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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND PROPERTY AND ENVIRONMENT RESEARCH CENTER IN SUPPORT OF RESPONDENTS

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Question Presented

Whether the Comprehensive Environmental Response, Compensation, and Liability Act, which expressly preserves "obligations or liabilities of any person under Federal or State law, including common law," nonetheless impliedly preempts state common law property rights if they would require a polluter to fund restoration work beyond that ordered by the Environmental Protection Agency.

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Adler, Jonathan H., *Clean Politics, Dirty Profits*, *in Political Environmentalism: Going Behind the Green Curtain* (Terry L. Anderson ed., 2000) 20

Adler, Jonathan H., *Conservative Principles for Environmental Reform*, 23 Duke Envtl. L. & Pol'y F. 253 (2013) 10

Adler, Jonathan H., *Free & Green: A New Approach to Environmental Protection*, 24 Harv. J.L. & Pub. Pol'y 653 (2001) 11, 13

Adler, Jonathan H., *Is the Common Law a Free-Market Solution to Pollution?*, 24 Critical Rev. 61 (2012) 13

Adler, Jonathan H., *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130 (2005) 19

Adler, Jonathan H., *Letting Fifty Flowers Bloom: Using Federalism to Spur Innovation*, *in The Jurisdynamics of Environmental Protection: Change and the Pragmatic Voice in Environmental Law* (Jim Chen ed., 2004).... 18, 20

Adler, Jonathan, *Is the Common Law the Solution to Pollution?*, PERC Reports vol. 29 (2011), https://www.perc.org/2011/06/09/is-the-common-law-the-solution-to-pollution/ 12

Anderson, Terry L. & Leal, Donald R., *Free Market Environmentalism for the Next Generation* (2015) 12

Butler, Henry N., *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*, 58 Case W. Res. L. Rev. 705 (2008) 19

Butler, Henry N. & Macey, Jonathan R., *Using Federalism to Improve Environmental Policy* (1996) 19

Coase, Ronald, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960) 10

Epstein, Richard A., *Takings: Private Property and the Power of Eminent Domain* (1985) 10

Farber, Daniel A., *Eco-pragmatism: Making Sensible Environmental Decisions in an Uncertain World* (1999) 19

McConnell, Michael W., *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484 (1987) 18

Meiners, Roger & Yandle, Bruce, *The Common Law: How It Protects the Environment*, PERC Policy Series Issue No. PS-13 (1998), https://www.perc.org/wp-content/uploads/2018/02/PS13.pdf 9-10

Sandefur, Timothy & Sandefur, Christina, *Cornerstone of Liberty: Property Rights in 21st-Century America* (2d. ed. 2015) 12

Sandefur, Timothy, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 Chap. L. Rev. 1 (2006) 12

Interest of Amici Curiae[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit legal foundation that defends the principles of liberty and limited government, including the protection of private property rights. In pursuing its mission, PLF and its attorneys have frequently litigated environmental and property-rights cases before this Court. *See, e.g.*, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *Weyerhaeuser v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018); *United States Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Sackett v. EPA*, 566 U.S. 120 (2012).

The Property and Environment Research Center (PERC) is the nation's oldest and largest institute dedicated to improving environmental quality through property rights and markets. It has produced extensive scholarship on the environmental benefits of clear and secure property rights. PERC has also participated as amicus in cases that involve property rights, individual liberty, and environmental stewardship. *See, e.g.*, *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014); *Public Lands*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Access Ass'n v. Bd. of Cty. Commissioners of Madison Cty., 321 P.3d 38 (Mont. 2014).

This case is of significant interest to amici because the preemption arguments raised would erode constitutionally protected property rights while also limiting the ability of states and private property owners to secure a cleaner environment. Amici believe their unique perspectives and experiences will aid this Court in the consideration of the issues presented in this case.

Introduction and Summary of Argument

In this case, innocent landowners seek to vindicate their constitutionally protected property rights by having a neighboring polluter restore their properties to their pre-contamination condition. Looking to avoid full financial responsibility for its actions, that polluter[2] asks this Court to hold that the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preempts any state requirement that polluters pay for remediation beyond CERCLA's federal floor. However, CERCLA does not compel this result. Indeed, Congress directed that "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[.]" 42 U.S.C. § 9652.

