No. 17-1498

In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, PETITIONER,

v.

GREGORY A. CHRISTIAN, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR PETITIONER

ROBERT J. KATERBERG
ELISABETH S. THEODORE
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001

JONATHAN W. RAUCHWAY
SHANNON W. STEVENSON
DAVIS GRAHAM & STUBBS
LLP
1550 17th St., Suite 500
Denver, CO 80202

LISA S. BLATT
Counsel of Record
JOHN S. WILLIAMS
SARAH M. HARRIS
CHARLES L. MCCLOUD
MENG JIA YANG
THOMAS S. CHAPMAN
WILLIAMS & CONNOLLY LLP
725 Twelfth St., NW
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

QUESTIONS PRESENTED

In a divided decision that conflicts with decisions of federal courts of appeals nationwide, the Supreme Court of Montana held that landowners can pursue common-law claims for "restoration" requiring environmental cleanups at Superfund sites that directly conflict with EPA-ordered cleanups at these sites. The Montana court reached that result for one of the largest, oldest, and most expensive Superfund sites in the country, the Anaconda Smelter site. The court ignored EPA's views that the Superfund statute—the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")—barred the restoration claims and that respondents' preferred remedies would *hurt* the environment. The state court's holding throws remediation efforts at Anaconda and other massive sites into chaos and opens the door for thousands of private individuals to select and impose their own remedies at CERCLA sites at a potential cost of many millions of dollars per site.

The questions presented are:

1. Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a "challenge" to EPA's cleanup jurisdictionally barred by § 113 of CERCLA.

2. Whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup.

3. Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner, who was petitioner below and defendant in the trial court, is Atlantic Richfield Company. Atlantic Richfield is a wholly owned subsidiary of BP America Inc., which is a wholly owned subsidiary of BP America Limited. BP America Limited is a wholly owned subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a wholly owned subsidiary of BP p.l.c., which is a publicly held company. Neither Atlantic Richfield Company nor any of its direct or indirect parent companies other than BP p.l.c. is publicly held.

Respondents, who were counter-petitioners below and plaintiffs in the trial court, are Gregory A. Christian; Michelle D. Christian; Duane N. Colwell; Shirley A. Colwell; Franklin J. Cooney; Vicki Cooney; Shirley Coward; Jack E. Datres; Viola Duffy; Bruce Duxbury; Joyce Duxbury; Bill Field; Chris Field; Andrew Gress; Charles Gustafson; Heather Hamilton; Rick Hamilton; Michael Hendrickson; Patrice Hoolahan; Shaun Hoolahan; Ed Jones; Ruth Jones; Barbara Kelsey; Brenda Krattiger; Doug Krattiger; Julie Latray; Leonard Mann; Valerie Mann; Kristy McKay; Russ McKay; Mildred Meyer; Judy Minnehan; Ted Minnehan; Diane Morse; Richard Morse; Karen Mulcahy; Patrick Mulcahy; Nancy Myers; Serge Myers; Jane Newell; John Newell; George Niland; Laurie Niland; David Ostrom; Judy Peters; Tammy Peters; Robert Phillips; Toni Phillips; Gary Raasakka; Malissa Raasakka; Alex Reid; Sheila Reid; Kent Reisenauer; Peter Reisenauer; Sue Reisenauer; Kathryn Rusinski; Emily Russ; Scott Russ; Carl Ryan; Penny Ryan; Diane Salle; Rich Salle; Dale Schafer; Michael Sevalstad; Jim Shafford; Rosemarie Silzly; Anthony Solan; Kevin Sorum; Don Sparks; Vickie Spehar; Zane Spehar; Cara Svendsen;

James Svendsen, Jr.; Doug Violette; Carol Walrod; Charles Walrod; Ken Yates; Sharon Yates; David Zimmer; and Toni Zimmer.

Respondent Montana Second Judicial District Court, Silver Bow County, the Honorable Katherine M. Bidegaray, was the nominal respondent below.

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OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 408 P.3d 515 (Mont. 2017) and reproduced at Pet. App. 1a-40a. The unreported opinion of the trial court is reproduced at Pet. App. 41a-55a.

JURISDICTION

The Supreme Court of Montana issued its opinion and entered judgment on December 29, 2017. On February 20, 2018, Justice Kennedy extended the time to file a petition for a writ of certiorari until April 30, 2018. The petition was filed on April 27, 2018, and granted on June 10, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9613, provides in relevant part:

> (b) Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.
>
> * * *
>
> (h) 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 except [in five enumerated exceptions].

Section 122(e)(6) of CERCLA, 42 U.S.C. § 9622(e)(6), provides:

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

Article VI of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") to place the federal government in charge of remediating hazardous waste sites across America from start to finish. The Environmental Protection Agency ("EPA") designates and prioritizes sites for remediation. After initiating a cleanup, EPA seeks public input, dictates what remedial action must happen to protect human health and the environment, controls the remediation work, and recovers costs of the cleanup from liable parties.

As a strict-liability statute, CERCLA sweeps broadly, covering not only the polluters (if they still exist), but also a multitude of other actors, from current landowners to legacy owners of defunct companies. In return, CERCLA offers all these actors a measure of certainty. The remediation process is often staggeringly expensive, time-consuming, and complex. But EPA's comprehensive control over the cleanup at least assures parties whom EPA requires to pay for the cleanup that they are securing a global resolution of their responsibility for cleanup from the federal government and are buying into just one comprehensive remediation effort. EPA's primacy likewise

ensures that EPA's community-wide remediation plan reflects input from all stakeholders, not just those paying for the cleanup. Those assurances are among the reasons actors covered by CERCLA—so-called "potentially responsible parties"—cooperate with EPA.

CERCLA delivers on those assurances, protecting EPA, its private-sector partners, and the surrounding community by prohibiting interference with EPA's selected remedy. Section 113 insulates EPA's choice of remedial plans from challenge: state courts lack jurisdiction to entertain any suits second-guessing these plans, and federal courts generally cannot hear suits challenging EPA's remedy, either. Section 122(e)(6), in turn, ensures that only EPA's remedy gets implemented. Once EPA's investigation begins, no potentially responsible party may implement any remedial action without EPA's permission. The Supremacy Clause provides the ultimate backstop. If nothing else, private parties cannot be subjected to state-law duties that directly conflict with their CERCLA obligations, including their duty to follow EPA's remedial plans.

Atlantic Richfield Company has for decades taken CERCLA at its word. In 1977, Atlantic Richfield bought the Anaconda Company, the operator of a massive copper smelter in Deer Lodge County, Montana. By 1980, CERCLA was law, the smelter was closed, and Atlantic Richfield found itself responsible for a century's worth of pollution scattered throughout a sprawling 300-square-mile area. As the site became one of the Nation's first and largest "Superfund" sites, Atlantic Richfield began working with EPA to clean up the region. Over the past 36 years, countless toxicologists, engineers, and other experts have studied the smelter site. EPA has painstakingly developed remediation plans—spanning thousands of pages—

to protect the community's health and stabilize the site. Those plans are binding on Atlantic Richfield, which has spent some $450 million working hand-in-hand with EPA to accomplish EPA's vision. And this pact worked, or so Atlantic Richfield thought: EPA-led remediation has vastly reduced pollution across the Anaconda Smelter site.

Then, respondents—a small group of landowners within the Anaconda Smelter site—insisted upon a very different remediation plan. Respondents have known the details of EPA's plans all along. EPA submitted its plans to community scrutiny before they took effect. Respondents have had dozens of occasions to shape EPA's plans. But in 2008, with EPA's cleanup of the site in full swing, respondents sued in Montana state court, alleging that EPA's remediation was not good enough. They asserted state-law claims against Atlantic Richfield, including trespass, nuisance, and strict liability, based on alleged property damage, not on any adverse health effects. Respondents requested traditional tort relief, including money damages for loss of use and diminished value of their property. Had respondents stopped there, this case would not be here, because all agree that CERCLA poses no impediment to such relief.

But respondents instead focused their suit on an unusual demand for relief in the form of "restoration" damages that would require Atlantic Richfield to pay for, and respondents to perform, "work in excess of what the EPA required of [Atlantic Richfield] in its selected remedy." Pet. App. 4a. Respondents allege that Atlantic Richfield has a state-law duty to return their property to its unblemished, pre-1884 condition, as if the Anaconda Smelter never existed. Respondents demand up to $58 million from Atlantic Richfield to effectuate a remedial plan that

would dig up soil that EPA wants undisturbed and would create giant underground trenches that EPA has already rejected because they risk contaminating more groundwater.

The Montana Supreme Court gave respondents everything they demanded—but at CERCLA's expense. EPA warned that respondents' competing remedial plan risked unleashing environmental havoc. But the Montana Supreme Court deemed EPA's views irrelevant in the face of whatever remedial plan a "jury of twelve Montanans" would see fit to approve. Pet. App. 13a. In the court's view, the multiple barriers CERCLA erects to shield EPA's carefully chosen remedial plans from interference are about as protective as cotton candy. According to the court, § 113 applies only to lawsuits directed at physically impeding ongoing EPA work, no matter how much the suit would throw EPA's plan into chaos. Section 122(e)(6) is also no bar to property owners who want to bring in their own bulldozers and uproot EPA's work mid-cleanup, either because EPA did not sue or settle with the property owners, or because a cleanup is more than six years in, or perhaps some combination of both. And the Supremacy Clause is toothless even if state law directly conflicts with CERCLA-imposed federal obligations, because CERCLA's savings clauses make state law supreme.

If this is what the statute means, Congress inexplicably abandoned EPA, affected communities, and private actors foolish enough to cooperate with EPA to the mercy of thousands of potential plaintiffs. At any time, any landowner on any Superfund site could decide to shred EPA's plans and impose different, and potentially detrimental, multimillion-dollar cleanups. The entire community would be hostage to the whims of a small minority of dis-

satisfied landowners, who could dictate a disastrous remedy without any real check beyond the approval of a state-court jury ill-equipped to consider broader environmental consequences. Then EPA might have to intervene again and clean up the cleanup, in a vicious cycle of warring remedies and ever-spiraling costs that would leave CERCLA a comprehensive mess.

A. The Anaconda Copper Smelter

Deer Lodge Valley lies in the shadow of the Continental Divide in southwest Montana, midway between Yellowstone and Glacier National Parks. The valley exemplifies Montana's natural bounty. The Clark Fork River drains the valley; its waters flow into the Columbia River and onward to the Pacific. Deer Lodge County is mostly forest and farmland, crisscrossed with creeks and streams. A handful of towns dot the landscape, including Anaconda, the county seat, and Opportunity, where most respondents live. J.A. 384.

But the county's most prominent feature is the colossal brick smokestack on Smelter Hill, 30 feet taller than the Washington Monument. The industry it once sustained is long gone, but the stack remains as a memorial to an era when much of the world's copper flowed through Deer Lodge County.

