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 TREASURE STATE RESOURCES ASSOCIATION OF MONTANA, MONTANA MINING ASSOCIATION, MONTANA PETROLEUM ASSOCIATION AND THE MONTANA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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August 28, 2019

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INTERESTS OF *AMICI CURIAE*[1]

The Treasure State. This "official nickname" of the State of Montana is based not on some kind of buried pirate treasure dreamed up by Robert Louis Stevenson, or on other flights of fancy, but on history and the "hard rock" reality of copper and other "treasures" dug up from below, and processed above, in the lands of the American West.[2] Montana, like many other western states, was built on mining and mineral processing from its Territorial days through the U.S. Civil War, through two World Wars and the Cold War when copper was king, and still produces minerals today.

The federal government has long played a role as well. Encouraging and fostering first the mining and processing of gold and silver – the "Oro y Plata" of Montana's Great Seal – with the 1872 Mining Act and silver purchasing acts, then copper and other minerals with electricity, communication and war time requirements. A century later, came, *inter alia*, the Clean Water Act, the Resource Conservation and

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[1] Pursuant to this Court's Rule 37.3(a), counsel of record for all parties have consented to the filing of this brief. No counsel for a party authored this brief, in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] *See* Montana.gov Official State Website, *About Montana*, http://www.mt.gov. *See also* William Kitteridge & Annick Smith, *The Last Best Place: A Montana Anthology* (1990); Michael Punke, *Fire and Brimstone: The North Butte Mining Disaster of 1917* (2006); John D. Leshy, *The Mining Law: A Study in Perpetual Motion* (1987). *See also* Job 28:2-11 ("copper is smelted from rocks … where food grows on top of the earth, [but] searching for ore [man] sinks a shaft far from where people reside; below, there … in the stones is sapphire, and the dust contains gold").

Recovery Act, and the federal statute at issue here: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). All of this is part of the complicated national equation that is Montana and the American West. As part of this diversity, historically and today, these Montana *amici* fear that the Montana Supreme Court decision at issue here is poised, as Petitioner asserts, to throw CERCLA's national policy – which delicately balances community, business and individual interests – "into chaos." Accordingly, *amici* ask this Court to reverse the Montana court's dangerous misinterpretation and misapplication of CERCLA.

Amicus Treasure State Resources Association of Montana (TSRA), a non-profit voluntary trade association, brings together diverse industry, labor, agricultural and recreation groups to work together on issues that affect land use and resource development in Montana. TSRA's members include mining and mineral production companies, transportation companies, unions, energy companies, water users and others (including PRPs at some of the 17 Superfund sites in Montana), all vitally interested in the consistency, certainty, finality and ability to plan for risk provided by CERCLA, a comprehensive federal environmental scheme that precludes and preempts state-law tort claims that conflict and interfere with federal cleanups and the federal statute's rules, requirements and protections. As a part of their vital communities, the members of TSRA are also concerned that the decision below, which misreads and wrongly refuses to apply CERCLA's jurisdictional and litigation limits will – unless reversed by this Court – result in community discord, and the very type of chaos and inconsistency that is the bane of its members' ability to function and prosper in the

communities where their employees and their families live, work and play.

Founded in 1919, amicus Montana Mining Association (MMA) is a non-profit voluntary trade association comprised of members from every sector of the mining industry in Montana. Producing members mine and/or beneficiate crucial minerals used in manufacturing, medicine, construction, agriculture and other endeavors. These minerals include copper, garnets, gold, lime, manganese, molybdenum, nickel, palladium, platinum, silver, talc and zinc. MMA's purpose is to be an advocate for its members, who as important contributors to the state's economic fabric dating back to Montana's Territorial days, help provide the necessary materials today for our everyday lives, along with affording countless Montana families and graduates from local universities the opportunity to prosper from well-paying employment. One of MMA's primary functions is to share the compelling story of the industry's history in Montana and the American West, a perspective that is often left unsaid and unheard today, and which, as amicus, MMA can bring to the attention of the Court.

Amicus Montana Petroleum Association (MPA) represents another sector of the mineral industry in Montana, *i.e.*, members who explore and produce oil and natural gas, who operate pipelines, and who refine petroleum products. A non-profit focused on maintaining a positive business climate in Montana for its members, MPA shares the concerns of its fellow voluntary trade associations that the decision of the Montana Supreme Court allowing tort claims to interfere with and supersede remedial actions carried out under the orders and auspices of a federal regulatory agency like EPA, is a recipe for disaster for business, including the petroleum industry.

The Montana Chamber of Commerce (MCC) often serves as *amicus curiae* in a wide variety of cases involving business in Montana, sometimes in tandem with the national Chamber of Commerce, which is also an *amicus curiae* in this matter. Like its co-*amici*, MCC is a voluntary, non-profit trade association. MCC champions economic development and a favorable business climate in the Treasure State on behalf of its over 750 members. MCC, too, sees the decision of the Montana Supreme Court as a disaster for industry and the state's economy as a whole, and as plainly wrong under the controlling federal law. MCC joins its fellow Montana trade associations in asking this Court to reverse the decision below.

SUMMARY OF THE ARGUMENT

CERCLA is hardly a darling of industry, and certainly not of *amici's* members. In fact, the broadly encompassing statute with its disconcerting reach backwards into a past of entirely different environmental norms, often frustrates and irritates industry. However, CERCLA's saving grace, indeed the reason that "comprehensive" is the law's first name, is that its various provisions provide protections to parties swept within its reach, both during and after the "one coordinated cleanup" that Congress has mandated, and do not allow trial lawyers or a jury to "second guess" EPA's response actions. U.S. Brief to Mont. Sup. Ct., Pet. App. 74a; U.S. Invitation Br., p.12. Indeed: Certainty, consistency, predictability for risk-planning, and finality, without them business cannot function, much less thrive.

