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 OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in preserving remedies available to consumers under state laws against unwarranted claims of preemption by federal law, and has frequently filed briefs in this Court and others addressing preemption issues.

In many instances, claims of implied conflict preemption disregard express indications in the governing federal statute that Congress did not intend to preempt the kinds of state laws that the party advocating preemption contends are in conflict with either the requirements of the federal law or its purposes and objectives. Such is the case here: Congress enacted multiple express provisions that should foreclose the implied preemption arguments advanced by petitioner Atlantic Richfield Company (ARCO). Public Citizen submits this brief in the hope that it may assist the Court in understanding that those provisions have force and are relevant to the issues of implied preemption presented in this case.

SUMMARY OF ARGUMENT

When it enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Congress included several provisions designed to ensure that the statute would not be

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

construed or interpreted to preempt state laws that would impose liabilities and requirements on persons responsible for environmental contamination over and above those imposed by CERCLA. Those provisions directly limit CERCLA's implied preemptive effect and provide strong support to respondents' arguments that the claims they assert in this case are not preempted.

ARCO, however, with the Solicitor General's support, asserts that CERCLA's anti-preemption provisions are effectively irrelevant to the issues of implied preemption that this case poses. Relying on *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), they assert that those provisions do not affect the operation of implied conflict preemption, which, they claim, should bar respondents from advancing their state-law claims. The assertions of ARCO and the Solicitor General on this point are fundamentally mistaken.

Preemption, including implied conflict preemption, is first and foremost a matter of statutory construction. In considering the preemptive effect of any federal law, courts must use normal interpretive tools to determine congressional intent with respect to preemption as manifested in statutory language and structure. Express statutory language aimed precisely at the issue of whether the statute may be construed to preempt specific types of state laws is the best possible indication of congressional intent with respect to implied preemption.

As a result, this Court has often given effect to congressional commands that statutes may not be construed to preempt state laws and has rejected claims of implied preemption that conflict with such express statements of anti-preemptive intent. Indeed, the

Court has held that statutory disclaimers of congressional intent to preempt, where their terms apply, are controlling in cases involving implied conflict preemption, just as in cases involving other forms of preemption. *See*, *e.g.*, *Dep't of Treas. v. Fabe*, 508 U.S. 491, 502, 507 (1993).

Geier and other cases relied on by ARCO and the Solicitor General are not to the contrary. Those cases do not hold that Congress is without power to devise express limits on the implied preemptive effects of the statutes it enacts, and they erect no categorical bar to consideration of statutory language in resolving issues of implied preemption. Rather, this Court concluded in those cases only that the language of the limited "savings clauses" before it did not reach particular applications of implied preemption. *Geier*, for example, addressed statutory language that the Court construed to create a limited exception to an otherwise broad express preemption clause, and accordingly the Court gave it little weight in determining the scope of implied preemption. Other cases cited by ARCO and the Solicitor General likewise involved savings clauses of limited scope, not the kind of broad anti-preemptive language at issue here. Never, however, has this Court held that a statutory "*non-preemption* clause," *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1902 (2019) (lead opinion of Gorsuch, J.), is powerless to affect issues of implied preemption. Nothing in this Court's case law supports the assertion that the Court should disregard CERCLA's express limits on implied preemption.

ARGUMENT

I. CERCLA's anti-preemption provisions directly address the issues of implied preemption that are central to this case.

ARCO and the Solicitor General assert that CERCLA preempts claims by landowners against ARCO for "restoration damages" potentially available to them under Montana law on account of the contamination of their property by ARCO's Anaconda smelter site in western Montana. ARCO and the Solicitor General place primary reliance on two statutory provisions that grant exclusive jurisdiction over controversies arising under CERCLA to federal courts and that limit the federal courts' jurisdiction in such actions to entertain "challenges" to CERCLA remedial actions. *See* 42 U.S.C. §§ 9613(b), (h). As respondents explain, however, the plain terms of those provisions render them inapplicable: Because respondents' claims arise under state law, not under CERCLA, they do not fall within the federal courts' exclusive jurisdiction under § 9613(b). And § 9613(h)'s limitations on jurisdiction to review "challenges" to remedial actions apply only to federal courts and, also, are explicitly inapplicable to claims brought under state law.