Between 1884 and 1902, the Anaconda Copper Mining Company built three giant copper smelters here, culminating in the titanic Washoe Smelter, whose 585-foot stack still towers over the county. J.A. 257-64. These smelters served the mines of nearby Butte, called "the richest hill on earth," and once the world's leading source of copper. J.A. 250-52. The Anaconda Smelter refined the tens of millions of pounds of copper ore mined in Butte

each year to feed the world's newly insatiable demand for telephone wires and power lines. J.A. 250-51.

At its height, Anaconda was the nation's fourth-largest company and dominated Montana's economy. Over more than 60 years, Anaconda employed approximately 75% of Montana's workforce. J.A. 311. Many lived in the company towns of Anaconda and Opportunity. J.A. 253-57, 284-95. By the mid-20th century, ores from the world over made their way into the Washoe Smelter. J.A. 304-05. Miners dug an estimated ten thousand miles of mines beneath the city of Butte. *See* Barbara LaBoe, *New Map Plots Butte Underground*, Mont. Standard (June 7, 2004). Open-pit mining would eventually create a vast hole in the heart of Butte measuring 1.5 miles across and 1,800 feet deep called the Berkeley Pit. Brian Leech, *Boom, Bust, and the Berkeley Pit*, 37 J. Soc'y Indus. Archaeology 153, 153 (2011).

By the 1970s, however, Anaconda was an ailing relic, felled by the worldwide energy crisis, falling copper prices, and the nationalization of the company's mines in Chile and Mexico. J.A. 305. In 1977, Atlantic Richfield acquired Anaconda for $700 million as part of an industry-wide drive to diversify holdings. J.A. 305; Thomas C. Hayes, *ARCO Sets Charge of $785 Million*, N.Y. Times (Aug. 28, 1984). Anaconda initially seemed a promising bet based on its still-significant mine holdings. Many believed that copper prices had bottomed out and would rise again. Anne B. Fisher, *The Decade's Worst Mergers*, Fortune (Apr. 30, 1984), at 262.

That purchase quickly became the proverbial albatross. The copper market kept plummeting. J.A. 305. Bringing the smelter into compliance with federal and state clean-air standards would cost an estimated $400 million. Lydia Chavez, *When ARCO Left Town*, N.Y.

Times (July 25, 1982). In 1980, the company gave employees about a year's worth of pay as severance and closed the Anaconda Smelter. *Id.* By 1984, *Fortune* dubbed the deal one of "The Decade's Worst Mergers." Fisher, *supra*, at 262. And that was before the extent of Atlantic Richfield's liability for Anaconda's environmental toll became clear.

B. CERCLA

Anaconda's demise coincided with CERCLA's beginning. In 1980, soon after the smelter's fires went out for the last time, J.A. 314, President Carter signed CERCLA into law. CERCLA established a nationally uniform and centralized program that would accomplish timely cleanups of hazardous waste sites, with EPA in charge.

1. CERCLA puts EPA in the driver's seat for making remediation decisions and overseeing cleanups. EPA designates on the National Priorities List sites that pose the greatest risk to public health. 42 U.S.C. § 9605(a)(8); 40 C.F.R. § 300.425. EPA then initiates a remedial investigation to determine the nature and extent of contamination, and conducts a feasibility study to evaluate remedial goals and potential cleanup options. 40 C.F.R. § 300.430(d), (e). Next, EPA selects an appropriate remedial plan using congressionally mandated criteria. 42 U.S.C. § 9621; 40 C.F.R. § 300.430(f). EPA documents its plan in a formal "Record of Decision." 40 C.F.R. § 300.430(f)(4), (5).

EPA has several options in carrying out this plan. It may remediate the site itself, 42 U.S.C. § 9604(a)(1), or compel responsible private parties to undertake remediation, *id.* § 9606(a). But CERCLA's preferred route is for EPA to enter into voluntary cleanup agreements with pri-

vate parties "in order to expedite effective remedial actions and minimize litigation," *id.* § 9622(a). To secure compliance, EPA incorporates its Records of Decision into administrative orders with the force of law. *See, e.g.*, J.A. 117-47. Whatever the approach, EPA gets to decide when a site "attain[s] a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment." 42 U.S.C. § 9621(d)(1).

EPA also gives stakeholders multiple opportunities to influence EPA's decision-making. When the process begins, EPA solicits input from interested parties in the community. 40 C.F.R. § 300.430(c)(2). Once EPA proposes a remedy, EPA publishes its proposed plan and receives public comments. 42 U.S.C. § 9617(a); 40 C.F.R. § 300.430(f)(2), (3). The final Record of Decision discusses "significant changes" from EPA's proposal and responds to significant comments and new data. 42 U.S.C. § 9617(b); 40 C.F.R. § 300.430(f)(3)(i)(F).

2. CERCLA erects a fortress around the remediation process. First, § 113(b) vests federal courts with "exclusive original jurisdiction over all controversies arising under [CERCLA]." 42 U.S.C. § 9613(b). Section 113(h) then limits federal courts' jurisdiction "to review any challenges to removal or remedial action" to narrow circumstances that all agree do not apply in this case. *Id.* § 9613(h). Subsections 113(b) and (h) together prevent lawsuits from disrupting EPA's cleanups.

Second, § 122(e)(6) precludes potentially responsible parties ("PRPs") from "undertak[ing] any remedial action" at a site where EPA has started investigating absent EPA's authorization. *Id.* § 9622(e)(6). This provision pre-

vents landowners and anyone else at the site from undertaking unapproved cleanup activity that could interfere with EPA's chosen remedy.

C. Cleanup of the Anaconda Smelter Site

In 1983, EPA added the Anaconda Smelter site—encompassing the smelter and a surrounding 300-square-mile area—to the initial National Priorities List. 48 Fed. Reg. 40,658, 40,670.[1] EPA-led remediation of the Anaconda Smelter site continues to this day, and has proceeded cooperatively with Atlantic Richfield and input from state and local authorities. So far, Atlantic Richfield has spent approximately $450 million implementing EPA's orders at the site, remediating hundreds of residential yards and thousands of acres of land. J.A. 379.

1. Cleaning up a century's worth of industrial waste from a New York City-sized area has posed a Herculean challenge. The site encompasses five towns and thousands of homes and people. The communities comprise properties with an array of interrelated land uses—residential, commercial, recreational, cropland, pastures, and rangeland. J.A. 381. The site contains mountains, forests, wetlands, a river with five major tributaries, two separate

[1] Other remnants of Anaconda's Montana operations are separate Superfund sites. The Clark Fork Basin Superfund complex includes four sites: the Anaconda Smelter site, the Silver Bow Creek/Butte Area site (which contains the city of Butte and the Berkeley Pit), the Milltown Reservoir/Clark Fork River site, and the Montana Pole site. J.A. 102.

aquifer systems, and plentiful wildlife. J.A. 381, 384; Water, Waste and Soils Record of Decision ("ROD") §§ 5.1, 5.2.2 (1998).[2]

The area also contained what Anaconda left behind: 230 million cubic yards of tailings, 30 million cubic yards of furnace slag, and 500,000 cubic yards of flue dust—much of it containing arsenic, lead, and other heavy metals. The contamination affected surface water and groundwater over much of the site. And the smokestacks had deposited arsenic and lead in the soil over an estimated 20,000 acres. J.A. 381-82.

2. In 1982, even before EPA formally added the Anaconda Smelter site to the National Priorities List, Atlantic Richfield conducted a study of heavy-metal contamination. J.A. 334-35. Atlantic Richfield and EPA also addressed urgent issues at the site, including dismantling the smelter and relocating 37 families who lived next to Smelter Hill. Fifth Five-Year Review §§ 6.0, 6.1 (2015), *available at* EPA Anaconda Webpage, *supra* note 2.

That study and those actions laid the foundation for decades of cooperation between Atlantic Richfield, EPA, state and local governments, and the residents in Deer Lodge County. J.A. 201-04. The administrative record contains tens of thousands of documents, six formal Records of Decision, and over twenty-five administrative orders to Atlantic Richfield, all entered with Atlantic Richfield's support. J.A. 339-40. The record contains only one instance of alleged noncompliance by the company—an

[2] Key EPA documents pertaining to the Anaconda Smelter site, including all Records of Decision, are available at https://bit.ly/2MfDhke ("EPA Anaconda Webpage").

incident where Atlantic Richfield started remedial work prematurely. J.A. 194, 205.

3. The Anaconda Smelter cleanup exemplifies CERCLA's EPA-led approach to remediation. After adding the site to the National Priorities List, EPA divided it into five "operable units," addressing different geographic areas or environmental issues. J.A. 335. This case concerns two of these units. The first, Community Soils, deals with soil in residential yards. J.A. 68-72, 373-76. The second, Anaconda Regional Water, Waste and Soils, includes pasture land, surface water, and groundwater throughout the site. J.A. 107-13.

EPA issued a Record of Decision prescribing the work for each operable unit. EPA prepared each one in consultation with the Montana Department of Environmental Quality, which co-signed each plan. EPA worked with Atlantic Richfield to develop work plans to implement each Record of Decision, then incorporated the Records of Decision and work plans into formal administrative orders that Atlantic Richfield must follow. *See, e.g.*, J.A. 117-47; *see also* 42 U.S.C. §§ 9604(a), 9606(a).

Under the 1996 Community Soils Record of Decision, which EPA incorporated in a formal administrative order in 2002, EPA recognized that Deer Lodge Valley soil naturally contains some arsenic. J.A. 72-73. That Record of Decision provides that a residential yard is eligible for cleanup if surface soil arsenic levels exceed 250 parts per million, *i.e.*, 0.025% by weight. J.A. 94. EPA determined after performing a complex toxicological analysis that this standard would protect residents' health. Community Soils ROD § 6 & tbl.5 (1996). The Agency for Toxic Sub-

stances and Disease Registry later concurred that exposure to soil arsenic at this level is not detrimental to human health. Mont. S. Ct. Rec. at Suppl-App-0133, -0163.[3]

EPA further ordered Atlantic Richfield to clean up residential yards affected by arsenic by excavating up to eighteen inches of soil, moving the soil to an on-site repository, and laying down clean soil and vegetation in its place. J.A. 94-96; Community Soils Am. ROD § 6.1 (2013). On pasture land, EPA set a cleanup threshold of 1,000 parts per million arsenic. Water, Waste and Soils ROD § 9.4.2 (1998); Expert Report of David J. Folkes 10 (June 19, 2013), Dist. Ct. Dkt. 308, Ex. R. For pasture land meeting that threshold, EPA opted against requiring soil removal, instead ordering Atlantic Richfield to leave the soil in place and restore protective vegetation so the soil did not disperse to areas where it might cause greater harm. Water, Waste and Soils ROD §§ 7.1, 7.2.1, 8.2.1 (1998).

EPA's 1998 Record of Decision for its Water, Waste and Soils Operable Unit, as incorporated in a formal administrative order in 2000 and as amended in 2011, includes EPA's comprehensive program to ensure that landowners have safe drinking water. J.A. 173-74, 211-17, 337-38. That program provides for monitoring domestic wells and requires Atlantic Richfield to replace or treat any well showing arsenic levels above federal and state drinking-water standards. J.A. 173-74, 215-16, 337-38.

