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

REPLY BRIEF FOR THE PETITIONERS

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The federal government's brief in opposition does not dispute that this is "the largest CERCLA case ever," Pet. App. 30a, or that it cleanly presents an important question of federal law implicating potentially hundreds of millions of dollars in liability, Pet. 27; *see* AFPM & WSPA Amicus Br. 21-22. Instead, the government opposes certiorari by arguing that the decision below was right on the merits, and that twenty-six years ago *United States v. Bestfoods* resolved any confusion about the applicable standard. 524 U.S. 51 (1998). Neither argument is correct—or consistent with the government's previous litigation positions. Certiorari is warranted to resolve confusion among the circuits that the government continues to exploit.

First, the government's own description of the caselaw confirms the circuits have different tests for operator liability under CERCLA. The Sixth Circuit held that to "qualif[y] as an operator," an entity must "'exercise[] control over the *waste disposal* process.'" Opp. 6 (emphasis added) (quoting Pet. App. 6a). But the Third Circuit has held—after *Bestfoods*—that operator liability may exist because of "involve[ment] with *waste production*." Opp. 18 (emphasis added) (quoting *PPG Indus. Inc. v. United States*, 957 F.3d 395, 405 (3d Cir. 2020)). Thus, control over waste-production activities is categorically irrelevant in the Sixth Circuit but can be "dispositive" in the Third Circuit. *PPG*, 957 F.3d at 406 n.11. Similarly, the government now suggests *United States v. TIC Investment Corp.*, 68 F.3d 1082 (8th Cir. 1995), was "superseded by this Court's subsequent decision in *Bestfoods*," Opp. 19, but the government does not

deny that it treated *TIC* as good law years after *Bestfoods*, Pet. 3, 19; Opp. 14.

Second, the government's history of inconsistent positions on the scope of operator liability highlights the confusion in the caselaw. Unable to explain away its past positions, the government simply ignores multiple briefs Petitioners cited as examples of the government taking a broader view of operator liability. In the selective defenses it does offer, the government cannot bring itself to disavow the language conflicting with the Sixth Circuit's holding here. The government's brief in opposition reflects yet another opportunistic reading of CERCLA.

Third, the government's position contradicts CERCLA's statutory text. Those who issue "binding directives" about "what to make" at a facility, Opp. at 4 & n.1, *operate* the facility because they "direct[] the workings of, manage[], or conduct[] the affairs of a facility," *Bestfoods*, 524 U.S. at 66. The government relies exclusively on additional language from *Bestfoods* meant "[t]o sharpen the definition for purposes of CERCLA's concern with environmental contamination": "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 government ignores that waste production is "specifically related to pollution" and "ha[s] to do with" subsequent waste disposal. *Id.* Under the government's approach, CERCLA would no longer be sufficiently "sweeping" to encompass "*everyone* who is potentially responsible for hazardous-waste contamination." *Id.* at 56 n.1.

The Court should grant review to resolve the confusion on this important question of federal environmental law.

I. The federal government essentially confirmed the existence of a circuit split.

By the government's own telling, the Third, Fifth, and Eighth Circuits deem waste-*producing* activities relevant in assessing operator liability. This conflicts with the Sixth Circuit, which held that operator liability depends on "control over the waste *disposal* process." Pet. App. 6a (emphasis added). As the government acknowledges, this was a categorical ruling, not a fact-specific inquiry into "particular regulatory requests or the distinct histories of the various refineries." Opp. 4 n.1.

A. The government recognizes that the Third Circuit in *FMC Corp. v. U.S. Department of Commerce*, 29 F.3d 833 (3d Cir. 1994), "identif[ied] *production-related matters* as leading indicia of operator status." Opp. 17 (emphasis added) (citing Pet. App. 13a, in turn citing *FMC*, 29 F.3d at 843). And the government also recognizes that, after *Bestfoods*, the Third Circuit in *PPG* confirmed that operator liability may exist because of control over "*waste production* and regulation." Opp. 18 (emphasis added) (quoting *PPG*, 957 F.3d at 405).

