No. 17-1498

In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

GREGORY A. CHRISTIAN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF AMICI CURIAE OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MISSISSIPPI, NEW JERSEY, NEW YORK, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Congress specifically considered and failed to enact the very sort of preemption petitioner describes	6
A. Early legislative efforts to address hazardous waste releases failed because the House and Senate were unable to reach agreement on preemption	6
B. The Congress that enacted CERCLA made a deliberate choice not to preempt state laws	13
II. Petitioner's arguments for conflict preemption are without merit	19
A. Montana's restoration damages remedy does not create an "obstacle" to fulfillment of CERCLA's purpose	20
B. Compliance with federal and Montana law is not "impossible"	26
CONCLUSION	30

TABLE OF AUTHORITIES

Page

Cases:

Arizona v. *United States*,
567 U.S. 387 (2012) 21

Bates v. *Dow Agrosciences LLC*,
544 U.S. 431 (2005) 21

Cipollone v. *Liggett Group*,
505 U.S. 504 (1992) 5, 19

Crosby v. *National Foreign Trade Council*,
530 U.S. 363 (2000) 21

CSX Transp., Inc. v. *Easterwood*,
507 U.S. 658 (1993) 21

CTS Corp. v. *Waldburger*,
573 U.S. 1 (2014) 20, 22

Exxon v. *Hunt*,
475 U.S. 355 (1986) 18

Gade v. *National Solid Wastes Mgmt. Ass'n*,
505 U.S. 88 (1992) 21

Geier v. *American Honda Motor Co., Inc.*,
529 U.S. 861 (2000) 22, 24, 25, 26

Georgia v. *Tennessee Copper Co.*,
206 U.S. 230 (1907) 5

Gregory v. *Ashcroft*,
501 U.S. 452 (1991) 1

Massachusetts v. *E.P.A.*,
549 U.S. 497 (2007) 5

Medtronic, Inc. v. *Lohr*,
518 U.S. 470 (1996) 1, 5, 25

TABLE OF AUTHORITIES – Continued

Page

Merck Sharp & Dohme Corp. v. *Albrecht*,
139 S. Ct. 1668 (2019) 26, 27

Mutual Pharmaceutical Co. v. *Bartlett*,
570 U.S. 472 (2013) 28

Phillips Petroleum Co. v. *Mississippi*,
484 U.S. 469 (1998) 5

Rice v. *Santa Fe Elevator Corp.*,
331 U.S. 218 (1947) 20, 21

Silkwood v. *Kerr-McGee Corp.*,
464 U.S. 238 (1984) 23

Spriestma v. *Mercury Marine*,
537 U.S. 51 (2002) 23

Virginia Uranium, Inc. v. *Warren*,
139 S. Ct. 1894 (2019) 21

Wyeth v. *Levine*,
555 U.S. 555 (2009) 4, 5, 22, 26

Constitution, Statutes, Regulations, and Rules:

42 U.S.C. § 9614(a) 2, 24, 25, 26

42 U.S.C. § 9614(b) 22

42 U.S.C. § 9652(d) 2, 24, 25

42 U.S.C. § 9655 17

42 U.S.C. § 9658(a)(1) 22

42 U.S.C. § 9659(h) 2, 19, 24, 25

U.S. Const. art. VI, cl. 2 1

TABLE OF AUTHORITIES – Continued

Page

Miscellaneous:

Committee Print, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510*, (1983) ....*passim*

Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability (Superfund) Act of 1980*, 8 Colum. Envtl. Law J. 1 (1982)..............................16

INTEREST OF THE AMICI CURIAE

"States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). Valid federal statutes are, of course, "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. But "because the States are independent sovereigns in our federal system," this Court "ha[s] long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc*. v. *Lohr*, 518 U.S. 470, 485 (1996). While the specific facts of this case concern a dispute between private parties, petitioner's arguments seek broad preemptive relief that could interfere with the delicate "constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460 (quotation marks omitted).

States have a strong interest in ensuring that their citizens (and the State itself) are compensated for injuries caused by releases of hazardous materials and in preserving their authority to address, respond to, and remediate harm from environmental contamination. In addition, States, apart from private litigants, bring claims for restoration of natural resources pursuant to CERCLA and in their *parens patriae* and public trust capacities. States thus have an interest in ensuring that the Court's resolution of this case does not call into question actions taken by States as trustees of their natural resources, as well as ensuring

that the appropriate balance of authority between the Federal Government and the States as independent sovereigns is maintained.

SUMMARY OF ARGUMENT

Petitioner paints a picture of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that is predicated on federal primacy. Indeed, the first substantive sentence of petitioner's brief asserts that Congress had one (and only one) overriding goal in enacting CERCLA: "plac[ing] the federal government in charge of remediating hazardous waste sites across America from start to finish." Pet. Br. 3.

