the plaintiff can file suit *and obtain relief*'") (emphasis added; citation omitted).

contribution plaintiff seeks to recoup. See *Arconic, Inc.* v. *APC Inv. Co.*, 969 F.3d 945, 952 (9th Cir. 2020) (holding that a settlement that did not impose "any response costs or remedial obligations" did not trigger Section 113(g)(3)(B)'s statute of limitations), cert. denied, 141 S. Ct. 2838 (2021); but see Pet. App. 18a-20a (citing *RSR Corp.* v. *Commercial Metals Co.*, 496 F.3d 552, 556-558 (6th Cir. 2007)).

Interpreting subparagraphs (A) and (B) in concert creates a coherent statutory scheme, reflecting the "symmetry" of Section 113(g)(3)'s limitations regime, *Atlantic Research*, 551 U.S. at 135-136. Under that approach, a "judgment * * * for such costs or damages" triggers the statute of limitations as to costs that are ordered to be paid by judgment, and an "administrative order * * * or entry of a judicially approved settlement with respect to such costs or damages" triggers the statute of limitations as to the costs required to be paid under an order or settlement. 42 U.S.C. 9613(g)(3)(A) and (B).

2. The court of appeals determined that the 1998 judgment resolving a counterclaim in the *KRSG* litigation triggered the Section 113(g)(3)(A) limitations period. Pet. App. 16a-24a. In reaching that conclusion, the court relied on CERCLA's authorization for the court in a Section 107(a) cost-recovery action to issue a declaratory judgment as to liability. See *id.* at 17a-18a; 42 U.S.C. 9613(g)(2). The court appeared to accept the proposition that a judgment can trigger Section 113(g)(3)(A)'s limitations period only if it creates a right to seek contribution. See Pet. App. 26a-27a. The court stated, however, that "the 1998 KRSG judgment started § 113(g)(3)(A)'s statute of limitations running and established [Georgia Pacific's] right to seek contribution

for the PCB contamination of the NPL site." *Id.* at 27a (citation and internal quotation marks omitted). The court's analysis is wrong in two respects.

a. The fact that CERCLA authorizes entry of declaratory relief, separate and apart from any order awarding specific costs or damages, does not mean that such a declaratory judgment either creates a contribution right or triggers the Section 113(g)(3)(A) limitations period. A "right to contribution under § 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties." *Atlantic Research*, 551 U.S. at 139; see *id.* at 139-140 & n.6. But a declaratory judgment of liability standing alone does not require the defendant to "pa[y] more than his or her proportionate share." *Id.* at 138 (citation omitted); see Pet. 24. And under the statute, only a "judgment * * * for recovery of [the relevant] costs or damages" starts the limitations period. See pp. 8-13, *supra*. A declaratory judgment that establishes liability, but does not order the defendant to pay any costs or damages, is not such a judgment. See *American Cyanamid*, 381 F.3d at 13 (explaining that "[t]he declaratory judgment [mandated by Section 9613(g)(2)] is binding on any subsequent actions to recover response costs or damages, but it is not itself a judgment for the recovery of such costs or damages").

b. The court of appeals also misperceived the significance of the 1998 *KRSG* judgment and its relationship to petitioners' current contribution claims. The 1998 "Partial Judgment" stated simply that "judgment as to liability is entered in favor of Defendants Eaton and Rockwell and against Plaintiff KRSG on Defendants' counterclaims." D. Ct. Doc. 741-17, at 2 (some capitalization omitted). Eaton and Rockwell were *defendants*

in the *KRSG* litigation, and the central question in the case was whether they should be ordered to pay a portion of the KRSG members' response costs. The *KRSG* district court largely resolved that question in the defendants' favor, though it ultimately directed Eaton to pay KRSG $62,261.58 in investigative costs. See p. 5, *supra*.