Far from "retreat[ing]" from *FMC* after *Bestfoods*, Opp. 17 (quoting Pet. App. 13a), the Third Circuit has reiterated that "*FMC* was correctly decided" precisely because it found operator liability based on control over "waste production." *PPG*, 957 F.3d at 405. Had such control existed in *PPG*, the Third Circuit would have found operator liability there too. *Id.* at 404 ("PPG has offered

no evidence permitting an inference that the Government 'demanded,' as opposed to 'recommended,' that NPRC switch to the quicker, more wasteful manufacturing process."). As *PPG* said, "who made the decisions about how to increase output" was "dispositive." *Id.* at 406 n.11.

That cannot be squared with the decision here, where the government concedes it "issued binding directives ordering refineries to take certain actions." Opp. 4 n.1. As the district court explained, "the petroleum industry had 'no choice.'" Pet. App. 37a. "[I]f they defied the Government's directives, they faced dire repercussions." Pet. App. 59a.

B. The government likewise concedes that the Eighth Circuit in *TIC* stated that "operator liability … does not require any involvement in the disposal activities themselves." 68 F.3d at 1090 n.7 (citation omitted). In the government's words, *TIC* held "that the 'exercise of control' that triggers [operator] liability need not involve active participation in [disposal] activities." Opp. 19. This is fundamentally inconsistent with the Sixth Circuit's holding, which requires "control over the waste disposal process." Pet. App. 6a.

The government's suggestion that *Bestfoods* superseded *TIC* is odd, as the government itself continued to rely on *TIC* after *Bestfoods*. Pet. 20. The government cannot reconcile its past reliance on *TIC* with its newfound argument that the case was superseded. Nor does the government cite any Eighth Circuit cases suggesting *TIC* is no longer good law.

C. Finally, the government concedes that the Fifth Circuit in *United States v. Nature's Way Marine, LLC*,

904 F.3d 416 (5th Cir. 2018), relied on "*Bestfoods'* dictionary-based textual analysis when interpreting the ordinary meaning of the word 'operator'" to include pollution-producing activities. Opp. 20-21 (citing *Nature's Way*, 904 F.3d at 420). The government nonetheless contends that the OPA (the statute at issue in *Nature's Way*) and CERCLA "require distinct legal inquiries." Opp. 20. But the Fifth Circuit applied *Bestfoods* precisely because the two statutes have "the exact same language," "common purposes," "and a shared history." *Nature's Way*, 904 F.3d at 420. The government cannot credibly deny that the Fifth Circuit would follow *Nature's Way* in a CERCLA case.

II. The federal government continues to exploit confusion among lower courts.

The government's opposition marks another installment in a series of briefs opportunistically taking inconsistent positions on the standard for operator liability. Pet. 22-23. This history of contradictory positions evinces confusion warranting this Court's clarification.

A. The government makes virtually no effort to reconcile its current position with contrary positions it has previously taken to impose operator liability on others. The government ignores its brief in *United States v. Kayser-Roth Corp.*, where it advanced the same position Petitioners press now: "A person who manages, directs, or conducts operations that … *generate hazardous substances* … is an operator under CERCLA." U.S. Appellee Br., *United States v. Kayser-Roth Corp.*, No. 00-2038, 2001 WL 36025287 (1st Cir. Mar. 9, 2001) (emphasis added). *Bestfoods*, the government explained, "simply

clarified that a person whose direction or management of a facility is in no way related to, and has nothing to do with, a process that *uses or generates* hazardous substances, is not liable as an operator." *Id.* (emphasis added).

Nor does the government mention its brief in *Nature's Way*, which stated that a "person with physical control over the facility who 'actually participate[s]' in *causing the pollution* cannot escape liability as an operator." U.S. Appellees Br., *Nature's Way*, No. 17-60698, 2018 WL 1641061, at *19 (5th Cir. Mar. 23, 2018) (alteration in original) (emphasis added). The "critical issue" for operator liability, the government explained, is the scope of "involvement in an 'organizational sense,' *i.e.*, decisions regarding the *manufacture*, storage, and disposal of chemical wastes." *Id.* at *20 (emphasis added) (citation omitted). These were the "very activities that could cause pollution." *Id.*

B. The Petition highlighted the government's *Atlantic Richfield Co. v. United States* brief, which quoted *TIC*: "operator liability … does not require any involvement in the disposal activities themselves." Pet. 3 (quoting U.S. Br. in Opp., *Atl. Richfield Co. v. United States*, Nos. 02-500 & 02-506, 2002 WL 32134324, at *24 (U.S. Dec. 2, 2002), in turn quoting *TIC*, 68 F.3d at 1090 n.7). The government does not explain how its reliance on *TIC* in this post-*Bestfoods* case squares with its current suggestion that *TIC* was "superseded by this Court's subsequent decision in *Bestfoods*." Opp. 19.

