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

REPLY BRIEF FOR PETITIONER

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

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Cases—continued:

Statutes, rules, and ordinances:

Page(s)

Statutes, rules, and ordinances—continued:

Page(s)

Statutes, rules, and ordinances—continued:

Other authorities:

In the Supreme Court of the United States

No. 17-1498

ATLANTIC RICHFIELD COMPANY, PETITIONER,

v.

GREGORY A. CHRISTIAN, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

REPLY BRIEF FOR PETITIONER

CERCLA does not bar nuisance or trespass suits, compensatory damages, or even the punitive damages respondents seek. CERCLA draws the line at a state-law restoration remedy that requires cleanups defying what EPA has ordered. Sections 113(b) and (h) bar that remedy as a "challenge" to EPA's remediation. Section 122(e)(6) bars that remedy because potentially responsible parties like respondents cannot "undertake any remedial action" without EPA's permission. And the Supremacy Clause bars that remedy because it conflicts with petitioner's federal-law obligations and would destroy EPA's ability to fulfill its statutory mandates to effectuate comprehensive, site-wide cleanups that protect the community.

I. This Court Has Jurisdiction

Respondents renew attacks on this Court's jurisdiction, arguing that the decision below is non-final because this Court's reversal would not end all state-court litigation. Resps' Br. 17-19, BIO 15. That approach flouts this Court's deference to state supreme courts' characterizations of their proceedings. *Fisher* deemed a decision resolving a Montana supervisory-writ proceeding "a final judgment within [this Court's § 1257] jurisdiction" because Montana makes such writs "available only in original proceedings" that are "not equivalent to an [interlocutory] appeal." *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 385 n.7 (1976) (per curiam); *see Kennerly v. Dist. Court of Ninth Judicial Dist.*, 400 U.S. 423, 424 (1971) (per curiam). Unlike an interlocutory appeal, Mont. R. App. P. 6(6), the Montana Supreme Court designates a supervisory-writ proceeding a self-contained case, *id.* 14(1), (3). *See* Pet. App. 1a. Similarly, *Arceneaux v. Louisiana*, 376 U.S. 336 (1964) (per curiam), looked to Louisiana's final-judgment rules to determine whether the Louisiana Supreme Court's denial of a writ of prohibition and other remedies was a final judgment. *Id.* at 338.

Respondents (at 20) are incorrect that supervisory-writ proceedings and their analogues are final only if they involve outcome-determinative jurisdictional issues. This Court's rule is unqualified: when state courts issue such writs, they initiate a separate suit and the ensuing judgment is final. *E.g.*, *Weston v. City Council of Charleston*, 2 Pet. 449, 464-65 (1829). "The word 'final,'" Chief Justice Marshall explained, "appl[ies] to all judgments and decrees which determine the particular cause," *e.g.*, the writ of prohibition, regardless whether "the right was finally

decided." *Id.* at 464-65; *see Bandini Petrol. Co. v. Superior Court*, 284 U.S. 8, 14 (1931). Such writs do "not determine the merits and end the litigation" in all cases. *Detroit & Mackinac Ry. Co. v. Mich. R.R. Comm'n*, 240 U.S. 564, 570-71 (1916); *see* Shapiro et al., *Supreme Court Practice* § 3.8, at 3-36 (11th ed. 2019). Regardless, the § 113 holding is jurisdictional and would "terminate[] original proceedings in [the] state appellate court" if reversed. *Fisher*, 424 U.S. at 385 n.7.

The Court alternatively has jurisdiction under the fourth exception of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Restoration damages are a distinct claim, Pet. App. 5a-6a, and reversal would dispose of the judgment below, *Cox*, 420 U.S. at 482-83. Failure to intercede would debilitate federal policy. Pet. 30-36.