Likewise, the community involvement mandated by CERCLA, and fostered by EPA, is part and parcel of what makes this delicate balance work, and what has made it work in the past. Whether the remedy

for cleaning up the remains of the Nation's prior century of mineral production and other industrial outputs is performed under a consent decree or an administrative order, the key to CERCLA is that there will be one comprehensive remedy designed and carried out with community involvement throughout the long and complex process. As the United States explained in its amicus brief, below, "the main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations." Pet. App. 74a.

Contrary to CERCLA's plain terms, and the interpretation of those terms by the federal circuit courts, the decision of the Montana Supreme Court allows individual private party landowners to sue for "restoration" money damages while cleanup is ongoing at a Superfund Site, and then requires every penny awarded by the jury to be spent on a different cleanup plan to "restore" that same site after it has already been remediated. Pet. App. 13a. Soil already cleaned and capped? Dig it up. Waste disposed and contained? Move it elsewhere, possibly contaminating the lands (and lungs) of plaintiffs' neighbors. Clean water for domestic use? Install underground barriers and inject enzymes that may make the water unsafe to drink for the community as a whole. As Petitioner so aptly put it, this is "the very definition of madness." Pet. 4.

Congress decided that EPA (with community input) not juries, selects remedies for hazardous wastes subject to CERCLA, and that individual PRPs (including current landowners like the Respondents here) cannot engage in individual conduct contrary to EPA's selected, in-progress remedy. Particularly given the long national (indeed, international) history of this site, and of the mining industry

in Montana and the American West as a whole, federal control over contrary state-level, jury-imposed, remedies must be upheld.

The opinion below reverses the mandate of Congress that a single, coordinated cleanup properly selected and supervised by EPA, with community outreach and input, is the appropriate solution to remedy a past manmade hazardous waste mess. The appropriate solution to remedy this present judge-made legal mess is mandated by the Constitution: a writ of certiorari from this Court to the Montana Supreme Court requiring it to uphold CERCLA as "the supreme law of the land." The decision below should be reversed.

ARGUMENT

A. What's Past is Prologue.

In its brief, Petitioner explains how Atlantic Richfield Company has worked cooperatively with EPA at Montana Superfund sites for over 36 years. Pet. Br. 4-5. For the waste at issue here, 36 years is recent history, as is Atlantic Richfield's involvement with it. Eminent historian David McCullough once instructed a class of college seniors eager to head out into the world, that "[h]istory is who we are and why we are the way we are."[3] With that context in mind, as explained in these *amici's* petition-stage brief, a better place to start this story, then, might be in 1864, when early prospectors in Montana's Summit Valley discovered "the richest hill on earth."[4]

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[3] David McCullough, *Address to Wesleyan University Graduating Class* (June 4, 1984).

[4] Michael Malone, *The Battle for Butte: Mining and Politics on the Northern Frontier, 1864-1906*, at 4, 34 (1981) ("The mineralized outcrops ran profusely from the brow of the hill" down to

Or in 1882, when excavations by Marcus Daly (one of Butte's "Copper Kings") uncovered on the Butte hill "the largest deposit of copper sulphide that the world had ever seen," copper that over the coming century would be smelted in the yet-to-be-constructed Washoe Smelter in the yet-to-be-founded city of Anaconda, about 21 miles to the northwest of Butte. The smoke from that smelter, built and operated by the Anaconda Copper Mining Company (a corporate predecessor of Petitioner), would waft over the Deer Lodge Valley, leaving behind the waste at issue in this lawsuit. But the smelter's product—refined copper, zinc and manganese—would not only result in riches for some, but would, among other things, electrify the nation and help win two world wars.[5]

In World War I, the metals from Butte and Anaconda were so critical to the war effort that the United States sent troops (commanded by then Captain Omar Bradley) to ensure the mines and smelter would keep running despite massive labor unrest, producing copper at an astonishing clip pushed by the federal War Industries Board. The government knew no copper literally meant no bullets and other key munitions. It was fresh American troops, armed

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the flats "where mineralization caused a lack of vegetation and where the earth bore unmistakable signs of a metal presence: green and blue carbonates of copper, the rusty brown discoloration of iron, the brown and black stains of zinc and manganese," and over to "conspicuous quartz-ledges rising prominently above the surface, [with] obvious metal content").

[5] *Id.* at 28, 34-35; *see also Bill Dedman, Empty Mansions: The Mysterious Life of Huguette Clark and the Spending of a Great American Fortune (2014)*; Michael Basso, *Meet Joe Copper: Masculinity & Race in Montana's World War II Home Front* (2013).

with munitions made from Anaconda copper, who eventually brought the "War to End All Wars" to a close.[6]

Of course, all wars did not end then, nor did the crucial need for copper and other Anaconda products. Between World War I and World War II, the nation prospered in the "boom" of the 1920s, and suffered through the Great Depression of the 1930s. By the end of the 1920s, most cities were connected with electric, telegraph and telephone wires (made with Anaconda copper). In the 1930s, national policy turned its focus on rural America. With, *inter alia*, the enactment in 1936 of the Rural Electrification and Communications Act, the Anaconda smelter kept smelting.[7]

By the 1940s, with the arrival of a second World War, Anaconda's smelted products were "use[d] in critical components of airplanes, ships, tanks, bomb sights, ammunition, and an astonishing range of other types of equipment."[8] In short, the Butte ores and the Anaconda smelter were crucial to the United States becoming "the arsenal of democracy."[9] When America entered World War II, the federal War Production Board (WPB) put copper in an "urgency rat-

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[6] *See, e.g.*, Punke, *supra* note 1 at 215-16; George Everett, *The Captain Who Fought World War I in Butte, Montana*, http://www.butteamerica.com/brad.htm; Robert Cuff, *The War Industries Board: Business-Government Relations During World War I* (1973); and generally, Adam Hochschild, *To End All Wars: A Story of Loyalty and Rebellion, 1914-1918* (2011).

[7] An Act to provide for rural electrification and other purposes, 49 Stat. 1363.

[8] Basso, *supra* note 5, at 5.

