No. 17-1498

IN THE

Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

GREGORY A. CHRISTIAN, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether CERCLA preempts a state common-law claim for restoration that seeks cleanup remedies that conflict with EPA-ordered remedies.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus curiae* before this Court both in CERCLA cases, see, e.g., *Burlington N. & S. F. R. Co. v. United States*, 556 U.S. 599 (2009), and in preemption cases, see, e.g., *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015).

CERCLA prohibits a State or a private party from using state law to interfere with the EPA-directed cleanup of an environmental-hazard site. Yet the decision below allows Montana landowners to do just that. If allowed to stand, the decision will undercut the federal government's ability efficiently and effectively to manage environmental restoration under CERCLA. WLF urges reversal.

STATEMENT OF THE CASE

Marcus Daly came to western Montana in 1876 to manage a small silver mine. He soon realized that the region's most abundant natural resource was not silver but copper; so in 1881 he bought a small local prospect called Anaconda and, with financial support from George Hearst (William Randolph Hearst's father), established the Anaconda Copper Mining

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. All parties have consented to the brief's being filed.

Company. Within a decade the Anaconda mine was the largest copper mine on earth, and the area was producing more than a quarter of the world's copper supply. In the following decades the Anaconda Company essentially built the economy and infrastructure of Montana.

Atlantic Richfield acquired the Anaconda Company in the late 1970s, and it shut down the Anaconda site in 1980. See Lydia Chavez, *When ARCO Left Town*, N.Y.Times, July 25, 1982 https://nyti.ms/2TUKmaU ("Anaconda had lost the employer who for decades had maintained its parks, built its medical centers, [and] treated its sewage.").

Nineteen-eighty happens also to be the year that Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Congress enacted CERCLA to ensure that the nation's hazardous-waste sites are cleaned promptly and effectively. *Burlington*, 556 U.S. at 602. CERCLA empowers the EPA to order and to oversee the cleanup of such sites—their informal name, "Superfund" sites, is an allusion to a cleanup trust fund established by the government—in accord with an EPA-directed plan. 42 U.S.C. § 9604. The EPA may require parties responsible for the hazard to pay for and conduct the cleanup. *Id.*; 42 U.S.C. §§ 9606(a), 9607(a). With exceptions irrelevant here, no one may challenge the EPA's cleanup plan in court while the cleanup is ongoing. 42 U.S.C § 9613(h). Also, no one associated with the site may conduct cleanup there without EPA approval. 42 U.S.C. § 9622(e)(6).

In 1983 the EPA declared the Anaconda mining and smelting area a Superfund site. The Anaconda site is one of the largest Superfund sites in the country. The EPA has devoted millions of dollars and thousands of workhours to it. Pet. App. 65a. Atlantic Richfield, for its part, has spent around $450 million on it. Pet. Br. 11. The company has also done extensive work at the site; it has, for instance, moved "hundreds of thousands of cubic yards" of refuse. Pet. Br. 15.

A group of landowners on the Anaconda site sued Atlantic Richfield in 2008 for, among other things, land-restoration damages. Atlantic Richfield objected that, because the restoration damages would be spent on cleaning the land, and because the plaintiffs' cleanup plan conflicts with the site's CERCLA plan, the plaintiffs improperly seek (1) to evade the statutory bar to challenging an ongoing CERCLA project, (2) to undertake illicit cleanup work unapproved by the EPA, and (3) to obtain money for cleanup through a state-law claim preempted by federal law. The trial court denied Atlantic Richfield's motion for summary judgment and allowed the plaintiffs' restoration claim to proceed.

The Montana Supreme Court granted interlocutory review. The United States submitted an *amicus* brief supporting Atlantic Richfield's appeal. It endorsed each of Atlantic Richfield's three arguments. In support of the preemption argument—the subject of this brief—the government explained how the plaintiffs' and the EPA's cleanup plans conflict. To wit: the plaintiffs' plan requires deeper and more expansive soil excavation, an

extensive new system of trenches, and dramatically lower (in truth likely impossible) soil pollutant levels. Pet. App. 72a; see Pet. Br. 17-18.

The Montana Supreme Court affirmed. It concluded that a jury may award money for the plaintiffs' plan even if the plan changes or undoes parts of the EPA's plan. Rejecting Atlantic Richfield's and the United States' preemption argument, it declared that CERCLA's two savings clauses permit the plaintiffs' state-law restoration claim. Pet. App. 17a-18a; see 42 U.S.C. § 9614(a) (stating that CERCLA does not preempt a State from "imposing any additional liability" for "the release of hazardous substances within such State"), § 9652(d) (stating that CERCLA does not "affect" anyone's "liabilities" under "State law, including common law, with respect to releases of hazardous substances").

