No. 17-1498

IN THE

Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

GREGORY A. CHRISTIAN, ET AL.,

Respondents.

On Petition for a 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

KYLE ANNE GRAY
Counsel of Record
WILLIAM W. MERCER
BRIANNE C. MCCLAFFERTY
HOLLAND & HART LLP
401 N. 31st St., Ste. 1500
Billings, MT 59101
(406) 252-2166
kgray@hollandhart.com

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

"Oro y Plata," gold and silver in Spanish. Since 1893, by statute these are the words on the "Great Seal of the State of Montana." MCA § 1-1-501 (En. Sec. 1, p. 42, L. 1893). The past, present and future of the Treasure State is encapsulated in this seal, which shows in its center "a plow and a miner's pick and shovel," on its left the "Great Falls of the Missouri River," and on its right "mountain scenery." *Id.* *Amici Curiae* are non-profit Montana trade associations with members engaged in all aspects of business, the Great Seal's center, including members who continue to produce "oro y plata" and the other "treasure" that forms such a critical part of the story of this Last Best Place.[2] The federal government has long played a role here as well, with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) becoming in the late 20th century part of the complicated equation that is Montana. *Amici*, concerned with balancing all interests represented on Montana's Great Seal, concur with Petitioner that the Montana Supreme Court decision at issue is poised to throw this balance "into chaos," and ask this Court to grant the petition and reverse the Montana court's dangerous misinterpretation and misapplication of CERCLA.

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amici's intent to file this brief and consented to it. 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] "Treasure State" is the "official nickname" of the State of Montana. *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).

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. TSRA is concerned that the decision below, which misreads and wrongly refuses to apply CERCLA's jurisdictional and litigation limits will result in the very type of chaos and inconsistency that is the bane of its members' ability to function and prosper.

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 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, 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 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 trade associations in asking this Court to grant Atlantic Richfield's petition and 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. U.S. Brief, Pet. App. 74a. Indeed: Certainty, consistency, predictability for risk-planning, and finality, without them business cannot function, much less thrive. Whether the remedy is performed under a consent decree or an administrative order, the key is that there will be one comprehensive remedy. 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." *Id.* at 71a.

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 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. Pet. App. 13a. Soil already cleaned and capped? Dig it up. Waste disposed and contained? Move it elsewhere. Clean water for domestic use? Install underground barriers and inject enzymes that may make the water unsafe to drink. As Petitioner so aptly puts it, this is "the very definition of madness." Pet. 4. Congress

decided that EPA, not juries, selects remedies for hazardous wastes subject to CERCLA and that PRPs (including current landowners like the plaintiffs here) cannot engage in conduct contrary to EPA's selected, in-progress remedy. Particularly given the long history of this site, and of the mining industry in Montana, federal control over contrary state remedies must be upheld. The opinion below reverses the mandate of Congress that a single, coordinated cleanup properly selected and supervised by EPA 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 uphold CERCLA as the supreme law of the land. The petition should be granted.

ARGUMENT

A. What's Past is Prologue.

The Petition explains how Petitioner Atlantic Richfield Company has worked cooperatively with EPA at Montana Superfund sites for over 35 years. Pet. 3-4, 6. For the waste at issue here, 35 years is recent history, as is Atlantic Richfield's involvement with it. Perhaps a better place to start this story is in 1864, when early prospectors in Montana's Deer Lodge Valley surveyed a remarkable sight: "one of the greatest prizes that man has ever found on this planet," often called "the richest hill on earth."[3] Or

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[3] Michael Malone, *The Battle for Butte: Mining and Politics on the Northern Frontier, 1864-1906*, at 28 (1981) ("The mineralized outcrops ran profusely from the brow of the hill" down to 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,"

perhaps on that day in 1882, less than a year after excavations on the Butte hill began, when Marcus Daly "leaned down and picked up a glistening copper glance," saying, "Mike, we've got it."[4]

What they'd got was "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 here. 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]

The massive fortunes of the Copper Kings (William A. Clark, Marcus Daly and F. Augustus Heinze) and their associates that came from this incredible mineral strike eventually financed the Hearst newspaper empire (inspiring *Citizen Kane*, named "the greatest American movie of all time" by the American Film Institute), raised and raced thoroughbreds like the world famous Salvator, stocked the Corcoran Gallery of Art with masterpieces by the likes of Rembrandt, Rubens and Monet, and ended its run just a

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and over to "conspicuous quartz-ledges rising prominently above the surface, [with] obvious metal content").

