No. 17-1498

In The Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

GREGORY A. CHRISTIAN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Montana

BRIEF OF THE CLARK FORK COALITION AND MONTANA ENVIRONMENTAL INFORMATION CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI*[1]

Amici curiae, the Clark Fork Coalition and the Montana Environmental Information Center (collectively, "Montana Conservation *Amici*") bring together more than 80 years of combined experience as environmental advocates. The Clark Fork Coalition is a landowner with direct experience in managing a ranch in the heart of a Superfund site, while the Montana Environmental Information Center has played a lead role in affirming the enforceability of Montanans' constitutional right to a clean and healthful environment.

The Clark Fork Coalition is a membership-based organization whose mission is to protect and restore the Clark Fork watershed, a 14-million-acre area that encompasses the Anaconda Co. Smelter site. The removal of mining contamination from the Upper Clark Fork River Basin has been a top priority of the Coalition since its founding in 1985. Indeed, the Clark Fork Coalition spearheaded the effort to have the Clark Fork River corridor listed as a Superfund site. The Coalition owns the Dry Cottonwood Creek cattle ranch, which was the first private property along the Upper Clark Fork River to undergo Superfund cleanup and restoration. The Coalition decided to purchase Dry Cottonwood Creek

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[1] Pursuant to Supreme Court Rule 37, *amici curiae* have sought and received written consent for the filing of this brief from both Respondents and Petitioner. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund its preparation or submission.

Ranch in order to demonstrate how a Superfund cleanup and an active ranching project can productively co-exist. The Coalition continues to work closely with Montana's Natural Resource Damage Program to restore the Upper Clark Fork watershed, where legacy mining contamination has injured both private and public resources.

Founded in 1973, the Montana Environmental Information Center is one of the state's most established non-profits serving the conservation community, with a mission to ensure clean air and water for all Montanans. The Center has worked as a grassroots advocate, a public educator, and a government agency watchdog. When necessary, the Center has utilized litigation to ensure that Montana's environmental laws are enforced. It prevailed in the landmark case of *Montana Environmental Information Center v. Department of Environmental Quality*, 988 P.2d 1236 (Mont. 1999), which affirmed that citizens may enforce the Montana constitution's enumerated right to a "clean and healthful environment" as a "fundamental right" under state law. The Center is known throughout Montana and the West as a strong advocate for a clean and healthful Montana environment.

Together, the Montana Conservation *Amici* are invested in ensuring that the federal scheme under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or the "Act") and well-established state environmental protections under Montana law continue to work in harmony.

SUMMARY OF ARGUMENT

From the perspectives of a landowner in the Upper Clark Fork watershed and an environmental watchdog headquartered in the state capital of Helena, the Montana Conservation *Amici* respectfully insist that Montanans are entitled to employ every tool available—under state and federal law—to clean up their contaminated properties. Confining Respondents to a limited, federal Superfund remedy denies landowners access to supplemental, state-specific solutions that have been part of Montana law for decades.

Montana courts have long acknowledged the necessity of allowing property owners to seek restoration damages. *See Nelson v. C&C Plywood Corp.*, 465 P.2d 314, 325 (1970) (holding "that the pollution of the ground water by dumping of the glue waste is such a continuing temporary nuisance" and affirming damages for "restoring or replacing the fixtures, appliances, water supply and dwelling"); *Bos v. Dolajak*, 534 P.2d 1258, 1261 (Mont. 1975) (affirming restoration damages on a contract claim); *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007) (connecting Montanans' constitutional right to a clean and healthful environment to a restoration damages claim). Responding to contamination left behind by a century of mining practices that prevailed before the advent of modern environmental law, the Montana constitution in 1972 affirmed citizens' rights to "a clean and healthful environment." Mont. Const. art. II, § 3. The Supreme Court of Montana then confirmed that the state constitution announces "a fundamental right" that cannot be breached absent

strict scrutiny. *Mont. Envtl. Info. Ctr.*, 988 P.2d at 1246.

Barring Respondents from exercising these rights would be like limiting a physician's treatment of a chronically ill patient to only one, partially effective option. Decimated by more than a century of mining activity, the Clark Fork watershed is a patient in need of multi-faceted, comprehensive care.