II. Section 113 Requires Reversal

Section 113(b) gives federal district courts "exclusive original jurisdiction over all controversies arising under" CERCLA, "[e]xcept as provided in subsections [113](a) and [113](h)." 42 U.S.C. § 9613(b). Sections 113(a) and 113(h) identify suits that even federal district courts cannot entertain, including § 113(h)'s bar on "any challenges" to EPA's remediation plans. *Id.* §§ 9613(a), (h). By definition, "challenges" to EPA's plans are a subset of the "controversies arising under" CERCLA that state courts cannot hear. Br. 27-28; U.S. Br. 25. Respondents' suit seeking to supplant EPA's remedy is a quintessential challenge to EPA's actions.

1. Respondents (at 27-28) insist that § 113 does not identify "challenges" as a subset of "controversies arising under" CERCLA because "an exception need not be 'narrower than the corresponding rule.'" Exceptions

sometimes reconcile two competing principles, as in respondents' Eleventh Amendment hypothetical. Other times, exceptions *are* narrower than the rule—as § 113's context illustrates. Section 113(b)'s rule of exclusive federal district-court jurisdiction over "controversies arising under" CERCLA has two exceptions: §§ 113(a) and 113(h). Section 113(a) vests in the D.C. Circuit jurisdiction to review CERCLA regulations. 42 U.S.C. § 9613(a). Whatever the contours of "controversies arising under" CERCLA, requests to review regulations qualify. Similarly, § 113(h) bars federal jurisdiction over "any challenges to" EPA response actions and "any order issued under" § 106(a). Respondents (at 32-33) agree that review of orders issued under § 106(a) presents "controversies arising under" CERCLA. Every other exception to § 113(b) refers to a type of controversy. It is implausible that Congress intended § 113(h)'s exception for "challenges" to mean something else.

Indeed, respondents' position implicitly acknowledges the interrelationship between § 113(b) and § 113(h). Respondents (at 32) define "challenges" as "calling for judicial review of EPA actions." Such "challenges" would necessarily be a subset of all "controversies arising under" CERCLA if respondents were correct (at 23-26) that "controversies arising under" CERCLA parallel the arising-under test of 28 U.S.C. § 1331. Federal law would always create, or be a necessary element of, the cause of action for such "challenges."

Respondents' invocation of § 1331 is wrong regardless. Nothing in § 113's text, structure, or history requires construing §§ 113(b) and 1331 together. U.S. Br. 32-33. Section 113(b) differs from § 1331 in fundamental ways. Unlike § 1331, § 113(b) provides "*exclusive* original jurisdiction … *without regard to the citizenship of the parties*

or the amount in controversy." Further, § 113(b) grants federal-court jurisdiction "[e]xcept as provided in subsections (a) and (h)." Respondents' position begs the question whether those exceptions involve "controversies arising under" CERCLA. No reason exists why Congress would have wanted to protect EPA's remedies from federal-court interference but not from state-court interference.

Respondents (at 22-23, 28) are also incorrect that § 113(h) allows restoration remedies to proceed in federal court under § 113(h)'s carve-out for suits where jurisdiction rests on "diversity of citizenship." Under both sides' readings, the diversity-jurisdiction provision is never implicated. Under petitioner's view, *every* § 113(h) "challenge" that calls into question EPA's remedy is a "controversy arising under" CERCLA subject to exclusive federal jurisdiction. The presence of one diverse party would not override the specific bar on "challenges" in federal court. Likewise, respondents' view—that § 113(b) adopts the § 1331 "arising under" standard and that "challenges" mean suits contesting the legality of EPA's remedy—renders the diversity carve-out a nullity. Any "challenge" is a "controversy arising under" CERCLA and presents a federal question.

Respondents' cherry-picked legislative history (at 29-31) suggests that some legislators understood that CERCLA would not prohibit traditional nuisance claims. That history does not show that "challenges" cannot include state-law-based claims. Respondents dismiss statements undermining their position. For example, Senator Thurmond, chair of the drafting committee, explained that § 113(b) and § 113(h) ensure that "any controversy over a response action … whether it arises under Federal law or State law, may be heard only in Federal court, and only

under the circumstances provided." 132 Cong. Rec. 28,441 (1986).