As EPA's process unfolded, EPA has consistently engaged with the public. Since the early 1980s, EPA has held many community meetings. Community Soils ROD, RS-3 (1996); J.A. 318-20. Before finalizing each Record of

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[3] EPA later added a separate action threshold for lead, set at 400 parts per million. Community Soils Am. ROD § 6.1 (2013).

Decision, EPA published summaries in the local paper, held formal public meetings, and responded to area citizens' comments. *See, e.g.*, Community Soils ROD, RS-3 to 4 (1996).

4. Atlantic Richfield, EPA, and the community have accomplished much over 36 years. Hundreds of acres of land have been remediated and are now covered with lush vegetation. Fifth Five-Year Review §§ 8.2.2.1, 8.2.3.1, 8.2.4.1. Wetlands and wildlife habitats have been revitalized. *Id.* § 10.2.8. Atlantic Richfield moved hundreds of thousands of cubic yards of arsenic- and cadmium-laden flue dust to a secure, on-site repository. *Id.* § 7.2.1. Hundreds of residential yards have been tested and cleaned up. J.A. 337. The immediate vicinity of the smelter stack is now a state park.

By 2025, EPA expects to complete the bulk of the remediation. Monitoring and maintenance work will follow, but EPA expects to begin the process of removing portions of the site from the National Priorities List. EPA, Superfund Priority "Anaconda" (July 2018), *available at* EPA Anaconda Webpage, *supra* note 2. Even after delisting, the site will remain indefinitely subject to enforceable "institutional controls" to ensure that EPA's remedies remain undisturbed and that hazardous substances remain contained. J.A. 100; Fifth Five-Year Review § 11. EPA must review the remedy every five years "to assure that human health and the environment are being protected by the remedial action being implemented." 42 U.S.C. § 9621(c); 40 C.F.R. § 300.430(f)(4)(ii). Atlantic Richfield remains responsible for any future remedial work EPA requires. Fifth Five-Year Review § 11.

D. Proceedings Below

1. Respondents are a small minority of landowners in the towns of Opportunity and Crackerville who own properties within the Anaconda Smelter site. Mont. S. Ct. Rec. at App-0058. In 2008, they sued Atlantic Richfield in Montana state court. Their complaint pleaded various common-law torts, including negligence, nuisance, trespass, and strict liability, all based on their allegations that emissions and waste from the Anaconda smelters had contaminated soil and groundwater on respondents' property. The roster of plaintiffs has evolved—many original complainants sold their properties or voluntarily dismissed their claims. *E.g.*, Mot. to Dismiss Without Prejudice (Sept. 26, 2018), Dist. Ct. Dkt. 646. Respondents make up about 10% of Opportunity and Crackerville residents. J.A. 297. All respondents bought their properties long after the smelter began operating; the vast majority did so after EPA declared the area a Superfund site. Most of the tracts include single-family residences, though the vast majority of respondents' land consists of large pasture areas, not residential yards. *See* Folkes Rep. tbls. 2 & 3, Dist. Ct. Dkt. 308, Ex. R. Some respondents rent their land out, run small businesses, or leave the land vacant. Br. Supp. Mot. Summ. J. re: Restoration Damages (Sept. 12, 2013) App. B1-B6, Dist. Ct. Dkt. 304.

Respondents' complaint seeks five forms of relief. Four requests seek compensation for how contamination allegedly limits their use of their land, has decreased the value of their land, has imposed incidental expenses, and is causing "[a]nnoyance, inconvenience, and discomfort." J.A. 54. Atlantic Richfield has never contended that CERCLA precludes those forms of relief. Respondents accordingly have stated that if the Court reverses they will

proceed to trial to attempt to recover these traditional damages. Br. Opp'n Pet. Cert. ("Opp.") 17.

This case involves the fifth requested remedy: "[e]xpenses for and cost of investigation and restoration of real property." J.A. 54. Respondents contend that Montana law obligates defendants to turn back the clock and restore the land to its pre-contamination state—that is, to remove every particle wrongfully deposited on the property. *See Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086-88 (Mont. 2007); Opp. 8. The defendant can discharge this duty by paying money damages to the landowner. *Sunburst*, 165 P.3d at 1088-90. To recover such damages, the plaintiff must prove "that an award of restoration damages actually will be used to repair the damaged property." *Id.*; *see* Opp. 8. Respondents' principal goal is to obtain restoration damages to conduct a very different cleanup than the one EPA developed. *See* Pls.' Br. Opp'n Mot. Summ. J. re: CERCLA 4 & n.2 (June 7, 2013), Dist. Ct. Dkt. 239.

2. Respondents have estimated that their cleanup would cost $50 to $58 million—seven times the total value of all of respondents' properties. J.A. 402-03; Dist. Ct. Dkt. 304, at 14. Their remedial plan diverges from EPA's plan in several important respects:

First, respondents claim entitlement to have soil on any type of land restored to a condition of no more than 15 parts per million arsenic. Opp. 8; J.A. 350-51, 365-66. That standard conflicts with EPA's 250-parts-per-million threshold for residential yard soil removal and EPA's even higher trigger of 1,000 parts per million of arsenic for pasture land. Applying respondents' standard for arsenic would require removing soil from all of respondents' land. *See* J.A. 397-98.

Second, respondents contend that state law requires Atlantic Richfield to replace a full two feet of soil on each property. J.A. 239, 386. EPA, however, ordered the company to excavate no more than eighteen inches of soil, finished off with a protective vegetative layer. Respondents would tear that protective vegetation up and haul out two feet of earth. Doing so would bring to the surface arsenic that is now deeply buried and, in EPA's view, potentially scatter arsenic-laden dust across Opportunity, Crackerville, and beyond. Pet. App. 72a-73a; *see* J.A. 90. Respondents would also dig up pastureland soil that EPA does not want disturbed at all because of the risk of spreading contaminated soil to more densely populated areas. Water, Waste and Soils ROD § 9.4.1 (1998).

Third, respondents' remedy requires constructing more than three miles of underground trenches (or "passive reactive barriers") near Opportunity and Crackerville to filter groundwater near their land. J.A. 239-40, 399-404. Respondents would fill the trenches with "zero valent iron" and perhaps a "biopolymer slurry," along with an unspecified "enzyme," to break down arsenic in the groundwater. J.A. 239-40. EPA, however, determined that the aquifer under Opportunity is not contaminated, and that removing arsenic from groundwater in other areas near respondents' lands would be technically infeasible. J.A. 157-58. EPA instead ordered Atlantic Richfield to monitor respondents' wells. J.A. 161, 173-74. Only two of respondents' wells have tested above the drinking-water standard. Atlantic Richfield replaced them. They now meet the standard. J.A. 338. As EPA noted below, changing the natural flow of groundwater in the area could spread groundwater contamination and jeopardize human health, the environment, and other aspects of the cleanup. Pet. App. 73a-74a.

EPA opposes respondents' cleanup plans. In April 2018, EPA informed respondents' trial counsel that "CERCLA identifies current owners of property within Superfund sites as potentially responsible parties." App. 1a. EPA further warned that CERCLA "prohibits potentially responsible parties from performing response actions at Superfund sites where the remedial action is already underway unless such actions have been authorized by EPA." App. 2a. In fact, EPA vetoed Atlantic Richfield's attempt to accommodate respondents after they sued. Atlantic Richfield offered to apply EPA's residential-yards remedy to respondents' pasture land as well. Folkes Rep. 10, Dist. Ct. Dkt. 308, Ex. R. But EPA rejected this departure from its remedial plan. *See* Mont. S. Ct. Rec. at Suppl-App-0182.

3. Before the state trial court, Atlantic Richfield moved for summary judgment on respondents' claims for restoration relief. The United States tried to file an amicus brief contending that state courts lack jurisdiction over respondents' restoration remedy. U.S. Mot. Leave to File Amicus Br. ¶ 1, Dist. Ct. Dkt. 428. But the state trial court did not let the government file a brief. The trial court first granted summary judgment to Atlantic Richfield on statute of limitations grounds, Mem. & Order, Dist. Ct. Dkt. 466, but the Montana Supreme Court reversed, *Christian v. Atl. Richfield Co.*, 358 P.3d 131 (Mont. 2015). On remand, the trial court held that CERCLA permitted respondents' restoration remedy. Dist. Ct. Dkt. 442; Pet. App. 42a-55a.

Atlantic Richfield sought a writ of supervisory control, *see* Mont. R. App. P. 14(3), which the Montana Supreme Court granted. Pet. App. 3a. The court acknowledged that Atlantic Richfield "concedes that [respondents] may move forward on their first four claims." Pet. App. 6a.

But the court held that respondents' claim for restoration relief must proceed too, and rejected all three of Atlantic Richfield's arguments, which the United States had echoed as an amicus. First, the court held, the restoration remedy is not a "challenge" barred by § 113(h), even though respondents demanded a cleanup different from EPA's. The court reasoned that respondents' cleanup would not physically "stop, delay, or change the work EPA is doing" assuming respondents did the work themselves. Pet. App. 11a, 13a. The court stated that respondents were "simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan." Pet. App. 13a.

Second, the court held that § 122(e)(6)'s prohibition on unauthorized remedial actions by PRPs did not bar relief, even though EPA strenuously opposed respondents' remedy. Pet. App. 15a-17a. The court concluded that respondents are not PRPs subject to § 122(e)(6) because "they have never been treated as PRPs" by courts or EPA. Pet. App. 16a. In the court's view, the statute of limitations had expired, and "the PRP horse left the barn decades ago." Pet. App. 16a.

Third, the court held, CERCLA did not preempt respondents' claims. Pet. App. 17a-18a. The court found that savings clauses in CERCLA § 114(a) and § 302(d) let respondents bring even state-law claims that conflict with Atlantic Richfield's CERCLA obligations. Pet. App. 17a-18a.

Justice McKinnon dissented, explaining that respondents' claim for restoration damages constituted a challenge barred under § 113. She observed that respondents' restoration plan "would conflict with the ongoing EPA investigation and CERCLA cleanup." Pet. App. 23a-24a.

She noted that "the undisputed evidence shows the EPA rejected the soil and groundwater remedies proposed by [respondents]." Pet. App. 39a. Justice McKinnon declared herself "at a loss to understand how this Court can suggest, without any authority, that we 'simply' allow 'a jury of twelve Montanans' to 'assess the merits of [respondents'] plan.'" Pet. App. 35a (quoting Pet. App. 13a).

SUMMARY OF ARGUMENT

I. CERCLA § 113 deprives state courts of jurisdiction to hear controversies challenging EPA's remedial plans. Respondents seek a state-court order to restore their land to pre-smelter conditions. This suit directly challenges the remedial plan EPA has imposed for the Anaconda Smelter site. This challenge falls within the heartland of claims barred by § 113.