Thankfully, Congress drafted CERCLA to ensure that both state and federal cleanup resources remain accessible to impacted communities. "CERCLA, it must be remembered, does not provide a complete remedial framework." *See CTS Corp. v. Waldburger*, 573 U.S. 1, 18 (2014). Three separate savings clauses confirm that state and common law remedies persist. *See* CERCLA §§ 114(a), 302(d), 310(h); 42 U.S.C. §§ 9614(a), 9652(d), 9659(h).

As then-Judge Alito observed, "[T]he language of § 114(a), the repeal of the original language of § 114(c), and the legislative history of that repeal demonstrate clearly that Congress did not intend for CERCLA to occupy the field or to prevent the states from enacting laws to supplement federal measures relating to the cleanup of hazardous wastes." *See Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 126 (3d Cir. 1991). Petitioner insists that "CERCLA sets both a floor and ceiling," Pet. Br. 50, but federal courts have held otherwise. *See New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1246 (10th Cir. 2006) ("CERCLA sets a floor, *not a ceiling*. Section 9614(a) preserves state environmental regulations which in some instances set more stringent cleanup standards.") (emphasis added) (citing *United States*

v. Akzo Coatings of Am., Inc., 949 F.2d 1409 (6th Cir.1991)).

Faced with the unambiguous language in CERCLA's savings clauses, Petitioner raises the specter of obstacle preemption, claiming that Montana's restoration damages remedy would undo EPA's cleanup efforts and that the community "might perversely face a heightened risk of exposure to hazardous substances if [R]espondents' plans became reality." *See* Pet. Br. 49. This argument, however, ignores that Montana's constitutional provisions securing a fundamental right to a "clean and healthful environment" would prohibit any restoration plans that might cause environmental damage or harm to human health. *See Cape-France Enters. v. Estate of Peed*, 29 P.3d 1011, 1017 (Mont. 2001). To ensure that state law does not conflict with the Act, the Supreme Court of Montana confirmed that "nothing in our holding here should be construed as precluding ARCO from contesting the Property Owners' restoration damages claims on its own merits." *See Atl. Richfield Co. v. Mont. Second Judicial Dist. Court*, 408 P.3d 515, 522 (2017).

The pervasive pollution problem throughout the Upper Clark Fork Superfund complex continues to impose environmental harms and threaten public health. *See* David McCumber, *Fish Kill on Clark Fork Prompts Concern Over Pace of Cleanup*, MONTANA STANDARD (Sept. 10, 2019), https://mtstandard.com/news/local/fish-kill-on-clark-fork-prompts-concern-over-pace-of/article_babb87ad-0dc4-50e0-a62a-33aa5576da2e.html (hereinafter "*Fish Kill on Clark Fork*"). The only way Montana will achieve long-term cleanup of such a thoroughly

contaminated watershed is through a combination of tools. Superfund *and* Montana's state law remedies must remain on the table.

ARGUMENT

I. A Century of Contamination in the Upper Clark Fork River Basin Demands Intensive Remediation.

Montana Conservation *Amici* are committed to leveraging both CERCLA and state law remedies to address the tragic legacy of contamination at the Anaconda Co. Smelter site. The Clark Fork River arises from its headwaters near Butte and Anaconda, and gathers waters from various tributaries for 120 miles until—near Missoula—it reaches its confluence with the Blackfoot River made famous by Norman Maclean. *See* A RIVER RUNS THROUGH IT AND OTHER STORIES (25th anniversary ed., Univ. of Chicago Press 2001).

The history of the Upper Clark Fork watershed is that of a hard-working river system, supporting Butte's copper mining industry from the late 19th century through much of the 20th century. *See* Gordon M. Bakken, *Montana, Anaconda, and the Price of Pollution,* 69 THE HISTORIAN 36, 37 (2007). The Anaconda copper mine traces its origins to an enterprise begun in 1880, *id.*, which continued until Petitioner closed the site in 1983. *Id.* at 46. The Clark Fork River and its tributaries were relied upon as a means to power the mines, fuel smelters, and transport waste—all in support of Butte's massive copper mining industry. *Id.* at 47.

Over the course of a century, mine operations and natural processes spread mine waste across much of western Montana. Mine tailings comprised of heavy metals worked their way into rivers and streams and left an expansive, toxic footprint across the watershed. Moonscape-like dead zones, known as "slickens," remain. *See* U.S. Envtl. Protection Agency Region 8, CLARK FORK RIVER OPERABLE UNIT OF THE MILLTOWN RESERVOIR/CLARK FORK RIVER SUPERFUND SITE: RECORD OF DECISION, *Part 1: Declaration*, at 1-5 (Apr. 2004) ("The floodplain is severely impacted by the presence of mining wastes. Tailings materials present in the root zone of riparian area soils are toxic to terrestrial plants. The most obvious instances of this toxicity are slickens areas—areas of exposed tailings that generally lack vegetation.").