This savings clause respects the longstanding role of property rights in protecting the environment, a

[2] To be more precise, Atlantic Richfield purchased Anaconda Copper Mining Company (the company responsible for most of the pollution) decades ago, bringing it within a larger mining and

role that CERCLA supplements rather than supplants. Secure property rights discourage environmental damage by forcing would-be polluters to internalize the harms imposed on neighboring property owners. And where this incentive isn't heeded, property rights enable anyone whose property is damaged by another to demand that property be restored. Where property rights are insecure, these incentives are weakened, leading to worse environmental outcomes.

This Court should not upend this longstanding regime without some clear indication Congress intended that result. Atlantic Richfield and the United States provide no such indicia. Indeed, they principally rely on a policy argument unmoored from the statute's text: that polluters are more likely to settle their CERCLA claims with EPA if doing so also conclusively resolves in the polluters' favor liability owed to the state or neighboring property owners. That may be logically sound, but it doesn't follow that Congress intended CERCLA to have this effect. As the Supreme Court of Montana recognized, there is no evidence that "Congress's objective" in enacting CERCLA "was to condemn, in perpetuity, the private property of an individual property owner because that

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oil conglomerate. ARCO Br. at 8. Atlantic Richfield continued operating the smelter itself for three years after the sale, before determining that falling copper prices and environmental regulation made it no longer profitable. *See id.* Although it may now regret its purchase, Atlantic Richfield does not deny that its ownership of Anaconda makes it liable for Anaconda's pollution. Nor does this change in ownership play any role in Atlantic Richfield's preemption argument. Therefore, for clarity and simplicity, this brief will refer to the two companies as a single entity.

property happened to have been contaminated by a third party." *Atlantic Richfield Co. v. Mont. Second Judicial District*, 408 P.3d 515, 521 (Mont. 2017).

Interpreting CERCLA to authorize EPA and polluters to bargain away the private property rights of innocent landowners would raise core constitutional concerns under the Takings Clause. If the statute preempts these rights, it could trigger immeasurable liability for the federal government to pay just compensation for the property rights taken. That these rights would be taken for the financial benefit of a private entity compounds the problem further, by offending the Takings Clause's "public use" requirement. This interpretation would also interfere with state authority in an area traditionally occupied by the state, without any clear statement that Congress intended this effect.

Courts have long avoided interpretations of statutes that would trigger such significant constitutional concerns and should do so again here. CERCLA's savings clause should be taken at face value and this Court should hold that CERCLA does not affect Atlantic Richfield's liability to neighboring property owners under Montana common law, including the duty to pay restoration damages.

Argument

I. CERCLA does not preempt innocent landowners' property rights

"Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law;" instead,

a party seeking to displace state law must identify "'a constitutional text or a federal statute' that does the displacing[.]" *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019). Rather than supporting preemption, CERCLA's text expressly preserves the common-law property rights invoked by the plaintiffs. 42 U.S.C. § 9652(d) ("Nothing in this chapter 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.").[3]

Atlantic Richfield and amicus United States search in vain for some statutory text in which to moor their theory that CERCLA preempts the property rights at issue here. First, they argue that CERCLA Section 113 deprives Montana courts of jurisdiction to hear this case. *See* ARCO Br. at 25-32. That section grants federal district courts exclusive jurisdiction "over all controversies arising under" CERCLA, then excludes from this grant certain CERCLA claims, including "challenges to removal or remedial action" supervised by EPA. 42 U.S.C. § 9613(b), (h). These common law claims do not arise under CERCLA, therefore Section 113 has no effect on this case. *See Gunn v. Minton*, 568 U.S. 251, 257 (2013) (a claim

[3] The United States notes that the landowners' complaint cites the Montana Constitution's healthy environment clause, Mont. Const. art. IX, § 1, rather than relying solely on the common law of trespass and nuisance. US Br. at 29-30 n.4. But its argument assigns no significance to this fact. Therefore, this brief will proceed by characterizing the landowners' claims generally as common law property rights claims.

"arises under" federal law if "federal law creates the cause of action asserted").

In arguing otherwise, Atlantic Richfield and the United States invert the statutory text, reading Section 113(h) as a free-floating provision that broadly preempts any claims that could be characterized vaguely as a "challenge" to an EPA-supervised cleanup rather than a qualification of Section 113(b)'s grant of federal jurisdiction over claims arising under CERCLA. *See* ARCO Br. at 21-22 (arguing Section 113(h)'s reference to "challenges" requires Section 113(b) to be interpreted broadly to reach anything that could be characterized as a challenge). Their reading is not only contrary to the text, which does not address any claims that do not arise under CERCLA, but also cannot be squared with CERCLA's broad savings clauses. *See, e.g.*, 42 U.S.C. §§ 9614(a), 9652(d), 9659(h). This Court should reject this invitation to interpret Section 113(h) to nullify Congress' decision to preserve the claims pressed here.