To be sure, the defendants' counterclaims asserted a contingent right to recover from KRSG members if Rockwell and Eaton subsequently incurred response costs, or were found liable under CERCLA, for cleanup activities at the site. See pp. 4-5, *supra*. But it does not appear that Rockwell or Eaton ever incurred such costs or liability, or that Georgia-Pacific ever paid money to either counterclaimant. The *KRSG* court's 1998 entry of partial judgment on the defendants' counterclaims therefore appears to have had no ultimate practical effect on costs borne by KRSG, Rockwell, and Eaton. Rather, that distribution of costs resulted from the court's determination that, except for the $62,261.58 investigative-costs award, KRSG was not entitled to any recovery *from* the defendants. And the district court's *denial* of KRSG's reimbursement request is not the sort of judgment that could trigger either a right to contribution under Section 113(f)(1) or the three-year limitations period under Section 113(g)(3)(A).

Thus, whatever effect the *KRSG* district court may have intended to achieve in 1998, when it granted judgment for Rockwell and Eaton on their counterclaims, that aspect of the court's ruling did not ultimately cause petitioners to expend any sums they would not otherwise have expended. The response costs that petitioners now seek to recover therefore were not incurred

"pursuant to" the 1998 judgment on the *KRSG* defendants' counterclaims. *Atlantic Research*, 551 U.S. at 140 n.6. Rather, they were incurred voluntarily and/or pursuant to preexisting or subsequent administrative orders and settlements. See p. 4, *supra*; First Am. Compl. ¶¶ 29-30; see also pp. 20-21, *infra* (explaining that this aspect of the case, which suggests that this action might properly be viewed as a Section 107(a) cost-recovery action, renders the case a poor vehicle for clarifying the proper interpretation of Section 113(g)(3)(A)). It therefore would be especially anomalous to treat the 1998 declaratory judgment as triggering the statute of limitations for petitioners' current claims.

3. Respondents' contrary arguments are unavailing. In arguing that Section 113(g)(3)(A)'s limitations period can be triggered by a judgment that does not award costs or damages, respondents treat as all-but-dispositive the fact that, within Section 113(g)(3)(A), the noun "action" is a nearer antecedent than "judgment" to the phrase "for recovery of such costs and damages." See Weyerhaeuser Br. in Opp. 3, 24-25; IP Br. in Opp. 19-21. But the rule of the last antecedent is "hardly a slam dunk." *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1498 (2022). Instead, it "can assuredly be overcome by other indicia of meaning." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003). That is particularly so where, as here, the last antecedent before "for recovery" ("chapter") is obviously not the appropriate referent. 42 U.S.C. 9613(g)(3)(A). The strong indicia of meaning discussed above easily overcome any inference that the "for recovery" phrase modifies the second-nearest antecedent rather than the third-nearest. See pp. 8-13, *supra*.

The early trigger for a contribution statute of limitations created by respondents' reading is particularly untenable given the practical realities of CERCLA remediation. Many cleanup sites, like the Site at issue here, have multiple operable units, distinguished by geographic area or media of contamination, where investigation occurs on different timetables. See, *e.g.*, Pet. App. 40a-45a, 109a; *United States* v. *Denver*, 100 F.3d 1509, 1511 (10th Cir. 1996) (describing site with 11 operable units in over 40 locations). Different operable units may also have different PRPs. At the time of an initial judgment awarding costs or damages for one operable unit, or addressing liability alone, a responsible party will often lack the necessary information to identify contribution defendants and to meaningfully pursue recovery for potential costs at other operable units.

Respondents' answer to those concerns is to assert a practical concern of their own: that the statute of limitations for a contribution claim could "continue[] in perpetuity." Weyerhaeuser Br. in Opp. 23-24; see Pet. App. 19a; IP Br. in Opp. 18. That possibility arises, however, only because of the court of appeals' and the parties' apparent belief that the 1998 *KRSG* judgment gave petitioners a right to seek contribution under Section 113(f). In fact, the 1998 judgment did not create such a right, see pp. 14-16, *supra*, so its failure to trigger the contribution statute of limitations is scarcely anomalous. When both the scope of the right to contribution and the reach of Section 113(g)(3)(A) are understood correctly, the problem identified by respondents would not arise because the judgment (or settlement) that creates the right to contribution will also trigger the limitations period. See, *e.g.*, Pet. App. 123a-129a (district

court's decision tying the running of the limitations period for each set of costs to the date of the settlement that created the corresponding contribution right).