A. Two provisions of § 113 work together to prevent suits that would allow state courts and juries to second-guess EPA's remedial plans. First, § 113(b) vests federal courts with "exclusive original jurisdiction over all controversies arising under [CERCLA]." Second, § 113(h) identifies a subset of controversies arising under CERCLA that even federal courts may not entertain. That provision withdraws from federal courts (with a handful of exceptions not relevant here) the authority that they would otherwise have under § 113(b) to entertain "any challenges" to EPA's chosen CERCLA remedy.

Respondents' suit for a restoration remedy is a "challenge" to EPA's remedial plan. A "challenge" means an effort to call into question EPA's chosen remedy. Respondents seek to implement a very different type of cleanup than what EPA ordered, and would uproot EPA-led cleanup efforts. The fact that respondents' claim for

restoration damages is a "challenge" under § 113(h) confirms that it is a "controversy arising under [CERCLA]" that § 113(b) prohibits state courts from hearing. Section 113(h)'s reference to "Federal court[s]" reflects that "challenges" are a subset of the claims that § 113(b) reserves exclusively to federal-court jurisdiction. Respondents' contrary reading of § 113 would create an implausible loophole in the statutory scheme by allowing private parties to upend EPA's remediation plans through the simple expedient of challenging those plans in state court.

B. The Montana Supreme Court found jurisdiction based on the untenable theory that respondents' claim for restoration damages is not a "challenge." Respondents purportedly would wait until EPA leaves to undo EPA's efforts themselves, so in the court's view they do not seek to "stop, delay, or change the work EPA is doing." Pet. App. 11a. But the meaning of a "challenge" to EPA remedial action cannot turn upon who wields the shovels, or whether they wait ten seconds or ten years to wreck EPA's remediation efforts.

II. CERCLA § 122(e)(6) independently bars respondents' restoration remedy. That provision prohibits any "potentially responsible party," or PRP, from taking "remedial action" at a Superfund site without EPA's approval, once a remedial investigation has begun. Respondents do not dispute that EPA and Atlantic Richfield long ago initiated a remedial investigation, or that their proposed restoration is a remedial action. Respondents instead contest their status as PRPs. But respondents are classic PRPs under CERCLA.

A. The term "potentially responsible party" refers to the four categories of "covered persons" who are subject to liability under CERCLA § 107(a). Respondents squarely fall within the "owner" PRP category. They own

land where hazardous substances have come to rest. Multiple CERCLA provisions treat such "owners" of affected land as PRPs. A contrary reading exempting landowners like respondents from § 122(e)(6)'s coverage would leave EPA powerless to defend the integrity of its single, unified cleanup. Landowners could launch hundreds of contradictory cleanups undoing EPA's work. Unsurprisingly, EPA has long considered landowners like respondents to be PRPs.

B. The Montana Supreme Court held, at respondents' urging, that parties cannot be treated as PRPs so long as no court has held them liable for a cleanup (or at least rejected defenses to CERCLA liability) and EPA has not settled with them. The court further held that once EPA is six years into its cleanup and the limitations period for certain types of claims has run, the time for PRP designation has passed and the "PRP horse [has] left the barn." Pet. App. 16a. At that point, landowners like respondents (plus any other party covered by CERCLA) can experiment with whatever cleanup they want, no matter how much it destroys EPA's efforts or endangers the environment. But the statutory text refers to "*potentially* responsible parties" because CERCLA covers any party who is *potentially* liable under § 107—not just parties who are *actually* liable.

The Montana Supreme Court's interpretation would unleash a stampede of practical problems. EPA would be forced to choose between giving landowners at a Superfund site license to tear up EPA's work six years into a multi-year cleanup, or to delay starting cleanup efforts until EPA has sued or settled with every potentially responsible party at the site. This result would destroy a central feature of CERCLA, which permits EPA to act

quickly to clean up toxic waste sites and to determine ultimate liability later. That interpretation would also force every landowner at a site to shoulder the burden of defending and settling CERCLA litigation. And it would recklessly cede unsupervised control over hazardous sites to individual community members—even if the rest of the community supports EPA's plan.

III. The Supremacy Clause presents the third insuperable bar to respondents' restoration plan.

A. Impossibility preemption applies when a party cannot unilaterally comply with its obligations under state and federal law. That is the case here. Respondents allege that Montana law imposes on Atlantic Richfield the duty to restore their land to its pristine, pre-smelter condition—or to pay damages so respondents can do so.

CERCLA forbids Atlantic Richfield to carry out that state-law obligation. Section 122(e)(6) and EPA regulations bar Atlantic Richfield—an undisputed PRP—from undertaking unauthorized remedial action. Further, Atlantic Richfield is subject to EPA orders, with the force of law, commanding it to carry out EPA's cleanup plans as directed. To comply with its state-law duties, Atlantic Richfield would have to defy those orders. The specific restoration remedy respondents demand underscores how starkly those duties conflict. Plaintiffs' restoration remedy requires plowing underground trenches EPA does not want plowed and digging up thousands of tons of soil EPA does not want excavated. It is irrelevant that Atlantic Richfield would be paying tens of millions of dollars to respondents to implement this plan, rather than wielding shovels itself. In every civil preemption case, defendants could pay damages to avoid following a conflicting state-law duty, yet impossibility preemption exists nonetheless.

B. Respondents' restoration remedy would also cripple CERCLA's comprehensive remedial scheme, presenting a quintessential case for obstacle preemption. CERCLA commits to EPA the exclusive authority to decide how best to clean up a Superfund site, after balancing competing interests within the community. But respondents would put their personal preferences first, checked only by a jury with no mandate to consider the wishes or safety of the broader community as a whole. Allowing respondents' restoration remedy would also destroy EPA's ability to secure full cooperation from PRPs like Atlantic Richfield at Superfund sites. PRPs in Atlantic Richfield's shoes would have little incentive to proactively cooperate with EPA if an endless stream of landowners could jump into the middle of EPA's cleanup and demand millions more to do completely different work.

C. CERCLA's savings clauses do not preserve all state-law claims in the hazardous-waste field. These clauses rule out field preemption, but do not save state laws that actually conflict with federal law. The savings clauses here preserve state liability rules that govern compensation for injury to persons or property, but not state laws that purport to require cleanups that differ from CERCLA's. CERCLA leaves respondents free to seek damages for diminution in the value of their property or other forms of traditional relief. But they cannot seek restoration damages at Superfund sites premised on alternative remedial plans that EPA has not ordered.

ARGUMENT

I. Section 113 Bars Respondents' Restoration Remedy

CERCLA § 113, 42 U.S.C. § 9613, mandates that only federal courts can entertain litigation relating to a CERCLA cleanup, and only under narrow circumstances. The Montana Supreme Court blessed respondents' claim for

restoration damages on the theory that parties can contest EPA's remedial plans for Superfund sites if litigation would not "stop, delay, or change the work EPA is doing." Pet. App. 11a. But § 113 bars challenges like respondents' in any court.

A. The Montana Courts Lacked Jurisdiction over Respondents' Claim for Restoration Damages

1. Section 113 "prevent[s] judicial interference, however well-intentioned, from hindering EPA's efforts to properly remediate sites." *Clinton Cnty. Comm'rs v. EPA*, 116 F.3d 1018, 1023 (3d Cir. 1997) (en banc). Two mutually reinforcing statutory restrictions on CERCLA-related litigation accomplish Congress's design. The first is § 113(b), which states: "Except as provided in [§§ 113(a) and (h)], the United States district courts shall have *exclusive original jurisdiction* over all controversies arising under [CERCLA], without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. § 9613(b) (emphasis added). The second provision is § 113(h), which § 113(b) cross-references. Section 113(h) provides that "[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under [§ 104] . . . or to review any order issued under [§ 106(a)]." *Id.* § 9613(h).

Section 113(h) creates narrow exceptions to that withdrawal of jurisdiction over challenges, but none is at issue here. First, federal courts retain jurisdiction over actions "under [28 U.S.C. § 1332] (relating to diversity of citizenship jurisdiction)" or under state environmental standards that EPA has incorporated into its remedial plan under § 121(d)(2). *Id.* Second, § 113(h) specifies five contexts in which challenges to EPA's removal or remedial action can proceed, including in post-cleanup citizen suits alleging that the action violated CERCLA.

2. Section 113(b)'s grant of exclusive jurisdiction to the federal courts over "controversies arising under" CERCLA deprived the Montana courts of jurisdiction over respondents' restoration-damages claim. This Court need not resolve whether the phrase "arising under," in isolation, sweeps as broadly as Article III or incorporates the narrower statutory test for "civil actions arising under" federal law pursuant to 28 U.S.C. § 1331. Either way, respondents' restoration-damages claim falls within the core of controversies that § 113(b) forbids state courts to hear.

Congress' choice in § 113(b) to grant federal courts "exclusive jurisdiction over 'all controversies arising under' CERCLA" was deliberate. "Congress used language more expansive than would be necessary if it intended to limit exclusive jurisdiction [under § 113(b)] solely to those claims created by CERCLA." *Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999) (citation and internal quotation marks omitted). And § 113(b) provides a critical textual clue to the scope of such "controversies": federal courts have jurisdiction over all of them, "[e]xcept as provided in subsections [113](a) and [113](h)." 42 U.S.C. § 9613(b). In other words, those subsections describe particular types of "controversies arising under [CERCLA]" that fall outside federal district courts' jurisdiction. Section 113(a) vests jurisdiction over challenges to CERCLA regulations only in the D.C. Circuit. *Id.* § 9613(a). Section 113(h), in turn, identifies a subcategory of claims that no federal courts can hear, *i.e.*, prohibited challenges to EPA remedial action. *Id.* § 9613(h).

Section 113(h) accordingly withdraws federal-court jurisdiction over the subset of controversies "arising under" CERCLA that also constitute "challenges" to EPA's chosen CERCLA remedy. The upshot is that "challenges" to

EPA's removal or remedial actions cannot be heard in state court either, because Section 113 identifies these challenges as a subset of "controversies arising under" CERCLA, and state courts lack jurisdiction over that whole category of disputes.

Because CERCLA does not define the term "challenges," this Court "give[s] the [term] its ordinary meaning." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 610-11 (2009); *accord United States v. Bestfoods*, 524 U.S. 51, 66 (1998). That ordinary meaning is readily apparent: to "challenge" is "[t]o object or except to; . . . to call or put in question; to put into dispute; to render doubtful." *Challenge*, *Black's Law Dictionary* 209 (5th ed. 1979). And the phrase "*any* challenges" covers the waterfront of challenges. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).[4] Thus, regardless of the full scope of the "controversies" that § 113(b) bars state courts from hearing, such "controversies" include any

[4] The Ninth Circuit, for example, has explained that "[a]n action constitutes a challenge to a CERCLA cleanup if it is related to the goals of the cleanup." *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1115 (9th Cir. 2000) (internal quotation marks omitted). Other courts similarly hold that a challenge under § 113(h) encompasses any suit that "calls into question" or "impacts" EPA's ordered cleanup, or that contests "what measures actually are necessary to clean-up the site." *See, e.g.*, *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991); *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006); *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 880 (D.C. Cir. 2014).

claim that "call[s] . . . into question" or "put[s] into dispute" EPA's remedial action.

