No. 17-1498

In The
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

GREGORY A. CHRISTIAN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) establishes standards and procedures that govern federal cleanups of hazardous waste sites, while expressly preserving parties' rights to press state-law claims related to such sites. *E.g.*, 42 U.S.C. §§ 9614(a), 9652(d). Respondents here (collectively, "Landowners") brought a variety of state-law claims against petitioner Atlantic Richfield Company ("ARCO"), seeking to recover damages for the harm caused by ARCO's contamination of Landowners' residential properties. Among other things, Landowners request the funds necessary to remove ARCO's pollution from their land. In an interlocutory decision, the Montana Supreme Court held that Landowners could submit this damages request to a jury. The questions presented are:

1. Whether this Court has jurisdiction to review this interlocutory state-court decision.

2. Whether the Montana Supreme Court erred in concluding that CERCLA Section 113(h) does not prohibit Landowners from bringing an action in state court seeking the funds necessary to perform their own cleanup on their own properties once the EPA-ordered cleanup is complete.

3. Whether the Montana Supreme Court erred in concluding that Landowners are not "potentially responsible part[ies]" within the meaning of CERCLA Section 122(e)(6) because, as non-polluting "innocent" parties protected by the statute of limitations, they could not be liable under CERCLA.

QUESTIONS PRESENTED—Continued

4. Whether the Montana Supreme Court erred in concluding that Landowners' damages request was not preempted because Landowners' intended cleanup measures do not conflict with the EPA-ordered remediation.

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INTRODUCTION

ARCO's predecessor emitted thousands of tons of toxic metals that contaminated Landowners' residential properties. EPA, invoking its authority under CERCLA, required ARCO to remediate some of this contamination. Although the CERLCA-mandated remediation efforts on Landowners' properties are now complete, much pollution remains. Accordingly, Landowners brought state-law claims to recover for damage to their private property.

In the interlocutory decision below, the Montana Supreme Court addressed a subsidiary issue raised by Landowners' suit. The court held that CERCLA does not prevent Landowners from seeking restoration damages as one remedy for ARCO's torts. If ultimately awarded, these damages will be held in a trust and spent on Landowners' efforts to remove the arsenic that ARCO deposited. The court concluded that the mere fact that EPA ordered ARCO to undertake some cleanup efforts does not mean Landowners are forever precluded from cleaning their own properties.

ARCO now asks this Court to review the Montana Supreme Court's straightforward conclusion. The petition should be denied for any number of reasons.

Perhaps most important, this Court lacks jurisdiction over the state court's interlocutory decision. This Court may review only *final* state-court decisions. The decision below is anything but final: the court remanded for trial on Landowners' claims, and that trial would proceed even if this Court decided the

questions presented against Landowners. Congress has precluded this Court from exercising jurisdiction over such cases.

Regardless, ARCO raises no issue warranting this Court's review. Although ARCO strains to identify three purported splits, its efforts fail. No court has held that CERCLA Section 113(h) precludes private landowners from securing damages used to clean their properties *after* a CERCLA-mandated cleanup is complete. No court has held that CERCLA Section 122(e)(6) prevents private landowners exempt from CERCLA liability from commencing cleanup activities on their properties without EPA approval. And no court has held that a state-court damages award that does not conflict with EPA's remedial orders is otherwise preempted by CERCLA.

ARCO thus seeks error correction. But each of the Montana Supreme Court's conclusions follows from CERCLA's plain language—including provisions expressly preserving state-law actions such as Landowners'. Even if any of these issues warranted review, this case would be an inappropriate vehicle, particularly given the interlocutory posture. Trial is scheduled for October 2018. ARCO identifies no reason for this Court to grant immediate interlocutory review rather than await the imminent final judgment.

The petition for certiorari should be denied.

STATEMENT

A. Statutory Background

Congress enacted CERCLA to "promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602 (2009). Section 107 provides that various "[c]overed persons," which include the "owner and operator" of a contaminated "facility" and "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of," are "liable" for all "costs of removal or remedial action." 42 U.S.C. § 9607(a). A person is not liable if the "release of a hazardous substance and the damages resulting therefrom were caused solely by * * * an act or omission of a third party," so long as the person is not connected to the polluting third party in various specified ways. *Id.* § 9607(b). Likewise, persons who own "real property that is contiguous to or otherwise similarly situated with respect to" property from which a hazardous substance has been released are not liable for CERCLA remediation costs if certain conditions are met. *Id.* § 9607(q). Pursuant to Section 113, "during or following any civil action" under Section 107, a "person may seek contribution from any other person who is liable or potentially liable" under Section 107(a). 42 U.S.C. § 9613(f)(1).

Although CERCLA provides "a federal cause of action to recover costs of cleanup from culpable entities," it contains no "federal cause of action for personal injury or property damage." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2180 (2014). Such remedies are instead left primarily to state law. *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998).

Congress ensured that CERCLA preserved such state-law remedies with at least two separate savings clauses. *First*, Section 114(a) provides: "Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). *Second*, Section 152(d) provides: "Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." *Id.* § 9652(d).

CERCLA imposes some express limitations on state-law actions. For example, Section 114(b) provides that "[a]ny person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law." *Id.* § 9614(b). Thus, parties who secure CERCLA Section 107 remediation damages cannot again recover those same damages in a subsequent state-law action seeking restoration of their property.

ARCO invokes two separate statutory provisions that it claims preclude Landowners from seeking certain state-law damages. The first, Section 113(h), is entitled "Timing of review." *Id.* § 9613(h). It provides:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action * * * .

Ibid.[1] This provision is subject to five exceptions, none at issue here. *Ibid.*

ARCO's second provision, Section 122(e)(6), provides:

> When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

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[1] "[A]pplicable or relevant and appropriate" state law, or "ARAR," refers to state-law standards EPA identifies and applies in a CERCLA cleanup. 42 U.S.C. § 9621(d).

Id. § 9622(e)(6). CERCLA does not define the term "potentially responsible party" (or "PRP"). *Contra* Pet. 5.

B. Factual Background

For nearly 100 years, the Anaconda Company, ARCO's predecessor, operated a copper smelter near the small community of Opportunity, Montana. Pet. App. 4a. This smelter emitted thousands of tons of toxic metals, including up to 24 tons of arsenic daily. Landowners' MT App. 1:24. Many of these emissions landed on Landowners' residential properties.