Montana Conservation *Amici* have been involved for many decades in assisting with clean up at three, separately designated Superfund sites (referred to as the Upper Clark Fork Superfund complex).[2] The Clark Fork Coalition purchased a 2,300 acre working cattle ranch in 2005 to serve as a model for

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[2] The three sites within the Upper Clark Fork Superfund complex are:

1) *Superfund Site: Silver Bow Creek/Butte Area, Butte, MT,* https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0800416 (last visited Oct. 16, 2019);
2) *Superfund Site: Milltown Reservoir Sediments, Milltown, MT,* https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0800445 (last visited Oct. 16, 2019); and
3) *Superfund Site: Anaconda Co. Smelter, Anaconda, MT,* https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0800403) (last visited Oct. 16, 2019).

remediation. The Montana Environmental Information Center has been engaged in Butte-area Superfund cleanups for many years, and has worked in the Montana legislature to defend Montana's mini-Superfund law, the Montana Comprehensive Environmental Cleanup and Responsibility Act, Mont. Code Ann. § 75-10-705 *et seq.* (West 1989).

Despite the work of Montana Conservation *Amici* and many other stakeholders, contamination persists at dangerous levels. A recent news report of a significant fish kill in the Clark Fork River has been attributed by state officials to contaminated rain water that overwhelmed berms built by Petitioner in the 1980s to contain the toxic "slickens." *See* McCumber, *Fish Kill on Clark Fork*, *supra* p. 5. The event highlights the pervasiveness of mining waste that continues to cause harm.

Nathan Cook, a biologist with Montana Fish, Wildlife and Parks, observed:

> It's one thing to read all the old reports and newspaper stories about fish kills, but to see it with your own eyes is much different. It shows how vulnerable the river is … It just brings home how much of a problem these metals are, and how important this cleanup is.

Id. (alteration in original). *See also* Edward O'Brien, *Biologists Suspect Mine Waste in Clark Fork Fish Kill*, MONTANA PUBLIC RADIO (Sept. 9, 2019), https://www.mtpr.org/post/biologists-suspect-mine-waste-clark-fork-fish-kill.

The harm is not limited to heavy metal contamination impacting trout populations and other ecological damage. A recent scientific study

confirms enduring and severe human health effects as well. Between 2000 and 2016—*i.e.,* many years into EPA's work in the area—"[c]ancers, cerebro- and cardiovascular diseases (CCVD), and organ failure were elevated" for one county within the Anaconda Co. Smelter site and a contiguous county within the Silver Bow Creek/Butte Area Superfund site. *See* B. Davis, S. McDermott, *et al.*, *Population-based Mortality Data Suggests Remediation is Modestly Effective in Two Montana Superfund Sites,* 41 ENVIRONMENTAL GEOCHEMISTRY AND HEALTH 803 (2019) (hereinafter "Davis & McDermott, *Mortality Data from Montana Superfund Sites*").

The researchers' most relevant finding for the purposes of this litigation is as follows: "Our study suggests that while remediation is conveying some reduction in negative health consequences, these efforts have not protected the residents of these two counties as a whole, *and further remediation is required to protect human health*." *Id.* at 810-11 (emphasis added). Respondents' claim for restoration damages must be evaluated as a component of the "further remediation" that research tells us is necessary.

II. Restoration Damages Claims Are an Essential Part of Protecting Montanans' Fundamental Right to a Clean and Healthful Environment.

Restoration provides a remedy for common law nuisance claims for damages to real property. In Montana, these common law legal doctrines were invoked as early as 1870, nineteen years before statehood. *See Lincoln v. Rodgers*, 1 Mont. 217

(1870) (holding that mine operators could not allow tailings to run unrestricted onto downstream property). In recent decades, restoration damages claims have built upon Montana's constitutional guarantee of a "clean and healthful environment," which stands as one of the strongest environmental protections among state constitutional provisions. It is onto this well-established body of state law that Congress added CERCLA, with savings clauses that guarantee the federal Act will supplement—but not supplant—Montana's pre-existing, common law damage remedies. *See* CERCLA §§ 114(a), 302(d), § 310(h); 42 U.S.C. §§ 9614(a), 9652(d), 9659(h).