That sort of single-minded purpose, however, appears nowhere in the statute Congress enacted. To the contrary, CERCLA's text (and the process that led to it) reveals that Congress also aimed to preserve the States' traditional role in addressing environmental contamination. To that end, the statutory text specifically disclaims any intent to prevent States from "imposing . . . additional liability or requirements with respect to the release of hazardous substances" within their borders, 42 U.S.C. § 9614(a), or to "modify *in any way* the obligations or liabilities [existing] under other Federal or State law," 42 U.S.C. § 9652(d) (emphasis added); see also 42 U.S.C. § 9659(h) ("This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with

respect to the timing of review . . . or as otherwise provided in section 9658 of this title (relating to actions under State law).").

Petitioner insists that CERCLA's savings clauses are inapplicable here because it does not challenge respondents' ability to obtain all forms of state law damages for pollution to their property.[1] Pet. Br. 51, 53–54. The issue, petitioner claims, is the specific *type* of damages in question. According to petitioner, Montana's restoration damages remedy[2] is subject to conflict preemption—both because it stands as an obstacle to CERCLA's "full purposes and objectives," *id.* at 47; and

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[1] Amici limit their arguments to the third question presented.

[2] Consistent with the parties' briefs, amici use the term "restoration damages" to describe the remedy authorized by Montana law at issue in this case. That term, however, should not be confused with the remedies States are specifically authorized to seek under CERCLA (as well as through state statutory and common-law authorities). CERCLA authorizes States, as "trustees of natural resources," to seek "damages for injury to, destruction of, or loss of natural resources," including the costs of restoring such resources. 42 U.S.C. § 9607(a)(4)(C), (f); see also 43 C.F.R. § 11.14(ll) (defining "restoration" to mean "actions undertaken to return an injured [natural] resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties"). Because the questions presented in this case concern CERCLA's impact on a Montana-specific remedy, States' ability to bring claims in their capacity as sovereigns is not at issue. Accordingly, regardless of how the Court resolves this case, the Court should make clear that its ruling does not implicate actions taken by States as trustees of their natural resources.

because it is "impossible" to comply with both federal and state law, *id.* at 40.

That argument fails. Petitioner distorts CERCLA's language and purpose, transforming it from a statute premised on cooperative federalism into one that would empower the Federal Government to the exclusion of the States. In reality, nothing in CERCLA comes close to approaching the "clear and manifest purpose" necessary to establish conflict preemption in a "field . . . the States have traditionally occupied." *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009) (quotation marks and citation omitted). Contrary to petitioner's assertion, the fact that Montana's restoration damages remedy could result in additional cleanup beyond what EPA requires is not an obstacle to the purposes or objectives of the federal scheme. Nor is it impossible for petitioner to meet its obligations under CERCLA and Montana law. And even if, in rare circumstances, CERCLA might preclude *parts* of a restoration damages plan under principles of conflict preemption, petitioner would not be entitled to the relief it seeks here: a grant of summary judgment on the basis that the statute categorically bars *any and all* private claims for restoration damages available under Montana law.

ARGUMENT

It is difficult to conjure more traditional areas of state concern than the regulation of real property and

the protection of natural resources within a State's borders. As this Court has acknowledged, States in their sovereign capacity have "an interest independent of and behind the titles of [their] citizens, in all the earth and air within [their] domain. [They have] the last word as to whether [their] mountains shall be stripped of their forests and [their] inhabitants shall breathe pure air." *Massachusetts* v. *E.P.A.*, 549 U.S. 497, 518–19 (2007) (quoting *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). In addition, "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 475 (1998).

Where (as here) "Congress has legislated . . . in a field which the States have traditionally occupied," this Court "assum[es] that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation marks and citation omitted). This "presumption against the pre-emption of state police power regulations," *Cipollone* v. *Liggett Group*, 505 U.S. 504, 518 (1992), applies not only to the "question whether Congress intended any pre-emption at all" but also "to questions concerning the scope of its intended invalidation of state law," *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996).

CERCLA reflects no "manifest purpose" to effect the sweeping preemption urged by petitioner. To the

contrary, the statute's text and background confirm Congress's considered legislative judgment that States play an important role in addressing, responding to, and remediating environmental disasters. Petitioner's preemption arguments invite this Court to second-guess that judgment and to ignore CERCLA's text, purpose, and extensive legislative history in the process.

I. Congress specifically considered and failed to enact the very sort of preemption petitioner describes

CERCLA was the culmination of a multi-year, multi-Congress effort to address releases of hazardous substances. Throughout that effort, members of Congress intensely debated the proper role for the States in addressing harm from contaminated sites. What emerged from those efforts is a statute that specifically preserves the States' traditional authority to respond to environmental disasters while also empowering the Federal Government to aid in that effort.