In 1983, EPA designated the area surrounding the Anaconda smelter a CERCLA "Superfund" site. Pet. App. 4a. It directed ARCO, the party responsible for the pollution, to investigate remediation responses. Pet. App. 4a; *see* EPA, *Community Soils Operable Unit Record of Decision* (CS ROD) § 2.0 (1996), goo.gl/FJ5VRc ("ARCO has been identified as the Potentially Responsible Party (PRP) for this site."). In determining the degree and method of ARCO's required cleanup, EPA considered a number of factors, including cost-effectiveness. *E.g.*, 42 U.S.C. § 9621(a), (d)(1); *see* EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision*, Responsiveness Summary (ARWWS ROD) § 2.1, RS-14 (1998), goo.gl/GG8aQC (explaining EPA's authority is to "reduce risk to human health and the environment," not to restore " 'pre-smelting' or baseline conditions").

Ultimately, EPA required ARCO to undertake remedial actions for both the soil and groundwater (often over ARCO's vociferous objections). *E.g.*, *id.*

§ 4.3. Most relevant here, EPA required ARCO to remove up to 18 inches of soil in portions of residential yards with arsenic levels exceeding 250 ppm. CS ROD § 9.1. It selected the 250 ppm figure because this threshold was "expected to reduce the level of overall risk" to human health "close to" a level EPA deemed tolerable. *Id.* § 6.11.1. The 18-inch requirement was "based upon possible activities that might be conducted in a yard (i.e., garden, play area, or other excavation)." *Id.* § 9.1. EPA also directed ARCO to replace drinking-water wells if arsenic levels exceeded 10 ppb. EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision Amendment* § 6.4.5 (2011), goo.gl/gj1CZ3.

As of September 2016, ARCO had completed all EPA-ordered remediation work on Landowners' properties. Landowners' MT App. 11:1-3; Pet. App. 47a, 54a.

C. Procedural Background

1. Landowners' claims

Landowners sued ARCO in Montana state court. They advanced a number of causes of action, including negligence, trespass, nuisance, and strict-liability claims. ARCO MT App. 1-2:9-16. In conjunction with these causes of actions, Landowners sought five separate types of compensatory damages: (1) loss of use and enjoyment; (2) diminution in value; (3) incidental and consequential damages; (4) annoyance, inconvenience, and discomfort; and (5) "[e]xpenses for and cost of investigation and restoration of real property." ARCO MT App. 1-2:17.

Under Montana law, this final type of damages—called "restoration" damages—is available where a defendant's tort damaged a plaintiff's property and the plaintiff demonstrates that (1) this injury is reasonably abatable and (2) "an award of restoration damages actually will be used to repair the damaged property." *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1089 (Mont. 2007); Pet. App. 6a. Landowners seek to restore their properties to pre-smelter conditions. Among other things, Landowners contemplate removing up to 24 inches of soil from portions of their yards containing greater than 15 ppm arsenic (the level at which this metal is naturally occurring). Landowners' App. 7:11; 16:3. Because this soil is too toxic for Montana landfills to accept, Landowners plan to move it to the site that received the contaminated soil ARCO previously removed. Landowners' MT Reh'g Pet. 7. Landowners also propose installing permeable walls to remove arsenic from their groundwater. Landowners' App. 7:12.

Any restoration damages Landowners secure will be placed in a trust. Pet. App. 5a. A controller will expend the funds as restoration work proceeds. Pet. App. 5a.

2. The prior Montana Supreme Court decision

The district court initially granted judgment for ARCO on the ground that Landowners' claims were time-barred, but the Montana Supreme Court reversed. *Christian v. Atl. Richfield Co.*, 358 P.3d 131

(Mont. 2015). The court concluded that application of the statute of limitations would depend on a jury's resolution of a number of factual issues, including whether the contamination was "reasonably abatable." *Id.* at 157.

3. ARCO's motion for partial summary judgment

On remand, ARCO filed multiple motions for summary judgment, including one addressing Landowners' restoration-damages request. ARCO argued that because this damages award would be premised on Landowners' intent to perform restoration work, it represented a "challenge" to EPA's remedial orders, contravening CERCLA Section 113(h). ARCO MT App. 1-3:14-15. ARCO further contended that because EPA had not approved Landowners' contemplated restoration work under CERCLA Section 122(e)(6), Landowners could not meet the state-law requirement of demonstrating they would perform the cleanup actions. ARCO MT App. 1-3:14-15. ARCO raised no separate conflict-preemption argument, instead asserting that "federal preemption of state laws" was a "concept completely separate from the federal statute defense asserted here and irrelevant to [ARCO's] motion." ARCO MT App. 1-5:3.

ARCO recognized CERCLA "does allow damage claims." ARCO MT App. 1-3:15. For that reason, ARCO did not move for summary judgment on Landowners' other damages theories. ARCO MT App. 1-3:9.

Its motion was "directed only to th[e] last category of 'restoration' damages." ARCO MT App. 1-3:9.

4. The district court's decision

The district court denied ARCO's motion. Relying on Ninth Circuit caselaw, it concluded Landowners' damages request could not be "interpreted as a 'challenge' pursuant to § 113(h)." Pet. App. 48a. That was because Landowners did not seek to alter EPA's remedial orders or delay their implementation, but rather sought to "recover restoration damages and perform the cleanup themselves." Pet. App. 48a.

The district court also rejected ARCO's argument that Section 122(e)(6) precluded Landowners from pursuing restoration damages. Pet. App. 53a. It noted that in the 33 years since EPA designated the area a Superfund site, no one had suggested Landowners might be "potentially responsible parties" to whom this provision applies. Pet. App. 53a.

5. ARCO's interlocutory appeal

With trial pending, ARCO petitioned the Montana Supreme Court for interlocutory review of five separate issues. The court granted review on only one of them—whether CERCLA barred Landowners' restoration-damages request. Pet. App. 3a. It invited EPA to file an amicus brief. Pet. App. 62a.

In its brief, EPA asserted that Landowners' soil-removal plan might create an "increased risk of dust transfer or contaminant ingestion," and that the proposed underground barriers could "unintentionally

contaminate groundwater and surface water." Pet. App. 73a-74a. It cited no evidence for either proposition. At oral argument, EPA clarified that it was unsure whether and to what extent Landowners' contemplated restoration actions would conflict with any EPA-ordered remediation. Counsel represented that "aspects of that cleanup don't conflict and aspects do," and that EPA had not "had an opportunity" to "get the kind of detail that we'd like to know the extent and scope of potential conflict." MT Oral Arg. 32:34-53. Counsel acknowledged that, once EPA's remediation efforts were complete, "a different cleanup might be something that the EPA could authorize." MT Oral Arg. 42:34-37.