Next, Atlantic Richfield and the United States argue that Section 122(e)(6) preempts the claims. 42 U.S.C. § 9622(e)(6). That provision bars potentially responsible parties from undertaking remedial action without EPA approval during the pendency of an EPA-supervised cleanup. *See id.* Despite asserting this provision preempts these claims, both Atlantic Richfield and the United States appear to concede that the landowners are not responsible for the contamination and, since the statute of limitations has long run, face no potential liability. *See* ARCO Br.

at 22-24; US Br. at 15; *Atlantic Richfield*, 408 P.3d at 522-23.

Even assuming that landowners could nevertheless be potentially responsible parties, the sole basis for that assertion is that they own contaminated property. *See* 42 U.S.C. § 9607(a) (identifying four categories of covered persons). Although the statute allows ownership of contaminated property as a means to determine a potentially responsible party, Congress has recognized that the broadest interpretation of this provision would result in extreme unfairness to innocent property owners whose land has been contaminated by someone else. CERCLA, therefore, carves out several cases where property owners cannot be potentially responsible parties. This includes innocent property owners whose land was contaminated by a neighbors' pollution, whom CERCLA provides "shall not be considered to be" potentially responsible parties if they take reasonable steps to ensure they do not make the contamination worse. *See* 42 U.S.C. § 9607(q). Atlantic Richfield and the United States offer no reason why the landowners do not enjoy the protection of this provision.

Even if the innocent landowners were potentially responsible parties, Section 122(e)(6) would merely require them to wait until the EPA-supervised cleanup is complete before taking any further action; it would not preempt their claims. *See Atlantic Richfield*, 408 P.3d at 522-23. Due to the substantial risk that a cleanup could exhaust the responsible party's resources, this provision gives EPA's supervised cleanup priority by requiring it to be

funded and completed before anything else. But that prioritization does not imply that all subordinated claims are void. Section 122(e)(6) does not subject the private property of innocent landowners to permanent federal control.[4]

Aside from these weak statutory hooks, Atlantic Richfield offers a policy argument. It observes that CERCLA encourages polluters to undertake cleanups by using the threat of even greater liability to spur polluters to settle with EPA. *See* ARCO Br. at 50. Incentives to settle are stronger, it continues, if CERCLA settlements also resolved any other remediation liability to the state or neighboring property owners. *See id.*

It may be that giving polluters additional benefits from settlement would increase their incentives to settle. Likewise, people would be more likely to promptly pay their speeding tickets if doing so voided all liability for past car accidents. But it doesn't follow that a court should create such incentive from whole cloth, even if public policy generally encourages tickets to be promptly paid.

CERCLA encourages settlement between EPA and polluters, to be sure. It does so by giving settling parties certainty regarding their liability *under*

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[4] Atlantic Richfield's and the United States' contrary interpretation of Section 122(e)(6) would lead to absurd results, including that an innocent owner of land designated by EPA as within the boundaries of a CERCLA site would be forever prohibited from improving her own property—perhaps even moving a few shovelfuls of dirt—without EPA's permission. A more significant and unwarranted intrusion on private property rights would be difficult to imagine.

CERCLA. *See* 42 U.S.C. § 9613(f) (providing for settlements that cap a settling parties' liability and authorize contribution claims against non-settling parties). CERCLA does not, however, authorize EPA and polluters to bargain away the property rights of innocent landowners not party to the negotiations.[5] And this Court should not read such an effect into CERCLA, as doing so would undermine the common law's role in promoting responsible environmental decisions, would raise significant constitutional questions under the Takings Clause, and would frustrate state efforts to find innovative ways to promote better environmental outcomes.

A. CERCLA supplements the common law's role of encouraging responsible environmental behavior; it does not supplant it

Historically, protection against harmful pollution "came primarily through" the common law, especially "legal actions for trespass and nuisance." Roger Meiners & Bruce Yandle, *The Common Law: How It Protects the Environment*, PERC Policy Series Issue No. PS-13 at 3 (1998).[6] The right to be left alone and to enjoy your property in peace are essential property

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[5] CERCLA gives affected landowners, like every other member of the public, a limited right to comment on EPA's proposed plan. *See* US Br. at 32. This is no substitute for the common law's protection of property rights. Indeed, CERCLA does not permit affected landowners to challenge a cleanup plan as inadequate to protect their rights. They (again, like the public generally) may only challenge it on the grounds that it violates CERCLA's public health standards. 42 U.S.C. § 9659.