A. Early legislative efforts to address hazardous waste releases failed because the House and Senate were unable to reach agreement on preemption

1. In the 95th Congress (which lasted from January 3, 1977, until January 3, 1979), the House and Senate considered multiple bills that would have addressed liability and compensation for oil spills and releases of hazardous substances. Some of these bills

contained broad preemption provisions that would have had the sweeping effect petitioner urges here. Others, in contrast, contained savings clauses like those that eventually made their way into CERCLA.

a. At least two bills the 95th Congress considered included language that would have expressly preempted state laws. For example, a House proposal to address oil spills stated: "Except as provided in this title . . . no action may be brought in any court of the United States, or of any State or political subdivision thereof, for damages for an economic loss described in [the bill], a claim for which may be asserted under this title." H.R. 6803, sec. 110(a), 95th Congress, 2d Sess. (1978). A Carter Administration proposal contained a nearly identical preemption provision, stating that "[n]o action may be brought in any court of the United States or of any State or political subdivision thereof, for damages for an economic loss or cost described in . . . this title, a claim for which may be asserted under this title." S. 1187, sec. 110(a), 95th Congress, 2d Sess. (1978).

b. In contrast, two Senate bills contained no preemption provisions. Instead, those bills specifically disclaimed preemption using language similar to that ultimately adopted in CERCLA. For example, Senate Bill 2900 provided that "[n]othing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the discharge of oil or hazardous substances within such state." S. 2900, sec. 7(a), 95th Congress, 2d Sess. (1978) (as introduced Feb. 6, 1978). Similarly,

Senate Bill 2803 stated: "Except as provided [herein] this Act shall not be interpreted to preempt the field of liability or to preclude any State from imposing additional requirements or liability for damages and cleanup costs, within the jurisdiction of such State, resulting from a discharge of oil." S. 2803, sec. 18(a), (b), 95th Congress, 2d Sess. (1978) (as reported by the Committee on Commerce, Science, and Technology).

Both Senate bills included provisions that would have barred the States from demanding contributions to state funds maintained for the same purpose as the federal fund. See S. 2900, sec. 7(b)(1) (as introduced) (barring "contribut[ions] to any public fund the purpose of which is to pay compensation for loss or damages resulting from discharge of oil or hazardous substance"); see also S. 2803, sec. 18(b), (as reported by the Committee on Commerce, Science, and Technology) (prohibiting states from mandating "contribut[ions] to any fund . . . the purpose of which is to pay compensation for any loss which may be compensated under this Act"). Senate Bill 2900, however, would have preserved existing state funds. S. 2900, sec. 7(b)(2).

2. Debates over preemption took center stage as Congress considered the proposed bills. The Chairman of the relevant subcommittee of the Senate Committee on Environment and Public Works identified preemption of state laws as the first of several questions warranting a "concentrated look" in connection with the superfund legislation. See Hearing Before the Subcommittee on Environmental Pollution of the

Committee on Environment and Public Works on S. 2900, United States Senate, 95th Cong., 2d Sess., at 1 (Apr. 17, 18, and May 24, 1978) (S. 2900 Hearing). Consistent with the Chairman's statement, witnesses hotly debated the appropriate role for state laws in the new federal scheme. See generally *id.*;[3] see also Sen. Rep. 95-1152, 95th Cong., 2d Sess., at 20 (Aug. 25, 1978) (Senate Report 95-1152) ("[P]reemption is perhaps the most difficult and sensitive issue raised by a Federal liability and compensation regime. . . . The Committee received more testimony, more correspondence, and more opinions on this single issue than on any other.").

On one side, the Executive Branch and industry groups pushed hard for broad federal preemption. The Carter Administration highlighted the preemptive effect of its bill (S. 1187) and the House bill (H.R. 6803), noting: "What these bills do preempt are actions under State law, whether in State or Federal court, that could be brought under this act." S. 2900 Hearing at 5. Such preemption, the Administration asserted, was "essential to a truly comprehensive nationwide . . . pollution liability and compensation system" and "[a]ny other less comprehensive preemption scheme w[ould] only add to the chaos of State and Federal laws on this subject." *Id.* Industry witnesses likewise complained about the express lack of preemption in Senate Bills 2803 and 2900, asserting "that conflicting Federal, State and

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[3] Although these statements and testimony were presented at a hearing ostensibly dedicated to Senate Bill 2900, witnesses addressed the various competing bills under consideration.

local laws and regulations reduce the effectiveness of cleanup programs and compensation plans." S. 2900 Hearing at 764. While acknowledging that "all of the referenced bills seek to establish a comprehensive federal system of liability, defenses and settlement of claims," industry witnesses noted that "only the Administration Bill . . . and the House bill . . . establish the primacy of the Federal Regime." *Id.*[4]

On the other side of the ledger, the States were equally committed to ensuring that the preemption provisions of the House bill and the Administration bill did not become law. As Virginia's Governor explained, the Commonwealth "has a direct interest in regulating conduct that can injure or destroy coastal resources. . . . If federal law were to preempt State authority in this area, the deterrent effect of State regulation would be severely weakened or lost." S. 2900 Hearing at 706.