6. The Montana Supreme Court's decision

The Montana Supreme Court affirmed the interlocutory order denying partial summary judgment. Addressing ARCO's Section 113(h) argument, the court observed this provision governs "*Federal* court * * * jurisdiction" and contains no "reference to state court jurisdiction over state law claims." Pet. App. 9a. Regardless, the court continued, Landowners' damages request was not a Section 113(h)-prohibited "challenge," as "[a]t a minimum, a 'challenge' must be more than merely requiring ARCO to spend more money to clean up the land for [Landowners'] benefit." Pet. App. 12a. The court emphasized that ARCO cited no case applying Section 113(h) to a "claim by private property owners, against another private party, seeking money damages for the purpose of restoring their own private property." Pet. App. 11a. The court also determined

Landowners' request "for restoration damages w[ould] not affect, alter, or delay EPA's work in any fashion." Pet. App. 14a. Noting that EPA would eventually "pull up stakes" and "leave these private property owners alone to attend to their own private property," the court concluded: "If [Landowners] must wait for that eventuality to conclude their restoration plan, the history of this case amply demonstrates that they have the patience for it." Pet. App. 14a.

The court also held Landowners were not Section 122(e)(6) "potentially responsible parties." Pet. App. 15a-16a. The court observed that while CERCLA establishes liability for "current owners of property at a CERCLA facility," it exempts from liability those persons who satisfy the "innocent" or "contiguous" landowner defenses. Pet. App. 15a-16a. The court rejected ARCO's argument that "even if [Landowners] were able to avail themselves of a defense to liability for cleanup costs, they would still" be Section 112(e)(6) "potentially responsible parties." Pet. App. 16a. The court further explained that even if a CERCLA claim *could* have been advanced against Landowners, "the statute of limitations for such a claim (at most six years from the date cleanup work was initiated) ha[d] long passed." Pet. App. 16a.

Finally, the court held that principles of conflict preemption did not otherwise preclude Landowners' restoration-damages request (an argument ARCO first raised on appeal). Pet. App. 17a. The court reasoned that, given CERCLA's savings clauses, CERCLA could not preclude *all* "alternative standards and remedies"

aside from those EPA selected. Pet. App. 17a. As for ARCO's argument that Landowners' specific proposals conflicted with EPA's chosen remedy, the Court concluded "[t]his argument fails for the same reason that § 113(h) does not apply: [Landowners'] claim does not prevent the EPA from accomplishing its goals at the ARCO site." Pet. App. 17a.

The court emphasized that "nothing in [its] holding here should be construed as precluding ARCO from contesting [Landowners'] restoration damages claim on its own merits, just as it may contest [Landowners'] other claims." Pet. App. 15a. "However, that is an issue of fact to be resolved at trial." Pet. App. 18a.

Justice Baker concurred, emphasizing the court's holding was "a narrow one: CERCLA does not, as a matter of law, preempt all common-law claims for restoration damages to the property of a private individual." Pet. App. 19a. She also highlighted the "factual questions" that remained "for the jury to resolve." Pet. App. 22a. In particular, ARCO was free to "offer evidence to support its claim that [Landowners'] proposed restoration plan is not feasible." Pet. App. 22a.

Justice McKinnon dissented. She believed Landowners' request for restoration damages "challenges the EPA's selected remedial action" because the "undisputed evidence shows the EPA rejected the soil and groundwater remedies [Landowners] proposed during the course of the EPA's regulatory deliberations." Pet. App. 39a. Justice McKinnon provided no citation for this assertion, and she overlooked EPA's

own contrary representations during oral argument. Pet. App. 39a.[2]

7. Proceedings on remand

The court remanded the case for further proceedings. Pet. App. 18a. Trial is set for October 2018.

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[2] One representative exchange with EPA's counsel went as follows:

> Q. I thought they had submitted a plan; it was specifically rejected by the EPA.
>
> A. They have not.
>
> Q. That plan was rejected by EPA itself when they considered it, isn't that correct?
>
> A. They have not submitted a plan to EPA under 122(e)(6) for review. EPA has not had the chance to ask questions about how that plan would be implemented. EPA's only opportunity to review that plan has been in the course of this case.
>
> Q. I understand. But my understanding from reading through the briefs is that this permeable wall was something that was considered by EPA and rejected. Is that correct?
>
> A. That is not correct. EPA considered a permeable wall, not the permeable wall that's been proposed in this plan. It was a different wall; it had different parameters.

MT Oral Arg. 38:26-39:08.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION OVER THIS INTERLOCUTORY STATE-COURT DECISION

A. ARCO Improperly Seeks Review Of A Non-Final State-Court Decision

ARCO's petition should be denied for lack of jurisdiction because the Montana Supreme Court's decision is not final. Congress limited this Court's review of state-court decisions to "[f]inal judgments or decrees." 28 U.S.C. § 1257(a). A state-court decision must be "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (internal quotation marks omitted).

This case does not satisfy that basic jurisdictional requirement. The Montana Supreme Court addressed ARCO's federal defenses on interlocutory review and remanded the case for trial on Landowners' claims. Pet. App. 18a. The decision below is therefore not final. *Jefferson*, 522 U.S. at 78; *accord O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (state court decision "not final" where court "remanded th[e] case for trial").

B. This Case Does Not Fit Any Exception To Section 1257's Finality Rule

ARCO's failure to acknowledge this jurisdictional defect (Pet. 1) is reason enough to deny review. *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948) ("Appellant, of course, has the burden of affirmatively

establishing this Court's jurisdiction."). But even had it addressed the issue, ARCO could not establish this Court's jurisdiction. Notwithstanding Section 1257(a)'s plain language, this Court has recognized a "limited set of situations" in which interlocutory state-court decisions may nevertheless be deemed "final." *Jefferson*, 522 U.S. at 82. ARCO cannot show this case fits any of the four narrow exceptions set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

The first *Cox* exception applies where "the outcome of further proceedings [is] preordained" given the state court's resolution of the federal issue. 420 U.S. at 479. Here, however, the Montana Supreme Court's decision leaves much to be decided, and the court expressly noted that ARCO is free to contest Landowners' restoration-damages request "on its own merits, just as it may contest [Landowners'] other claims." Pet. App. 15a; *see Minnick v. California Dep't of Corr.*, 452 U.S. 105, 121-22 (1981).