[4] *Id.* at 28. Daly, one of the soon-to-be "Copper Kings," was one of the founders of the Anaconda Copper Mining Company.

[5] *Id.* at 34-35; *see also* Michael Basso, *Meet Joe Copper: Masculinity & Race in Montana's World War II Home Front* (2013).

few years ago with the death of a 104 year-old heiress who may have been swindled by her caregivers.[6]

In between the copper strike and the spending of the Copper King fortune, minerals smelted in Anaconda played a huge role in the history of not only America, but the world.[7] 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 with munitions made from Anaconda copper, who eventually brought the "War to End All Wars" to a close.[8]

Of course, all wars did not end then, nor did the crucial need for copper and other Anaconda products. By the 1940s, these products were "use[d] in critical

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[6] Malone, *supra* note 3, at 46, 198; Bill Dedman, *Empty Mansions: The Mysterious Life of Huguette Clark and the Spending of a Great American Fortune* (2014); Anne Peters, *The Great 19th Century Champion Salvator* (Apr. 8, 2014), https://www.bloodhorse.com/horse-acing/articles/112850/the-great-19th-century-champion-salvator.

[7] Although production peaked in the war years, Butte copper (and other metals) are still produced, treated and transported today by *amici* members.

[8] *See, e.g.*, 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); Adam Hochschild, *To End All Wars: A Story of Loyalty and Rebellion, 1914-1918* (2011).

components of airplanes, ships, tanks, bomb sights, ammunition, and an astonishing range of other types of equipment."[9] When America entered World War II, the federal War Production Board put copper in an "urgency rating band" higher than anything except the Manhattan Projects. 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.[10]

But this is a brief in a court of law, so what better place to start than with a legal opinion? 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—Fred Bliss, representing an association of other farmers in the Deer Lodge Valley, sued to enjoin the operation of Anaconda's new Washoe smelter because arsenic and other particulates in the smelter's smoke were harming

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

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

their crops and land. 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. 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 v. Anaconda Copper Min. Co.*, 167 F. 342, 372 (D. Mont. 1909). 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 has happened here in 2017, the 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 development 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). 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."[11] It then established Opportunity as a rural housing community for smelter workers on the lands it had purchased. 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. The deeds all contained "smoke and tailings easements," resolving—so the Company thought—any remaining problems it had, or would ever have, with private landowners in the Deer Lodge Valley.[12]

The federal government also took legal action in this era. In 1910, it 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

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[11] *See, e.g.*, Bode Morin, *The Legacy of American Copper Smelting: Industrial Heritage versus Environmental Policy* (2013); *Christian v. Atlantic Richfield Co.* (*Christian I*), 356 P.3d 131, 137-38 (Mont. 2015).

[12] *Id.*

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. 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 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.[13]

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 smel-

[13] *Id.*; and Arthur Wells, *Report of the Anaconda Smelter Smoke Commission*, Oct.1, 1920, National Archives (Record Group 70, Box 278).

ter's smoke zone. Thus, the United States received compensation for smelter injuries to federal lands, just as the *Bliss* farmers (and Opportunity residents) did for their private lands.[14]

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. After all, wars needed to be won, and they couldn't be won without copper. 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 District of Montana as "abandoned."[15] 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 *Sunburst*.

From the publication of Rachel Carson's *Silent Spring* in 1962, things began to change in what had seemed to be a settled landscape. As the economy evolved and an 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."[16] The enactment of CERCLA in December 1980 was a watershed event. Petitioner

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[14] Bode, *supra* note 11, at 118. *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).

[15] Bode, *supra* note 11, at 118; F&R, *supra* note 13, at 5.

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

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 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. Of the 17 Superfund sites that currently cover the map of Montana, nearly all involve wastes related to old mining or mineral processing activities. *Id*.