2. Respondents (at 31-32) argue that "challenges" under § 113(h) include only suits "contest[ing] the legality of the EPA-ordered remedy." That seismic shift from their brief in opposition (BIO 24-25) abandons the linchpin of the decision below, that a "challenge" is something that interferes with ongoing removal or remedial action. Pet. App. 11a. Respondents' new position would permit courts to order injunctions requiring warring cleanups that undo what EPA ordered. That could not have been what Congress contemplated, which is presumably why *no* court has adopted respondents' reading. Nothing suggests Congress departed from the ordinary understanding of the word "challenge," *i.e.*, actions that question EPA's remedy. Br. 31; *see Johnson v. United States*, 559 U.S. 133, 138-40 (2010).

Respondents contend (at 32) that because all five exceptions under § 113(h) for permissible "challenges" involve CERCLA enforcement actions, all "challenges" must directly contest EPA's orders. That premise is false; these exceptions actually show the breadth of "challenges." Section 113(h)(1), for instance, authorizes private parties to sue other PRPs for cost recovery and contribution claims. *See* 42 U.S.C. § 9613(h)(1). Those suits are not enforcement actions, and they need not challenge EPA's orders.

Respondents (at 33-35) claim that their "claims do not depend on the invalidity of any EPA action." But they extensively (at 7-10) accuse EPA of caring more about cleanup costs than children. Their restoration remedy presupposes that EPA's cleanup is inadequate. Their plan collaterally attacks EPA's ongoing remediation at every step, from digging up soil EPA wants undisturbed

to building unnecessary underground trenches. Br. 28-29; U.S. Br. 20-21. In sum, respondents' view of § 113 is far-fetched: § 113 would bar formal attacks on EPA's orders, but would not protect EPA's ongoing cleanups even from state laws mandating their physical destruction.

III. Section 122(e)(6) Requires Reversal

CERCLA designates landowners within Superfund sites (like petitioner and respondents) as "potentially responsible part[ies]" (PRPs) who cannot "undertake any remedial action" without EPA's authorization. 42 U.S.C. § 9622(e)(6). As PRPs, respondents need (but lack) EPA's approval to execute their remediation plan. Respondents' remedy thus fails because they lack EPA's authorization to do what state law requires.

A. Respondents Are PRPs

1. Respondents, as "[o]wners" of contaminated land, are "[c]overed persons." 42 U.S.C. § 9607(a). Section 107(a) identifies various "[c]overed persons" who "shall be liable" for the costs of EPA's cleanups. *Id.* "Covered persons" do not stop being covered even if they establish defenses and no longer "shall be liable." Br. 36-40; U.S. Br. 34-35. This Court and CERCLA equate PRPs with "[c]overed persons" because the terms interchangeably describe the class of persons CERCLA subjects to *potential* liability, even if no liability transpires.

This Court has repeatedly used the term "PRPs" to mean those who may be liable for cleanup costs under § 107(a), *i.e.*, "[c]overed persons."[1] Respondents (at 37-

[1] Br. 32-33; U.S. Br. 33; *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608-09 (2009); *United States v. Atl. Research Corp.*, 551 U.S. 128, 131-32, 134 n.2 (2007); *Cooper Indus., Inc. v. Aviall Servs.*, 543 U.S. 157, 161 (2004); *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998); *Key Tronic Corp. v. United States*, 511 U.S.

39) say nothing rode on this language. But if PRPs and covered persons differed, this Court presumably would have said so, rather than misleading EPA and regulated parties in six cases spanning three decades.