The second *Cox* exception applies where the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. That is not true here: if ARCO defeats liability at trial, its federal defenses will be moot. *See Pierce Cty. v. Guillen*, 537 U.S. 129, 141 n.5 (2003).

The third *Cox* exception applies where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481. But if ARCO loses at trial, it can re-assert its federal defenses and seek this Court's review after final

judgment. *Jefferson*, 522 U.S. at 82-83. This is therefore not a case where the federal issues must be reviewed now or never. *Ibid.*

The fourth *Cox* exception applies where (1) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and (2) "refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-83. This case satisfies neither requirement.

First, even if this Court reversed the decision below, litigation would proceed on *all* Landowners' causes of action. As ARCO acknowledges (Pet. 27-29), its federal defenses pertain only to Landowners' request for restoration damages—just one of several remedies Landowners seek with respect to their trespass, nuisance, and other state-law claims. Precluding Landowners from seeking this particular remedy would "merely" change "the nature and character of * * * the state proceedings still to come"; it would not, as the fourth *Cox* exception requires, ensure there would be "no trial at all" on any of Landowners' causes of action. 420 U.S. at 483, 485.[3]

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[3] Further jurisdictional complications would arise if this Court determined that federal law precludes some, but not all, aspects of Landowners' restoration-damages request. *E.g.*, Pet. App. 14a ("[T]he United States' counsel acknowledged during oral argument that *some aspects* of [Landowners'] restoration plan would not constitute a 'challenge' within the meaning of the law.") (emphasis added).

Second, and in any event, denying immediate review will not erode any federal policies in a manner outweighing the paramount interest in finality. *Johnson v. California*, 541 U.S. 428, 430 (2004). Although ARCO invokes various purported reasons to grant review (Pet. 30-36), it identifies no pressing federal interest that cannot be addressed on review of final judgment after the imminent trial. *Cox*, 420 U.S. at 478-79 (requiring "sufficient justification for *immediate* review" (emphasis added)). "A contrary conclusion would permit the fourth exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981). Jurisdiction is therefore lacking.

II. LANDOWNERS DO NOT "CHALLENGE" AN EPA-ORDERED REMEDIATION

A. The Montana Supreme Court's Decision Conflicts With No Decision Applying Section 113(h)

ARCO claims the Montana Supreme Court's decision creates a split regarding what constitutes a Section 113(h) "challenge." Contrary to ARCO's conclusory assertions, however, the court below did not apply a test that "require[s] the plaintiffs' remedy actually to alter the terms of the EPA's order or to force EPA to implement those changed terms." Pet. 17. Instead, the court (like other courts to address the issue) adopted a functional approach, holding that whether a lawsuit "challenge[s]" EPA's plan depends on the extent to which the requested remedy would interfere with that plan. Pet. App. 10a-15a; *see El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 880 (D.C.

Cir. 2014) (summarizing relevant cases). And as the court correctly observed, *none* of the decisions ARCO cites addressed circumstances like those present here. Pet. App. 12a. There is thus no conflict.

1. In contending otherwise, ARCO focuses primarily on the Ninth Circuit. Pet. 15-17. But the Montana Supreme Court expressly relied on one decision ARCO invokes, *ARCO Environmental Remediation, LLC v. Department of Health & Environmental Quality of Montana*, 213 F.3d 1108 (9th Cir. 2000). Pet. App. 10a. And *ARCO Environmental* could create no conflict because the Ninth Circuit there, much like the Montana Supreme Court here, *rejected* the argument that a state-law claim related to a Superfund site was a Section 113(h) "challenge." 213 F.3d at 1115. The *ARCO Environmental* plaintiff sought access to information about EPA's cleanup, information that might "lead to a reduction in the extent of cleanup required under CERCLA" and "disrupt the CERCLA cleanup process." *Id.* Nevertheless, the Ninth Circuit concluded the claim was not a "challenge," holding: "an action does not become a challenge to a CERCLA cleanup simply because the action has an incidental effect on the progress of a CERCLA cleanup." *Id.*

The other Ninth Circuit decisions ARCO invokes provide it no better support. In *Pakootas v. Teck Cominco Metals, Ltd.*, the plaintiffs brought a CERCLA citizen suit. 646 F.3d 1214, 1217 (9th Cir. 2011) (citing 42 U.S.C. § 9659). They did not, as ARCO claims, seek "money damages" (Pet. 18), but instead sought to compel the defendant to pay CERCLA

penalties set forth in an EPA order. *Pakootas*, 646 F.3d at 1217. Because the EPA had expressly chosen *not* to enforce this penalty, the Ninth Circuit concluded the action was a Section 113(h) "challenge." *Id.* at 1220-21. The court explained that where EPA has already determined what CERCLA required yet plaintiffs seek "more" *from CERCLA*, plaintiffs "challenge" EPA's CERCLA determination. *Id.* at 1220. By contrast, Landowners do not challenge any of EPA's CERCLA determinations, nor even invoke CERCLA; they simply press their state-law right to recover for damage to their properties.

Similarly distinguishable is *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995). There, the plaintiffs sought an injunction compelling the Air Force to comply with reporting requirements that EPA, in a CERCLA cleanup plan, deemed unnecessary. *Id.* at 330. The court held this requested injunction "would constitute the kind of interference with the cleanup plan that Congress sought to avoid or delay." *Id.* at 330. The plaintiffs also sought an injunction preventing ongoing "leaching" from the site. *Id.* at 330-31. The court held this claim would "interfere" with EPA's plan because "the leaching process is a necessary component of the CERCLA plan's groundwater extraction system." *Id.* *McClellan* thus did not hold or suggest that state-law claims for damages to remediate private property following CERCLA cleanups are prohibited "challenges"; it held that requests for injunctions that directly interfere with ongoing cleanups are. *Id.*

When the Ninth Circuit confronted claims similar to those here, it concluded they were *not* "challenges." In *Beck v. Atlantic Richfield Co.*, for example, the court held that plaintiffs who sought damages resulting from a CERCLA cleanup plan did not press a "'challenge to the cleanup effort"; rather, they merely sought "to recover damages under Montana law." 62 F.3d 1240, 1242-43 (9th Cir. 1995). Likewise, in *Weiss v. Kuck Trucking, Inc.*, the court held Section 113(h) inapplicable where "plaintiff's alleged causes of action are based entirely on state law and do not challenge any CERCLA cleanup plan," even though the claims might "draw money" away from the cleanup. 166 Fed. Appx. 931, 932 (9th Cir. 2006). The Montana Supreme Court's similar treatment of Landowners' state-law damages request creates no conflict.