[9] *Id.*, and Punke, *supra* note 1, at 265.

ing band" higher than anything except the Manhattan Projects.[10]

Copper production was so important to the war effort that Butte workers who would otherwise have been drafted received deferments or were furloughed to the mines and smelter, and were required to work there, in lieu of serving in the military, as "soldiers of production." The WPB successfully pushed Anaconda to a 400% increase in copper production by 1943, about one-third of the total supply of primary copper then available in the United States, and throughout the war the Anaconda smelter, as required by the WPB and the needs of the nation and the free world, kept sending out its smoke.[11]

But, as *amici* explained in their petition-stage brief, because they had filed a brief in a court of law, the best place to start a brief about mining waste and CERCLA seemed to be not with war and peace, but with a legal opinion in an early 20th century lawsuit. That lawsuit reached all the way to this Court, and was all about *the very property at issue here again*, over a century later, in 2019.

In 1911, three years before the start of World War I, the Ninth Circuit Court of Appeals decided a case it considered of such "importance" it "directed that [its] mandate be stayed for six months to enable the appellant to apply to the Supreme Court for a writ of certiorari should he so desire." *Bliss v. Washoe Copper Co.*, 186 F. 789, 828 (9th Cir. 1911). The case was straightforward—in 1909, Fred Bliss, representing an association of other farmers in the Deer Lodge Valley, sued to enjoin the operation of

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[10] *See, e.g.*, *id.* at vii, 125-30, 178-88, 233.

[11] *Id.*

Anaconda's new Washoe smelter because arsenic and other particulates in the smelter's smoke were harming their crops and land. *Bliss v. Anaconda Copper Min. Co.*, 167 F. 342, 372 (D. Mont. 1909).

In this era, fifty years before Rachel Carson, the outcome was perhaps not surprising. The Ninth Circuit affirmed the district court, which had denied the requested injunction, declining to close the smelter down. Commenting that the smelter owners "were ready to treat with [Bliss] and other landowners, and were willing to buy his land, and consider claims of injury," the injunction was an "ultimatum" that the district court rejected. *Bliss*, 167 F. at 372.

To order such an injunction, the district court ruled, would cause a greater harm: "Practically the whole population of Butte depends upon the continued operation of the copper mines [and] the effect of stopping the [smelter] works" would essentially bankrupt the state. *Id.* at 363-64. In other words, directly contrary to what the Montana Supreme Court would hold in the case at issue now, the federal court in 1909 refused to countenance a remedy that would cost far more than the land (the very same land at issue here) was worth.

The *Bliss* court explained it could not "overlook the historical fact that Congress, through its beneficent legislation, invited the exploitation of the Rocky Mountains by prospectors for the precious metals," which turned what "was a wilderness less than half a century ago[,] principally through the development of mineral wealth[,] into a scene of energy and restless activity." *Id.,* 167 F. at 369-70. The court expounded: "In this forward movement defendants joined by the erection of their smelter [and] its operations have been a significant force toward the material devel-

opment and upbuilding of the state of Montana, including the valley where complainants' lands are located." *Id.* at 370.

The district court held that "the business of copper smelting" is lawful even though by "its conduct, some injury to others in the immediate vicinity of the smelter would seem to be unavoidable because of the arsenic in the smoke." *Id.* Concluding that shutting down the smelter would result, *inter alia*, in "the industry of smelting copper sulphide ores [being] driven from the state, and that values of many kinds of property will either be practically destroyed or seriously affected," the court held as follows: "[D]iscretion, wisely, imperatively guided by the spirit of justice, does not demand that injunction, as prayed for, should be granted." *Id.*

The state cheered. A year later, the Montana Supreme Court would uphold wide-ranging eminent domain powers for the mining industry, including the right to take private property for "dumping places for working mines, mills or smelters for the reduction of ores." *Kipp v. Davis-Daly Copper Co.*, 110 P. 237, 240 (Mont. 1910). The court explained:

> The prosperity of the state has been due, in large measure, to [the mining industry], and many of our other industries and business enterprises are entirely dependent on it. This is especially true in Butte and its immediate vicinity, because there the great mass of its people gain their livelihood from their employment in the mines and reduction of ores. There, as in many other localities, the mineral deposits are the only available natural resources, and but for the promise which they give of profitable return for well-directed investment and industry, such

> portions of our state would be almost entirely destitute of population, whereas they now furnish homes and the means of support for populous communities. Hence, from the beginning it has been the policy of the state, indicated by its constitutional and statute law, as interpreted by this court, to foster and encourage the development of this state's mineral resources in every reasonable way.

Id. at 240-41.

The Ninth Circuit affirmed the denial of Fred Bliss' injunction in 1911, and in 1913, this Court dismissed his certiorari petition. *See Bliss v. Washoe Copper Co.*, 231 U.S. 764 (1913). Thereafter, Anaconda bought out many of the *Bliss* suit farmers, and obtained so-called "smoke and tailings" easements from the rest that "allow[ed] the [continuing] deposition of smelter waste on the land."[12] Anaconda then established Opportunity as a rural housing community for smelter workers on the lands Anaconda had purchased from the farmers. [13]

As recognized by the Montana Supreme Court in the case at issue here, the real property owned by today's plaintiffs, the very same property at issue in *Bliss*, was transferred to their predecessors-in-title by recorded deeds with covenants identifying the smelter waste.[14] And, as noted above, the deeds all contained "smoke and tailings easements," resolving—so the Company thought—any remaining prob-

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[12] *Christian v. Atlantic Richfield Co. (Christian I)*, 356 P.3d 131, 137-38 (Mont. 2015).