[6] https://www.perc.org/wp-content/uploads/2018/02/PS13.pdf.

rights. *See Int'l News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it."); *see also* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 63 (1985). The common law protects these rights by forbidding anyone from entering the land of another without permission (trespass) or substantially and unreasonably interfering with her enjoyment of it (nuisance). *See, e.g.*, *Christian v. Atlantic Richfield*, 358 P.3d 131, 140 (Mont. 2015).

Secure property rights discourage pollution by forcing would-be polluters to account for the harms imposed on others. *See* Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Envtl. L. & Pol'y F. 253, 276-77 (2013) (describing the "polluter pays" principle underlying the common law). Often, pollution results when environmental harms are borne by someone other than the polluter, such as when a factory's emissions affect its neighbors' air or water quality but do not interfere with the factory's operations. *See generally* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). If the neighbors have no mechanism to stop the factory or force it to pay for the damage, the factory will have little incentive to avoid or reduce these harms.

Secure property rights correct these incentives, by forbidding the polluter from imposing these harms or requiring it to compensate the neighbors for them. *See* Meiners & Yandle, *supra*. Property rights are not secure, however, unless property owners have

adequate means to protect them. To ensure adequate protection, judicial remedies for trespass and nuisance are not limited to compensation for lost property value. Instead, violators' actions may be enjoined or they may be required to restore the property to its prior condition, even if the cost of these remedies exceeds the value of the property. *See Lampi v. Speed*, 261 P.3d 1000, 1004-05 (Mont. 2011). Although these remedies may seem unreasonable from the perspective of the polluter, they play an essential role by disincentivizing the violation of property rights and encouraging the resolution of competing demands to land and other resources through voluntary exchange. Jonathan H. Adler, *Free & Green: A New Approach to Environmental Protection*, 24 Harv. J.L. & Pub. Pol'y 653, 667-68 (2001).

To allow anyone to violate their neighbors' rights so long as they were willing to pay what a court later deems fair market value would "deprive the poor litigant of his little property by giving it to those already rich." *Whalen v. Union Bag & Paper Co.*, 101 N.E. 805, 806 (N.Y. 1913). In effect, it would give those with the means to exercise it a private equivalent to the government's eminent-domain power. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710-11 (1999) (discussing the differences between the Takings Clause's just compensation requirement and traditional equitable relief for private property rights violations).

Remedies like restoration damages better reflect the richness of property. Property is not merely an economic asset but essential to individual liberty and

dignity. *See* Timothy Sandefur & Christina Sandefur, *Cornerstone of Liberty: Property Rights in 21st-Century America* (2d. ed. 2015). As a result, remedies that only address economic effects would systematically fall short. They would fail to account for the sentimental value property may hold due to memories formed there. *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988). They would ignore the role property plays in the formation of community. *See* Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 Chap. L. Rev. 1, 40-42 (2006) (describing the impact of this Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), on the Fort Trumbell community). And they would fail to account for property's role in empowering individuals to express and act on their idiosyncratic values, such as when conservationists purchase land to protect or improve its environmental assets. *See* Terry L. Anderson & Donald R. Leal, *Free Market Environmentalism for the Next Generation* (2015) (describing cases where property rights have enabled individuals and conservation groups to protect valued environmental assets, like rare ecosystems, vistas, or streams). Restoration damages protect property in its fuller sense by encouraging negotiation over expropriation, which allows the property owner to demand a price that reflects this broader range of values. *See* Jonathan Adler, *Is the Common Law the Solution to Pollution?*, PERC Reports vol. 29 (2011);[7] *see also United States v. 564.54 Acres of Land*, 441 U.S. 506, 514 (1979) (acknowledging that the use of "fair market

[7] https://www.perc.org/2011/06/09/is-the-common-law-the-solution-to-pollution/.

value" to determine just compensation under the Takings Clause systematically undercompensates property owners by ignoring the subjective or idiosyncratic value they have in their property).