2. The decisions ARCO invokes from other Circuits (Pet. 17) are likewise inapposite. In *Boarhead Corp. v. Erickson*, the Third Circuit confronted a direct suit against EPA challenging its "ability to conduct [a study] pursuant to § 104 of CERCLA." 923 F.2d 1011, 1019 (1991). In *Pollack v. Department of Defense*, the plaintiff sought to invalidate a transfer of a CERCLA-designated landfill and thereby "halt the ongoing remediation efforts at the landfill." 507 F.3d 522, 527 (7th Cir. 2007). In *Schalk v. Reilly*, the plaintiff sought an injunction compelling EPA to consider studies that might lead it to reconsider its CERCLA plan. 900 F.2d 1091, 1097 (7th Cir. 1990). In *Broward Gardens Tenants Ass'n v. EPA*, the plaintiffs sought injunctive relief that would "order the defendants to alter the

remedial plan." 311 F.3d 1066, 1073 (11th Cir. 2002). And in *El Paso Natural Gas Co.*, the plaintiffs sought an injunction against the government to compel "specific cleanup activities that would threaten to *obviate the very point* of the [CERCLA] remedial investigation and feasibility study" EPA was then conducting. 750 F.3d at 881. Landowners' state-law damages request bears no resemblance to any of these direct challenges to EPA action.

Below, ARCO recognized as much. It described *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006) as the "*only*" case addressing a remedy like that Landowners seek here. ARCO MT Reply 1 (emphasis added).[4] But *New Mexico* is different. There, the plaintiff's state-law action was premised on a challenge to the "alleged inadequacy" of the EPA's "*ongoing* remediation" efforts. *New Mexico*, 467 F.3d at 1236, 1249-50 (emphasis added); *see* David Kriewaldt, *Recent Treatment of the Challenges Clause in CERCLA § 113(h)*, 3 Envtl. & Energy L. & Pol'y J. 169, 175 (2008) (characterizing *New Mexico* as turning on how "the plaintiff[] addressed the underlying EPA remedial action plan"). By contrast, Landowners' requested damages depend on no attack on EPA's remedial orders, but rather their contentions that additional efforts are required (after the EPA has "pull[ed] up

[4] The other Tenth Circuit decision ARCO cites, *Cannon v. Gates*, involved a suit against the government seeking "injunctive relief ordering the remediation of [the plaintiffs'] property," and is thus distinguishable for the same reasons as the decisions discussed above. 538 F.3d 1328, 1335 (2008).

stakes," Pet. App. 14a) to return their properties to their pre-pollution state. *Supra* p. 8. In fact, Landowners sought to *exclude* as irrelevant evidence of EPA's actions. ARCO MT App. 1-4:6. When the Tenth Circuit has confronted state-law suits that seek to supplement CERCLA cleanup efforts—even suits that (unlike here) request injunctive relief regarding ongoing cleanups—it has permitted them. *United States v. Colorado*, 990 F.2d 1565, 1576 (1993) (no "challenge" where action merely sought "compliance" with state-law requirements, and did not "seek to halt" CERCLA action).

In any event, even were ARCO correct that the Tenth Circuit would deem Landowners' restoration-damages request a Section 113(h) "challenge," application of that Circuit's law would not be "outcome-determinative." Pet. 14. That is because the Tenth Circuit has held Section 113(h) entirely inapplicable in state courts. *Colorado*, 990 F.2d at 1579. Thus, far from establishing that Landowners' restoration-damages request is a "brazen assault on EPA's remedial efforts that no other court would permit" (Pet. 18), ARCO fails to identify even a *single* court that would read Section 113(h) to preclude Landowners' request.

B. The Montana Supreme Court's Decision Was Correct

The Montana Supreme Court's decision was also consistent with Section 113(h) itself. Indeed—although the court below had no need to reach the issue—multiple courts have recognized that Section 113(h) does not

apply to state-law actions at all. Congress expressly excluded from Section 113(h)'s jurisdictional bar both state-law "ARAR" claims and cases arising under federal courts' "diversity jurisdiction," 42 U.S.C. § 9613(h), thus barring only federal-law challenges. *Village of DePue v. Exxon Mobil Corp.*, 537 F.3d 775, 784 (7th Cir. 2008); *see supra* n.1. As the relevant Conference Committee Report explained, "section 113(h) [was] not intended to affect in any way the rights of persons to bring nuisance actions under state law." *Id.* at 785 (quoting H.R. Rep. No. 99-962, at 223, 1986 U.S. Code Cong. & Admin. News 3276, 3317 (1986)); *see United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1455 (6th Cir. 1991) (quoting legislative history that "challenges to the selection or adequacy of remedies based on state nuisance law" are "clearly preserved"). The savings clauses providing that CERCLA cannot be construed to preclude States' ability to impose "additional liability," *see* 42 U.S.C. §§ 9614(a), 9652(d), further confirm Section 113(h) has no application to state-law claims. *See Colorado*, 990 F.2d at 1577 (Section 113(h) must be interpreted in light of CERCLA's savings clauses).

Even if, contrary to its plain terms, Section 113(h) applied to state-law claims, it still would not bar requests for restoration damages such as Landowners'. As the Montana Supreme Court correctly recognized, Landowners seek only the funds necessary to perform cleanup work on their properties after EPA's efforts are complete (as they now are). Pet. App. 14a. Landowners' suit does not "challenge" EPA's remediation

plan because the remedy they seek will not "*interfere* with a 'removal' or a 'remedial' action"; these already have taken place. *El Paso Nat. Gas*, 750 F.3d at 880.