[13] *Id.*

[14] *Id.*

lems it had, or would ever have, with private landowners in the Deer Lodge Valley.[15]

The federal government also took legal action in this era. One year after *Bliss* was filed, in 1910, the United States sued Anaconda for, *inter alia*, smelter damage to trees on federal government forest lands in the Deer Lodge Valley, and tailings released into streams. Recognizing the importance of the smelter's products, the conservationist administration of President Theodore Roosevelt was not looking to shut the smelter down. Instead, the government stayed its lawsuit early on, stipulating with Anaconda to the formation of a Board of Experts—often called "the Anaconda Smoke Commission"—to ascertain the best technology to make smelter operations less harmful to land, trees and water, obtaining the Company's agreement, *inter alia*, to implement the Board's recommendations for reducing and eventually eliminating hazardous particulates from the smoke.[16]

This lawsuit led, among other things, to Anaconda constructing a series of tailings ponds (including what is now the Warm Springs Ponds Wildlife Management Area managed by the state), building a new 585-foot smokestack (the tallest in the world, then, taller than the Washington Monument, now a state park), and installing new technology to reduce and

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[15] *Christian I*, 356 P.3d 137-38. *See also* Bode Morin, *The Legacy of American Copper Smelting: Industrial Heritage versus Environmental Policy*, at 117-18 (2013).

[16] Morin at 117-118; Arthur Wells, *Report of the Anaconda Smelter Smoke Commission*, Oct.1, 1920, National Archives (Record Group 70, Box 278). *See also* Findings & Recommendations of U.S. Magistrate Judge (F&R), *United States v. Atlantic Richfield Co.*, CV-89-39-BU-SEH (D. Mont. Oct. 7, 1998).

capture the hazardous particulates in the smoke. In particular, Anaconda invested millions in purchasing and installing "cutting edge" electrostatic precipitators invented by an early 20th century high tech genius, Frederick Cottrell. The precipitators removed most of the arsenic from the smoke, and other devices turned sulfur dioxide into sulfuric acid, which when mixed with phosphorous became high tech, cutting edge fertilizer for the farmers who had once sued to shut down the smelter.[17]

The United States and Anaconda also engaged in a series of land exchanges signed off on by then Attorney General (later Supreme Court Justice) Harlan Stone—with Anaconda deeding healthy forest lands outside the smoke zone to the United States in return for smoke damaged forest lands inside the smelter's smoke zone.[18] Thus, the United States received market value compensation for smelter injuries to federal lands, just as the *Bliss* farmers (and Opportunity residents) did for their private lands.

By 1920, two years after the end of World War I, the Board of Experts concluded Anaconda had done all that could be asked of it in terms of technological fixes, and should continue to operate its smelter.[19] After all, wars needed to be won, and they couldn't be won without copper, just as copper was essential to telephone and electricity lines. In 1933, ten days after the Secretary of Agriculture signed off on the last land exchange, the federal government's lawsuit was dropped, recorded by the clerk of court in the

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[17] Morin at 62-63, 117, and Wells, *supra* note 14.

[18] *Id.,* and Morin at 117-18; F&R at 5.

[19] Morin at 118; Wells, *supra* note 14.

District of Montana as "abandoned."[20] Here, again, Anaconda thought it had resolved any and all disputes with the United States related to its smelter operations. That belief would hold true for another half century, until Anaconda was purchased by Atlantic Richfield in 1977, and later merged into it in 1981, leaving Petitioner as Anaconda's sole corporate successor.

B. Superfund and Mining.

In its decision in *Bliss*, *supra*, declining to shut down the smelter in Anaconda in 1909, the district court relied, in part, on "the historical fact that Congress, *through its beneficent legislation*, invited the exploitation of the Rocky Mountains by prospectors for the precious metals," 167 F. at 369-70 (emphasis added). This "beneficent legislation" was the General Mining Law of 1872, with some amendments still the law today; described by eminent professor of law, and former United States Solicitor of the Interior, John Leshy, as "one of the most durable perpetual motion machines ever assembled."[21]

Perhaps not surprisingly, the first foray of the U.S. Congress into mining issues, *i.e.,* the 1824 adoption of a type of leasing system for the mining of lead on federal lands near Galena, Illinois, was driven by the strategic need of lead for the bullets of that era.[22] This Court addressed that mineral lands policy in *United States v. Gratiot*, 39 U.S. 526 (1840), and "laid the constitutional foundation for Congress'

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[20] F&R at 5, Morin at 118.

[21] *See* 30 U.S.C. §§ 21-43 (codification of the General Mining Law of 1872); Leshy, *supra* note 1, at 2.

[22] Leshy at 9.

power to lease (and, implicitly to retain title to) federal resources found within borders of duly admitted sovereign states."[23]

After *Gratiot*, leasing of federal mineral lands fell by the wayside in favor of a developing policy of "free access" to mineral lands in the west.[24] In a nutshell, the General Mining Law of 1872 (and its predecessor in 1866) set up a system whereby any American citizen (or anyone who intended to become an American citizen) could stake a "mining claim" on the vast federal lands of the public domain, explore for minerals, and if "discovered" dig them up, sell the ore or process it, and later get a land patent from the United States to become a mine owner.[25] And that is precisely what Americans did, including gold and silver "barons" in California, Colorado, Idaho, Nevada, Utah and Montana, and the "Copper Kings" in Butte.[26]

During the gold and silver rush era, pushed by the politics of the time, Congress enacted laws that required the U.S. Treasury to purchase large amounts of silver, mostly from mines and miners in the west, *inter alia*, to put more liquidity into the national economy for the individual entrepreneurs and small businesses who sold their goods for the smaller amounts of money represented by silver coinage.[27]

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[23] *Id.*

[24] *Id.* at 10-22.

[25] Leshy at 17-23.

[26] Malone, *supra* note 2, *passim*.

[27] The 1878 Bland-Allison Act mandated that the Treasury Department purchase "not less than two million dollars' worth" of silver bullion "per month." 20 Stat. 289. The 1890 Sherman Silver Purchase Act increased this federal purchasing require-

Much of this early mining activity occurred on land owned by the United States, which would not be patented out to private owners until later.[28]

That the 1872 Mining Law and the earlier creation of Yellowstone National Park came from the same Congress, only two months apart, bears witness to the conflicting interests of the time.[29] Just over a century later, the consequences of this second decision by Congress in 1872, would run head first into another law, passed by another Congress; *i.e.,* CERCLA in 1980. Discussing this (then) recent law, in 1987 Professor Leshy noted that Aspen, Colorado and Park City, Utah were just "two of several western mining towns turned ski resort … facing the possibility that large tracts of land within their borders, occupied by such things as a shopping mall, homes, businesses, and condominiums, will be placed on the national priority cleanup list because of their former use as waste disposal sites for now-abandoned silver mines."[30]

Indeed, by 1980, following the publication in 1962 of Rachel Carson's *Silent Spring*, things had begun to change in what had seemed, just a few years before, to be a settled landscape. As the economy evolved and the modern-era environmental conscience emerged, Americans began to take to heart L.P. Hartley's witticism: "The past is a foreign country; they do things differently there."[31] Congress

ment, instructing the Treasury Department that it must buy "four million five hundred thousand ounces of silver" in "each month." 26 Stat. 289.