This Court was not asleep at the switch. CERCLA repeatedly identifies covered persons with PRPs. Section 122(e)(1)(A) describes "potentially responsible parties (including owners and operators and other persons referred to in § [107(a)])." 42 U.S.C. § 9622(e)(1)(A). Respondents (at 44) dispute that "*all* individuals identified in Section 107(a) are necessarily [PRPs]." Nonsense: § 122(e)(1)(A) refers without limitation to covered persons as PRPs. At a minimum, § 122(e)(1)(A) shows that PRPs include § 107(a) "owners and operators"—*i.e.*, respondents.[2]

Section 105(h)(4)(A) reinforces that owners and operators are necessarily PRPs. That provision lets EPA list sites on the National Priorities List if a "State, as an owner or operator or a significant contributor of hazardous substances to the facility, is a potentially responsible party." 42 U.S.C. § 9605(h)(4)(A). States are PRPs because they are "owner[s] or operator[s]," regardless whether they polluted.

Or take § 122(a), which authorizes agreements between EPA and "any person (including the owner or operator of the facility from which a release or substantial

---

809, 818 (1994); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989), *overruled on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

[2] Respondents claim (at 44-45) they cannot be PRPs because EPA did not satisfy § 122(e)(1)(A)'s notification requirements. Presumably, EPA followed its longstanding policy of not seeking costs from landowners like respondents. U.S. Br. 34. Regardless, EPA's actions cannot override the statutory text.

threat of release emanates, or any other potentially responsible person)." 42 U.S.C. § 9622(a). The described "owners or operators" (a type of "[c]overed persons") are PRPs. Respondents (at 43-44) protest that because they did not pollute, § 122(a) is inapplicable. But CERCLA is a strict-liability statute. Owners of a "facility" include anyone who owns a "site or area where a hazardous substance has … come to be located." 42 U.S.C. § 9601(9). Such owners can be held liable—*i.e.*, potentially responsible—regardless of fault, and are therefore PRPs. *Id.* § 9607(a)(1); *Atl. Research*, 551 U.S. at 136 (CERCLA subjects even the "innocent … landowner whose land has been contaminated by another" to liability).

Respondents (at 39) are incorrect that §§ 119(d) and 124(b)(2) show that PRPs and "[c]overed persons" differ. Those two provisions extend various defenses or indemnities to actors who engage in certain conduct that would render them "[c]overed persons," then withdraw that benefit if the actors, regardless of those activities, still would be "[c]overed persons" under § 107(a). 42 U.S.C. §§ 9619(d), 9624(b)(2). These provisions never suggest that covered persons are not PRPs.

2. Respondents (at 45) decline to defend the holding below that only parties "designated" as PRPs are PRPs. Br. 35-40. Instead, respondents maintain (at 36, 40, 45) that because "potentially" means "possible but not yet realized," a PRP is "a covered person who faces potential liability," but not someone whose "potential for liability is eliminated—whether through judicial determinations or the passage of time." Respondents identify no authority embracing their theory. Even were this Court writing on a blank slate, the word "potential" supports petitioner. Just as "[c]overed persons" are people who "shall be liable" even if no one collects, the word "potentially" in PRP

describes people who *may* be legally responsible for cleanups, even if liability never materializes. *Supra* § 1.

Other aspects of CERCLA refute the notion that only people who could be forced to pay cleanup costs are PRPs. Section 105(h)(4)(A) is again instructive. It provides: a "State, as an owner or operator or a significant contributor of hazardous substances … is a potentially responsible party." 42 U.S.C. § 9605(h)(4)(A). But state sovereign immunity (absent waiver) shields States from CERCLA damages. *Seminole Tribe*, 517 U.S. at 63-73. Respondents' reading also produces absurdity. If only parties whose liability is "possible but not yet realized" are PRPs, *actually* liable parties would not be PRPs; they *have* realized liability.