ARCO and the Solicitor General accordingly fall back on two broad theories of implied conflict preemption. First, they argue that respondents' claim for restoration damages, which seeks recoveries that under Montana law can be used only to clean up their properties, conflicts with a CERCLA provision that bars "potentially responsible part[ies]" from taking remedial actions without authorization from the federal government. 42 U.S.C. § 9622(e)(6). Second, they argue that allowing state-law damages recoveries that

may facilitate cleanup actions exceeding the scope of those taken under a CERCLA remedial order would thwart the "purposes and objectives" of CERCLA.

These implied preemption arguments disregard Congress's explicit disavowal of such preemptive intent in several provisions of CERCLA. CERCLA provides sweepingly that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). 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." *Id.* § 9652(d). Finally, CERCLA's citizen-suit provision provides that "[t]his chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law" except in respects not relevant to the claims here. *Id.* § 9659(h).[2] In each provision, "this chapter" refers to Chapter 103 of Title 42 of the U.S. Code—that is, to the entirety of CERCLA.

On their face, these provisions broadly disavow congressional intent to displace, either expressly or impliedly, state-law remedies such as those at issue here. The provisions refer in comprehensive terms to

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[2] The only exceptions to this provision are (1) CERCLA's provisions concerning the "timing of review [of CERCLA remedial orders] as provided in § 9613(h)," *id.*, which on their face limit rights to judicial review under federal law, and (2) the terms of § 9658, which preempts state statutes of limitations applicable to state-law personal-injury and property-damage claims to the extent that they might otherwise commence running before the "commencement date" specified in the statute.

the effects of CERCLA as a whole, not just to particular provisions. *See id.* § 9614(a) ("[n]othing in this chapter shall"); § 9652(d) ("[n]othing in this chapter shall"); *id.* § 9659(h) ("[t]his chapter does not"). And they contain language aimed directly at *implied* preemptive effects: They prohibit "constru[ing] or interpret[ing]" CERCLA to preempt state-law liabilities and requirements, *id.* § 9614(a), and disclaim "affect[ing] … in any way" common-law liabilities, specifically including liabilities and rights under state law. *Id.* § 9652(d). Moreover, the scope of their anti-preemptive language is broad, extending to state laws imposing "any additional liability or requirements," *id.* § 9614(a), and to "obligations or liability of any person," *id.* § 9652(d). "Any," as this Court has often noted, has "an expansive meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (citation omitted).

II. Issues of implied preemption, like all other questions involving preemption, turn on the meaning of statutory language.

Notwithstanding the broad language of CERCLA's non-preemption provisions, ARCO asserts as a blanket proposition that "such savings clauses do not override impossibility or obstacle preemption principles." Pet. Br. 52 (citing *Geier*, 529 U.S. at 871–74). Likewise, the Solicitor General invites the Court to disregard these provisions on the ground that "the presence of statutory savings' clauses 'does *not* bar the ordinary working of conflict pre-emption principles.'" U.S. Br. 31 (quoting *Geier*, 529 U.S. at 869). The arguments of both ARCO and the Solicitor General misconceive the nature of the implied preemption inquiry, disregard a significant body of case law in this Court that gives

effect to similar anti-preemption provisions, and overstate the holdings of *Geier* and similar decisions.

To begin with, the Constitution's Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be 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. The Supremacy Clause requires "preemption" of state laws only where giving them effect would be in derogation of the supremacy of the Constitution or a valid federal law enacted under it—that is, where state law stands in contradiction to some applicable command of federal law. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018). All forms of preemption, in other words, involve "a clash between a constitutional exercise of Congress's legislative power and conflicting state law." *Murphy*, 138 S. Ct. at 1480. Importantly, though, not all differences between state law and federal law give rise to preemption because not all involve contradictory or conflicting federal and state commands. *See*, *e.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). Whether such a contradiction exists depends on what the federal law commands.