[28] *See, e.g.,* Leshy, *supra*, note 1 at 188.

[29] Leshy at 12.

[30] Leshy, *supra* note 1, at 188.

[31] L.P. Hartley, *The Go-Between* (1953).

passed a series of regulatory environmental laws, including the Clean Air Act and the Clean Water Act. Then, in a watershed event, Congress sought to remediate the effects of earlier industrial practices through the enactment of CERCLA in December 1980.[32] Petitioner would soon learn that many of the understandings and agreements from the "foreign country" of the past would not survive this new world.

The minerals business changed along with the times. The Anaconda smelter closed in 1980, a few months before CERCLA became law. Although the Superfund statute was enacted, in large part, to deal with chemical waste sites like Love Canal, in the western United States it has been used mostly—and most expensively—at old mining and mineral processing sites. Pet. 35. This is true across the American West, where the Nation's mineral wealth was discovered and developed under the auspices of the 1872 Mining Law.

Montana is far from the only state with a mining nickname and complicated mining legacy. As noted by Professor Leshy, California "is the Golden State, Nevada the Silver State, Montana the Treasure State, and Idaho the Gem State," and "the 49ers and the Nuggets" play in the NFL and NBA today.[33] A simple review of EPA's Superfund site lists for Colorado, Nevada, Idaho, California New Mexico and

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[32] The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601, *et seq.* (Dec. 11, 1980).

[33] Leshy, *supra*, note 1 at 3.

Utah tells the more complicated side of this story.[34] Many of these sites are on the National Priorities List precisely because they pose extremely complex problems left behind by the legacy of the Nation's mining history.

Of the 17 Superfund sites that currently cover the map of Montana, nearly all involve wastes related to old mining or mineral processing activities: The name of the "ACM Smelter and Refinery" Superfund site in Great Falls (north central Montana) says it all, as do the names of these others: Anaconda Aluminum Co. Columbia Falls Reduction Plant (northwestern Montana); Baker Hughesville Mining District (north central Montana); Basin Mining Area (central Montana); Carpenter Snow Creek Mining District (south central Montana). The mining and mineral processing origins of other Montana Superfund sites are somewhat disguised: East Helena Site (old lead smelter) (central Montana), Flat Creek IMM (old silver, gold and lead mines, near Superior) (northwest Montana); Milltown Reservoir sediments (river sediments from Butte mining and mineral processing, near Missoula) (central west Montana); Libby Asbestos (vermiculite mine) (northwest Montana), Lockwood Solvents (chemicals manufactured, near Billings, for use by the mining industry) (southeast Montana); Mouat Industries (old chromite treatment facility in Columbus) (south central Montana); Upper Tenmile Creek (old gold, lead and zinc mines near Helena) (central Montana). And, of course, the sites

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[34] https://www.epa.gov/superfund/search/-superfund-sites-where-you-live.

at issue here: Anaconda Co. Smelter and Silver Bow Creek/Butte Area.[35]

Because of the inherent complexities noted by Professor Leshy, above, the cleanup of old mining sites has proved to be lengthy, expensive and divisive. In the 19th century, people often walked to work and built their homes close to the mines and mills that employed them. As the mining industry expanded, more homes, and schools and shops were built in areas already impacted by mining and mineral processing. And Mother Nature played a role as well, with floods, spring thaws, wind storms and other weather events that wreaked havoc with a landscape often lacking much vegetation. In Butte, the "Great Flood of 1908" washed out bridges, dams, tailings impoundments and other waste areas, strewing throughout the city, what had earlier been better contained.[36] In short, in many old mining districts today, historic homes and businesses exist alongside, and often do not mix well with, the massive excavation projects, toxic substance warning signs and other accompaniments of a CERCLA cleanup.

For example, the Libby Asbestos Site, in northwestern Montana, was placed on the National Priorities List – *i.e.,* made a Superfund site – in 2002. There, EPA carried out investigations at "more than 6,400 properties and cleanups at more than 2400 properties," all while the residents of two towns –

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[35] EPA, *Superfund Sites in Region 8*, https://www.epa.gov/region8/superfund-sites-region-8.

[36] *See, e.g., https//www.bonnermilltownhistory.org/the-great-flood-of-1908,* and https://mtstandard.com/news/local/mining-city-history-floods-of-part-ii/article_6966c8f1-47a6-5bfe-b5c7-c199273519b9.html.

Libby and Troy – were living their lives in the midst of a cleanup of a hazardous substance easily dispersed by wind and other disruptions. The complexities of this site led to EPA, in 2009, declaring "a Public Health Emergency" in order "to provide federal health care assistance for victims of asbestos-related diseases."[37] The scope and complexity of this site meant the people of Libby and Troy needed national remedial help, not state court lawsuits.

As for Anaconda and Butte, their complexity is also self-evident. As explained in Petitioner's brief, Anaconda is still in the shadow of the once tallest smokestack in the world, which on behalf of the United States, the Anaconda Smoke Commission required Anaconda to build.[38] And the now 33,000 or so citizens of Butte, where the ore to be smelted in Anaconda came from, live overtop of "an estimated 10,000 miles of mines" beneath them.[39]

If that were not complex enough, the scope of the site is much more massive when not looked at in more "bitesize" operable units. As described on EPA's website, the area impacted by the Anaconda Smelter covers "300-square miles," [40] and the Silver Bow Creek/Butte area site impacted by mining and other mineral processing, encompasses the "city of Butte" and "26 miles of stream and streamside habi-

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[37]https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0801744.