It is difficult to conceive of a claim that more clearly qualifies as a "challenge[]" to EPA's remedy than respondents' restoration-damages claim. As the Montana Supreme Court observed, respondents "clearly believe that the EPA-approved residential action level is inappropriate." *Christian v. Atl. Richfield Co.*, 358 P.3d 131, 156 (Mont. 2015).

EPA has explained that "aspects of [respondents'] plans are a dramatic departure" from what EPA required. Pet. App. 72a. Respondents would apply a soil-action level of 15 parts per million for arsenic, not EPA's level of 250 parts per million. In other words, they call EPA's judgment about appropriate soil action levels into question. Respondents would "excavat[e] to two feet [of topsoil] rather than EPA's chosen depth of 18 inches within residential areas," Pet. App. 72a, and would do the same on pasture land that EPA wants undisturbed. Those actions call into doubt EPA's judgment about the appropriate soils remedy, as well as EPA's judgment that respondents' plan could spread arsenic-laden soil to the winds.

Respondents also would "construct[] a series of underground trenches and barriers for capturing and treating shallow groundwater," which EPA believes "could unintentionally contaminate groundwater and surface water" and "upset a balance that currently protects human health and the environment." Pet. App. 72a, 74a. In short, respondents' restoration claim for Atlantic Richfield to fund a remedial plan different from what EPA has ordered is a "challenge" to EPA's remediation plan. It is thus, by definition, a "controvers[y] arising under" CERCLA. 42 U.S.C. § 9613(b). So § 113 unquestionably bars that claim.

3. Respondents argue that § 113(h)'s reference to "Federal" courts means that § 113 is no impediment to their state-court suit. Opp. 26. But that argument ignores the interrelationship between § 113(h) and § 113(b). The combined effect of those provisions is to "deprive the . . . state court[s] of jurisdiction" over any claim that "constitutes a challenge to a CERCLA cleanup." *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1115 (9th Cir. 2000); *accord Fort Ord*, 189 F.3d at 832. The only permissible "challenges" to CERCLA remediation plans are those filed in federal court. There is no such thing as a "challenge" that would not also qualify as a "controvers[y] arising under" CERCLA that § 113(b) would bar state courts from entertaining. So there is nothing "[c]onspicuous[]," Pet. App. 9a, about § 113(h)'s reference to federal courts. Congress addressed the jurisdictional bar to "federal courts" because under § 113(b) "only federal courts . . . have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place." *Fort Ord*, 189 F.3d at 832.

This interpretation of § 113(b) and § 113(h) also reflects common sense. Section 113 protects Superfund cleanups from unauthorized litigation over EPA's remedial authority. Respondents do not dispute that federal courts cannot hear "challenges" to EPA's remedy absent an express statutory exception. Under respondents' position, however, plaintiffs could defy the comprehensive, EPA-led process Congress prescribed simply by filing a "challenge" in state court. The Montana Supreme Court agreed, concluding that respondents can "present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan." Pet. App. 13a. But the whole point of § 113 is that challenges to "the merits of [a] plan," *id.*, for conducting an ongoing CERCLA remediation cannot be heard in

any forum except under limited circumstances, because such challenges would interfere with EPA's ability to address urgent environmental hazards. It would be perverse to permit litigants to file in state courts exactly the same claims that federal courts cannot hear. Respondents' reading of § 113(h) would blow a Montana-sized hole in the statutory scheme.

B. The Montana Supreme Court's Interpretation of "Challenge" Is Flawed

1. The Montana Supreme Court held that respondents' restoration claim is not a "challenge[]" under § 113(h) because it does not seek to "stop, delay, or change the work *EPA* is doing," and instead allows *respondents* to upend EPA-ordered remediation themselves. Pet. App. 11a (emphasis added). But the ordinary meaning of "any challenges" does not change depending on who is implementing the remedy. *See McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 328 (9th Cir. 1995). And "any challenges" sweeps broadly for good reason: it would have been pointless for Congress to enact the jurisdictional bar in § 113(h) if litigants could circumvent it by cleverly targeting private parties whom EPA requires to carry out its remedy, rather than EPA itself.

2. The Montana Supreme Court also suggested that respondents' suit could not be a "challenge" under § 113(h) as long as respondents waited to implement their restoration plan until after EPA "pull[ed] up stakes." Pet. App. 14a. Even if respondents so wait, that delay would not make respondents' suit any less of a "challenge[]." Section 113 prohibits "any" unauthorized challenges to a CERCLA remediation effort. It makes no difference whether the end result of such a challenge is to undo EPA's plan today or five years from now—§ 113 forbids it either way. As the four-decade history of the Anaconda

cleanup shows, Superfund remediation plans are breathtakingly complex and evolving processes. This Court should decline to thwart "Congress's overall goal that CERCLA free EPA to conduct forthwith cleanup-related activities at a hazardous site" without interfering litigation. *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991).

II. Section 122(e)(6) Bars Respondents' Restoration Remedy

Section 122(e)(6), entitled "Inconsistent Response Action," independently bars respondents' restoration remedy. Under this provision, once EPA or any "potentially responsible party" acting under EPA's direction has "initiated a remedial investigation and feasibility study for a particular facility [under CERCLA], no potentially responsible party may undertake any remedial action at the facility" without EPA's authorization. 42 U.S.C. § 9622(e)(6). The court below held that respondents were not PRPs because respondents had never been sued or entered into settlements accepting CERCLA liability, and it was too late now. Pet. App. 16a-17a. But owners of land containing hazardous substances are classic PRPs. Any other conclusion would unleash chaos by permitting everyone covered under CERCLA, including landowners, to implement competing remedial plans without so much as a heads-up to EPA or the rest of the community.

A. Respondents Are "Potentially Responsible Parties"

Although CERCLA does not define "potentially responsible parties," this Court has recognized that the term signifies the "[c]overed persons" that § 107 identifies for possible responsibility for addressing contamination. 42 U.S.C. § 9607(a); *see Burlington*, 556 U.S. at 608-09 (describing "four broad classes of PRPs" corresponding to the four types of "covered persons" under § 107); *United States v. Atl. Research Corp.*, 551 U.S. 128, 131-32,

134 n.2 (2007) (similar); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004) (similar).

A paradigmatic category of "[c]overed persons," *i.e.*, PRPs, is any current "owner . . . [of] a facility." 42 U.S.C. § 9607(a)(1); *Burlington*, 556 U.S. at 609 (explaining that parties undisputedly "qualif[ied] as PRPs . . . because they owned the land [at issue] at the time of the contamination and continue to own it now"). An owner of a "facility" includes an owner of "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). CERCLA repeatedly treats owners as PRPs. For instance, CERCLA authorizes EPA to enter into agreements with the "owner or operator of the facility" and "*any other potentially responsible person*." *Id.* § 9622(a) (emphasis added). CERCLA likewise requires EPA to give notice of settlement negotiations to "potentially responsible parties (*including owners and operators and other persons referred to in [section 107(a)]*)." *Id.* § 9622(e)(1)(A) (emphasis added). Owners of land within Superfund sites are unambiguously PRPs.

Under these provisions, Atlantic Richfield is a PRP because the company owns much of the land within the Anaconda Smelter site. Or, in the words of CERCLA, the company is an "owner" of a "site or area where a hazardous substance has . . . come to be located." 42 U.S.C. §§ 9607(a)(1), 9601(9), 9601(20)(A)(ii). But respondents, too, own land within the Anaconda Smelter site where hazardous substances came to be located; that is why they brought this lawsuit. *See* Pet. App. 4a. Respondents thus fall within the owner category of PRPs every bit as much as Atlantic Richfield does.

Excluding respondents from the definition of PRPs would create a huge statutory void. Again, § 122(e)(6)

bars any PRP from "undertak[ing] any remedial action at the facility" without EPA's sign-off once a remedial investigation and feasibility study begin. 42 U.S.C. § 9622(e)(6). "[R]emedial action" covers virtually any physical action with respect to hazardous waste at the site, including storage, excavation, recycling, diversion, destruction, onsite treatment or incineration, and offsite transport and storage. *Id.* § 9601(24). Section 122(e)(6) thus "avoid[s] situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." 132 Cong. Rec. 28,430 (1986) (statement of Sen. Mitchell).

Landowners are the PRPs most likely to go off and pursue their own visions of remediation. Were they exempt from the PRP definition, any landowners on Superfund sites could rev their bulldozers, start digging trenches, and remove soil on their own, without consulting EPA or even letting their neighbors know that hazardous substances could migrate their way in the process. Rather than channeling efforts to one, EPA-led cleanup, respondents' position would permit warring, simultaneous cleanups at every Superfund site. Hundreds or thousands of landowners on larger Superfund sites could each go their own way and defy EPA's remediation plans no matter how much the broader community supported EPA's vision. The end result effectively creates a heckler's veto over EPA's community-wide remedial plan.

For nearly 30 years, EPA has interpreted the term "potentially responsible parties" to encompass residential landowners like respondents whether or not they ever face liability under CERCLA. EPA, *Policy Towards Owners of Residential Property at Superfund Sites*, 1, 3-4 (1991), https://bit.ly/2TEmQ1E. EPA has explained

that there may be "several hundred . . . residential properties located on a Superfund site," and that CERCLA § 107 covers such property owners, making them PRPs. *Id.* at 1-4 & n.1. EPA has long decided, as an exercise of its enforcement discretion, to decline to compel these residential landowner PRPs to engage in cleanup or pay costs—but only "if the owner's activities are consistent with [EPA's] policy" and do not interfere with EPA's cleanup. *Id.* at 3-5.

EPA considered respondents' PRP status self-evident below, Pet. App. 79a-80a, and reiterated its view to respondents in April 2018. EPA told respondents that "current owners of property within Superfund sites [are] potentially responsible parties" based on EPA's longstanding interpretation, and that, as PRPs, respondents' "proposed cleanup activities need to be reviewed and authorized by EPA." App. 1a, 3a.

If respondents are PRPs, their unauthorized restoration remedy undisputedly constitutes the kind of unauthorized "remedial action" that § 122(e)(6) bars. Indeed, Montana law requires plaintiffs seeking restoration damages to actually remediate their property. Pet. App. 5a, 13a; Opp. 8. Accordingly, as PRPs, respondents cannot invoke state law to compel unauthorized remedial action.

B. The Montana Supreme Court's Interpretation of § 122(e)(6) Is Flawed

The Montana Supreme Court dismissed § 122(e)(6), accepting respondents' view that only parties affirmatively designated as PRPs qualify as PRPs. Such designation, the court believed, occurs only upon a voluntary settlement with EPA, "a judicial determination that the party is a responsible party," or when the party becomes a "defendant in a CERCLA lawsuit" deemed ineligible for statutory defenses. Pet. App. 15a-16a; Opp. 31-33. And if

such designation does not happen within CERCLA's limitations period of six years after a cleanup begins, the "PRP horse [has] left the barn." Pet. App. 16a; Opp. 31. At that point, landowners and other PRPs (even culpable ones) that elude suits or settlements for six years can roam free and try out whatever remedial actions they like.