Justice McKinnon dissented. She concluded that because the plaintiffs' plan conflicts with the EPA's plan, the majority's ruling is "inconsistent with CERCLA and federal precedent." Pet. App. 23a-24a. CERCLA's savings clauses change nothing, Justice McKinnon said, because "a savings clause is not intended to allow specific provisions of the statute that contains it to be nullified." Pet. App. 33a.

SUMMARY OF ARGUMENT

When NASA designs a rocket, no one empanels a jury to check the math. Congress would never let twelve people walk in off the street, watch a tutorial on astrophysics, take a Saturn V apart, "improve" its

Stage II liquid hydrogen-liquid oxygen propulsion system, and then reassemble it for liftoff.

Restoring the environment is not rocket science—but it is often pretty close. Just as it would not let a jury tinker with a space launch, Congress would not let a jury reorganize a major environmental-restoration project. Yet in this case the Montana Supreme Court held that CERCLA does not preempt a state-court jury from reviewing and altering the EPA's half-billion-dollar cleanup plan for the Anaconda Superfund site. Montana's justices based this preemption ruling almost entirely on CERCLA's savings clauses. To do so, they had to duck at least five parts of CERCLA and a long line of this Court's cases.

There are, of course, many forms of preemption—i.e., (a) express, (b) field, and (c) conflict, the third of which is in turn comprised of (i) impossibility and (ii) obstacle. This case involves conflict preemption: both impossibility preemption and obstacle preemption bar the plaintiffs' lawsuit. Our focus, however, is obstacle preemption. We make three points:

1. CERCLA is an exhaustive statute that grants the federal government broad power to orchestrate the prompt and efficient cleanup of hazardous-waste sites. In several discrete ways, CERCLA's detailed remedial scheme instructs States and private parties not to second guess the federal government's judgments about how a site cleanup should proceed. The Montana Supreme Court made a hash of this scheme, gutting at least five parts of CERCLA on its way to holding that a jury may authorize a private

cleanup plan at odds with an EPA-directed CERCLA plan. The EPA cannot clean a hazardous-waste site effectively if a jury may review the EPA's plan and then, substituting its judgment for the EPA's, start awarding money earmarked for a competing plan.

2. This Court has rejected—repeatedly—the argument on which the Montana Supreme Court based its preemption ruling. Many federal laws contain a broad savings clause that protects state law-making power or preserves state-law remedies. Several times, a State or a private party has argued that a savings clause permits a state law or remedy to work against the very federal law in which the savings clause appears. And several times, this Court has rejected this argument and held that a savings clause is not some kind of statutory self-destruct mechanism. The decision below conflicts with this Court's common-sense reading of federal savings clauses.

3. The consequences of upholding the Montana Supreme Court's decision would be disastrous. The decision allows a jury to undermine, even wreck, decades of work by the EPA's experts. It exposes Atlantic Richfield to tens of millions of dollars in new liability. It invites work that the plaintiffs' fellow Anaconda-area landowners may well oppose—alterations that could even expose those other landowners to new health hazards. It opens the way for similar chaos at other Superfund sites. And, yes, it leaves the environment *less* protected.

ARGUMENT

I. THE DECISION BELOW UNDERCUTS CERCLA IN MANY DISCRETE WAYS.

A state law is conflict-preempted (1) if complying with both the state law and federal law "is a physical impossibility" (i.e., "impossibility" preemption) or (2) if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (i.e., "obstacle" preemption). *Arizona v. United States*, 567 U.S. 387, 399 (2012).

As Atlantic Richfield explains (Pet. Br. 41-47), this lawsuit plainly triggers impossibility preemption. It is impossible for the EPA cleanup plan and the plaintiffs' cleanup plan to coexist at the Anaconda site.

As Atlantic Richfield also explains (*id.* at 47-51), and as we discuss here, the lawsuit triggers obstacle preemption as well. The Montana Supreme Court created at least five major obstacles to the implementation of federal policy.

A. The Decision Below Undermines The CERCLA-Mandated National Contingency Plan.

CERCLA instructs the EPA to publish and maintain a "national contingency plan for the removal of oil and hazardous substances." 42 U.S.C. § 9605; see *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed. Reg. 8666 (Mar. 8, 1990). "The response," CERCLA declares, to

"damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions" of this National Contingency Plan. 42 U.S.C. § 9605(a).

The National Contingency Plan requires an extensive deployment of the EPA's technical and scientific expertise. Under the Plan, the EPA must (among many other things) inspect and evaluate a Superfund site; conduct a "detailed analysis" of the "viable approaches" to cleaning it; and select and implement "remedies that eliminate, reduce, or control risks to human health and the environment." 40 C.F.R. §§ 300.410, 300.430(a)(1), 300.430(e)(9)(i).