Representatives from Maryland echoed that sentiment, telling members of Congress that "the issue of

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[4] See also *id.* at 248 (industry association arguing that "oil spill pollution liability should be governed exclusively by Federal law"); *id.* at 583 ("States should be totally preempted from legislating or regulating in this oil spill and cleanup fund area. Their efforts are duplicative, conflict with Federal law, are uneconomical, and for the added expense, provide no additional or improved environmental protection than we can provide under uniform national law."); *id.* at 606 ("In the field of pollution legislation, we feel that preemption by the Federal Government is one of the most pressing needs. Underwriters have found it impossible to provide insurance coverage to meet all of the varying standards and limits of liability provided in the laws of the several States.").

preemption of state law is of prime concern." S. 2900 Hearing at 692. "States . . . with the personnel and equipment resources to assume the responsibilities of rapid response," Maryland asserted, "should be permitted to exercise the capability to the fullest." *Id.* North Carolina likewise "oppose[d] total federal preemption of state law in these matters," explaining that "[a]ny federal act on oil spill liability should . . . allow for direct recovery by the state without reference to limitations set by federal law." *Id.* at 703.

California and New Jersey specifically objected to provisions preempting contributions to state funds. Both States agreed, however, that "[s]uch a double recovery prohibition would . . . appear preferable to the additional preemption language which appears in [the House bill] . . . [and] states that[,] except as provided by the bill[,] no action may be commenced in state or federal court for damages for an economic loss, a claim for which may be asserted under the bill." S. 2900 Hearing at 647; see also *id.* at 477 (New Jersey noting its support for S. 2900, which called for the lowest level of preemption); see also *id.* at 822 (representatives from New York stating: "We are . . . impressed with the limited preemption of State Programs (especially the preservation of existing State compensation funds)" in S. 2900).

3. Months after the hearings, the Senate Committee on Environment and Public Works reported out a revised version of Senate Bill 2803 "amended with the text of S. 2900." Senate Report 95-1152 at 2. The amended bill retained the savings clause originally

found in Senate Bill 2900. See S. 2803, sec. 7, 95th Cong. 2d Sess. (1978) (as amended Aug. 25, 1978) ("Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the discharge of oil or hazardous substances within such State."). The bill, however, omitted the provision prohibiting States from mandating contributions to their own funds. See Senate Report 95-1152 at 22. Describing that decision, and explaining its unwillingness to adopt the sort of broad preemption advocated by certain stakeholders, the Committee noted:

> [P]reemption is a superficially attractive concept, especially when couched in terms of industries which are imbued with interstate commerce like merchant shipping. But close examination reveals it as an argument rejected as flawed and dangerous in the adoption of the federal system 200 years ago. Neither the circumstances nor dangers have changed so much since that time that the Committee is now willing to embrace an authoritarian Federal regime.

Id. (quotation marks omitted).

Ultimately, the divide between the House and the Senate bills over preemption proved insurmountable in the 95th Congress. Speaking to the fate of the House's oil spill measure (H.R. 6803), one Member explained that "[t]he bill died" for two reasons: "because [it] did not address hazardous substances pollution issues," and because "the Senate would not accept

preemption of State programs which duplicated the Federal law." Committee Print, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510*, Vol.2, at 942 (1983) (CERCLA Legislative History).

B. The Congress that enacted CERCLA made a deliberate choice not to preempt state laws

Like its predecessor, the 96th Congress considered several competing proposals involving superfund legislation, each of which took a different approach to the preemption question. Despite the growing consensus in favor of federal legislation to address environmental contamination, preemption remained a sticking point for lawmakers that was only resolved when the House agreed to pass the Senate's less preemptive version of CERCLA.

1. As had been true in the 95th Congress, the House considered a bill with broad preemptive effect. H.R. 85 was described by its sponsor as "similar to [the bill] passed by the House during the last Congress." CERCLA Legislative History Vol.2 at 470. Indeed, H.R. 85 contained the same preemption provision as its predecessor (H.R. 6803), stating that "[e]xcept as provided in this title . . . no action may be brought in any court of the United States, or of any State or political subdivision thereof, for damages for an economic loss described in [the bill], a claim for which may be asserted

under this title." H.R. 85, sec. 110(a), 96th Cong., 2d Sess. (1980). H.R. 85 also precluded duplicate contribution obligations, providing that "no person may be required to contribute to any fund, the purpose of which is to compensate for such a loss, nor to establish or maintain evidence of financial responsibility relating to the satisfaction of a claim for such a loss." *Id.*

There was no mistaking the preemptive intent of H.R. 85. As the Committee that reported on the bill explained, "the patchwork of oil spill liability and compensation laws already existing on Federal and State levels, and those now contemplated, can only create excessive bureaucracies and a quilt of paperwork, all to the detriment of everyone." *Id*. (quotation marks omitted).