Instead, the government runs away from this language, attempting to recast it as distinguishing between "directly" controlling waste disposal versus indirectly

controlling waste disposal through "another" entity. Opp. 14. But that is not what the government's *Atlantic Richfield* brief argued, and it is plainly not what *TIC* acknowledged. The question presented in *Atlantic Richfield* was whether the government faced arranger liability under CERCLA "when it did not direct or control the actual disposal of waste from th[e] manufacture" of petroleum. U.S. Br. in Opp., *Atl. Richfield*, Nos. 02-500 & 02-506, 2002 WL 32134324, at *1 (U.S. Dec. 2, 2002). The government's brief expressly contrasted arranger liability—which "focuses on the question of arranging for the disposal *of the substances*"—and operator liability—which "focuses on the question of ownership or operation *of the facility*." *Id.* at *24 (emphases in original). That argument is irreconcilable with the Sixth Circuit's approach here.

III. The federal government failed to rehabilitate the erroneous decision below.

A. The government agrees that the relevant statutory text is "operator." Opp. 2 (quoting 42 U.S.C. 9601(20)(A)(ii)). This Court in *Bestfoods* explained that this term should be "give[n] … its 'ordinary or natural meaning.'" 524 U.S. at 66 (citation omitted). Consulting dictionaries, the Court concluded that, "under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *Id.* The Court proceeded to "sharpen" this definition given "CERCLA's concern with environmental contamination," explaining 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 government's activities here make it an "operator" in this ordinary sense. The government repeatedly undersells its level of wartime control over petroleum facilities as mere "federal regulation of the petroleum industry." Opp. I; *see* Opp. 3, 9, 10. But make no mistake, this was not ordinary regulation. The government admits that, during World War II, it:

- issued "binding directives ordering refineries to take certain actions," Opp. 4 n.1;
- imposed "production directives" on facilities that instructed them "'what to make and for whom to make it,'" Opp. 3-4 (quoting Pet. App. 3a);
- enforced "rationing schemes" that instructed what goods facilities could use, Opp. 3; and
- "seiz[ed] several refineries temporarily after labor disputes threatened production," Opp. 4 (quoting Pet. App. 3a).

These are not "run-of-the-mill regulat[ions]." Opp. 6 (quoting Pet. App. 6a); *see* AFPM & WSPA Amicus Br. 5 ("The U.S. Government exercised sweeping control over domestic refineries during World War II" that "was unprecedented then and has no modern analogue now.").

Despite admitting that it "'seiz[ed]'" certain refineries and issued "binding directives," Opp. 4 & n.1 (citation omitted), the government maintains that it did not "operate" the facilities. But these activities plainly entail "direct[ing] the workings of, manag[ing], or conduct[ing] the affairs of a facility," *Bestfoods*, 524 U.S. at 66, so they render the government an operator under the plain statutory text.

B. Rather than engage with the text itself, or its ordinary meaning as recognized in *Bestfoods*, the government parses the language of a clause in a follow-on sentence in *Bestfoods* intended simply to "sharpen" that ordinary meaning. *Id.* at 66-67. The government conveniently downplays the first half of this sentence, focusing myopically on the language that follows the phrase "that is." Opp. 10-12. The government is wrong for three primary reasons.

First, "the starting point" for statutory interpretation "is the statutory text" itself, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003), not a judicial opinion. And CERCLA's definition of "operator" includes anyone "operating" a "facility." 42 U.S.C. § 9601(20)(A)(ii). It is not limited to those operating a waste-disposal program in particular. The government's attempt to selectively parse a clause in *Bestfoods* to retrofit a gloss on CERCLA contravenes this Court's instruction that "the language of an opinion is not always to be parsed as though [one] were dealing with [the] language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). This Court will not "override a lawful congressional command" based on "a handful of sentences"—let alone a single clause—"extracted from decisions that had no reason to pass on the argument … present[ed] today." *Brown v. Davenport*, 596 U.S. 118, 141 (2022). Simply put, a subordinate clause in a supposedly clarifying sentence in a judicial opinion cannot supersede plain statutory text—particularly on an issue not presented in that prior case.