The history of the EPA-directed cleanup at the Anaconda site perfectly illustrates how much work and expertise goes into a National Contingency Plan-consistent cleanup. The EPA's "remedial orders total more than 1,300 pages and consist of detailed soil and water reports, topographical surveys, scientific analyses, and countless charts, tables, and graphs supporting EPA's decisions." Cert. Pet. 7; see, e.g., EPA, *Fifth Five-Year Review Report: Anaconda Smelter Superfund Site*, goo.gl/7RLczh (2015). The cost and complexity of federally directed cleanups confirm that Congress wanted such cleanups to be exclusive.

The decision below allows a jury to ignore the National Contingency Plan, second-guess the EPA's experts, and adopt a plan of its own. Pet. App. 13a. This outcome cannot be squared with Congress's intent that the EPA, guided by the National Contingency Plan, direct a Superfund site cleanup.

B. The Decision Below Flouts CERCLA's Bar On Independent Site Cleanups.

Confirming that CERCLA aims to facilitate a single and unified cleanup at each site, CERCLA § 122(e)(6), entitled "Inconsistent response action," states that, once a CERCLA site study has begun, "no potentially responsible party [PRP] may undertake any remedial action at the facility unless such remedial action has been authorized" by the EPA. 42 U.S.C. § 9622(e)(6). The decision below allows PRPs to skirt this protection of the EPA-directed cleanup and implement their own bespoke cleanup plans. See Pet. Br. 32-40. It allows PRPs simultaneously to extend, to complicate, and to foil the cleanup process.

Congress "designed [CERCLA] to promote the timely cleanup of hazardous waste sites." *Burlington*, 556 U.S. at 602. It hardly needs saying that the EPA cannot fulfill Congress's intent if others, proceeding without the EPA's expertise or approval, may alter or undo the site work the EPA has completed or ordered. See *United States v. Denver*, 100 F.3d 1509, 1513 (10th Cir. 1996) ("to hold that Congress intended that non-uniform and potentially conflicting [state practices] could override CERCLA remedies would fly in the face of Congress's goals of effecting prompt cleanups" of hazardous-waste sites).

C. The Decision Below Flouts CERCLA's Bar On Legal Challenges To An EPA-Crafted Cleanup Plan.

CERCLA § 113(h) generally deprives a court of jurisdiction to review an ongoing CERCLA cleanup project. 42 U.S.C. § 9613(h) (setting forth the jurisdictional bar, and listing exceptions not pertinent here); see Pet. Br. 25-32. "In enacting section 113(h), Congress intended to prevent time-consuming litigation which might interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites." *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 674 (8th Cir. 1998).

Here is yet another sign that the decision below flouts Congress's will. In brushing § 113(h) aside and allowing the plaintiffs' suit to proceed, the decision below approves and even promotes "time-consuming litigation" likely to obstruct "the prompt cleanup" of CERCLA sites.

D. The Decision Below Disrupts CERCLA's Settlement Scheme.

CERCLA contains a detailed section on settlement between a potentially responsible party and the federal government. 42 U.S.C. § 9622. A settlement benefits the government, the PRP, and the land itself by quickly clarifying the parties' respective cleanup responsibilities and enabling an organized cleanup to commence.

An implicit term of a settlement, for both the EPA and the PRP, is that the jurisdictional bar in § 113(h) will insulate the PRP from other lawsuits

while the site cleanup proceeds. If, suddenly, a PRP must contend with additional litigation challenging the cleanup plan, the settlement's terms are altered. Now the PRP must pay additional legal fees. And if the PRP, who is already paying to restore the land under the settlement, loses the litigation, it will have to pay additional, even duplicative, restoration costs—costs that can exceed the land's market value. At that point, the PRP might well "find it economically advantageous to walk away from further cleanup efforts" or to "use the threat of bankruptcy as [a] hammer to hold over the EPA's head." *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1221-22 & n.46 (9th Cir. 2011). The settlement could collapse. Future settlements will be harder to reach. Cf. *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 771 (7th Cir. 1994) (Easterbrook, J., concurring in part and dissenting in part) ("Risk that in the name of 'equity' a court will disregard . . . the parties' bargain . . . will lead potentially responsible parties to fight harder to avoid liability (and to pay less in settlements)[.]").

As the United States explained below, allowing "actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA." Pet. App. 71a.