1. That interpretation puts the cart before the horse. Under CERCLA's plain text, parties are PRPs long before any suits or settlements resolve ultimate responsibility for a cleanup, not vice versa. A PRP is anyone who fits within § 107(a)'s broad definitions of "covered persons"—full stop. *Supra* Section II.A. The statutory text does the "designation." CERCLA does not contain some phantom additional designation provision requiring the outside world to recognize someone as a responsible party before EPA can treat that party as a PRP.

Respondents' and the Montana Supreme Court's interpretation makes a muddle of CERCLA by conflating *qualification* for PRP status with *actual liability* as a responsible party. "PRP" starts with a "P" because CERCLA covers "everyone who is *potentially* responsible for hazardous-waste contamination," not just parties actually deemed liable for cleanup costs or remediation. *See Bestfoods*, 524 U.S. at 56 n.1 (emphasis added). That is the very essence of the term that the Montana Supreme Court, at respondents' urging, read out of the statute. "[E]ven parties not responsible for contamination may fall within the broad definitions of PRPs in [section 107(a)]." *Atl. Research*, 551 U.S. at 136. Likewise, even the "'innocent' . . . landowner whose land has been contaminated by another" counts as a PRP. *Id.* (citation omitted); *see also* 42 U.S.C. § 9622(g)(1)(B) (authorizing "[d]e minimis settlements" with EPA for landowners who are "potentially

responsible part[ies]," did not contribute to contamination, and had no basis for knowing about it).

But if parties must have entered into voluntary settlements or have been subjected to judicial determinations of liability to qualify, the distinction between potentially and actually responsible parties would evaporate. Similarly, a defendant that a court has deemed ineligible for CERCLA-based defenses is well on the road to liability. Those defenses are available only to persons who are "otherwise liable" as covered persons under § 107, underscoring that PRP status endures even if parties can claim defenses to liability. *Id.* § 9607(b); *see, e.g.*, *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 882 (9th Cir. 2001).

Respondents' interpretation would also warp the overall statutory design. As § 122(e)(6) illustrates, EPA must be able to regulate all PRPs to maintain its control over Superfund sites, even if many PRPs never face actual liability. *Supra* Section II.A. Additionally, CERCLA refers to PRPs in instances unrelated to ultimate liability for contamination or cleanup costs. CERCLA confers procedural benefits on PRPs to ensure that all PRPs have a voice in the cleanup EPA selects, even if they never bear its costs. For instance, all PRPs can participate in developing the administrative record underlying EPA's selection of a remedy. 42 U.S.C. § 9613(k)(2)(B). EPA must also notify all PRPs before selecting a response action, *id.* § 9613(k)(2)(D), before embarking on a period of settlement negotiation, *id.* § 9622(e)(1), and after deciding not to use CERCLA-specified settlement procedures, *id.* § 9622(a). PRP status, in sum, cuts broadly to ensure that all parties at the site work towards EPA's remedial plan.

2. CERCLA is likewise devoid of any deadline to designate PRPs after which "the PRP horse [has] left the

barn." Pet. App. 16a. The Montana Supreme Court held that CERCLA's six-year limitations period for filing suit to recover costs of remedial actions, which runs from the beginning of construction of the remedial action, 42 U.S.C. § 9613(g)(2)(B), sets off a six-year race to designate PRPs for any purpose. Pet. App. 16a. That is not what that narrow provision says. Moreover, § 122(e)(6) already spells out a time period during which PRPs are barred from acting unilaterally, i.e., as soon as EPA's remedial investigation begins. It defies credulity to think that Congress secretly hid a six-year deadline for EPA to recognize PRPs within a statute-of-limitations provision about the timing of lawsuits to recover remedial costs.

Respondents' and the Montana Supreme Court's position would also create a veritable Augean stable of practical problems that would destroy EPA's authority to direct cleanups. By their logic, a would-be PRP that has avoided liability six years into EPA's cleanup is free to ignore § 122(e)(6) and scuttle EPA's plans. But as this lawsuit illustrates, EPA can ill afford to roll the dice and hope that any actors who escape suits or settlements six years into EPA's cleanup will resist the temptation to go their own way.

EPA would be equally hamstrung with respect to *any* PRP on any Superfund site—a multitude of actors, from past and current owners and facility operators to parties that transported hazardous substances. Any of them could also reach the six-year mark without facing a qualifying suit or settlement and launch their own personal cleanup plan, no matter how much the rest of the community disagreed—and no matter how high the risk of exposing their neighbors to hazardous substance. EPA's binding plans would become mere suggestions, preventing

EPA from protecting the community as a whole from environmental threats.

But avoiding that outcome would require EPA to delay starting its cleanup until after it sued and settled with all PRPs. CERCLA's whole point is to empower EPA to act fast to remedy environmental crises and litigate ultimate liability later, subject to broad enforcement discretion. The Montana Supreme Court's view would strip EPA of that discretion and require EPA to squander enormous resources negotiating settlements or bringing actions against hundreds or even thousands of PRPs whom EPA would otherwise never target, lest six years pass without the requisite designation. That result would also impose immense burdens on every landowner at every Superfund site—all of whom would likely have to hire counsel and negotiate settlements with EPA, even if they fully support EPA's remedial approach. The remedial flexibility and cooperative enforcement Congress envisioned would disappear.

Respondents further suggest that parties could "invoke CERCLA exemptions from liability" to avoid PRP status. Opp. 31. That limitation is not one the Montana Supreme Court embraced. *See* Pet. App. 16a-17a. Regardless, those exemptions only undermine respondents' position, since the statutory text treats these provisions as defenses to liability, not exemptions from statutory coverage. Further, this limitation might not limit much. CERCLA contains many defenses to liability, including where the release of hazardous substances was caused by "an act of God" or "an act of war." 42 U.S.C. § 9607(b). CERCLA also shields from liability "actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan … or at the direction of an onscene coordinator." *Id.*

§ 9607(d)(1). Respondents' position would permit anyone who could invoke these defenses to do whatever they want with Superfund sites. And it is anyone's guess how or when a party seeking to avoid PRP classification could "invoke" one of those defenses outside a judicial proceeding.

Congress could not have intended to allow rogue landowners, operators, and transporters to turn EPA-ordered cleanups into virtual demolition derbies where PRPs' bulldozers rush to dig up holes that EPA tractors just filled. Nor would PRPs in Atlantic Richfield's shoes have much incentive to proactively approach EPA and collaborate with its efforts, if any landowner or other covered person could undo years of work and stick the cooperating party with the bill without even having to check with EPA first.

III. CERCLA Preempts a Restoration Remedy

CERCLA doubly preempts respondents' state-law restoration remedy. First, federal law compels Atlantic Richfield to clean up the Anaconda site in strict accordance with EPA's remedial plan. Federal law thus makes it impossible for Atlantic Richfield to unilaterally comply with its alleged duty, under Montana law, to see respondents' land restored to its pre-smelter state. Second, respondents' restoration remedy poses monumental obstacles to CERCLA's implementation, by wresting control of a cleanup away from EPA and its comprehensive efforts and allowing individual landowners to literally tear up EPA's remediation.

Respondents and the Montana Supreme Court believed that CERCLA's savings clauses salvage even state laws that conflict with federal law, but that is not how this Court has read similar savings clauses. While CERCLA's savings clauses leave respondents free to pursue their

other state tort remedies, these clauses are not an escape hatch for state laws to supplant competing federal obligations.

A. Atlantic Richfield's CERCLA Cleanup Obligations Directly Conflict with Its Alleged State-Law Duty

"When federal law forbids an action that state law requires," then "the state law is 'without effect'" because federal law preempts it. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486 (2013) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). That is the case here: federal law forbids Atlantic Richfield to deviate from EPA's cleanup plan at the Anaconda Smelter site. But Montana law erects a conflicting duty. Respondents' restoration remedy rests on Atlantic Richfield's alleged state-law duty to restore respondents' land to pristine, pre-smelter condition. The only way for Atlantic Richfield to avoid paying tens of millions of dollars for respondents' competing cleanup would be for Atlantic Richfield to have already done that cleanup—a move that CERCLA prohibits.

1. This Court's recent impossibility-preemption cases establish that if defendants need a federal agency's approval and assistance to comply with a state-law obligation, then federal law preempts that state obligation. Defendants cannot serve two conflicting masters, and when federal law leaves no room for a defendant to unilaterally fulfill state-law duties, federal law prevails.

In the first of these decisions, *Wyeth v. Levine*, 555 U.S. 555 (2009), a brand-name drug manufacturer argued that its inability under federal law to change its drug labeling without FDA's approval left the manufacturer powerless to fulfill its state-law duty to strengthen the warning on the drug's label. *Id.* at 559-60, 568. This Court disagreed, explaining that FDA regulations sometimes let brand-name manufacturers change drug labels first and

seek FDA approval later. *Id.* at 568, 571. Absent "clear evidence" that FDA would have rejected the plaintiff's proposed warning change, the manufacturer could have independently complied with both state and federal law. *Id.* at 571. So that state-law duty was not preempted.

PLIVA, Inc. v. Mensing, 564 U.S. 604 (2011), then held that a *generic* drug manufacturer could not simultaneously satisfy its federal-law obligations regarding drug labeling and its state-law obligation to change an allegedly inadequate warning label. Unlike brand-name counterparts, federal law prohibits generic manufacturers from altering FDA-approved warning labels, which generics copy from the brand. *Id.* at 614. So federal law prohibited what state tort law required. Further, the Court rejected the notion that the manufacturer could have avoided the conflict by asking FDA for permission to change the label. "[W]hen a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency," the Court held, "that party cannot independently satisfy those state duties for pre-emption purposes." *Id.* at 623-24.

Mutual Pharmaceutical Co. v. Bartlett, 570 U.S. 472 (2013) also involved a generic drug manufacturer's alleged breach of its state-law duty to adequately warn of the drug's hazards. *Id.* at 475. As in *Mensing*, the Court concluded that the generic manufacturer could not simultaneously maintain its required label (under federal law) and change its label (under state law). *Id.* at 486-87. The Court likewise rejected the argument that the defendant could have complied with state law by paying damages. A party who must choose between violating federal law, and paying damages under state law, is still stuck between two logically incompatible obligations. *Id.* at 490-91.

Finally, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019), recently confirmed that the key question for impossibility preemption remains "whether federal law," including agency actions with the force of law, "prohibited" the defendant from taking actions "that would satisfy state law." *Id.* at 1678.