Almost as soon as mining took hold in Montana, nuisance suits for environmental damages followed. *See, e.g., Durfee v. Granite Mountain Mining Co.*, 33 P. 3, 4 (Mont. 1893) (debris from milling operation contaminating downstream properties); *Watson v. Colusa-Parrot Mining & Smelting Co.*, 79 P. 14, 14 (Mont. 1905) (farmers downriver of a smelting operation alleging that the mine operator had "polluted the water … to such an extent as to render such waters unfit for irrigation or domestic use"); *Bliss v. Anaconda Copper Mining Co.*, 167 F. 342, 350 (D. Mont. 1909) (farmers complaining "that such quantities of sulphur [*sic*] and arsenic were discharged into the air through the several smoke stacks … that the crops and live stock [*sic*] in the valley were being poisoned").

In recent decades, Montana courts have accepted that the cost of making a plaintiff whole (*i.e.,* repairing damaged property) may very well exceed the market value of the property itself. *See Bos v. Dolajak*, 534 P.2d at 1261 (upholding a substantial damages award for the replacement of an unfinished

silo because plaintiffs were dairy farmers and "the inherent nature of their operation require[d] an integrated program" with reliance on the silo "prior to the spring growing season."). Thus, as Petitioner concedes, "[u]nder 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." *See* Pet. Br. 43 (quoting *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1087 (Mont. 2007)).

Although *Sunburst* is the critical case in understanding Montana law on the right to restoration damages, the seeds for that decision were planted eight years earlier in *Montana Environmental Information Center v. Department of Environmental Quality*, 988 P.2d 1236 (Mont. 1999). There, the Supreme Court of Montana confirmed, "[T]he right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution … ." *Mont. Envtl. Info. Ctr.*, 988 P.2d at 1246. The state constitution further provides, "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. IX, § 1. Relying on the text of the state constitutional provisions and their legislative history, the Supreme Court of Montana held that the constitution was intended by its drafters "to be the strongest environmental protection provision found in any state constitution." *Id.* at 1246.

Thus, the state constitution does not "merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment;" it goes further. *Id.* at 1249.

A clean and healthful environment mandates "adequate remedies … to prevent unreasonable degradation of natural resources." *Id.* The Supreme Court of Montana has explained both the force of this constitutional guarantee and the need for it given Montana's long history with extractive industries:

> For better and for worse, many companies in the business of natural resource development leave evidence of their practices in Montana long after such companies cease to exist. Montana's unique governing body of law reflects the value that Montanans place on protection, promotion, and restoration of the environment. The Montana Constitution provides that all persons have a 'right to a clean and healthful environment.' Mont. Const. art. II, § 3. The right to a clean and healthful environment constitutes a fundamental right.

State ex. rel. Dep't of Envtl. Quality v. BNSF Ry. Co., 246 P.3d 1037, 1046 (Mont. 2010). *See also Cape-France Enters. v. Estate of Peed*, 29 P.3d 1011, 1016-17 (Mont. 2001) ("Montana's Constitution, Article II, Section 3, guarantees all persons in this state the right to a clean and healthful environment. This guarantee is a fundamental right that may be infringed only by demonstrating a compelling state interest.").

With the state constitutional framework established, the *Sunburst* court was tasked with

evaluating claims brought by a school district and private property owners for public nuisance and violation of the state constitutional right to a clean and healthful environment, all stemming from a gasoline refinery's alleged contamination of soil and groundwater. *Sunburst,* 165 P.3d at 1084-86. Under the state's analogue to CERCLA, the Montana Comprehensive Environmental Cleanup and Responsibility Act, state environmental regulators had merely ordered the oil company defendant to undertake "monitored natural attenuation," *i.e.,* observe the migration of underground pollutants but bear no responsibility for mitigating the harm. *Id.* at 1084. The state court ruled that the school district was entitled to far more: "If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation." *Id.* at 1087. Thus, the court held that "an award of restoration damages must be available to compensate a plaintiff fully for damages to real property when diminution in value fails to provide an adequate remedy." *Id.* at 1088. Critical to the court's holding was its recognition that Montana's mini-Superfund law's "focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law." *Id.* at 1092.