E. The Decision Below Disrupts CERCLA's Contribution Scheme.

CERCLA enables a PRP that spends money on a cleanup to seek contribution from another responsible party—so long as the PRP spent its money in compliance with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(B). "When the

requirement" of consistency with the National Contingency Plan "is flouted, contribution is denied; that is the sanction for the violation." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). Conversely, of course, the right to seek contribution is the reward for complying with the plan.

The decision below distorts this scheme. A PRP can defeat a plaintiff's state-law restoration claim only by altering a site to the plaintiff's liking. But such changes will usually violate the EPA's cleanup plan and thus conflict with the National Contingency Plan. Under the rule set by the decision below, therefore, a PRP can avoid state-law liability only by forfeiting its right to seek contribution under CERCLA.

Congress has set a policy of rewarding PRPs that comply with federal cleanup standards. The decision below obstructs that policy.

* * *

This Court's recent, fractured opinion in *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019), has no effect on this case. The plaintiff there claimed that the Atomic Energy Act preempted a state-law ban on uranium mining. One small problem: the AEA says *nothing* about mining. It governs uranium "*milling*, *transfer*, *use*, and *disposal*." *Id.* at 1900 (emphasis added). As three justices observed, preemption does not arise from "a supposition (or wish) that 'it must be in there somewhere.'" *Id.* at 1901. In this case, by contrast, Atlantic Richfield can point to many distinct parts of CERCLA and

exclaim, "Here it is!" They can point to CERCLA's bar on challenges to an ongoing EPA-directed cleanup, to its bar on cleanup activity unapproved by the EPA, to its carefully calibrated settlement scheme, and more.

This is not a case that merely touches "some brooding federal interest." *Id.* at 1901. Congress enacted a law that explicitly empowers the EPA to clean hazardous-waste sites without having to deal with lawsuits or environmental vigilantes. It enacted a law, moreover, that encourages PRPs to cooperate with the EPA and to pay their share for environmental restoration. Under the Montana Supreme Court's reading of CERCLA, Congress's careful design no longer works right.

II. THE DECISION BELOW MISCONSTRUES CERCLA'S SAVINGS CLAUSES.

In reading CERCLA's savings clauses expansively, the decision below ignores basic rules of statutory construction. In addition, it defies this Court's rule against placing a statute's savings clause above its specific mandates.

A. The Decision Below Erroneously Adopts The Broadest Possible Reading Of CERCLA's Savings Clauses.

The Montana Supreme Court relied on two of CERCLA's savings clauses. A subpart of § 114, entitled "Relationship to other law," provides:

> Nothing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. § 9614(a). And § 302(d), part of a section entitled "Effective dates; savings provisions," states:

> Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to the releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d). The Montana Supreme Court adopted a sweeping construction of these provisions. The savings clauses, it said, ensure that any state-law claim that does not "*actively* interfere with EPA's work" may proceed. Pet. App. 11a (emphasis added). According to the Montana Supreme Court, in fact, a state-law claim that seeks to undo aspects of a completed EPA cleanup plan "is exactly the sort contemplated in CERCLA's savings clauses." Pet. App. 11a-12a, 17a.

The state high court ignored two fundamental rules of statutory construction. First, the court failed to read CERCLA's savings clauses in the context of CERCLA itself. "A statute's meaning does not always turn solely on the broadest imaginable definition of its component words." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). A court,

after all, "construe[s] statutes, not isolated provisions." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). It is important, therefore, that a court "read [a statute's] words in their context and with a view to their place in the overall statutory scheme." *Id.* Reading a savings clause out of context can wreak havoc on the operation of the rest of the statute. See Sec. I, above.

Second, the court ignored "the commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *Id.* That is the situation here, where general savings clauses run counter to specific provisions ensuring that a single, EPA-directed cleanup proceeds in accord with the National Contingency Plan.

Reasonably construed, CERCLA's savings clauses establish merely that CERCLA does not preempt the field of hazardous-waste cleanup. A state law may complement CERCLA; it may not impede it.

B. The Decision Below Conflicts With This Court's Cases Addressing The Proper Scope Of A Remedies Savings Clause.

Many savings clauses in other federal laws are nearly identical to CERCLA's savings clauses. This Court has been asked to interpret several of these

clauses, and, in each instance, it has read the savings clause before it in a fashion incompatible with the Montana Supreme Court's approach here.

1. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The Airline Deregulation Act contains a savings clause held over from the Federal Aviation Act. Nothing in the FAA, the clause says, "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Id.* at 378.

Note the similarity of the broad language in the FAA and CERCLA savings clauses:

> Nothing "shall *in any way* abridge" remedies "now existing at common law or by statute" (FAA (emphasis added)).
>
> Nothing shall "*in any way*" modify the "liabilities of any person under other Federal or State law, including common law" (CERCLA (emphasis added)).