For this reason, the Court has said time and again that in determining the preemptive effects of federal law, "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). As members of this Court have recently emphasized, this proposition holds good regardless of the type of preemption at issue: "Whatever the category of preemption asserted, 'the purpose of Congress is the ultimate touchstone' in determining

whether federal law preempts state law." *Va. Uranium*, 139 S. Ct. at 1912 (Ginsburg, J., concurring in the judgment) (quoting *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016)).

It follows that, in the first instance, "'[e]vidence of pre-emptive purpose,' whether express or implied, must … be 'sought in the text and structure of the statute at issue.'" *Va. Uranium*, 139 S. Ct. at 1907 (opinion of Gorsuch, J.) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Thus, a litigant claiming preemption based on conflict between state law and the requirements, purposes, or objectives of federal law "must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* at 1901. Courts considering such claims, moreover, must respect both "what Congress wrote" and "what it didn't write." *Id.* at 1900. The inquiry turns on "what can be found in the law itself," *id.* at 1908, not on "abstract and unenacted legislative desires," *id.* at 1907.

Thus, the contention that Congress is powerless to prevent the courts from using implied preemption doctrines to find unintended preemptive effects of federal statutes runs afoul of the cardinal rule that preemption of whatever stripe—express preemption, implied field preemption, and implied conflict preemption—is *always* a matter of congressional intent discernible from statutory text and structure. *Va. Uranium*, 139 S. Ct. at 1901 (opinion of Gorsuch, J.); *id.* at 1912 (Ginsburg, J., concurring in the judgment). Of particular relevance here, where a statute enacted by Congress manifests an intent to allow operation of requirements of state law—even requirements that might otherwise appear to conflict with federal law—that statute does not preempt state law. *See*, *e.g.*,

Wyeth, 555 U.S. at 575; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). In such a case, effectuating the law enacted by Congress requires giving effect to its command that state laws *not* be disturbed. Put another way, if a federal statute does not in some way require displacement of state law, such displacement cannot be necessary to ensure the federal statute's "supremacy."

It would be paradoxical if, in undertaking an inquiry so focused on discerning the existence of preemptive purpose in a statute's text and structure, courts were required to ignore the most significant evidence of such purpose: statutory provisions expressly aimed at defining or limiting a statute's preemptive effect. After all, it is "the statutory language" that "necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (citation omitted). That proposition, fundamental in resolving all issues of statutory construction, is no less applicable to a "*non-preemption* clause," *Va. Uranium*, 139 S. Ct. at 1902 (opinion of Gorsuch, J.), than to an express preemption clause. *See*, *e.g.*, *Calif. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987) (plurality).

III. This Court has often read broad anti-preemption provisions to preclude implied preemption.

Consistent with its insistence on the primacy of a statute's terms in determining a law's preemptive effect, this Court has in a number of cases treated statutory provisions similar to the anti-preemption provisions here—that is, provisions stating that nothing in a statute shall be construed or interpreted as having preemptive effect—as highly relevant to, and

dispositive of, issues of implied preemption. Indeed, the Court has recognized that such statutes specifically address the existence or scope of implied conflict preemption.

For example, the Court has described the McCarran-Ferguson Act, which provides, in terms strikingly similar to those of one of CERCLA's non-preemption provisions, that no federal statute "shall be construed to invalidate, impair, or supersede" state laws regulating the business of insurance, 15 U.S.C. § 1012(b), as "a federal statute directed to implied preemption by domestic commerce legislation." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003). Far from holding that this language does not affect the operation of ordinary principles of conflict preemption, this Court has held that the language effectively reverses the direction of conflict preemption: Where "there is a direct conflict between [a] federal … statute and [state] law," the "terms of the McCarran Ferguson Act" provide that "federal law must yield." *Fabe*, 508 U.S. at 502.