[38] Wells, *supra* note 14; Morin, *supra*, note 13 at 62-63, Pet. Br. 8.

[39] Pet. Br. 8.

[40]https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0800403.

tat downstream from Butte."[41] And, the "Milltown Reservoir Sediments/Clark Fork River site," covers "about 120 miles of the Clark Fork River upstream of the (since removed and remediated) Milltown Dam and Reservoir," down which mining wastes floated from Butte.[42] In short, this is another national-sized issue that calls for national policy, not state court, remedies.

Moreover, it is not as if Montana and its citizenry have not already received some compensation from Petitioner. In 1983, the State of Montana filed a natural resources damages suit in federal court against Petitioner under CERCLA for these sites, and Petitioner eventually agreed to pay approximately $400 million in environmental and restoration settlements to the State on behalf of the people of Montana.[43] And this despite the fact that the State, as admitted by the same Montana Supreme Court that issued the opinion now under review here, proudly played a significant role in the mining and mineral processing industry that built this state, and from which the contamination at issue emanated. *See Kipp*, 110 P. at 240.

Even further, the State played an actual "hands-on" role in mineral processing, generating mining wastes itself. From 1908 through the 1940s, the State operated its own custom mill and smelter – and disposed of wastes from its mill buildings onto

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[41]https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0800416.

[42]https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0800445; *see also* Pet. Br., 11-15, and *supra*, note 36.

[43] Mont. Dep't of Justice, Natural Resource Damage Program Consent Decrees, https://dojmt.gov/lands/consent-decrees/.

the land and into the water of Butte – from the campus of the University of Montana's Montana State School of Mines (*nka* Montana Tech). As boasted in the college's "Annual Catalogue" for 1917-1918: "under proper instruction the students operate the mill from the power plant to the tailings dump."[44]

In 1989, the United States – as explained above, itself a major facilitator of the smelter and the mines – filed a CERCLA cleanup/cost recovery suit against Petitioner that is still pending in the same United States District Court which decided the *Bliss* case and dismissed the government's 1910 lawsuit.[45] Since 1989, Petitioner has already spent hundreds of millions for removal and remediation work under this action, including nearly $500 million for cleanup of the Anaconda Smelter site; all told, it has spent over $1.4 billion to address its CERCLA obligations in Montana. Pet. 2, 34.

Part of the current cost recovery action filed by the United States has included its assertion that the settlement of its 1910 Anaconda smelter lawsuit is not relevant to its current CERCLA Anaconda smelter related claims. So far the United States has been successful in this assertion. In Findings & Recommendations on hold under a stay of the 1989 suit, a United States Magistrate Judge had this to say in recommending that Petitioner's "prior release" defense be rejected:

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[44] Montana State School of Mines, *Seventeenth Annual Catalogue for 1916-1917*, at 28 (1916); and George Gale, *Montana School of Mines: Mineral Dressing Pilot Plant Laboratory Survey* (Master's Thesis, Montana School of Mines) (May, 1947).

[45] *See*, *supra*, note 16.

This Court is mindful that this decision may leave [Atlantic Richfield] feeling as though it is being double charged for the damages caused by the Anaconda smelter. The issue here is not whether this Court agrees with the imposition of liability under CERCLA upon a successor corporation for damages caused by its predecessor who reaped the benefits of mining and smelting. The Court is constrained to follow the law and the precedent interpreting the law. To borrow the words of Judge Wisdom from his *Penn Central* decision:

> "As a final word, we note that [defendant's] position deserves some sympathy. The Settlement Agreement was supposed to end the interaction between [defendant] and the government once and for all. *Furthermore, [defendant's predecessor] owned and operated the [smelter] at a time when our collective knowledge of the safety and health threat posed by environmental hazards was woefully inadequate. We are all paying for that mistake. CERCLA is but one mechanism for remedying these decades of abuse.* Sympathetic or not, however, [defendant] cannot escape the fact that Congress passed a statute which launched similar retroactive actions everywhere."[46]

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[46] F&R, *supra* note 16, at 24-25 (quoting *Penn Central Corp. v. United States*, 862 F. Supp. 437, 458 (Reg'l Rail Reorg. Ct. 1994) (emphasis added).

In short, whether for railroads, chemical plants, or mineral processors, this is a national issue that requires a national solution. Double charged? For Petitioner, quadruple-charged, more like it, if plaintiffs have their way. Unlike Montana's current courts, Congress did not mandate that the past be ignored, but took history into account in its passage of CERCLA. While from *amici's* point of view unfairly skewed in many ways, the Superfund statute does contain some protections against "double recovery," and provides for contribution claims against all PRPs, including the federal government, which is to be treated like any other party. *See, e.g.*, CERCLA §§ 113(f), 114(b) 120(a)(1).

Thus, CERCLA supports claims against the United States based upon the Nation's actions related to war, and to its long-term involvement with the mining and mineral processing industry in the West. *See, e.g.*, *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 299 F.3d 1019, 1026, 1029 (9th Cir. 2002) (explaining that some CERCLA war-related cleanup costs can properly be allocated to the United States as an expense "for which the American public as a whole should pay"); *Chevron Mining v. United States*, 863 F.3d 1261, 1276-78 (10th Cir. 2017) (as owner of lands in Colorado on which unpatented mining claims were worked by others, the United States is a PRP; its active "encouragement" of mining and mineral processing increases the public's share of liability).

On this latter point, Professor Leshy now seems prescient. In 1987, he took note of CERCLA, as then

recently (and comprehensively) amended by SARA,[47] and – citing to CERCLA – said this: "It is an interesting question whether the United States, as holder of legal title to land embraced in unpatented mining claims, might be held responsible for the cleanup of any hazardous mining wastes disposed of on that land."[48] That it took 30 years from the publication of Professor Leshy's book for this crucial, "interesting question" to finally be addressed by one of the federal circuit courts, speaks volumes about the lengthy and complex process of cleaning up sites originally staked and worked under the 1872 Mining Law.