Common-law property rights have been supplemented by environmental regulation intended to address the common law's perceived shortcomings, such as concerns for people who lack the resources to enforce their own rights or complex environmental problems that may require scientific or technical expertise unavailable to the average property owner. *See* Jonathan H. Adler, *Is the Common Law a Free-Market Solution to Pollution?*, 24 Critical Rev. 61, 63 (2012). CERCLA is an example of this. It authorizes EPA to address significant and immediate public health concerns where the common law moves slowly, pollution problems are overly complex, or the distribution of harms makes it difficult for individual property owners to enforce their rights. But this supplementation does not supplant the key role property rights play. Indeed, environmental regulation is most effective when it respects and supports common law property rights, rather than discarding them. *See* Adler, *Free & Green*, *supra* at 688-89.

Polluters have long asserted that federal environmental regulation preempts this common law regime. Thus, courts have confronted, under several federal environmental statutes, arguments that federal permits create a right to pollute that supersedes others' property rights. This Court rejected that argument under the Clean Water Act. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497-500

(1987) (federal permitees are subject to the common law of the state where the discharge occurs). Several circuits have rejected the argument under the Clean Air Act, including rejecting the argument that common law should be preempted "simply because it is the product of a less sophisticated or expert-driven process than that" administered by a federal agency. *see, e.g.*, *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 695 (6th Cir. 2015).

Congress has rarely found it necessary or advantageous to preempt state common law to protect the environment, preferring to set a federal floor above which states are free to regulate but not a federal ceiling beyond which states cannot go. That is precisely what Congress has done in enacting CERCLA. *See, e.g.*, 42 U.S.C. § 9652(d) (preserving states regulation, including common law).

B. Interpreting CERCLA to preempt property rights would raise significant constitutional concerns under the Takings Clause

Preemption should also be disfavored because it would raise significant constitutional concerns under the Takings Clause. This Court's cases counsel the avoidance of statutory interpretations that raise such concerns. The Court should follow that precedent here.

The Takings Clause protects individual property rights by forbidding the taking of property except for a legitimate public use. *See* U.S. Const. amend. V. Thus, property cannot be taken for purely private benefit. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229,

245 (1984); *see Kelo*, 545 U.S. at 477 ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."). Atlantic Richfield's interpretation of CERCLA as preempting property rights would raise serious concerns that Congress has taken these rights for private benefit, *i.e.* to protect polluters from full financial responsibility for their actions.[8]

The taken property is not used in any sense by the public. That leaves only the possibility that the taking of property from one private party and giving it to another private party can be justified by some public benefit, which is itself a dubious interpretation of the public use requirement. *See Kelo*, 545 U.S. at 505-23 (Thomas, J., dissenting). This question is distinct from whether CERCLA generally has a legitimate public purpose. Cleaning up contaminated properties that pose public health risks is a legitimate public purpose. But the question in this case would be whether, after EPA's cleanup efforts are done, taking property to protect the polluter from having to fund any further cleanup confers a public benefit. It is dubious that the public benefits from less environmental remediation.

The Takings Clause also requires the government to pay just compensation when property is taken. *See* U.S. Const. amend. V. If the property rights invoked

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[8] Atlantic Richfield's preemption theory would have the effect of authorizing the continued physical occupation of property by contamination put there by a neighboring polluter, by taking property owners' rights to protect themselves from this invasion under common law. This would be a *per se* taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

in this case are preempted, as Atlantic Richfield argues, this obligation would be triggered. CERCLA provides no mechanism to compensate property owners for this taking. Thus, preemption of these claims could trigger significant, unanticipated federal liability under the just compensation clause, as any property owner similarly deprived of her rights would have a claim under the Fifth Amendment and the Tucker Act. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019).

This Court should demand a clear statement from Congress before triggering such liability. *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). Atlantic Richfield and the United States have identified no such clear statement. Instead, as has been noted several times in this brief, CERCLA's text says the opposite, as it expressly preserves common law claims like these. *See, e.g.*, 42 U.S.C. § 9652(d)

When serious doubt of a statute's constitutionality is raised, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Here, the question can be avoided by interpreting CERCLA to preserve the constitutionally protected property rights invoked here, as CERCLA's text provides. *See* 42 U.S.C. § 9652(d); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) (Courts should not "lightly assume that Congress intended to infringe constitutionally protected liberties . . . .").

C. Preemption would needlessly interfere with traditional state authority to regulate land use and the environment

Preemption is especially disfavored where "Congress has 'legislated . . . in a field which the States have traditionally occupied.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). For preemption to apply in these areas, this Court has demanded a clear statement from Congress. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (*SWANCC*); *see also Rapanos v. United States*, 547 U.S. 715, 776 (2006) (Kennedy, J., concurring). This case concerns areas of traditional state authority and the requisite clear statement has not been identified.