2. Here too federal law forbids a defendant from fulfilling its alleged state-law obligations. The state-law duties at issue concern the duty of "restoration" that Montana law imposes through the specific remedy of restoration damages. "[C]ommon-law damages actions . . . are premised on the existence of a legal duty." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522 (1992) (plurality op.); *accord Bartlett*, 570 U.S. at 482 n.1. Under Montana law, anyone who causes an injury to land that "is used for a purpose personal to the owner," like a residence, may face unique remedial obligations. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1087 (Mont. 2007) (quoting Restatement (Second) of Torts § 929 cmt. b (Am. Law Inst. 1979)). If that damage is reversible, Montana law requires the responsible party to restore the property to "the condition [it] would have been [in] absent [the] contamination." *Id.* at 1086-87. To satisfy respondents' demand, Atlantic Richfield would have had to restore their property to pre-1884 conditions, or pay for respondents to perform that restoration themselves. *See id.*

Although this restoration remedy involves paying money to the injured property owner, it is no ordinary money-damages award. Funds must be used to clean up the land to its pre-contamination condition. *See id.* at 1089. Montana's restoration remedy thus resembles injunctive relief or specific performance, by requiring the defendant to bring about a particular future result. The defendant's damages correspond to the estimated cost of

fulfilling a specific restoration plan that property owners are required to execute once a state-court jury signs off. *See id.* at 1089-90. Here, respondents demand up to $58 million—seven times the combined value of all their property—to discharge Atlantic Richfield's alleged state-law obligation "to restore their properties to pre-smelter conditions." Opp. 8.

3. CERCLA prohibits Atlantic Richfield from unilaterally fulfilling that state-law remedial obligation. CERCLA compels Atlantic Richfield to follow EPA's remedial plans for the Anaconda Smelter site to the letter. Once the remedial investigation and feasibility study for the site began in 1988, § 122(e)(6) prohibited Atlantic Richfield—as an undisputed potentially responsible party—from "undertak[ing] any remedial action at the facility unless such remedial action has been authorized" by EPA. 42 U.S.C. § 9622(e)(6). Further, binding EPA regulations require everything Atlantic Richfield does at the site to be "in conformance with the remedy [EPA] selected and set forth" in its Records of Decision. 40 C.F.R. § 300.435(b)(1).

EPA's Records of Decision—which contain hundreds of pages of remedial plans—also became federal law when EPA incorporated them into a series of administrative orders that it issued using its delegated authority under CERCLA § 104(b) and § 106(a). *See, e.g.*, J.A. 121. EPA's administrative orders compel Atlantic Richfield to follow the remedies EPA selected. *See, e.g.*, J.A. 123, 125-26, 127-28. For example, the order requiring implementation of the Community Soils Record of Decision provides that "[u]ndertaking any on-Site physical activity without prior approval of EPA is a violation of this Order." *See* J.A. 127. Violations trigger stiff civil penalties and possible Department of Justice enforcement action. *See*

42 U.S.C. § 9606(a), (b)(1); J.A. 146. In short, federal law spells out what remediation Atlantic Richfield can do across the Superfund site—no more, and no less.

Atlantic Richfield thus cannot "independently do under federal law what state law requires of it." *Mensing*, 564 U.S. at 620. State law, through the restoration remedy, holds Atlantic Richfield responsible for not having cleaned up the Anaconda site to what respondents contend is a pristine, pre-smelter condition. Federal law instead demands that Atlantic Richfield clean up the Anaconda site to a condition *EPA* determines will "assure[] protection of human health and the environment." 42 U.S.C. § 9621(d)(1). Atlantic Richfield can go no further without EPA's consent. Indeed, when Atlantic Richfield offered to conduct remediation on respondents' pasture lands beyond what EPA's plan required, EPA blocked the proposal. Mont. S. Ct. Rec. at Suppl-App-0182. Federal law thus prohibits Atlantic Richfield from independently taking the remedial actions that would have allowed the company to avoid state-law restoration damages.

Respondents' particular remedial plan vividly illustrates that it is impossible for Atlantic Richfield to simultaneously discharge its obligations to EPA and avoid being on the hook for state-law restoration damages. Take groundwater remediation. EPA determined that removing arsenic from groundwater at the site, rather than replacing or treating individual wells, would be technically unachievable—so EPA declined to authorize such action in the remedial plan that binds Atlantic Richfield. J.A. 150-58.

To avoid state-law restoration damages, however, Atlantic Richfield would have had to disregard EPA's decision and install three miles' worth of underground trenches. Not only that, Atlantic Richfield would have to

ignore EPA's judgment that such trenches could wreak environmental havoc by unpredictably altering the groundwater flow, introducing new chemicals into the aquifer, and risking contamination of uncontaminated groundwater. Pet. App. 73a-74a. Atlantic Richfield cannot unilaterally install underground barriers when EPA wants this groundwater undisturbed and unadulterated. And had Atlantic Richfield tried to prevent state-law liability for remedial damages by flouting EPA's prescriptions for groundwater remediation, the company would have walked straight into the buzz saw of harsh federal sanctions for defying EPA's orders. *See* 42 U.S.C. § 9606.

4. This conflict is inescapable. It is no answer that "a different cleanup might be something that the EPA could authorize." Opp. 11 (quoting Tr. of Oral Argument at 42:34-37). Again, "when a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency," federal law preempts the state-law mandate. *Mensing*, 564 U.S. at 623-24.

It also makes no difference for impossibility-preemption purposes that Atlantic Richfield would not wield the shovels itself, but would instead pay respondents damages. *See* Opp. 36. As *Bartlett* acknowledged, preemption does not depend on whether the defendant itself performs the federally prohibited act or pays someone else damages for failing to perform that act. 570 U.S. at 490-91. If the generic drug manufacturers in *Mensing* and *Bartlett* could have avoided the conflict between their federal-law duty to keep the same label and their state-law duty to change it by paying tort damages, those cases would have found no preemption. *See Mensing*, 564 U.S. at 611-12; *Bartlett*, 570 U.S. at 490-91. Impossibility preemption it-

self would be impossible in civil cases, because one can always theoretically obey one sovereign and pay the sanction dictated by the other. But this Court has squarely rejected "an approach to pre-emption that renders conflict pre-emption all but meaningless." *Mensing*, 564 U.S. at 621.

B. A Restoration Remedy Conflicts with CERCLA's Purposes and Objectives

State law also "actually conflicts with federal law . . . where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). That type of preemption plainly applies to respondents' restoration remedy, which would undermine CERCLA's comprehensive federal scheme and would eject EPA from the driver's seat in managing cleanups.

1. This Court has repeatedly found state law preempted when it interferes with an overlapping federal scheme. For instance, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), held that federal law preempted an alleged state tort-law duty to equip cars with airbags where a federal safety standard instead provided for a gradual phase-in for airbags. *Id.* at 874-75, 879. Because the Department of Transportation determined that the latter approach would be safest in the long run, requiring airbags in every car would have "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* at 881.

Likewise, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), held that federal laws sanctioning Burma preempted Massachusetts' Burma sanctions. Congress had delegated to the President the power to decide what level of sanctions to impose, and Massachusetts'

law impaired the President's leverage in calibrating the appropriate degree of pressure. *Id.* at 376-80.

More recently, *Arizona v. United States*, 567 U.S. 387 (2012), held that federal immigration law preempted provisions of an Arizona immigration statute, including a section authorizing state officers to arrest removable aliens. *Id.* at 407, 410. Because federal law vests federal officials with discretion to decide when such arrests are appropriate, Arizona's provision "violate[d] the principle that the removal process is entrusted to the discretion of the Federal Government." *Id.* at 409. In all of these cases, state laws were preempted where they deprived federal agencies of flexibility to administer comprehensive federal laws.

By contrast, *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019), held that the Atomic Energy Act did not preempt a Virginia law banning uranium mining. The petitioner had failed to identify any provision of federal law that would be thwarted, and argued only that the state statute threatened the abstract "balance" struck under the act. *See id.* at 1907-08 (opinion of Gorsuch, J.). The Court further noted the federal and state law did not regulate the same activity. *Id.* at 1908; *see id.* at 1915-16 (Ginsburg, J., concurring in the judgment).

2. Allowing respondents' restoration remedy would deprive EPA of the comprehensive control of cleanup sites that CERCLA requires. CERCLA commits to EPA decisions about how best "to promote the timely cleanup of hazardous waste sites." *Burlington*, 556 U.S. at 602 (internal quotation marks omitted). Specifically, CERCLA requires EPA to choose and implement the most effective means of cleaning up hazardous waste sites after balancing over a half-dozen statutory considerations and the interests of all affected parties. *See* 42 U.S.C. § 9621(a)-(d).

CERCLA further protects EPA's primacy over cleanup efforts by prohibiting both judicial challenges to ongoing cleanups, via § 113(h), and practical challenges in the form of conflicting cleanup activities, via § 122(e)(6).

Respondents' restoration remedy would impermissibly usurp EPA's role in making conclusive judgments about how to remediate a site and protect affected communities from residual risks. A handful of private property owners would receive the cleanup they personally prefer—but at inordinate expense, and subject only to the review of a state-court jury. Addressing environmental threats requires "informed assessment of competing interests," which is why Congress has "entrust[ed] such complex balancing to EPA in the first instance." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011). "The expert agency is surely better equipped to do the job" than individual juries on a case-by-case basis, acting only on the record the parties present. *See id.* at 428; Br. Wash. Legal Found. Supp. Cert. at 5, 8-9. Respondents brandish state law that pursues one narrow aim: restoring individual landowners' properties to a pristine, pre-contamination state. But allowing respondents to pursue that single aim would compromise EPA's ability to accommodate the full panoply of considerations that CERCLA requires EPA to balance in crafting its remedy.

Respondents' private restoration remedy, by definition, ignores the interests of neighbors and anyone else in the community who might perversely face a heightened risk of exposure to hazardous substances if respondents' plans became reality. This case illustrates the risks of that approach: respondents' proposed underground trenches would potentially adversely affect *everyone*'s groundwater in Opportunity, not just respondents'. Pet. App. 73a-74a. And respondents' soil excavation free-for-

all could expose everyone in the community to previously contained arsenic.

3. Allowing private landowners like respondents to pursue a restoration remedy would also subvert CERCLA's objective of securing voluntary cooperation from parties at Superfund sites. CERCLA recognizes that agreements between EPA and PRPs "expedite effective remedial actions and minimize litigation," 42 U.S.C. § 9622(a), and thus encourages EPA to make agreements with private parties to conduct cleanup activities "[w]henever practicable and in the public interest." *Id.*

Allowing every landowner at a Superfund site to unilaterally dictate their own cleanup terms would destroy this collaborative process. Parties in Atlantic Richfield's position will not willingly devote years and millions of dollars to working with EPA to craft cleanup plans that do not fix the company's obligations. *See* Br. Chamber of Commerce et al. Supp. Cert. 18-21. True, a settlement with EPA could not resolve *all* of Atlantic Richfield's state-law liability, Opp. 38, but liability for cleanup costs is by far the largest and most unpredictable component of a PRP's financial exposure at a Superfund site. The opportunity to buy peace in this area alone is a highly attractive incentive to cooperate with EPA early and often. Respondents' restoration remedy would deprive EPA of its most valuable bargaining chip in most CERCLA cases.