The government notes, Opp. 13, that CERCLA's operator liability provision encompasses those who

operated facilities "at the time of disposal." 42 U.S.C. § 9607(a)(2). But this temporal limitation specifies only *when* the operator must have operated the facility, not *what* activities they must have performed. On the other hand, CERCLA's arranger liability provision specifies *what* activities must have been arranged: an arranger must have "arranged *for disposal or treatment*, or arranged with a transporter for transport *for disposal or treatment.*" *Id.* § 9607(a)(3) (emphases added). The operator liability provision has no similar language, proving Congress did not intend it to be similarly limited. *See* Pet. 29-30.

Tellingly, the government concedes that "involvement in generating … waste" is relevant to "allocating" cleanup costs among "multiple responsible parties." Opp. 15. But the government balks at using that same "involvement in generating … waste" to identify "responsible parties." Opp. 15.

The distinction is illogical. There is no reason for CERCLA to consider pollution-producing activities when *apportioning* liability but not when *imposing* liability. Opp. 14-15. As the government previously explained, that result "would … be *manifestly unjust*." U.S. Joint Br. in Opp., *Litgo N.J., Inc. v. Martin*, No. 06-2891, 2010 WL 4786390 (D.N.J. July 19, 2010) (emphasis added). The government devotes a lengthy footnote to the facts of *Litgo*, Opp. 15 n.2, but it neither disavows nor explains this language from its brief in that case.

Second, *Bestfoods* does not support the government's atextually narrow reading of CERCLA. *Bestfoods* defined "operator" broadly to include those who "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." 524 U.S. at 66-67 (emphases added). The government fails to acknowledge that "related to" and "having to do with" are expansive phrases. *See* Pet. 29 (citing cases). Indeed, the government itself has specifically emphasized these capacious phrases in arguing for a broad understanding of *Bestfoods*' definition of "operator." *See* U.S. Appellee Br., *Kayser-Roth*, No. 00-2038, 2001 WL 36025287 (1st Cir. Mar. 9, 2001) (relying on the broad sweep of "*related to*" and "*having to do with*" (emphases in original) (quoting *Bestfoods*)).

Activities that produce waste are naturally understood to "relate to" pollution and "have to do with" waste disposal. *See* Pet. 29. If the waste had not been produced, then there would be no "leakage or disposal." *Bestfoods*, 524 U.S. at 67; *see Webster's Third New International Dictionary Unabridged* 1040 (2002) (defining "have to do with" as "to have a specified relationship with or effect on").

The government's focus on the phrase "that is" also does not help it. Opp. 11. To begin, the government's definition is not universally shared. *See, e.g.*, *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1326 (Fed. Cir. 2012) (construing "i.e."—which translates to "that is"—as exemplary and not definitional). But more importantly, even if the government were right about "that is," it would only increase the importance of the following words in *Bestfoods*. And the government's control over waste-creating operations plainly "ha[s] to do with the leakage or disposal of [that] waste." *Bestfoods*, 524 U.S. at 66-67. As

the district court explained, "no reasonable juror could find that the extent of the Government's management, direction, and control over the [refineries here] had nothing 'to do with' the amount of waste they produced." Pet. App. 79a; *accord* Pet. App. 84a-87a, 92a-98a.

In fact, the district court identified several ways in which the government's control over the refineries "ha[d] to do with the leakage or disposal of hazardous waste." *Bestfoods*, 524 U.S. at 66-67; *see, e.g.*, Pet. App. 78a n.18 ("[T]he Government inspected the Eight's disposal sites."); Pet. App. 87a n.19 ("[T]he Government admitted to delaying the improvement of the disposal process at Hanford and Springs."); Pet. App. 96a n.20 ("[T]he Government told Gulf and Eastern whether, when, how, or where to dispose of waste."); Pet. App. 96a n.20 ("[T]he Government negotiated with Gulf and Eastern and specified how they should dispose of waste.").

Third, the government's argument subverts CERCLA's "purpose." Opp. 12. Under the government's approach, an entity could avoid operator liability by outsourcing control over or simply turning a blind eye to waste disposal despite retaining control over the production process that generates waste. *See* Pet. 32-33. An interpretation of CERCLA that incentivizes such a scheme does not "promote the timely cleanup of hazardous waste sites" or "ensure that the costs of such cleanup efforts are borne by those responsible for the contamination." Opp. 2 (citation omitted). It does the opposite, as the government effectively concedes by failing to respond to this argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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