Land use and environmental regulation are both fields that states have traditionally occupied. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). The federal government, in contrast, enjoys no general authority to regulate property or the environment. It may do so only to the extent authorized by the Commerce Clause or other enumerated power. *See, e.g.*, *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (the Commerce Clause authorizes Congress to regulate the environmental impacts of economic activity).[9]

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[9] Atlantic Richfield and the United States' exceedingly broad interpretation of 42 U.S.C. § 9622(e)(6) would raise another significant constitutional concern. It purports to exert federal

The presumption against preemption in an area of traditional state authority shows due regard for the many benefits of federalism. Federalism provides decentralized government "sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987).

Preserving the common law's role respects the diversity of states and localities. Federalism allows the tailoring of environmental regulation to the specific needs of a community, while also benefitting from access to local knowledge. *See* Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Innovation*, *in The Jurisdynamics of Environmental Protection: Change and the Pragmatic Voice in Environmental Law* 263 (Jim Chen ed., 2004).

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control over any innocent landowner's use of her private property if it is within the boundaries set by EPA for a CERCLA site. *See* US Br. at 32-35. This capacious assertion of authority gives no regard to whether the property is used for economic activities regulated under the Commerce Clause nor, for that matter, any consideration relevant to any other enumerated power. Instead, it asserts control over property as such, which this Court has previously suggested the Constitution does not authorize. *See SWANCC*, 531 U.S. at 173-74; *cf. Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 554-55 (2012) (expanding the Commerce Clause beyond the regulation of economic activity that substantially effects interstate commerce could fundamentally change the relation between the citizen and the federal government).

One-size-fits-all federal policies, by contrast, are less likely to account for this variation. *See* Daniel A. Farber, *Eco-pragmatism: Making Sensible Environmental Decisions in an Uncertain World* 181 (1999). Consequently, federalism allows communities to decide for themselves how to weigh economic costs versus environmental benefits. *See* Henry N. Butler & Jonathan R. Macey, *Using Federalism to Improve Environmental Policy* 27 (1996). It rejects the hubris that only a bureaucrat in Washington, D.C., is qualified to make these value judgments.[10]

Environmental federalism also spurs innovation. *See* Henry N. Butler, *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*, 58 Case W. Res. L. Rev. 705 (2008). By setting different standards or requiring different cleanup techniques, states can serve as laboratories of experiment "without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932); *see* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130, 137 (2005). The benefits of this

[10] Atlantic Richfield's and the United States' positions, by contrast, place tremendous faith in the federal administrative state, repeatedly dismissing the competency of a jury composed of members of the community affected by pollution to reasonably strike the balance between environmental harms and cleanup costs differently than distant federal bureaucrats. *See* ARCO Br. at 7, 25, 44, 49; US Br. at 15, 29, 32. They ignore that juries resolve such questions, even under their theory, for sites that haven't been designated for federal action under CERCLA. If Congress agreed with Atlantic Richfield and the United States that EPA officials alone were qualified to weigh these competing concerns, it would have preempted all state common law claims in favor of exclusive EPA authority to manage all pollution and its abatement. But it didn't.

experimentation and the information it reveals are not limited to the laboratory state. Instead, all states and the federal government benefit from seeing the results of these experiments.

Finally, federalism promotes accountability by having decision-making power as close to the people as possible. If state regulation, including common law, falls short, it is more realistic that affected citizens can seek redress through the local political process than they could if the fault was due to a misjudgment of a distant (and democratically unaccountable) agency. *See* Adler, *Letting Fifty Flowers Bloom*, *supra* at 268. Absent clear and effective lines of accountability, environmental regulation can easily go off course. An agency may be "captured" by special interests or otherwise influenced by rent-seeking behavior. Jonathan H. Adler, *Clean Politics, Dirty Profits*, *in Political Environmentalism: Going Behind the Green Curtain* 4 (Terry L. Anderson ed., 2000). Preserving the common law's role in regulating pollution mitigates these risks.

Conclusion

Preemption here would interfere with the common law's longstanding role in mitigating pollution. It would raise significant constitutional concerns under the Takings Clause, by taking private property rights for the benefit of private interests and triggering incalculable liability for federal taxpayers. And it would interfere with state authority in a field traditionally occupied by the states, undermining the benefits of environmental federalism. Nothing in CERCLA compels this result. Instead, the law's text preserves the common law claims raised here.

This Court should hold that the property-rights claims asserted in this case are not preempted and affirm the decision of the Montana Supreme Court.

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Respectfully submitted,

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