Another superfund bill, this one addressing inactive hazardous waste sites, also passed the House in the 96th Congress. Unlike H.R. 85, H.R. 7020 included no express preemption language. Even without such language, some members criticized the bill's expansion of EPA's powers, with one suggesting that it made EPA "the czar over every hazardous waste site in the country." CERCLA Legislative History Vol.2 at 299. Amendments to restrict EPA's powers were rejected, including one that would have permitted Congress to veto any regulations the agency issued. *Id.* at 371, 373.

2. The Senate grappled with two other bills on its way to passing CERCLA and, consequently, with two other approaches to preemption.

The Carter Administration submitted a new proposal addressing oil spills and active and inactive

hazardous waste sites.[5] Like its prior proposal (S. 1187), the Administration's new bill (S. 1341) included an express preemption provision that closely tracked H.R. 85's: "No action may be brought in any court of the United States or of any State or political subdivision for damages for an economic loss or cost [for spills of oil or hazardous waste] . . . a claim for which may be asserted under this title." S. 1341, sec. 612(a), 96th Cong., 2d Sess. (1980). The Administration's bill also would have precluded double recovery and prevented States from demanding contribution to any fund designed to compensate for losses addressed in the federal legislation. *Id.* It did not, however, preempt State liability schemes with respect to inactive or abandoned hazardous waste sites, and expressly reserved the States' authority to raise revenue for environmental cleanups through taxes. *Id.* § 612(b). Recognizing that preemption "goes against the grain of EPA and [the Senate] Committee [on Environment and Public Works]", the Administration described its proposal as a "judicially balanced attempt to tackle a problem of national dimension without intruding into areas of legitimate State concern." CERCLA Legislative History Vol.1 at 63, 85.

Unlike the Administration's bill, S. 1480 did not address oil spills. Likewise, the bill did not preempt state law. Instead, the bill contained a savings clause that mirrored what would become part of CERCLA. It provided: "[n]othing in this Act shall be construed or

[5] The Administration's proposal also was introduced in the House. CERCLA Legislative History Vol.2 at v.

interpreted as preempting any State from imposing any additional liability or requirements with respect to the discharge of hazardous substances within such State." S. 1480, sec. 8, 96th Cong., 2d Sess. (1980). A fact-sheet submitted with the bill described the preemption provision succinctly: "No State would be preempted from imposing additional liability or stricter hazardous substance laws." CERCLA Legislative History Vol.1 at 151.

3. a. The 1980 elections complicated (and almost derailed) legislative efforts to establish a superfund. Facing an upcoming change in partisan control of the chamber and the potential "loss of the entire effort, the Senate staged a carefully (though hurriedly) negotiated scenario, fully orchestrated by the leadership of both parties." Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability (Superfund) Act of 1980*, 8 Colum. Envtl. Law J. 1, 19 (1982). Though the bill presented to the Senate for approval bore the name of H.R. 7020, it was a combination of various proposals considered in the preceding years.

As relevant here, the savings clause originally found in S. 1480 was adopted into the new bill without revision. See CERCLA Legislative History Vol.1 at 639. Following the savings clause, a new subsection was added that was adapted from H.R. 85 and other bills: "Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be

compensated under this title." *Id.* at 639–40. Like prior bills, however, the revised bill clearly stated that States were not precluded from "imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the release of hazardous substances." *Id.* at 640.[6]

In keeping with its pattern of resisting the House's efforts to expand federal authority at the expense of the States, the Senate resurrected the failed amendment to H.R. 7020 limiting EPA's regulatory authority by providing a legislative veto. Grad, *supra* at 19; see also CERCLA Legislative History Vol.1 at 677. Under the revised bill, no "rule or regulation" promulgated under the Act "shall . . . become law if . . . both Houses of Congress adopt a concurrent resolution . . . disapprov[ing] the rule or regulation." CERCLA Legislative History Vol.1 at 677; see also 42 U.S.C. § 9655.

b. When transmitting the bill to the House, Senate leaders made clear no changes would be tolerated. The bill presented, they explained, "was the best bill we could pass. Had we changed a comma or a period, the bill would have failed." CERCLA Legislative History Vol.1 at 774–75. "With the evaporation of the

[6] It was at this point in the legislative process that CERCLA's other savings clause was added to the bill. As passed by the Senate, the final bill included a provision stating, "[n]othing 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." CERCLA Legislative History at 675–76.

balance of interests which permitted us to go to the Floor in the first place, amendments to the bill will kill it if it is returned to the Senate." *Id.* Demonstrating once again the primacy of preemption in the debate over superfund legislation, Senate leaders explained that lack of agreement "with preemption provisions" had prevented the Senate from including a title addressing oil spills. *Id.*