Following *Sunburst*, plaintiffs in Montana courts have recovered restoration damages in varied circumstances, including when the damages sought exceeded the value of the injured property. In *McEwen v. MCR, LLC*, 291 P.3d 1253, 1269 (Mont. 2012), for example, the court affirmed that private property owners could "pursue restoration costs as

an appropriate measure of damages to their property" stemming from poor management of a natural gas compressor station. Although the "McEwens' contaminated property had an estimated value of between $850 and $2400," the court still allowed pursuit of restoration damages in the range of "$138,000 and $2.2 million," provided the McEwens could establish "personal reasons" for the restoration, including a showing that they "genuinely intend[ed] to restore the property." *Id.* at 1261. *See also Lampi v. Speed*, 261 P.3d 1000, 1004 (Mont. 2011) ("[c]ertain cases warrant an award of restoration damages in excess of the property's diminution in market value").

These cases also demonstrate the broad availability of common law remedies in situations analogous to the one faced by Respondents here. *See, e.g., Burley v. Burlington N. and Santa Fe Ry. Co.*, 273 P.3d 825, 844 (Mont. 2012) (on a certified question from the U.S. District Court, holding that a "tortfeasor who impairs the property rights of another should not prevail simply because its pollution or interference with another's property takes a lengthy amount of time or a large amount of money to abate.").

Crucially, as the *Sunburst* court confirmed, Montanans' historical right to seek restoration damages works in concert with the constitutional guarantee of a clean and healthful environment. *See Sunburst,* 165 P.3d at 1093 ("We … allow for the recovery of restoration damages … [which] would restore a private party back to the position that it occupied before the tort. An award of restoration damages serves to ensure a clean and healthful environment.").

Simply put, restoration damages are available to compensate plaintiffs for a variety of tortious acts under Montana law and—because they guarantee greater environmental protections than CERCLA alone can provide—they are precisely the type of common law obligations that CERCLA's savings clauses were designed to preserve. *See New Mexico,* 467 F.3d at 1246 (holding that CERCLA "preserves state environmental regulations which in some instances set more stringent cleanup standards.") (internal citation omitted). What is more, epidemiological research confirms that these additional remedies may be necessary to bring the Anaconda Co. Smelter site back to health. *See* Davis & McDermott, *Mortality Data from Montana Superfund Sites*, *supra* p. 9, at 810-12.

III. CERCLA Preserves a Montana Restoration Damages Remedy that Augments EPA's Cleanup Efforts.

Petitioner acknowledges that CERCLA's 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," leaving Petitioner to argue "impossibility or obstacle preemption." Pet. Br. 52. The Court's well-established jurisprudence on preemption, however, strongly counsels against second-guessing Montana's law on restoration—especially given that CERCLA explicitly envisions an important role for the states in augmenting the cleanup of hazardous waste sites.

A. The Court's Preemption Cases Require a "Clear Manifestation" of Congressional Intent to Override State or Common Law Remedies.

"This Court has sometimes used different labels to describe the different ways in which federal statutes may displace state laws—speaking, for example, of express, field, and conflict preemption. But these categories 'are not rigidly distinct.'" *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (Gorsuch, J.) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U. S. 363, 372, n. 6 (2000)). *See also Virginia Uranium*, 139 S. Ct. at 1911-12 (Ginsburg, J.) ("This Court has delineated three circumstances in which state law must yield to federal law. First, and most obvious, federal law operates exclusively when Congress expressly preempts state law. Second, state law can play no part when 'Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.' Third, state law is rendered inoperative when it 'actually conflicts with federal law,' as when a private party cannot 'comply with both state and federal requirements.'") (internal citations omitted).

Justice Gorsuch's opinion in *Virginia Uranium* counsels that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Virginia Uranium*, 139 S. Ct. at 1901 (quoting *Puerto Rico*

Dept. of Consumer Affairs v. ISLA Petroleum Corp., 485 U.S. 495, 503 (1988)). *See also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 265-90 (2000) (outlining several critiques of obstacle preemption doctrine). This is because "[i]t will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (internal quotation marks and citation omitted). Where Congress chooses to regulate in an area traditionally reserved to the states, as is the case here, the federal preemption analysis begins "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

B. CERCLA's Savings Clauses Preserve State Remedies That Will Aid in Cleaning Up Toxic Waste Sites.

Where a state has enshrined a clear preference for greater environmental restoration than federal law provides, the state's preference remains preserved. *See* CERCLA § 114(a), 42 U.S.C. §9614(a) ("Nothing in [the Act] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."). *See also* CERLCA §§ 302(d), 310(h); 42 U.S.C. §§ 9652(d), 9659(h); *CTS Corp.*, 573 U.S. at

18 ("CERCLA, it must be remembered, does not provide a complete remedial framework.").