Similarly, the Court has cited anti-preemption provisions in federal labor laws in holding that state laws are not impliedly preempted. For example, in *Retail Clerks v. Schermerhorn*, the Court held that a provision added to the National Labor Relations Act (NLRA) by the Taft Hartley Act, providing that "[n]othing in this Act shall be construed" to authorize agency shop agreements in states whose laws prohibit them, 29 U.S.C. § 164(b), foreclosed an argument that state laws providing remedies against unlawful agency shop agreements are subject to implied preemption. *See* 375 U.S. at 99–105. Stating that it would be "odd" to find implied preemption in such circumstances, *id*. at 99, the Court held that the statute indicated that Congress had "chose[n] to abandon any

search for uniformity" in the area governed by the statute, *id.* at 104, and that implied preemption of state law would render the anti-preemption provision "empty and largely meaningless," *id.* at 102.

Likewise, in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), the Court held that, before the passage of the Employment Retirement Income Security Act (ERISA), the NLRA did not impliedly preempt state laws regulating collectively bargained employee pension plans. The Court stressed that, unlike ERISA, the NLRA had no express preemption provision with respect to employee benefit plans, while a pre-ERISA federal statute that specifically related to pension plans, the Welfare and Pension Plans Disclosure Act (Disclosure Act), contained two anti-preemption provisions similar to those at issue here. One provided that "[t]he provisions of this Act … shall not be deemed to exempt or relieve any person from any liability [or] duty … provided by any present or future law … of any State," *id.* at 505, while another stated that "[n]othing contained in this subsection shall be construed to prevent any State … from otherwise regulating [a pension] plan," *id.* The Court held that these provisions "clearly indicated that Congress at that time recognized and preserved state authority to regulate pension plans." *Id.* Therefore, the Court held, the provisions precluded implied preemption under both the Disclosure Act and the NLRA.

The opinions in *California Federal Savings & Loan v. Guerra*, 479 U.S. 272, express an even more powerful recognition of Congress's authority to limit the implied preemptive effect of its statutes through provisions stating that nothing in them may be construed to have such effect. *Guerra* rejected the claim that a California statute requiring pregnancy leave not

required under federal law was impliedly preempted by Title VII. A four-Justice plurality emphasized that Title VII provides expressly that "[n]othing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State … other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 479 U.S. at 281–82 (quoting 42 U.S.C. § 2000e-7). The plurality also pointed to a provision precluding anything in the statute from being "construed as invalidating any provision of State law on the same subject matter unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." *Id.* at 282 (quoting 42 U.S.C. § 2000h-4). The plurality stated that these provisions "severely limit Title VII's pre-emptive effect" and leave "no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII." *Id.* Justice Scalia, concurring in the judgment, emphasized that these provisions are "*antipre-emption* provisions," *id.* at 295, and that the first of the two was by itself sufficient to dispose of the case, because, under its plain language, California's law imposing additional duties on employers "cannot be pre-empted," *id.* at 296.

As these decisions illustrate, statutory language providing that a statute shall not be construed or interpreted to preempt state law is precisely targeted at precluding or limiting implied preemption. Indeed, if such language has no impact on implied preemption analysis, as ARCO and the Solicitor General suggest, it is meaningless. As Justice Scalia once observed, "[u]nless it serves no function, [such anti-preemption] language forecloses preemption on the basis of

conflicting 'purpose'" within the non-preempted sphere of authority it defines. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 96 (1987) (Scalia, J., concurring in the judgment). Construing statutory language to have no effect, of course, runs contrary to "the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (internal quotation marks omitted). Thus, particularly in light of this Court's insistence that preemption in all its forms is a matter of congressional intent as manifested in statutory language and structure, there is no possible justification for ignoring the plain meaning of anti-preemption provisions when considering implied preemption.