Faced with passing the Senate version of the bill or nothing at all, the House fell in line. The distinction between the preemption provision of the Senate-passed bill and H.R. 85 did not go unnoticed, however. See CERCLA Legislative History Vol.1 at 786. As one Member posited in describing the "serious and technical problems with the bill," "[p]reemption of State liability laws" in the final enacted legislation "is much weaker than . . . [in] H.R. 85." *Id.*[7]

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[7] The 1986 amendments to CERCLA further weakened its preemptive effect. In *Exxon* v. *Hunt*, 475 U.S. 355 (1986), this Court found a tax imposed by the New Jersey Spill Compensation and Control Act preempted by the provision of CERCLA barring States from mandating contributions to their own funds. In response, Congress repealed that provision. As one Senator explained:

> CERCLA, as enacted in 1980, contained only one arguably preemptive provision, which was section 114(c). [The 1986 amendments] repealed even that provision due to its misconstruction by the U.S. Supreme Court. Thus, the law as amended . . . will leave unalloyed the statement contained in 114(a) that—"Nothing in this act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous

II. Petitioner's arguments for conflict preemption are without merit

Petitioner does not (and cannot) argue that Montana's restoration damages remedy is expressly preempted by CERCLA. See Pet. Br. 40–41. Moreover, petitioner admits, as it must, that CERCLA's savings clauses "rule out field preemption." *Id.* at 25. Nonetheless, petitioner maintains that state law is preempted by implication, both because state law "poses monumental obstacles to CERCLA's implementation" and because state and federal law are so incompatible that compliance with both is "impossible." *Id.* at 40; see also U.S. Br. 27–32. But the history of CERCLA reveals that Congress not only declined to *expressly preempt* state law, it made a deliberate and calculated decision to *preserve* it. Accordingly, petitioner cannot overcome the "presumption against . . . pre-emption" established by this Court's precedents, *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992), let alone demonstrate that CERCLA has the sweeping (indeed, field-preemption-like) effect petitioner urges.

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substances within such State." 132 Cong. Rec. 33475 (Oct. 17, 1986) (Sen. Stafford).

If that were not enough, Congress added *another* provision expressly disclaiming any intent to preempt state law. Having included a time bar on claims in the amendments, Congress provided that "[t]his Act does not affect or otherwise impair the rights of any person under Federal, State or common law, except with respect to the timing of review . . . or as otherwise provided in section 309 (relating to actions under State law)." See Pub. L. 99-499, Title II, § 206, 100 Stat. 1703 (1986); 42 U.S.C. § 9659(h).

A. Montana's restoration damages remedy does not create an "obstacle" to fulfillment of CERCLA's purpose

Petitioner contends that CERCLA impliedly preempts respondents' cause of action because that action "actually conflicts with federal law" by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pet. Br. 47 (citation and alterations omitted). Put simply, petitioner contends that any state-law remedy that differs from an EPA-prescribed cleanup action is preempted. *Id.* at 48–51; see also U.S. Br. 28–31. But that contention cannot be squared with the clear congressional intent revealed in CERCLA's text (particularly its savings clauses) and the process leading to its passage.

1. In enacting CERCLA, Congress was well aware that its legislation entered a "field in which the States have traditionally occupied." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); accord *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 18–19 (2014) (applying principle in CERCLA case). As described above, during the legislative process, Congress considered existing state regulatory schemes and debated whether and to what extent such laws would be preempted by the new federal statute. See Part I, *supra* (describing consideration of testimony from State representatives); see also Senate Report 95-1152 at 22 (noting that preemption of state laws would upend "basic philosophical and judgment issues which go to the heart of a State's right to exercise power within its borders"). Accordingly, this Court "start[s] with the assumption that the historic

police powers of the States were not . . . superseded by [CERCLA] unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230; see also *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (presumption that "Congress does not cavalierly pre-empt state-law causes of action.") (quotation marks and citation omitted).[8]

2. Petitioner falls far short of that mark. In attempting to manufacture a "clear and manifest purpose" to preempt state law, petitioner extrapolates from CERCLA's various provisions, purporting to divine Congress's overriding aim. See Pet. Br. 48–50; see also U.S. Br. 28. But in seeking to ascertain Congress's intent regarding preemption, "[t]he only thing a court can be sure of is what can be found in the law itself." *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1908 (2019) (opinion of Gorsuch, J.). "A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring). For that reason, any "[e]vidence of pre-emptive purpose" must be found "in the text and structure of the statute at issue," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993), and "[a] court should not find pre-emption

[8] By contrast, two of the cases on which petitioner relies (at 47–48) involved subject matter that is distinctly federal in nature. See *Arizona* v. *United States*, 567 U.S. 387 (2012) (immigration); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000) (foreign relations).

too readily in the absence of clear evidence of a conflict." *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 885 (2000).