Conversely, when a federal statute has been "'drawn with meticulous regard for the continued existence of state power,'" courts "must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015) (quoting *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 517-18 (1947)). The text of the federal statute at issue here could not have been drafted more clearly. Three distinct savings clauses demonstrate that Congress enacted CERCLA "with meticulous regard" for the role of the states.

Thus, the Third, Tenth, and Ninth Circuits have all recognized a broad array of state remedial programs that are preserved by CERCLA. *See Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 126 (3d Cir. 1991) (Alito, J.) ("[T]he language of § 114(a) [and the repeal of another CERCLA provision] demonstrate clearly that Congress did not intend for CERCLA … to prevent the states from enacting laws to supplement federal measures relating to the cleanup of hazardous wastes."); *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1246 (10th Cir. 2006) ("CERLCA's savings clauses … undoubtedly preserve a quantum of state legislative and common law actions and remedies related to the release and cleanup of hazardous waste."); *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 941 (9th Cir. 2002) ("CERCLA contains three separate savings clauses to preserve the ability of states to regulate in the

field of hazardous waste cleanup."); *id.* at 956 ("In sum, we hold that CERCLA … do[es] not preempt the field of hazardous waste remediation, either explicitly or by implication.").

CERCLA's savings clauses are particularly concerned with state responses to the continued release of pollutants. The first savings clause, CERCLA § 114(a), ensures that nothing in the federal law "shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to" the ongoing release of hazardous and toxic substances from an identified Superfund area. The second clause, CERCLA § 302(d), includes similar protections for state law remedies designed to address "releases of hazardous substances or other pollutants or contaminants." The third clause, CERCLA § 310(h), is even broader and notes that the Act "does not affect or otherwise impair the rights of any person under Federal, State, or common law," except in limited circumstances not applicable here.

Continued release of pollutants remains a particularly vexing problem throughout the Upper Clark Fork Superfund complex, as a September 2019 fish kill event demonstrates. *See* McCumber, *Fish Kill on Clark Fork*, *supra* p. 5. Toxins are still migrating from river banks and "slickens" into downstream habitats. *Id.* Public health studies confirm that even decades after EPA delineated the Anaconda Co. Smelter site, "mortality ratios for cancer and organ failure were significantly elevated for the case counties." *See* Davis & McDermott, *Mortality Data from Montana Superfund Sites*, *supra* p. 9, at 812.

The directly impacted communities are entitled to relief. State remedies must remain part of the cleanup enterprise, as "CERCLA sets a floor, not a ceiling." *New Mexico*, 467 F.3d at 1246. For good reason, CERCLA preserves Montana's unique, state law remedies aimed at environmental restoration. *Cf. Sunburst,* 165 P.3d at 1092 (holding that Montana's mini-Superfund law does not preempt "a common law claim that seeks to recover restoration damages to remediate contamination beyond the statute's health-based standards.").

C. A State Restoration Award to Guarantee a Clean and Healthful Environment Complements CERCLA and is not a "Challenge" to EPA's Remediation Scheme.

Perhaps mindful of the hurdles imposed on it by the Act's savings clauses, Petitioner attempts to identify some specific, statutory text that might nevertheless carry the day. It looks to CERCLA § 113(h), 42 U.S.C. § 9613(h), which is unremarkable in barring most "challenges" to an EPA-mandated remediation plan. *See* Pet. Br. 27-28. Yet this provision was *never* intended to inhibit supplemental state law remedies, as the legislative history makes clear.

Congress' purpose in amending CERCLA to add § 113(h) was to bar polluting parties who are financially responsible for cleanup "from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities." H.R. REP. NO. 99-253, pt.1 (1985); *see also United States v. Colorado*, 990 F.2d 1565, 1576 (10th

Cir. 1993) (quoting the House Report). The committee of conference on the Superfund Amendments and Reauthorization Act of 1986 ("SARA") further explained, "New section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants." H.R. REP. NO. 99-962, at 224 (1986) (Conf. Rep.); *see also Samples v. Conoco, Inc.*, 165 F.Supp. 2d 1303, 1312 (N.D. Fla. 2001) (quoting the Conference Report).