Moreover, CERCLA defenses are not decisive endpoints. Non-polluting (or minimally polluting) parties qualify for defenses only as long as they abide by myriad statutory conditions, including non-interference with EPA's cleanup. 42 U.S.C. §§ 9601(40)(B), 9607(r)(1) (bona-fide-prospective-purchaser defense), 9607(q)(1)(A) (contiguous-landowner defense), 9607(o)(2)(A) (*de micromis* polluter defense). The minute parties stop complying, they subject themselves to liability again. In the parlance of the Montana Supreme Court, the PRP horse would trot in and out of the barn, leaving EPA to try to pinpoint the horse's whereabouts at any time.

PRP status also does not depend on the availability of statute-of-limitations defenses, as respondents (at 36) envision. Br. 37-39. Respondents ask how landowners could be potentially liable under CERCLA if § 113(g)(2)(B)'s six-year limitations period for an action to recover remediation costs has run. 42 U.S.C. § 9613(g). Here is how: EPA at any time can issue unilateral administrative orders compelling landowners to spend money effectuating

EPA's cleanup. *Id.* §§ 9606(a), (b)(2). Indeed, EPA told respondents that their actions "may put them at risk of becoming liable for significant response costs" under § 106(a). Br. 1a, 3a; *see* CVSG Br. 16-17. Moreover, if respondents remediate absent EPA approval, EPA could initiate a "removal action" in response and sue for cost recovery within three years under § 113(g)(2)(A). 42 U.S.C. § 9613(g)(2)(A). Additionally, if petitioner and EPA sign a site-wide consent decree, the company has three years to sue respondents for contributions to remaining cleanup costs. *Id.* If respondents' cleanup harms natural resources, they could be sued for those damages until three years after EPA's remediation ends. *Id.* § 9613(g)(1). Respondents thus face many avenues to possible CERCLA liability.[3]

Further, figuring out when "potential" liability terminates under respondents' theory presents complex metaphysical questions that would thwart administration of all 54 CERCLA provisions involving PRPs. Respondents never explain how or when anyone could be sure PRPs no longer face potential liability. Br. 37-40. Just because PRPs could assert statute-of-limitations or other defenses is no guarantee that courts or EPA would agree. Absent an unappealable final judgment, some possibility of liability remains.

Respondents (at 39-40) infer that PRP status relates to whether a party "faces potential liability and therefore might settle" because Congress placed 33 of 54 references

---

[3] Respondents (at 47) misrepresent the government's district-court brief, which does not suggest that PRP status disappears upon establishing defenses. The brief says only that "landowner PRP[s]" might invoke contiguous-landowner and innocent-landowner defenses if they meet statutory criteria, not that they would stop being PRPs. Mont. S. Ct. R. at App-555.

to PRPs within a section (§ 122) that largely concerns settlements. But this Court does not read in such atextual limitations. *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 291-92 (2010). Further, CERCLA refers to PRPs in contexts unrelated to "potential" liability, refuting this theory. Take § 119, which authorizes "any [PRP] carrying out an agreement under [§§ 106 or 122]" to delegate cleanups to contractors. 42 U.S.C. §§ 9619(e)(1)(D), 9619(c)(2)(D). Such PRPs are implementing settlement agreements, *i.e.*, are still PRPs despite accepting liability. *Accord id.* § 9613(g)(1) (requiring notice to PRPs of natural-resource-damages suits that can be filed 3 years *post*-cleanup).

Respondents finally (at 43) rely on proposed language Congress never adopted that defined PRPs as "a person who would be liable under section 107 if response costs were incurred." But statutory outtakes are not law. Regardless, that definition undermines respondents by effectively equating PRPs with "[c]overed persons," *i.e.*, persons who "shall be liable" for cleanup-related costs. 42 U.S.C. § 9607(a).

3. Respondents' position invites chaos. In Montana alone, some 50,000 people live on Superfund sites. Pet. 34. Under respondents' theory, tens of thousands of landowners would initially qualify as PRPs. But upon establishing statute-of-limitations or other defenses, they become *former* PRPs who can undo EPA's efforts. To avoid a patchwork of one-off remedial plans and preserve EPA's control over on-site remediation, EPA would have to sue or settle with every PRP within the limitations period and resolve all defenses. Br. 38-40.