In any event, the statute petitioner describes is not the one Congress enacted. Contrary to the uniquely federal scheme petitioner envisions, CERCLA's text, background, and context make clear that Congress *rejected* the broad preemptive effect petitioner claims, and did so with full appreciation of the potential consequences of that decision. See Part I, *supra*.[9] As this Court has explained (in a case also involving CERCLA), "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *CTS Corp.*, 573 U.S. at 18 (2014) (citation and alterations omitted) (narrowly construing the express preemption provision in 42 U.S.C. § 9658).[10]

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[9] As respondents explain, numerous textual indicators in CERCLA point against preemption. See Respondents' Br. 61–62 (citing 42 U.S.C. § 9614(b) (reducing the amount recoverable under state law for "removal costs" by "compensation for removal costs or damages or claims" recovered under CERCLA), and 42 U.S.C. § 9658(a)(1) (expanding availability of state-law tort actions by extending applicable statute of limitations)).

[10] For that reason, the process leading to CERCLA's passage would undermine petitioner's implied preemption defense even in the absence of any express savings clauses. Congressional "silence on [an] issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend" for federal preemption. *Wyeth* v. *Levine*, 555 U.S. 555, 575 (2009).

For similar reasons, petitioner errs in suggesting that implied conflict preemption exists in every situation where state law can be seen as being in tension with some broad congressional objective. Federal objectives (even unquestionably important ones) are rarely "unyielding." *Spriestma* v. *Mercury Marine*, 537 U.S. 51, 70 (2002). Indeed, this Court has acknowledged that, even where a given subject "is the exclusive concern of the federal law" (unlike here), Congress may draw "the conclusion that a state may nevertheless award damages based on its own law of liability." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). Where "Congress intended to stand by both concepts and to tolerate whatever tension there was between them," this Court has declined to "second-guess that conclusion." *Id.* at 256, 258.

So too here. Although petitioner envisions a Congress singularly focused on setting up a "comprehensive federal scheme" with EPA at the helm (Pet. Br. 47), it ignores the multitude of other aims apparent in CERCLA's text and history, including (to list just two) "assur[ing] that the costs of chemical poison releases are borne by those responsible for the releases" (see, *e.g.*, 42 U.S.C. §§ 9604, 9607) and providing "an opportunity . . . for victims to receive prompt and adequate compensation" (see, *e.g.*, 42 U.S.C. §§ 9608, 9612). CERCLA Legislative History Vol.1 at 685; see also *Burlington Northern & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 602 (2009) ("[CERCLA] was designed to . . . ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.")

(quotation marks omitted). In attempting to elevate its preferred purpose over all others, petitioner engages in exactly the sort of second-guessing this Court has warned against.

3. If there were any doubt that Congress's "purpose" was not to empower the federal government to the exclusion of the States, CERCLA's savings clauses would erase it. As explained previously, Congress: (i) specifically declined to enact provisions that would have prevented States from imposing additional liability and requirements on entities that release hazardous substances; and (ii) specifically preserved obligations created by State statutory and common law. See 42 U.S.C. §§ 9614(a), 9652(d), 9659(h).

Petitioner dismissively waves its hand at CERCLA's savings clauses, asserting that they "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." Pet. Br. 53; see also U.S. Br. 31–32. That argument boils down to little more than the truism that the Supremacy Clause remains in effect, savings clause or not.

But just as CERCLA's savings clauses "do[] not bar the ordinary working of conflict pre-emption principles," *Geier*, 529 U.S. at 869, those clauses likewise may not be ignored when preemption principles are applied. Far from disregarding the savings clauses at issue, the decisions on which petitioner relies engaged in a close analysis of the statutory text (and, in some cases, legislative history) to determine whether or not

preemption was consistent with Congress's intent. See, *e.g.*, *Geier*, 529 U.S. at 869–72; *id.* at 869 (reading "the language of the . . . clause" to "bar a special kind of defense" rather than to disclaim preemption of all state laws based in part on use of words "[c]ompliance" and "does not exempt"). After all, "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case," and "Congress' intent, of course, primarily is discerned from the language" of the statute. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 468, 486 (1996) (citation and alterations omitted).

Applied here, that analysis makes clear that CERCLA does not preempt Montana's restoration damages remedy in the sweeping manner petitioner claims. As CERCLA's text instructs, the statute "shall [not] be construed or interpreted as preempting any State from imposing additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a); accord CERCLA Legislative History Vol.1 at 151 ("No State would be preempted from imposing additional liability or stricter hazardous substance laws."). The statute further provides that "[n]othing 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." 42 U.S.C. § 9652(d); *id.* § 9659(h) ("This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law except with respect to the timing of review as provided in section 9613(h)

of this title or as otherwise provided in section 9658 of this title (relating to actions under State law).”). Under CERCLA’s plain terms, the “additional liability” created by Montana law is not preempted, petitioner’s “obligations [and] liabilities” under state law are unaffected by the federal scheme, and respondents’ rights are not “impair[ed].”[11]

