No. _____

In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

GREGORY A. CHRISTIAN, ET AL.,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Anthony M. Kennedy, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit, which includes the State of Montana:

1. Pursuant to Supreme Court Rule 13.5, petitioner Atlantic Richfield Company (Atlantic Richfield) respectfully requests a 32-day extension of time, until April 30, 2018, within which to file a petition for a writ of certiorari. The Montana Supreme Court issued its opinion in this case on December 29, 2017. A copy of the opinion is attached. This Court's jurisdiction would be invoked under 28 U.S.C. § 1257.

2. Absent an extension, a petition for a writ of certiorari would be due March 29, 2018. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. Plaintiffs in this case own property within the 300-square-mile Anaconda Smelter Superfund site near Butte, Montana. The Anaconda Smelter site is one of the largest and oldest Superfund sites in the country, and has been actively managed by EPA and remediated by Atlantic Richfield for over 30 years. Plaintiffs allege that their properties were damaged by pollution from historical operations of the Anaconda Smelter, which operated from the late 1800s until 1980, releasing arsenic and other mineral contaminants into the surrounding soils and groundwater.

4. Plaintiffs brought suit against Atlantic Richfield in Montana state court seeking, *inter alia*, restoration damages, which must be used to implement plaintiffs' plans to restore their properties to their original condition, *i.e.*, to the condition that obtained at the Anaconda Smelter site before nearly a century of environmental damage. Plaintiffs' proposed restoration plan is directly contrary to the cleanup plans set out in EPA's records of decision and administrative orders. For example, EPA's standard for soil arsenic levels is 250 parts per million (ppm), whereas plaintiffs' proposed remedy sets that level at 8 ppm—30 times more stringent. Plaintiffs' proposed plan also includes removing 650,000 tons of soil over a period of years and constructing several underground walls totaling 19,000 feet in length to serve as groundwater barriers. Not only are such plans absent from EPA's cleanup order, but EPA rejected plaintiffs' proposals in the course of its regulatory deliberations. And EPA has determined that plaintiffs' underground wall could actually worsen arsenic levels at the site. Plaintiffs' most recent estimate is that

their plan will cost between $50,000,000 and $57,600,000, and previous estimates have been as high as $101,000,000. For its part, Atlantic Richfield has already spent over $400,000,000 implementing EPA's remedies at the site, including extensive investigations and cleanup work in and around plaintiffs' community.

5. The state district court ruled that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510 (codified as amended at 42 U.S.C. § 9601 *et seq.*), does not bar or preempt plaintiffs' claims for restoration damages, and Atlantic Richfield petitioned the Montana Supreme Court for a writ of supervisory control.

6. The Montana Supreme Court accepted supervisory control of the case and affirmed the district court's decision. To reach that result, the court confronted three defenses to plaintiffs' claims for restoration damages. First, CERCLA bars courts from hearing "challenges" to EPA remedies. *See* 42 U.S.C. § 9613(b), (h). Second, CERCLA bars "potentially responsible parties" (PRPs)—defined by CERCLA to include all current owners of property at a CERCLA site—from undertaking any remedial actions EPA has not authorized. *See id.* § 9622(e)(6). Third, CERCLA preempts all State laws that stand as obstacles to the achievement of its purposes.

7. The court held that none of those barriers precluded plaintiffs' claims. The court held that plaintiffs' claim did not constitute a "challenge" because the plaintiffs' remedy—including the 19,000 feet of trenches and the 650,000 tons of soil removal—would not "actively interfere with EPA's work" but merely "requir[e]

ARCO to spend more money to clean up." Op. 11. The court held that the plaintiffs were not PRPs because "they have never been treated as PRPs for any purpose," and "[t]here has never been a judicial determination that the [plaintiffs] are responsible parties." Op. 16. Finally, the court held that CERCLA did not preempt the plaintiffs' suit because, despite its extreme cost and inconsistency with EPA's chosen remedy, it "does not prevent the EPA from accomplishing its goals at the [Anaconda Smelter] Site." Op. 17.

8. Justice McKinnon dissented, finding that "the undisputed evidence shows the EPA rejected the soil and groundwater remedies proposed by Property Owners during the course of the EPA's regulatory deliberations at the Smelter Site." Op. 37. She concluded that "the Property Owners' plan is plainly contrary to the EPA's remediation plan" and thus a "challenge" barred by CERCLA. Op. 36. Justice McKinnon further explained how the majority's decision conflicts with the Ninth Circuit's view on what constitutes a "challenge" to a CERCLA remedy. Op. 28-29 (citing *Fort Ord Toxics Project v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999); *Razore v. Tulalip Tribes*, 66 F.3d 236, 239 (9th Cir. 1995); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995)).

9. The United States filed an amicus brief in the Montana Supreme Court in support of Atlantic Richfield. The United States argued in its brief and at oral argument that plaintiffs' proposed remedy conflicts with EPA's remedy and could, in fact, cause greater harm to the environment.

10. Petitioner respectfully requests an extension of time to file a petition. A 32-day extension would allow counsel sufficient time to review the extensive record, including two extensive EPA records of decision, research and analyze the issues presented, and prepare the petition for filing. In addition, undersigned counsel has a number of other pending matters that will interfere with counsel's ability to file the petition on March 29, 2018. These include, among others, two additional petitions for certiorari due April 7, 2018, and April 26, 2018; a reply brief on a petition for a writ certiorari due around March 25, 2018; a brief in the U.S. Court of Appeals for the Fifth Circuit due April 19, 2018; and a reply brief in the U.S. Court of Appeals for the Seventh Circuit due March 7, 2018.

Wherefore, petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to April 30, 2018.

February 14, 2018

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, petitioner makes the following disclosures:

Atlantic Richfield Company is a wholly owned subsidiary of BP America, Inc., which is a wholly owned subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a wholly owned subsidiary of BP p.l.c., which is a publicly held company. Neither Atlantic Richfield Company nor any of its direct or indirect parent companies, other than BP p.l.c, is publicly held.

Dated: February 14, 2018

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