Professor Leshy began his book with a quote from Georgious Agricola's 1556 treatise on mining and minerals, *De Re Metallica*.[49] Agricola discussed the "arts and sciences" of mining and metallurgy that should be studied by someone intending to participate in an industry, which some 450 years ago, had already existed for millennia.[50] Indeed, according to the over 4,000-year-old *Old Testament*, in describing the "promised land," Moses said "and from its mountains you will mine copper."[51] In the 16th century, Agricola further instructed about mining: "Lastly, there is the Law."[52] He advised a prospec-

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[47] Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499).

[48] Leshy at 188, and n.29.

[49] *Id.* at xvii.

[50] *Id.*

[51] Deuteronomy 8:7-9. *See also* Genesis 4:22 (describing Tubalcain, as "a forger of every sort of tool of copper and iron").

[52] *Id.* (quoting Agricola, *De Re Metallica*, translated by Herbert and Lou Henry Hoover (1912)). Herbert Hoover was a mining engineer – who apparently also studied Latin – before, in 1929, he became the 31st President of the United States.

tive miner to become knowledgeable of the law so "that he could claim his own rights" and also "fulfil his obligations to others according to the law."[53] Agricola, it seems, would have been able to work within CERCLA's balanced scheme. But *Sunburst* is another matter altogether.

C. Superfund and *Sunburst*.

Recognizing that the past can be neither ignored nor easily washed away, CERCLA leaves to EPA the choice of appropriate remedies, not necessarily pristine ones. And this is the rub for Respondents here (a "small minority" of the residents, "about 10%").[54] They don't like the remedy EPA chose, they call it "botched" and want to force Petitioner "to pay for the cleanup they want," namely "replacement of all their soil to a depth of 2 feet, and permeable barriers installed underground."[55] These admissions alone make it clear that Petitioner, and Justice McKinnon, are correct that the Opportunity restoration claim is barred by CERCLA § 113(h). *See Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1221 (9th Cir. 2011) (Section 113(h) bars claims that seek "to improve on the CERCLA cleanup" because the claimants, as here, "want[] more").

Forget history and the covenants in their deeds, in the words of Respondent Robert Phillips, the plaintiff Opportunity property owners would "like [their property] cleaned up to what it would have

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[53] *Id.*

[54] Pet. Br. 16.

[55] Matt Volz, *Montana Landowners Say Government Botched Arsenic Cleanup*, U.S. News (Feb. 24, 2017), https://www.usnews.com/news/business/articles/2017-02-24/landowners-say-epa-botched-cleanup-now-they-want-a-shot.

been had the smelter not existed," ignoring that in such a case the community of Opportunity also would not have existed.[56] And that's precisely what the decision below, if allowed to stand, will let a jury do—require Petitioner to finance a fictional landscape turned into a fairytale reality. But as the United States explained in the amicus brief the Montana Supreme Court refused to credit, CERCLA gives EPA the authority to select one comprehensive remedy that will "fix the party's cleanup obligations" despite state-law claimants who want something different. Pet. App. 71a.

Regarding the remedy selected for Opportunity, EPA's spokesman explained: "the goal of the cleanup plan is to protect human health, not to restore soil levels to original condition."[57] But unlike Congress, in its ruling permitting a jury to award pristine "restoration damages" in the middle of an on-going CERCLA cleanup, the Montana Supreme Court refused to accord history its due. Acknowledging the existence of the "smoke and tailings easements," the court gives them no effect, allowing "restoration" of century-old, stable contamination as long as a jury determines it is "reasonably abatable." *Christian I*, 356 P.3d at 137, 157 (reversing summary judgment for Petitioner under statutes of limitation).

Recognizing Opportunity would not have existed at all but for the smelter and its smoke-conveyed wastes, the court nevertheless agreed Petitioner can be required to "restore" Opportunity property to a fiction that never was. *Compare id.* at 137-38 ("As part of the efforts to settle lawsuits brought by Bliss

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[56] *Id.*

[57] Volz, *supra*, note 55.

and others, the Anaconda Company [also] purchased significant amounts of land near the smelter. On this land [it] set out to establish a rural housing community for smelter workers, Opportunity." Anaconda reserved "an easement allowing the deposition of smelter waste on the land," and that "easement was then incorporated into the deeds transferred to new Opportunity homeowners"); *with* Pet. App. 4a (these Opportunity property owners are entitled to ask the jury for damages "to restore their properties to pre-contamination levels").

In short, giving only lip service to the fact that federal law is supreme, the majority below did an "end run" around CERCLA's remedy protections to allow the Opportunity property owners to recover damages intended to "restore" a fictional condition the property owners never enjoyed, via a remedy long ago rejected by the courts and their own predecessors-in-title, and currently rejected by EPA as unwarranted and potentially dangerous to human health. And the decision below does this all in total reliance on *Sunburst*, a state law decision the court apparently seeks to make supreme. Cited 20 times in the decision below, *Sunburst School District v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007), is a darling of the Montana plaintiffs' bar, and a *bête noire* of Montana industry.[58]

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[58] *Sunburst* created a new breed of Montana attorneys who identify themselves as "pollution lawyers." *E.g.*, Cok Kinzler PLLP, Bozeman, Montana Environmental Pollution and Contamination Attorneys, https://www.cokkinzlerlaw.com/Practice-Areas/Environmental-Pollution-Contamination.shtml; Edwards Frickle & Culver, Montana Environmental Pollution Attorneys, https://www.edwardslawfirm.org/civil-litigation/environmental-litigation/. Following on the heels of the decision below, "pollu-

The *Sunburst* decision allowed landowners within a cleanup area subject to Montana's state-law environmental regulatory scheme, to collect damages from a corporate successor so they could restore their property that had been contaminated in the early 20th century by a long shuttered oil refinery. As here, the Sunburst property owners did not like the remedy selected by the regulator, DEQ (the Montana Department of Environmental Quality), and convinced a jury to award them $15 million to do their own cleanup of property with a fair-market value of much less than that. The Montana Supreme Court affirmed. It addressed the concern of "an unreasonable windfall" for property owners who might never actually restore the property, but sell to another, who could then file yet another restoration suit, and so on, agreeing with the plaintiffs that "a single lump sum to be awarded for restoration damages" was the answer. *Id.* at 1088-89.