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 at issue here: Anaconda Co. Smelter and Silver Bow Creek/Butte Area.[17]

In 1983, the State of Montana filed a natural resources damages suit in federal court against Petitioner under CERCLA, and Petitioner eventually agreed to pay approximately $400 million in settlements to the State on behalf of the people of Montana.[18] In 1989, the United States 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. 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 has been the assertion by the United States that the settlement of its 1910 Anaconda smelter lawsuit is not relevant to its current CERCLA Anaconda smelter related claims. So far it 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:

> This Court is mindful that this decision may leave [Atlantic Richfield] feeling as though it is being double charged for the damages

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

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

> 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:
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> > "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."[19]

Double charged? Quadruple-charged, more like it, if plaintiffs have their way. Congress, however, did not mandate that the past be entirely ignored, but took history into account in its passage of CERCLA. While from *Amici's* point of view unfairly skewed in

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[19] F&R, *supra* note 13, at 24-25 (quoting *Penn Central Corp. v. United States*, 862 F. Supp. 437, 458 (Reg'l Rail Reorg. Ct. 1994).

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).

Recognizing that the past cannot be either ignored or washed away, CERCLA leaves to EPA the choice of appropriate remedies, not necessarily pristine ones. And this is the rub for plaintiffs—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."[20] These admissions alone make it clear that Petitioner, and Justice McKinnon,

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[20] 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.

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"). It is hard to imagine a clearer split between the federal circuit courts and Montana's highest court over how to interpret and apply this controlling federal law.

Forget history and the covenants in their deeds, in the words of Respondent Robert Phillips, the Opportunity property owners would "like [their property] cleaned up to what it would have been had the smelter not existed," ignoring that in such a case Opportunity also would not have existed.[21] 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, built into the "warp and weft" of the Superfund statute are protections—which make CERCLA workable—that ensure landowners like plaintiffs cannot challenge the single, comprehensive remedy that EPA selects. Whether by administrative order or consent decree, CERCLA gives EPA the authority to select one comprehensive remedy that will "fix the party's cleanup obligations" despite state-law claimants who want more. Pet. App. 71a.

As explained by EPA's spokesman regarding the remedy selected for Opportunity, "the goal of the cleanup plan is to protect human health, not to re-

[21] *Id.*

store soil levels to original condition."[22] 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*, 358 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 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 "end runs" CERCLA's remedy protections to allow the Opportunity property owners to recover damages intended to "restore" a fictional condition the property owners

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[22] *Id.*

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 it 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.[23]

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

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[23] The *Sunburst* decision created a new breed of Montana attorneys who identify themselves as some variation of "pollution lawyers." *See, 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, "pollution lawyers" are now holding public meetings to round up *Sunburst* clients within federal Superfund sites. Pet. 35.

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.

Whether this was even an answer at Sunburst is questionable. Eleven 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.[24] This is not surprising. How could this "answer" ever work in these types of cases? The plaintiffs' counsel take their contingency fee share out of this "single lump sum," leaving the plaintiffs with insufficient funds to carry out the restoration plan the jury approves.

In any event, for *federal* Superfund sites a "lump sum" payment is no answer at all. 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 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.

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. This Court should grant the Petition to make clear that federal law is supreme, to the Montana Supreme Court and all other state courts poised to follow it.

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[24] *See* Mont. Dep't of Envtl. Quality, Texaco Sunburst Works Refinery, http://deq.mt.gov/Land/statesuperfund/sunburst.

C. Certainty, Consistency and Finality are Essential to Industry.

Minerals remain as necessary today as they were in the 19th and 20th centuries, 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.

While the history of the Opportunity property, explained above, is a compelling and concerning story that needs to be told, the major concern of these *amici* is that the decision below will make it difficult, if not impossible, for their Montana members to work with federal regulators, 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. In the 21st century, industry and government strive to work together to protect the environment, and to remedy the problems of both the past and the present. The decision below interferes with the viability of such agreements and cooperation between the regulators and the regulated, with potentially chaotic and unsafe results. For a law like CERCLA, which strongly favors voluntary compliance with administrative orders, settlement agreements and consent decrees, the decision is a disaster, both for industry and for the EPA. Reversal is the only remedy.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

KYLE A. GRAY
Counsel of Record
WILLIAM W. MERCER
BRIANNE C. MCCLAFFERTY
HOLLAND & HART LLP
401 N. 31st St., Suite 1500
Billings, MT 59101
(406) 252-2166
kgray@hollandhart.com

Counsel for Amici Curiae