B. Compliance with federal and Montana law is not “impossible”

Like obstacle preemption, “[i]mpossibility preemption is a demanding defense.” *Wyeth*, 555 U.S. at 573. “The underlying question” when assessing an “impossibility pre-emption defense is whether federal law . . . prohibited the [actions] that would satisfy state law.” *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1678 (2019); see also *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (impossibility arises when “state law penalizes what federal law requires”). As this Court has “cautioned many times before, the possibility of impossibility [is] not

[11] Petitioner’s tortured reading of CERCLA’s savings clauses (Pet. Br. 54) is no more persuasive than its preemption argument. By disavowing preemption of “additional liability or requirements,” 42 U.S.C. § 9614(a), Congress plainly contemplated state laws permitting liability or imposing obligations above and beyond what federal law demands. Had Congress intended what petitioner suggests—preemption of any claims falling within the purview of the federal scheme—it would have adopted the broad preemption provisions of H.R. 85 and other bills. See Part I, *supra*. That Congress rejected that approach in favor of an express savings clause is clear evidence that petitioner’s reading is incorrect.

enough." *Merck*, 139 S. Ct. at 1678 (internal quotation marks and citation omitted).

1. Petitioner misapprehends both its state-law duties and its burden in establishing an impossibility preemption defense. Petitioner claims that "federal law forbids [petitioner] from fulfilling its alleged state-law obligations" because "[t]o 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." Pet. Br. 43. But, as the Montana Supreme Court observed, respondents were "not seeking to enjoin any of EPA's activities, or requesting that EPA be required to alter, delay, or expedite its plan in any fashion." Pet. App. 13a. 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." *Id*. The restoration damages at issue involve petitioner contributing money towards a fund; they do not require petitioner to perform the restoration on the landowners' property. The only question is whether petitioner may satisfy *any* of the remedies available to the landowners under state law—including contributing money towards a fund for the restoration damages that the landowners seek—without running afoul of federal law. The answer is plainly yes.

Petitioner claims "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." Pet. Br. 45 (emphasis added).[12] But state law does not require petitioner to "avoid being on the hook for state-law restoration damages" as petitioner describes. Petitioner cannot manufacture impossibility preemption by attempting to avoid the very relief respondents seek.[13] And because federal law does not *prohibit* petitioner from paying the restoration remedy that would satisfy state law, there is nothing "impossible" about its compliance with both schemes.

2. Respondents explain in their brief why petitioner is not entitled to the assumption that respondents' remediation plans are inconsistent with EPA's plan. See Resp. Br. 52. What is more, even if CERCLA might preclude *parts* of a restoration damages plan under principles of conflict preemption in rare circumstances, that would not be a basis for the relief

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[12] See also *id.* (contending that the landowners' 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*" because "[t]o avoid state-law restoration damages . . . Atlantic Richfield would have had to disregard EPA's decision and install three miles' worth of underground trenches") (emphasis added)).

[13] *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U.S. 472, 480 (2013), does not support petitioner's broad assertion that "paying damages under state law" will still leave it "stuck between two logically incompatible obligations." Pet. Br. 42. The impossibility in *Bartlett* arose from the inability of a drug manufacturer "to comply with both its state-law duty to strengthen the warnings on [a drug's] label and its federal-law duty not to alter [the drug's] label." *Bartlett*, 570 U.S. at 480. In other words, complying with state law would have forced the manufacturer to violate federal law. For the reasons stated in the text, that is not the case here.

petitioner seeks here: a grant of summary judgment on the theory that CERCLA categorically bars *any* restoration damages remedy, *see* Pet. Br. 19–20, 40–41, even those that merely result in additional cleanup beyond what EPA requires.

Moreover, Justice Baker explained in her concurrence below that petitioner could demonstrate at trial that respondents' "proposed remedy conflicts with or requires modification of measures [Atlantic Richfield] already has taken to clean up the site." Pet. App. 22a. And, as the United States admits, if the landowners' "claims for restoration damages are allowed to proceed" in state court "and the suit culminates in a monetary award, EPA could seek to prevent [the landowners] from using those funds to carry out any remedial actions that the agency believed would violate federal law." U.S. Br. 31. Hence, to the extent there is a genuine threat of impossibility should a Montana court award restoration damages here, there will be ample means to prevent it without stopping respondents' suit at the threshold.

* * *

CERCLA's language, purpose, and legislative history confirm that Montana's restoration damages remedy is not preempted by federal law. Petitioner's contrary argument is premised on a view of the statute that bears little similarity to the one Congress passed and has far more in common with ones that it did not. In keeping with precedents requiring a clear legislative statement to overcome the presumption against

preemption, this Court should reject petitioner's effort to rewrite CERCLA to suit its own ends.

CONCLUSION

The judgment of the Supreme Court of Montana should be affirmed.

Respectfully submitted.

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