IV. *Geier* and similar decisions do not control the application of CERCLA's broad anti-preemption provisions.

Contrary to the suggestions of ARCO and the Solicitor General, the Court's decision in *Geier* does not render Congress's explicit statutory language expressing broad anti-preemptive intent irrelevant to determining whether CERCLA impliedly preempts state law. *Geier*'s outcome turned on the meaning of an entirely different type of statutory provision: a limited "savings" clause that created an exception to a statute's otherwise expansive express preemption provision.

Geier involved a regulation issued under the National Traffic and Motor Vehicle Safety Act (Safety Act) that, as interpreted by the Court, was intended to give automobile manufacturers a choice as to whether to install airbags in their vehicles. The question the case posed was whether that regulation preempted a

state-law action seeking to impose liability on a manufacturer for not installing airbags. The Safety Act contains a broad preemption provision that forbids states from imposing their own distinct safety requirements if a federal Safety Act regulation provides a standard applicable to the same matter. *See* 529 U.S. at 867. Although that provision might otherwise preempt a state-law damages action premised on a standard of care different from the federal standard, the Safety Act also contains a "savings clause" providing that compliance with a federal standard "does not exempt any person from liability under common law." *See id.* at 868. The Court held that the savings clause precluded any argument that the express preemption provision barred state-law damages actions altogether.

The Court, however, also held that the savings clause, while carving out an exception to express preemption, did not bar implied preemption of a state-law right of action that was, in the majority's view, incompatible with a central purpose of the federal standard at issue: preserving manufacturer choice as to whether to use airbags. Focusing on the narrow language of the savings clause in juxtaposition to the otherwise broad express preemption clause, the Court concluded that "the words '[c]ompliance' and 'does not exempt,' sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one." *Id.* at 869. The Court also stressed that its reading did not render the provision without effect because, even as narrowly read, the provision would continue to exclude state-law damages

actions from the broad express preemption clause. *Id.* at 870.

Geier erects no per se bar to consideration of anti-preemption provisions in determining a law's implied preemptive scope. The decision's reasoning is limited to the language at issue there, which stated a relatively narrow exception to an express preemption bar; it did not address, let alone rule out giving effect to, broad language that expressly targets implied preemption by stating that nothing in a statute is to be construed as having implied preemptive effect with respect to some subject of state law.

Moreover, even as to savings clauses that limit express preemption provisions, the Court has made clear that *Geier* does not rule out consideration of such savings clauses in determining issues of implied preemption. In *Sprietsma v. Mercury Marine*, the Court held that a boat safety statute with very similar express preemption and savings clauses to the ones at issue in *Geier* did not impliedly preempt a state-law damages action. 537 U.S. at 64–70. The Court did not rule out implied preemption based on the savings clause alone, but it recognized the importance of the statutory language in determining the scope of any implied preemptive effect of the statute. *See Sprietsma*, 537 U.S. at 69. Subsequent to *Sprietsma*, in a case dealing with the implied preemptive effects of motor vehicle safety standards concerning passenger lap belts, this Court recognized the importance of the same Safety Act savings clause at issue in *Geier* in holding a state-law damages action not impliedly preempted by the manufacturer's compliance with the federal standards. *See Williamson v. Mazda*, 562 U.S. at 335 (stating that savings clause was intended to ensure a "meaningful role" for state law); *id.* at 338 (Sotomayor,

J., concurring) (same); *id.* at 339 (Thomas, J., concurring in the judgment) (stating that savings clause "speaks to this question and answers it").

This Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), relied on by the Solicitor General, offers no support for the proposition that anti-preemption language is irrelevant to questions of implied preemption. The Court's analysis in *Ouellette* made clear that the Court regarded the meaning of anti-preemption provisions to be critically important to the resolution of the implied preemption question presented, but that its careful reading of the statutory language indicated the provisions did not preserve the state-law claim in that case. *Ouellette* involved two non-preemption provisions of the Clean Water Act. One provides only that nothing in a *specific section* of the Act (the one providing for citizen suits) restricts common-law rights of action, *see* 33 U.S.C. § 1365(e); the other provides broadly that nothing in the Act as a whole preempts states' jurisdiction over their own waters, *see id.* § 1370. The Court read the two provisions together to hold that the Act does *not* impliedly preempt state-law causes of action against dischargers of pollutants under the law of the state into whose waters the discharge occurs, *id.* at 497–99, but *does* impliedly preempt a state-law cause of action against a person who discharges into the waters of another state, *id.* at 493–97. As in *Geier*, the Court's holding was based on the specific statutory language at issue, not on the proposition that broad anti-preemption provisions are irrelevant to the scope of implied preemption.

ARCO's reliance on a line of cases, beginning with *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), concerning the effect of statutory

language originating in the Interstate Commerce Act is similarly misplaced. That Act, and others modeled on it, included a provision stating that "[n]othing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." *Id.* at 446. The Court held in *Texas & Pacific* that this provision did not preclude implied preemption of a state-law right of action that sought to enforce a rate different from the filed rate established pursuant to the statute's scheme of federally regulated railroad rates. The Court construed the statutory savings clause to refer to remedies for violations of rights or duties established by the Act, and to establish that "any specific remedy given by the Act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act." *Id.* at 446–47. Construing the Act to provide instead for the continued existence of state common-law actions aimed at enforcing rates other than those provided for in the Act, the Court stated, would read the Act to "destroy itself." *Id.* at 446. In light of the holding in *Texas & Pacific*, the Court has similarly construed subsequent statutes in which Congress has used the same words, *see*, *e.g.*, *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227–28 (1998)—consistent with the well-established general principle that when Congress enacts a statute containing language with an established judicial construction, it intends to adopt that construction. *See*, *e.g.*, *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019).

Here, by contrast, Congress chose very different language that cannot be construed as addressing only

the existence of alternative remedies for violations of federal statutory requirements. CERCLA expressly provides that it does not preempt state-law rights of action and other requirements that *differ* from those federal law imposes: "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). Nothing in the Court's decisions addressing the Interstate Commerce Act language suggests that the language used in CERCLA fails to achieve Congress's evident purpose of limiting the statute's implied preemptive effect.

Giving effect to that language, moreover, would not require reading CERCLA to "destroy itself." *Tex. & Pac.*, 204 U.S. at 446. Unlike the rate regulatory schemes established by the Interstate Commerce Act and statutes modeled after it, CERCLA's provisions are not effectively negated by state laws that measure a facility owner's liability against a different standard. Montana's right of action for restoration damages does not purport to license violations of federal law or impede the federal government's ability to take action against any person who violates or threatens to violate any provision of CERCLA or any other federal law. Thus, even if ARCO and the Solicitor General were correct that every landowner in the vast area of Montana contaminated by the Anaconda smelter is a "potentially responsible party" and was forever barred from disturbing the soil of their property without federal permission from the moment ARCO began to consider taking remedial action, *but see* Resp. Br. 36–49, giving effect to CERCLA's prohibition of implied

preemption of state-law remedies would not in itself threaten to negate any of CERCLA's provisions.

In sum, ARCO's and the Solicitor General's blithe assertions that, under *Geier* and similar cases, CERCLA's broad anti-preemption language is meaningless are erroneous. Implied conflict preemption does not exist independently of Congress's intent as manifested in the statutory language it enacts. Here, that language is directly aimed at limiting the statute's implied preemptive effect, and this Court's decisions require that the Court give that language its evident meaning. CERCLA's anti-preemption provisions strongly reinforce the conclusion that the statute does not impliedly preempt Montana's restoration damages remedy and that respondents' claims should be allowed to proceed.

CONCLUSION

Unless this Court dismisses this case for want of jurisdiction, it should affirm the judgment of the Supreme Court of Montana.

Respectfully submitted,

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