**B. The Question Presented Does Not Warrant Review In This Case**

Although the court of appeals erred in holding that the 1998 declaratory judgment in the *KRSG* litigation triggered Section 113(g)(3)(A)'s limitations period, the petition for a writ of certiorari should be denied. Petitioners urge this Court to grant review to resolve a conflict between the decision below and the First Circuit's ruling in *American Cyanamid*. Although petitioners are correct that a circuit split exists, it is questionable whether a shallow conflict between two decisions issued eighteen years apart would warrant this Court's review even in an appropriate case. In any event, this case is a poor vehicle for clarifying Section 113(g)(3)(A)'s proper application, both because it is unclear whether and to what extent petitioners' current claims are properly viewed as claims for contribution, and because of the atypical nature of the *KRSG* judgment.

1. In *American Cyanamid*, the First Circuit considered whether a contribution action filed by Rohm and Haas (R&H) was barred by Section 113(g)(3)(A). See 381 F.3d at 11-16. In 1988, in *O'Neil* v. *Picillo*, 682 F. Supp. 706 (D.R.I. 1988), the district court had found R&H liable for $991,937 in past soil-remediation costs "and for 'all future costs of removal or remedial action incurred by the state'" at a particular site. *American Cyanamid*, 381 F.3d at 10 (quoting *O'Neil*, 682 F. Supp. at 731). "In April 1995, R & H instituted a [Section 113(f)(1)] contribution action * * * to recover past and future response costs related to groundwater cleanup." *Id.* at 11.

The defendants argued that R&H's contribution action was time-barred, but the court of appeals disagreed. See *American Cyanamid*, 381 F.3d at 11-16. In determining whether the *O'Neil* judgment had triggered the three-year limitations period for R&H's suit, the court separately analyzed the two components of that judgment described above, *i.e.*, the $991,937 award for past soil-remediation costs and the declaratory judgment for the State's future response costs. See *id.* at 12-16. Relying heavily on Section 113(g)(3)(A)'s reference to "*such* costs," the court held that the monetary award did not trigger the limitations period for R&H's contribution suit because that award was for *soil*-remediation costs, and R&H sought contribution for costs pertaining to *groundwater* contamination. See *id.* at 13-16; see pp. 9, 11-12, *supra*.

With respect to the declaratory-judgment component of the *O'Neil* judgment, however, the First Circuit articulated a different rationale for rejecting the defendants' statute-of-limitations defense. Consistent with the unqualified terms of the *O'Neil* decision, the court appeared to construe that declaratory judgment as encompassing future response costs for *both* soil and groundwater remediation. See *American Cyanamid*, 381 F.3d at 12-13; *O'Neil*, 682 F. Supp. at 730 (noting that the State's request for a declaratory judgment was based on the fact "that toxic chemicals ha[d] been released into the groundwater"). The court concluded, however, that the declaratory judgment did not trigger Section 113(g)(3)(A)'s statute of limitations because "[t]he declaratory judgment * * * is not itself a judgment for the recovery of [response] costs or damages." *American Cyanamid*, 381 F.3d at 13. The court ex-

plained that, "[a]fter obtaining such a declaratory judgment, a PRP is able to seek contribution from other PRPs in phases as it incurs costs beyond its pro rata share," and does "not lose the ability to seek contribution if a phase of a cleanup occurs after three years of an initial judgment." *Id.* at 14. We agree with petitioners that the Sixth Circuit's decision in this case conflicts with that aspect of the First Circuit's decision in *American Cyanamid*.