Senator Robert Stafford (R-Vermont), a member of the committee of conference on SARA confirmed:

> The time of review of judicial challenges to cleanups is governed by 113(h) for those suits to which it is applicable. It is not by any means applicable to all suits. For purposes of those based on State law, for example, 113(h) governs only those brought under State law which is applicable or relevant and appropriate as defined under section 121. *In no case is State nuisance law, whether public or private nuisance, affected by 113(h).*

132 Cong. Rec. 28406, 28410 (1986) (emphasis added); *see also Samples*, 165 F.Supp.2d at 1312 (quoting the Congressional Record).

This legislative history is congruent with broad acceptance of the common law remedies at issue here. Restoration damages to real property were expressly addressed in the Restatement (Second) of Torts published in 1979—just one year prior to the

original enactment of CERCLA. *See* RESTATEMENT (SECOND) OF TORTS § 929 cmt. b (AM. LAW INST. 1979). Montana has gone on to adopt this remedy for certain common law nuisance claims. *Sunburst,* 165 P.3d at 1088 ("We now join other jurisdictions in adopting the flexible guidelines of the Restatement (Second) of Torts § 929, and comment b, for the calculation of damages to real property to ensure that plaintiffs receive a proper remedy for their injuries.").

Here, Petitioner's argument on CERCLA § 113(h) boils down to a claim that any restoration damages award would risk causing *more* environmental harm. *See* Pet. Br. 29 (insisting that a restoration damages claim "call[s] into doubt EPA's judgment about the appropriate soils remedy, as well as EPA's judgment that [R]espondents' plan could spread arsenic-laden soil to the winds").

This is the telltale error in Petitioner's case. The *only* way a restoration damages claim could worsen Anaconda's legacy of environmental contamination in the Clark Fork River Basin would be for Montana courts to grossly misapply their own laws, constitution, and precedents. Montana's constitutional provisions securing a fundamental right to a "clean and healthful environment" would serve as a bar to any restoration plans that might cause environmental damage or harm to human health. *See Cape-France Enters.*, 29 P.3d at 1017 ("In light of these two provisions of Montana's Constitution [Mont. Const. art. II, § 3 and art. IX, § 1], it would be unlawful for Cape–France, a private business entity, to drill a well on its property in the face of substantial evidence that doing so may cause

significant degradation of uncontaminated aquifers and pose serious public health risks.").

To the extent that Petitioner and the EPA are troubled by Respondents' proposals to remediate their own private properties, Montana law provides a straightforward solution: present evidence on the alleged harm to the Montana court overseeing the restoration damages claim. *See Atl. Richfield Co.*, 408 P.3d at 522 ("nothing in our holding here should be construed as precluding ARCO from contesting the Property Owners' restoration damages claim on its own merits," and "Property Owners are not seeking to compel EPA to do, or refrain from doing, any action.").

Following the state court process to its conclusion is the federalism-respecting solution. It will preserve EPA's authority to execute its cleanup plan under Superfund while adhering to CERCLA's savings clauses that unambiguously allow state nuisance claims to proceed in harmony with the federal regime. *See CTS Corp.*, 573 U.S. at 4 (In enacting CERLCA in 1980, Congress "provided a federal cause of action to recover costs of cleanup from culpable entities but not a federal cause of action for personal injury or property damage.").

CONCLUSION

In a much earlier case addressing contamination caused by copper mining, Justice Holmes reflected that a state government should have "the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. … The states, by entering the Union, did not sink to the

position of private owners, subject to one system of private law." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907). In this case, the Supreme Court of Montana has articulated the state's interest in upholding Montanans' right to a clean and healthful environment as a fundamental right, and in allowing claims for restoration damages to proceed in order to effectuate that right.

While CERCLA is intended to provide a comprehensive scheme for mitigating environmental harms of national concern, Montana's restoration damages remedy must be permitted to augment the federal Act. *See CTS Corp.*, 573 U.S. at 18. Montanans' right to a clean and healthful environment, enshrined in the state constitution, should not be undercut by a federal statute that explicitly preserves a state's authority to impose "additional liability or requirements" on polluters. *See* CERCLA § 114(a), 42 U.S.C. §9614(a).

Montana Conservation *Amici* ask that the judgment of the Supreme Court of Montana be affirmed.

Respectfully submitted,

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