The ADA bars the States from regulating airline prices, routes, or services. *Id.* at 378-79. The *Morales* plaintiffs argued that the FAA's savings clause stopped that bar from preempting their state-law deceptive advertising claim. Rejecting this argument, *Morales* observes that "the specific governs the general." *Id.* at 385. Congress, *Morales* concludes, does not "undermine [a] carefully drawn statute through a general saving clause." *Id.* A general savings clause cannot overcome a specific provision—such as the "prices, routes, or services"

bar—that divides authority between state and federal law.

2. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998). "Nothing in this [law]," the Communications Act of 1934 says, "shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414. This savings clause is identical to the one in the FAA.

A set of rules in the Communications Act required AT&T to sell its services only at rates it filed with the government. A telephone-service broker brought state-law claims that, if successful, would have entitled the broker to service from AT&T at a rate lower than AT&T's filed rates. *Id.* at 222-23. *AT&T* holds that the federal rate-filing rules preempted the broker's state-law claims.

The Communications Act's general savings clause, the Court said, changed nothing:

> The saving clause cannot in reason be construed as continuing in customers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.

Id. at 227-28 (quoting *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

3. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). The National Traffic and Motor Vehicle Safety Act says that "'compliance with' a

federal safety standard 'does not exempt any person from any liability under common law.'" 529 U.S. at 868.

When it was sued for omitting airbags from the 1987 Honda Accord, Honda invoked a Vehicle Safety Act regulation that declared airbags merely an optional safety feature. The plaintiff answered with the Vehicle Safety Act's savings clause.

The Court, *Geier* says, "has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 870. Put another way, a savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869. And under those principles, preemption occurs whenever an "actual conflict" exists between a federal standard and a state standard. *Id.* at 884. Because the pertinent regulation deliberately made airbags optional, the plaintiff's state-law claims, which could succeed only if airbags were required, were preempted—the savings clause notwithstanding. *Id.* at 874-86.

* * *

Whereas the court below used CERCLA's savings clauses to discard specific provisions of CERCLA (see Sec. I, above), *Morales*, *AT&T*, and *Geier* each use a specific statutory provision to limit the scope of a savings clause. The decision below conflicts with this Court's assumption, grounded in sound principles of statutory interpretation, that a federal savings clause is not an invitation for States to bypass federal law.

III. THE DECISION BELOW WILL HARM TAXPAYERS, COMPANIES, LANDOWNERS, AND THE ENVIRONMENT.

The EPA has spent decades creating and adjusting a plan to restore the Anaconda site to environmental health. The EPA's efforts have been paid for by—of course—the American taxpayer. Atlantic Richfield has spent another $450 million or so fulfilling the EPA's plan. The decision below allows a jury to treat a lot of this painstaking work like so much dress rehearsal, a lot of this massive expenditure like so much money placed in a pile and burnt.

This astounding outcome is not some product of the *volonté générale* around Anaconda. It is not part of some grand revolt of The People against the federal government's environmental regulators. As Atlantic Richfield points out, only a "small minority of landowners in the towns" around the site have brought this lawsuit. Pet. Br. 16. It should not be lightly assumed that the suit serves the many non-party landowners well. Indeed, they have good reason to worry about what might come in its wake. The plaintiffs want deeper soil replacement, even though the extra digging could upset and aerate arsenic dust. *Id.* at 18. And they want trenches, the construction of which might spread now-contained groundwater contamination. *Id.*

What's more, in Montana it is now open season for attacking CERCLA cleanup plans. The plaintiffs here seek to add a second cleanup plan to the Anaconda site. Others may now seek to add a second

plan to Montana's sixteen other Superfund sites. And yet others may then seek to add third plans, and fourth plans, and fifth plans, each of which may impede and uproot the others. Like Disney's Mad Tea Party ride, this regime will move a lot around while taking no one anywhere.

All of these problems *might* be tolerable if the decision below *at least* ensured greater protection for the environment. But sound environmental stewardship is not something the decision can promise. Think again of a rocket—or, for that matter, just a bicycle. Regardless of which design is best, the chances of success turn on just *one* design being executed. Likewise with environmental restoration. Maybe it would have been optimal, for example, to dig out the contaminated soil in some area a little deeper. But once the digging is done, new soil is laid, and new vegetation is planted, it almost certainly makes no sense to *re*-dig the hole, *further* upset the contamination that lies beneath, etc. The best environmental outcomes will arise only if the EPA, and the EPA alone, makes the final call about what measures are needed to restore a Superfund site.

Fortunately, that's exactly how CERCLA actually works.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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