2. It is questionable whether this shallow circuit split would warrant the Court's review even in an appropriate case. In any event, this case is a poor vehicle for deciding the question presented. That is so for two reasons.

a. Petitioners do not question the court of appeals' determination that their suit is properly viewed as a Section 113(f)(1) contribution action rather than a Section 107(a) cost-recovery action. Indeed, they ask the Court to use this case to clarify the proper application of a limitations provision that applies *only* to CERCLA contribution actions. But petitioners do not specify what judgment, settlement, or administrative order has given them a right to seek contribution in the first place.

In particular, the petition for a writ of certiorari neither endorses nor disavows the court of appeals' holding that the 1998 declaratory judgment on the *KRSG* defendants' counterclaims "established [Georgia Pacific's] right to seek contribution for the PCB contamination of the NPL site." Pet. App. 27a (citation and internal quotation marks omitted). To the extent petitioners view that declaratory judgment as the source of their contribution right, petitioners' limitations argument implies that a particular judgment can trigger a right to contri-

bution without triggering Section 113(g)(3)(A)'s limitations period. Any such argument is wrong for the reasons stated above. See pp. 10-12, *supra*; Weyerhaeuser Br. in Opp. 27 ("Georgia-Pacific does not explain why the same judgment that caused its contribution claim to accrue * * * would not be 'the judgment' that triggered the statute of limitations on the contribution claim.") (citation omitted).

The district court identified other orders and agreements pursuant to which petitioners have incurred costs, see Pet. App. 109a-113a; but neither the petition nor the court of appeals' opinion contains any meaningful discussion of those potential sources of contribution rights. Cf. Pet. 10 (stating, without elaboration, that Georgia-Pacific had "continued to investigate and clean up the site under various agreements with the state and federal governments" after the *KRSG* litigation concluded). To the extent that any of the costs for which petitioners seek reimbursement were incurred "voluntarily," petitioners' claims for those costs arise under Section 107(a) and are governed by a separate limitations provision. *Atlantic Research*, 551 U.S. at 140 n.6; see p. 2, *supra*; 42 U.S.C. 9613(g)(2). And this Court 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." 551 U.S. at 140 n.6. The uncertainty as to the source and nature of petitioners' current claims makes this case a poor vehicle for clarifying the proper application of Section 113(g)(3)(A).

b. Section 113(g)(2) declaratory judgments in CERCLA cost-recovery actions are often entered in conjunction with initial awards of response costs. The *O'Neil* judgment that was at issue in *American Cyanamid*, for

example, held R&H liable for $991,937 in soil-remediation costs that the State had previously incurred, in addition to awarding declaratory relief covering all of the State's future response costs at the site. See *American Cyanamid*, 381 F.3d at 10, 12. The 1998 *KRSG* declaratory judgment on the defendants' counterclaims, by contrast, was unaccompanied by any concrete monetary award. And while those counterclaims rested in part on the *possibility* that Rockwell or Eaton might later incur response costs at the Site, see p. 5, *supra*, that possibility does not appear to have materialized.

The court of appeals in this case stated that "the KRSG decision issued in 1998 imposed * * * response costs or damages, compelling [Georgia-Pacific] as a member of KRSG to pay for 'the entire cost of response activities relating to the NPL site,' i.e., PCB cleanups on this stretch of the Kalamazoo River." Pet. App. 22a (quoting *KRSG* v. *Rockwell Int'l*, 107 F. Supp. 2d 817, 840 (W.D. Mich. 2000)). The court thus appeared to view the 1998 *KRSG* judgment as imposing on KRSG's members a new, freestanding obligation to perform and pay for response actions at the Site. But the plaintiff KRSG members did "not contest[] their liability as PRPs," D. Ct. Doc. 741-17, at 12; the disputed question was whether the entities KRSG had sued should be held liable *as well*. The district court's statement that KRSG's members should bear "the entire cost of response activities" appears simply to have reflected the court's denial of relief on KRSG's affirmative Section 107(a) and 113(f) claims. See p. 15, *supra*. To 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 this Court's analysis and provide a further reason to deny review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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