Disputing this conclusion, ARCO asserts the court below provided "no textual or other basis" for deeming it relevant that "the remedy could be implemented after EPA's cleanup was conducted." Pet. 25. But Section 113(h) is entitled "*Timing* of review." 42 U.S.C. § 9613(h)
(emphasis added). As courts have consistently held, the timing of a requested remedial action is critical: Section 113(h) "postpones" challenges to EPA remediation; it does not forever prohibit them. *ARCO Envtl.*, 213 F.3d at 1115; *see, e.g.*, *Cannon*, 538 F.3d at 1332 (Section 113(h) "does not preclude actions to challenge a remedial plan *after* that plan has been completed"). Because Landowners' proposed remediation efforts would commence only *after* the EPA-dictated cleanup is complete, Landowners do not "challenge" EPA's implementation of its selected remedy. *See El Paso Nat. Gas*, 750 F.3d at 882 ("once a removal or remedial action has concluded there would be no 'removal' or 'remedial action' " to challenge).

The nature of Landowners' claims also precludes any conclusion that Landowners "challenge" EPA's remediation plan. Contrary to ARCO's assertions, Landowners do not seek to "dig up soil that the EPA wants in the ground." Pet. 26. In the relevant remediation orders, EPA concluded only that it would not require ARCO to remove more than 18 inches of soil from residential yards, and only in yards containing greater

than 250 ppm arsenic. CS ROD § 9.1. In other words, EPA determined which actions CERCLA required ARCO to take. Landowners do not dispute that determination, nor do they hope to "postpone," "dictate specific remedial actions," or otherwise modify the cleanup efforts EPA ordered. *ARCO*, 213 F.3d at 1115. They simply seek the funds necessary to clean their own properties to the standard specified by state law. *See New Mexico*, 467 F.3d at 1246 (recognizing that "CERCLA sets a floor, not a ceiling"). Section 113(h) does not bar such a claim.

C. This Petition Is A Poor Vehicle For Addressing Section 113(h)'s Scope

Even if there were a conflict regarding what is a Section 113(h) "challenge," this case would be a poor vehicle for resolving it. The answer to the question presented matters only if Section 113(h) applies in state courts. Yet as the Montana Supreme Court noted, Section 113(h) is expressly limited to *federal* courts. Pet. App. 9a. The Ninth Circuit, relying on speculation about Congress's hypothesized intent, has suggested that Section 113(h) nevertheless deprives state courts of jurisdiction to hear CERCLA "challenges." *Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828, 832 (1999). Other courts, however, have adhered to the plain text and recognized the provision applies *only* in "Federal court." 42 U.S.C. § 9613(h); *see, e.g.*, *Colorado*, 990 F.2d at 1579; *Williams Pipeline Co. v. Soo Line R.R.*, 597 N.W.2d 340, 344 (Minn. Ct. App. 1999).

ARCO's petition does not ask this Court to address this conflict, presumably because resolution of that question would provide no basis for reversing the decision below. But applying the statute according to its plain terms would obviate any need to address the question ARCO's petition does present. If this Court wishes to clarify what constitutes a Section 113(h) "challenge," a petition arising from federal court—in which Section 113(h) *is* applicable—would provide a better vehicle.

The lack of full factual development also makes this a poor vehicle for deciding the Section 113(h) issue. Even EPA has said that "some aspects of [Landowners'] restoration plan would not constitute a 'challenge' within the meaning of the law." Pet. App. 14a. But the EPA has not identified precisely which "aspects" fall on which side of its (erroneous) line, *accord* Pet. 29, and there is an insufficient factual basis for it to do so.

III. LANDOWNERS NEED NOT SECURE EPA APPROVAL BEFORE CLEANING THEIR PROPERTIES

A. The Montana Supreme Court's Conclusion That Landowners Are Not Section 122(e)(6) "Potentially Responsible Part[ies]" Conflicts With No Other Decision

ARCO next asserts the Montana Supreme Court created a "split on who is a 'potentially responsible party,' or 'PRP,' barred under CERCLA § 122(e)(6) from conducting unilateral cleanups at Superfund sites without EPA's approval." Pet. 19. But *none* of the

decisions on the other side of ARCO's purported "split" address the application of Section 122(e)(6). Moreover, none of ARCO's decisions even turn on an interpretation of the term "potentially responsible party" as used elsewhere in CERCLA. And even if they had, none of the decisions involved parties situated similarly to Landowners—who own property indisputably polluted by *another* entity, and who would be shielded from CERCLA liability by the statute of limitations. The decision below thus created no conflict in recognizing that Landowners are not Section 122(e)(6) "potentially responsible parties." Pet. App. 15a-17a.

The Ninth Circuit decision ARCO cites, *California Department of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910 (2010), illustrates the degree to which ARCO stretches in trying to conjure a split. Hearthside, the owner of contaminated property, entered into an agreement with a state agency to clean this property but refused to remediate an adjacent residential property into which the contamination leaked. *Id.* at 911-12. After Hearthside sold its property, the agency brought suit. *Id.* at 912. Invoking CERCLA Section 107(a), the agency argued Hearthside was responsible for the remediation costs for the residential property. *Id.* Hearthside countered that it could not be liable because it did not own the polluting property when the suit was brought and thus was not an "owner" within the meaning of Section 107(a)(1). *Id.* at 912-13. The Ninth Circuit rejected that proposition, holding "Congress intended the owner at the time of cleanup to be

the 'current owner' in a subsequent recovery suit." *Id.* at 915.

Hearthside thus had little to do with the question presented here. How, then, does ARCO contend it establishes that because Landowners are "property owners at the Superfund site, they are PRPs, full stop"? Pet. 19. ARCO appears to be relying on a single statement from the Ninth Circuit's overview of CERCLA's cost-recovery provision: "At issue here is one type of potentially responsible party: 'the owner and operator of a vessel or a facility.'" *Hearthside*, 613 F.3d at 912 (quoting 42 U.S.C. § 9607(a)(1)). Yet this passing statement: (1) was not a holding; (2) used the term "potentially responsible party" but did not interpret CERCLA's (let alone Section 122(e)(6)'s) use of it; and (3) did not address whether parties who might invoke the innocent- or contiguous-landowners exceptions to liability, or who are shielded by the statute of limitations, are "potentially responsible parties."[5]

The other decisions ARCO cites are equally far afield. In *Rumpke of Ind., Inc. v. Cummins Engine Co.*, the Seventh Circuit considered the scope of its judicially created "innocent landowner" exception to its judicially created limitation on Section 107 actions to plaintiffs unable to bring Section 113(f) contribution

[5] In fact, to the extent the Ninth Circuit has considered these issues, it has held a party exempt from liability as an "innocent" landowner "is not a PRP." *Western Property Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 690 n.53 (2004).

actions. 107 F.3d 1235, 1238, 1240 (1997).[6] The court described the plaintiff (the owner of a landfill containing hazardous waste) as a "potentially responsible party," but it did not interpret CERCLA's use of that term or address whether the term would encompass individuals in Landowners' circumstances. *Id.* at 1236-37, 1239-42.