For *federal* Superfund sites a "lump sum" payment to a small minority of community residents is no answer at all.[59] As discussed above, these sites are extremely complicated, which is why they are on the National Priorities List in the first place. Congress decided that such sites must be remediated under plans the experts at EPA determine, pursuant

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tion lawyers" began holding public meetings to round up *Sunburst* clients within federal Superfund sites. Pet. 35.

[59] Whether this was even "an answer" at Sunburst is questionable at best. Twelve years later, the Sunburst site has not been "restored" with the $15 million jury award, but is still in the state-law risk assessment phase. *See* Mont. Dep't of Envtl. Quality, Texaco Sunburst Works Refinery, http://deq.mt.gov/Land/statesuperfund/sunburst.

to federal regulations and guidelines that incorporate the best science and technology have to offer—not under plans approved by "a jury of twelve Montanans" with no scientific or technical expertise. Pet. 24-29.

And a jury-imposed "new and different" restoration carried out by PRPs themselves could well leave Petitioner in the Sisyphean nightmare of being ordered by EPA to correct the problems created by conflicting cleanups happening all across these huge, complex Superfund sites. Pet. Br. at 6-7. Notwithstanding that *Sunburst* is the law in Montana, that state law must yield when it conflicts with federal law. To be blunt, as dissenting Justice McKinnon showed, Superfund and *Sunburst* are wholly incompatible. Pet. App. 35a-36a. Agricola would agree. This Court should reverse and make clear that federal law is supreme, to the Montana Supreme Court and all other state courts poised to follow it.

D. Certainty, Consistency, Community Buy-In and Finality are Essential to Industry.

Minerals remain as necessary today as they were in the 19th and 20th centuries, in Agricola's 16th century, and indeed have been throughout all of recorded history. Copper is not only used in transmission wires, refrigerators, automobiles and air conditioners, it is a necessary component in computers, smart phones and tablets. Copper and other minerals mined and processed by *amici's* members make modern medicine, indeed virtually all of modern life, possible. Pollution from both the past and present is a legitimate concern, but just as in the past, in order to progress, the present and the future still require the minerals industry to thrive.

The history of the Opportunity property specifically, and of the environmental consequences of mining in the American West, more generally – as discussed above – is a compelling and concerning story that needs to be told. The major concern of these *amici* today, however, is that the decision below will make it difficult, if not impossible, for their Montana members to work with federal regulators to implement EPA remedies, to compromise and agree to settlements, where warranted, and to participate in ongoing regulatory efforts not yet finalized.

CERCLA is not the only federal law at issue here. Particularly for the Montana Mining Association and the Montana Petroleum Association, their members operate within heavily regulated federal arenas under the purview of the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act, to name just a few. Predictability, certainty, consistency, finality—these are all necessary ingredients for industry to thrive in this new world. *Amici's* members must have confidence that the remediation agreements, closure plans and other agreements they reach with federal regulators will not be undercut or overturned by state-law claimants seeking something, as here, in conflict with federal law.

And it is not just *amici* who are affected. Lawsuits have their place, but have never been known for their ability to resolve or even address the issues of an entire community. EPA, on the other hand, under the strict mandates of CERCLA and its regulatory scheme, requires the involvement of the community. *See* 40 C.F.R. §§ 300.430(c)(2), (f)(2), (f)(3). Under CERCLA, therefore, EPA hears from the entire spectrum of differently situated community

members, not just the individual plaintiffs who choose to sue.

In Anaconda, for example, between 1993 and 1997 alone, EPA held eleven community-wide meetings, including one three-day "Open House" focused on alternative remedies. J.A. 319. Since that time, EPA has published at least fourteen fact sheets about its remedies in local newspapers and hired a part-time community-relations liaison. J.A. 319-20. EPA is, thus, able to take account of the competing preferences of community members in formulating a remedy that "assures protection of human health and the environment," not just the specific demands of individual plaintiffs made to a jury. 42 U.S.C. § 9621(d)(1).

That does not mean, of course, that EPA comes up with a one-size-fits-all solution. The experience at Anaconda and its five Operable Units, six Records of Decision, and more than twenty-five administrative orders, speaks to that. But EPA is able to hear from different stakeholders with different, and sometimes competing, interests and goals. A respondent who owns predominantly pastureland is likely to have very different priorities in a cleanup than a storeowner in Opportunity or Crackerville. EPA's process acknowledges and addresses both sets of concerns.

Another advantage of CERCLA's, and EPA's, community-wide approach is that it strives for inclusive buy-in across the board, not the divisive "one side wins, one side loses" outcome of private lawsuits. For example, one of the challenges facing the community of Libby –an asbestos-related Superfund site in Montana, discussed above – was that residents felt Libby had been "stigmatized" by the pro-

cess and publicity.[60] But consistent community meetings and other outreach by EPA helped smooth over these concerns. In a recent local newspaper article, Mike Cirian, EPA's "onsite remedial project manager," commented on the small crowd that had turned out for the latest EPA public meeting, comparing it favorably to the numbers who "ten years ago … would have packed the room when [EPA] officials came to town."[61] With the town now safe to live in, "Libby," Cirian said, "is ready to move on."[62]

In the 21st century, industry and government strive to work together with the broader community to protect the environment, and to remedy the problems of both the past and the present. The decision below interferes with the viability of cooperation between the regulators and the regulated, with potentially chaotic and unsafe results for the community. If the decision is not overturned, it will be a disaster for Montana communities, industry and the EPA. Reversal is the only remedy.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

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[60] https://www.mtpr.org/post/epa-presents-health-risk-assessment-libby.

[61] https://missoulian.com/news/local/last-call-for-libby-as-epa-discusses-its-preferred-final/article_da0ecffa-a50d-5a81-8e81-fb1dde04ceae.html.

[62] *Id.*

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