4. The Montana Supreme Court and respondents dismiss any obstacle-preemption problem by contending that respondents merely seek to remediate their properties beyond EPA's floor. Opp. 35; Pet. App. 11a. But, as noted, CERCLA sets both a floor and ceiling for remediation by forbidding PRPs from doing anything else—no matter how well-intentioned—without EPA's consent. 42 U.S.C. § 9622(e)(6).

Regardless, EPA remedies are not evaluated on a single dimension, from "less cleanup" to "more cleanup." EPA selects a remedy by weighing many factors, including short-term and long-term effectiveness, compliance with state law, cost, implementability, and community acceptance. 40 C.F.R. § 300.430(e)(9)(iii). One step forward along one dimension may be two steps back along another. For example, EPA decided that, on balance, no pasture land should be disturbed, because the risk of spreading arsenic to more densely-populated areas was too high. Respondents second-guess that determination and demand that pasture lands with more than 15 parts per million arsenic should be dug up. And the next litigants could just as easily decide that pasture land meeting a different threshold should be dug up, or that they should try different technological options to attenuate any residual arsenic. Only EPA is in a position to evaluate whether a particular cleanup decision will lead to greater "protection of human health and the environment." 42 U.S.C. § 9621(d)(1). Respondents' restoration remedy would instead replace EPA's community-focused balancing of interests with blinkered piecemeal proposals that could jeopardize the community's health.

C. CERCLA's Savings Clauses Do Not Apply

CERCLA's savings clauses do not prevent CERCLA from preempting respondents' restoration remedy. Section 114(a) states: "Nothing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). Section 302(d) provides in relevant part: "Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common

law, with respect to releases of hazardous substances or other pollutants or contaminants." *Id.* § 9652(d); *see also id.* § 9659(h). These provisions are the type of cookie-cutter savings clause that this Court has held does not defeat conflict-preemption principles. Read in context, these clauses do not preserve respondents' restoration remedy.

1. Generally-worded savings clauses are scattered throughout the U.S. Code. *See, e.g.*, *Geier*, 529 U.S. at 867-68. Such savings clauses indicate that Congress did not mean for the statute to occupy the field and extinguish every possible state-law claim on the same subject. *See id.* But such savings clauses do not override impossibility or obstacle preemption principles. *Id.* at 871-74.

Geier, for instance, involved a savings clause providing that "[c]ompliance with" any Federal motor vehicle safety standard "does not exempt any person from any liability under common law." *Id.* at 868 (quoting 15 U.S.C. § 1397(k) (1988)). On its face, that language could be read to authorize plaintiffs to sue manufacturers who complied with a federal-law duty but violated a conflicting state common-law duty. But the Court considered such a reading illogical. If an interpretation of a savings clause "reads into a particular federal law toleration of a conflict that [conflict-preemption] principles would otherwise forbid, it permits that law to defeat its own objectives." *Geier*, 529 U.S. at 872. Following this reasoning, the Court has "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States v. Locke*, 529 U.S. 89, 106 (2000).

Even broader savings clauses do not shield state laws that conflict with federal law. For example, section 22 of the Interstate Commerce Act of 1887 declared: "[N]othing in this act contained shall in any way abridge

or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Pub. L. No. 49-104, 24 Stat. 379, § 22. At first blush, that provision would seemingly foreclose preemption of any state remedies. The Court nonetheless held that the provision "cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). The Court later held that this same savings clause did not preserve state-law claims that impeded the Interstate Commerce Act. *See Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981). And where Congress has copied materially identical savings-clause language into other statutes, the Court has read it the same way. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (Federal Aviation Act); *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (Communications Act).

Sections 114(a) and 302(d) closely resemble savings clauses the Court has encountered before. Like those provisions, § 114(a) and § 302(d) make clear that CERCLA does not preempt the whole field of state environmental regulation. And, like those other provisions, § 114(a) and § 302(d) contain no indication that Congress preserved state laws that would require a party to violate federal law or destroy the integrity of the federal regulatory scheme. There is "no reason to believe" that those two provisions wrought a major realignment of the federal-state balance and authorized state laws to supersede conflicting federal obligations. *Geier*, 529 U.S. at 872.

2. Reading these two CERCLA savings clauses to authorize state laws that conflict with federal law would also

pervert their text. CERCLA imposes certain forms of liability on responsible parties, including liability for EPA's cleanup costs, 42 U.S.C. § 9607(a)(4)(A). Section 114(a) preserves States' ability to impose "any *additional* liability or requirements with respect to the release of hazardous substances." *Id.* § 9614(a) (emphasis added). "Additional" in this context means "supplemental," not "alternative" or "conflicting." *See Additional*, *Random House Dictionary of the English Language* (1967) ("added; supplementary"). Thus, § 114(a) underscores that CERCLA does not occupy the field with respect to liability.

For instance, if a state law established a duty to offer medical monitoring to a homeowner exposed to toxic substances, CERCLA would not preempt that duty, which would not interfere with EPA's exclusive authority over cleanups. That makes sense, because CERCLA elsewhere indicates that state-law actions "for personal injury, or property damages" caused by pollution will remain available—those actions will just be subject to a CERCLA-mandated statute of limitations. *See* 42 U.S.C. § 9658(a). In sum, § 114(a) preserves common-law actions that do *not* seek to dictate substantive cleanup steps—but it does not protect conflicting state laws that the Supremacy Clause says must yield to federal law.

Section 302(d)'s text likewise does not signal any subversion of ordinary conflict preemption. Its first sentence disclaims any intent to "affect or modify" parties' "obligations or liabilities . . . under other Federal or State law . . . with respect to releases of" contaminants. *Id.* § 9652(d). Again, this Court has never read such language to disclaim the normal operation of the Supremacy Clause with respect to state laws that conflict with federal law. Section 302(d)'s second sentence confirms that intuition, elab-

orating that CERCLA "shall not be considered, interpreted, or construed in any way as reflecting a determination . . . of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances." *Id.* Considered as a whole, § 302(d) concerns (and preserves) state-law duties not to pollute, but does not permit state laws that overrule EPA's remediation plan.

Other provisions reinforce that CERCLA treats state law setting substantive pollution-cleanup standards differently from state law governing compensation for injury to persons or property. CERCLA provides that EPA, in selecting a remedy, must take into account state laws that set a cleanup threshold more stringent than federal law. *Id.* § 9621(d)(2)(A)(ii). But if EPA determines that the application of such a state standard is inappropriate—for example, if compliance would cause more environmental harm than good—EPA can waive that standard. *See id.* § 9621(d)(4). Congress determined, then, that when selecting a remedy and choosing the substantive cleanup thresholds to apply, EPA has the authority to override state law. And respondents have never claimed that EPA failed to account for Montana law in this fashion here.

In sum, CERCLA leaves wide swaths of state law untouched. Nothing in CERCLA prevents respondents from bringing their state common-law claims to hold Atlantic Richfield liable for Anaconda's pollution. Montana law establishes a general duty not to pollute others' property, which plaintiffs usually pursue through common-law claims such as nuisance, trespass, strict liability, or negligence. *See Christian*, 358 P.3d at 140, 150. CERCLA does not conflict with that duty not to pollute. J.A. 54. But CERCLA's routine savings clauses do not save respondents' restoration remedy, which conflicts with Atlantic

Richfield's CERCLA obligations and would destroy Congress's carefully wrought design.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

ROBERT J. KATERBERG
ELISABETH S. THEODORE
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001

JONATHAN W. RAUCHWAY
SHANNON W. STEVENSON
DAVIS GRAHAM & STUBBS LLP
1550 17th St., Suite 500
Denver, CO 80202

LISA S. BLATT
JOHN S. WILLIAMS
SARAH M. HARRIS
CHARLES L. MCCLOUD
MENG JIA YANG
THOMAS S. CHAPMAN
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

Counsel for Petitioner

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APPENDIX

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region8

Ref: ENF-IO

Mr. J. David Slovak
Lewis, Slovak, Kovacich & Snipes, P.C.
725 - 3rd Avenue North
P.O. Box 2325
Great Falls, Montana 59403

Re: Gregory A. Christian, et al, v. Atlantic Richfield Company, Montana Second Judicial District, Silver Bow County, Cause No. DV-08-173

Dear Mr. Slovak:

This letter concerns the above-referenced lawsuit that involves the Anaconda Smelter Superfund Site, located at Anaconda, Montana (Site). It is the understanding of the U.S. Environmental Protection Agency that your clients are seeking, among other things, funding to perform cleanup actions on property located within the Site. As you are aware, EPA is already addressing this Site using its authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. § 9601-9675. Depending on the specifics of the situation, your clients' future actions may put them at risk of becoming liable for significant response costs.

CERCLA identifies current owners of property within Superfund sites as potentially responsible parties, liable for costs of cleaning up contamination at these

sites. 42 U.S.C. § 9607(a). However, as a matter of enforcement discretion, EPA generally will not take enforcement actions against an owner of residential property within a Superfund site to require the owner to perform response actions or pay response costs, unless the homeowner's activities exacerbate existing contamination, resulting in the need for a response action at the site; the owner does not cooperate with EPA or interferes with an EPA response action; or, if the owner fails to comply with any other CERCLA obligations. See EPA's *"Policy Towards Owners of Residential Property at Superfund Sites."* A residential landowner faces significant legal and financial exposure pursuant to CERCLA's statutory provisions; the policy towards residential property owners describes the circumstances EPA will consider in exercising its enforcement discretion. Furthermore, a residential landowner who manages and arranges for the disposal of contaminated media, such as soil, may be potentially responsible parties under the other provisions of CERCLA. 42 U.S.C. § 9607(a).

CERCLA also prohibits potentially responsible parties from performing response actions at Superfund sites where the remedial action is already underway unless such actions have been authorized by EPA. 42 U.S.C. § 9622(e)(6). This prohibition is consistent with Congress' mandate to expeditiously cleanup sites - it ensures that ongoing CERCLA cleanups undertaken at significant expense and public process are not jeopardized by inconsistent response actions.

Further, it is EPA's responsibility under CERCLA to ensure that its selected cleanup actions continue to be protective. Therefore, every 5 years, EPA considers whether new information merits a change to the cleanup action in order to remain protective. Please notify your

clients that their proposed cleanup activities at the Site need to be reviewed and authorized by EPA. It is critical that your clients understand if they perform cleanup actions at the Site without authorization from EPA that cause the EPA cleanup to fail in whole or in part, they may be liable to pay for additional cleanup actions at the Site.

EPA is available to consult about these matters at your convenience. Additional information about liability under CERCLA can be found at https://www.epa.gov/enforcement/superfund-liability.

If any of your clients wish to discuss potential remedial actions at properties within the Site, please have them contact Charles Coleman, the EPA's remedial project manager for the Site at (406) 457-5038. Any legal questions should be directed to Andy Lensink, EPA's enforcement attorney for the Site, at (303) 312-6908.

Sincerely,

/s/ Suzanne J. Bohan
Suzanne J. Bohan
Assistant Regional Administrator
Office of Enforcement, Compliance,
and Environmental Justice