Similarly, in *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, the Second Circuit concluded the operator of a manufactured gas plant properly brought Section 113(f) contribution claims against past and current owners of the site and the owner of another polluting facility (all of which it referred to as "potentially responsible parties"). 596 F.3d 112, 132-35 (2010). ARCO (Pet. 20) quotes the statement from the court's general overview of CERCLA that "[s]omewhat like the common law of ultra-hazardous activities, property owners are strictly liable for the hazardous materials on their property, regardless of whether or not they deposited them there." *Id.* at 120. But the court did not hold or suggest that all owners of polluted properties are "potentially responsible parties" regardless of fault; indeed, in the very next sentence, the court observed that "[o]wners can escape liability" if "they are 'innocent owners' under the statute." *Id*. And contrary to ARCO's suggestions (Pet. 20-21), the court nowhere addressed whether parties are CERCLA "PRPs"

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[6] This Court subsequently abrogated that judicially created limitation. *United States v. Atl. Research Corp.*, 551 U.S. 128, 134-36 (2007).

when the statute of limitations would protect them from CERCLA liability.

Finally, in *Litgo New Jersey Inc. v. Commissioner, New Jersey Department of Environmental Protection*, the Third Circuit concluded that owners of a property "contaminated as a result of the commercial activity that occurred there over the years" were, under Section 107, "liable as current operators" because they "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution." 725 F.3d 369, 374, 381 (2013) (internal quotation marks omitted). Once again, the court: (1) occasionally used, but did not interpret, the term "PRP"; (2) did not apply that term to landowners who might invoke exemptions from liability; and (3) never considered whether such landowners might be "PRPs" notwithstanding the applicable statute of limitations.

B. The Montana Supreme Court's Decision Was Correct

Given the absence of any conflict, ARCO's attack on the Montana Supreme Court's interpretation and application of Section 122(e)(6) amounts to a request for error correction. But the decision below was correct.

The court's holding follows from a plain-text reading of Section 122(e)(6). Parties who have never been sued or otherwise designated as having potential CERCLA liability, who would be able to invoke CERCLA exemptions from liability, and who would be protected by the statute of limitations, are not

"potentially responsible" because they face no prospect of liability. Pet. App. 15a-17a. By limiting its reach to "potentially responsible part[ies]," Section 122(e)(6) ensures that parties possibly subject to CERCLA liability adhere to the specific cleanup responsibilities EPA determines are warranted. The provision does not (as ARCO would have it) forever prevent anyone whose property has been contaminated from taking any steps to clean their property without federal government approval. *Contra* Pet. 27. If Congress had intended such an extreme derogation of private property rights, it would have imposed Section 122(e)(6) on "all property owners" or even "all persons," rather than on "potentially responsible part[ies]" alone.

ARCO's contrary contentions are grounded in its repeated assertions that "CERCLA defines" the term "PRP" in Section 107(a). Pet. 19, 26. But Section 107(a) nowhere uses, let alone "defines," this term. Section 107 describes in subsection (a) who is a "Covered person[]" under the Act, then sets forth defenses to liability in separate subsections. 42 U.S.C. §§ 9607(a), (b), (q). Because Section 107 establishes liability for remediation costs, this Court has naturally looked to it in describing who is a "potentially responsible party." *Atl. Research Corp.*, 551 U.S. at 132. But it has never held (as ARCO suggests) that when CERCLA uses the term "potentially responsible party," the phrase encompasses any and all property owners "regardless of defenses they may have to any ultimate liability." Pet. 26. And ARCO can point to nothing in the statute's text that would require this blinkered approach

to determining whether a party is "potentially responsible."

C. Remaining State-Law Questions Render This Petition A Poor Vehicle For Addressing Section 122(e)(6)'s Scope

In any event, this case is a poor vehicle for resolving any purported conflict on CERCLA's use of "potentially responsible party." Section 116(e) is relevant only to the extent it supports ARCO's arguments that Landowners have not met the *state-law requirement* of demonstrating they would use a restoration-damages award to restore their properties. ARCO MT App. 1-3:14-15; *Sunburst*, 165 P.3d at 1089. This Court does not "ordinarily" consider "state-law issues[s]." *The Wharf (Holdings) Ltd. v. United Int'l Holdings*, 532 U.S. 588, 596 (2001).

Even if this Court were to reverse and hold that Landowners are Section 116(e) "potentially responsible part[ies]," application of this provision would not necessarily preclude Landowners from recovering restoration damages. *Contra* Pet. 23. Although Landowners have not sought EPA approval for their planned cleanup efforts, they could later obtain such approval—as EPA has acknowledged. MT Oral Arg. 42:34-37. Whether that possibility is sufficient to support an award of damages would be a question of Montana law.

IV. CERCLA DOES NOT OTHERWISE PREEMPT LANDOWNERS' RESTORATION-DAMAGES REQUEST

A. Consistent With Other Appellate Courts, The Montana Supreme Court Recognized Conflicting State-Law Remedies May Be Preempted

Lastly, ARCO contends the Montana Supreme Court departed from the Seventh, Ninth, and Tenth Circuits by holding that "CERCLA's savings clauses categorically save all state common-law claims from preemption, no matter how much the remedy sought conflicts with EPA's orders." Pet. 23. But because the court applied no such categorical rule, it created no split.

Instead, the court held CERCLA did not impliedly preempt Landowners' restoration-damages request because that request "does not prevent the EPA from accomplishing its goals at the ARCO Site." Pet. App. 17a. In other words, the court held Landowners' request is saved from preemption because it does not conflict with EPA's orders, not because it arises under state law. The court also invoked CERCLA's savings provisions, but it did not read them to establish that no state-law claim could ever be preempted. The court instead cited these provisions in explaining why ARCO's proposed categorical rules were mistaken: contrary to ARCO's contentions, not *all* state-law claims regarding "alternative standards and remedies" are precluded if EPA has issued remediation orders;

only those claims that actually conflict with or "challenge" those remediation orders are. Pet. App. 17a-18a.

The decision below was thus consistent with the Seventh, Ninth, and Tenth Circuit precedents ARCO cites. Each of these courts recognizes that state-law claims may be preempted if they "come[] into conflict with CERCLA." *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 951 n.26 (9th Cir. 2002); *accord PMC*, 151 F.3d at 618; *New Mexico*, 467 F.3d at 1244. But each of these courts also recognizes that actions enforcing state-law requirements respecting cleanups are not preempted for that reason alone. *E.g.*, *Stanton Road Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021-22 (9th Cir. 1993) (state-law award of future response costs not preempted); *Village of DePue*, 537 F.3d at 787 (no preemption where there is no "conflict" with "any CERCLA-authorized remediation effort"); *New Mexico*, 467 F.3d at 1246 (CERCLA "sets a floor, not a ceiling" and "preserves the right of a state or other party to proceed under applicable state law to conduct a cleanup of a site affected by hazardous substances"). Likewise, the Montana Supreme Court concluded that where there is no conflict with CERCLA or a CERCLA-implementing order, there is no preemption. Pet. App. 17a. It created no split in doing so.

B. The Montana Supreme Court's Decision Was Correct

The court below was also correct: there is no conflict that would necessitate preemption of Landowners' restoration-damages request. "[C]onflict pre-emption

exists where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (internal quotation marks omitted). Landowners' restoration-damages request presents neither issue.

ARCO contends that complying with both EPA's orders and Landowners' restoration-damages remedy would be an "impossibility." Pet. 28. But nothing in EPA's orders precludes ARCO from paying damages so Landowners may conduct additional remediation efforts EPA did not order ARCO to undertake. Despite ARCO's rhetoric, it is at no risk of being placed "in flagrant violation of EPA's orders." Pet. 28.

ARCO also fails to establish that Landowners' restoration-damages request would present an "obstacle" to EPA's cleanup orders. Instead, ARCO simply invokes the EPA's purportedly "carefully considered views" on the matter. Pet. 29. In the section of EPA's amicus brief addressing conflict preemption, however, EPA noted only that certain aspects of Landowners' proposed restoration "could" present environmental concerns. Pet. App. 78a. EPA cited no evidence of such risks, later explaining it was unsure of their existence and extent. *Supra* pp. 10-11. The absence of evidence in the summary-judgment record supporting these assertions reflects ARCO's failure to press this contention before the district court, where ARCO disclaimed conflict preemption entirely. ARCO MT App. 1-5:3. Yet as ARCO acknowledges (Pet. 22), conflict preemption

is an affirmative defense. *E.g.*, *New Mexico*, 467 F.3d at 1244. The unsupported assertion that Landowners' proposed remediation efforts could cause additional contamination cannot, at this stage of the litigation, allow ARCO to meet its burden and escape liability.

Nor can ARCO establish that Landowners' restoration-damages request would otherwise stand as an "obstacle" to CERCLA's more general objectives. ARCO asserts the requested remedy would "usurp" EPA's "exclusive" authority to "implement the appropriate remedy." Pet. 28. But where Congress legislates "in [a] field which the States have traditionally occupied," courts "start with the assumption that the historic police powers of the States were not to be superseded * * * unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Nothing in CERCLA indicates Congress sought to preclude any and all additional cleanup efforts, whenever conducted. To the contrary, Congress expressly provided that CERCLA should *not* "be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a); *accord id.* § 9652(d).

Even setting aside CERCLA's savings provisions, Congress expressly contemplated additional state-law cleanup efforts would occur: Section 114(b) reduces the amount plaintiffs can recover in state-law remediation actions by the "compensation for removal costs or damages or claims pursuant to" CERCLA. 42 U.S.C.

§ 9614(b). "[I]f CERCLA's remedies preempted state remedies for recovering costs of hazardous waste cleanups, § 114(b) would make no sense at all." *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 127 (3d Cir. 1991) (Alito, J.).

ARCO also invokes CERCLA's objective of "encourag[ing] settlement," insisting parties will have reduced incentives to "enter into a CERCLA consent decree with the United States" to fix their "cleanup obligations." Pet. 30-31. But if the exposure to state-law damages claims is a deterrent for such settlements, that deterrent would remain even if ARCO prevailed here. After all, ARCO concedes that "CERCLA [does] not preempt four out of five types of damages claimed in this case." Pet. 29. Consent agreements provide parties with a means to fix their *CERCLA* obligations. That parties responsible for contamination may remain subject to additional state-law claims is not an obstacle to the fulfillment of CERCLA's objectives, but a necessary consequence of Congress's decision not to preempt the field "with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). As this Court has held in the CERCLA context, "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts." *CTS Corp.*, 134 S. Ct. at 2188 (internal quotation marks omitted).

V. ANY REVIEW SHOULD AWAIT FINAL JUDGMENT

This case's interlocutory posture makes it a poor vehicle to review ARCO's contentions (even setting aside the jurisdictional defect arising from the lack of finality). This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). There is good reason to adhere to that policy here. Notwithstanding ARCO's assertions that the sky is falling (Pet. 30-36), the questions resolved in the Montana Supreme Court's decision may not be outcome-determinative. The jury may reject the state-law tort claims on which Landowners' restoration-damages request is premised. *See Christian*, 358 P.3d at 157. If ARCO presents evidence that aspects of Landowners' remediation plan would harm the environment, or that the contamination is not "reasonably abatable," the jury may also decline to award some or all of the requested restoration damages. Pet. App. 6a, 15a.

Nor is this Court's intervention necessary to save ARCO from the burdens of trial. Trial will happen in any event. It is scheduled for October—shortly after this Court will consider this petition. And "ARCO concedes" a trial is necessary on four of Landowners' five damages requests, regardless of whether the request for restoration damages is barred. Pet. App. 5a-6a; *see* Pet. App. 35a-36a (McKinnon, J., dissenting); Pet. 9.

If and when the impending trial resolves the various factual issues in Landowners' favor, this Court would have a better-developed record on which to address any issues ARCO might continue to press. This Court would also have a better sense of what effect, if any, the decision below has had in Montana or elsewhere. As Justice Baker put it in her concurrence, "[i]t makes sense to allow the parties to develop the evidence for the jury's consideration of these issues and a record that may be reviewed, if necessary, on appeal from any final judgment." Pet. App. 23a. This Court should do the same.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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