Respondents (at 45) downplay these consequences as "how limitations periods work." But Congress could not possibly have intended to force EPA to pursue thousands

of actions (which would delay cleanups and prolong hazardous waste exposure) to ensure the integrity of its cleanups. The only beneficiaries would be the swarm of lawyers whom landowners and other PRPs would have to hire. Br. 38-40.

Not to worry, respondents say: EPA could "seek equitable relief" if competing cleanups "create 'an imminent and substantial endangerment to the public health or welfare or the environment.'" Resps' Br. 46 (quoting 42 U.S.C. § 9606(a)). Start worrying: how would EPA know when former PRPs are poised to endanger communities? They have no reason, absent § 122(e)(6), to seek EPA's pre-approval. Would EPA have to track every PRP on every Superfund site to ascertain when they establish a defense? EPA can hardly surveil every former PRP in case today is the day they breach an underground aquifer and release toxins into everyone's water. And EPA can only enjoin "imminent and substantial" threats—small comfort while EPA's comprehensive cleanup suffers death by a thousand unilateral cuts.

Respondents (at 40-41) doubt Congress would place a provision broadly protecting EPA cleanups against interference within § 122, which generally concerns settlements. But § 122(e)(6) is no rogue elephant hiding transformative consequences in an obscure CERCLA mouse-hole. CERCLA is a stomping ground for parallel provisions that sweep even further to protect EPA's cleanup and the community. Non-polluting, bona-fide prospective purchasers of land on Superfund sites must "provid[e] full cooperation, assistance, and access" to EPA's remediation efforts (*i.e.*, not displace EPA's existing remediation), or lose their exemption from CERCLA liability. 42 U.S.C. §§ 9601(40)(B), 9607(r)(1). Non-polluting contiguous landowners likewise cannot interfere with

EPA's cleanup if they want to remain exempt from liability. *Id.* § 9607(q)(1)(A)(iv)-(v). The same goes for *de micromis* polluters. *Id.* § 9607(o)(2)(A).[4]

Respondents (at 41-42) exaggerate § 122(e)(6)'s intrusiveness. EPA does not "forever" control every "shovelful of dirt" on respondents' property. In cleanups involving complete removals of hazardous substances, landowners without hazardous substances on their property would no longer fit the PRP definition, *see* 42 U.S.C. § 9607(a). Cleanups like Anaconda, which involve partial waste-in-place remediation, differ because the cleanup is ongoing and EPA has determined it is safer or more practicable not to disturb some substances. Br. 13-14; *cf.* Resps' Br. 56-58. Regardless, § 122(e)(6) bars only unauthorized "remedial action." That term does not prohibit minor yardwork like planting flowers or installing fences. *See* 42 U.S.C. § 9601(24). Any further restrictions come from local land-use law—part of the system of "institutional controls" that local governments impose to protect citizens around Superfund sites. *E.g.*, Anaconda-Deer Lodge County, Montana Code of Ordinances ch. 24, art. XXX.

Respondents (at 42) claim that EPA's approval authority over residential landowners' competing cleanups raises Takings and Commerce Clause concerns. That position is incoherent. Respondents seemingly agree that non-polluting landowners could be PRPs until limitations periods run, meaning § 122(e)(6) requires them to "house pollutants on their land" for years already. Why the Constitution would tolerate that restriction until the clock

---

[4] Respondents (at 41) fault Congress for not extending § 122(e)(6) to "all persons" if the point was to comprehensively protect sites. But the above provisions and § 122(e)(6) together prohibit any on-site landowner from interfering.

runs on liability, but not later, is a mystery.

Respondents' position is just a backdoor attack on CERCLA and suggests the whole Act is constitutionally suspect. Under respondents' theory, holding non-polluting landowners liable for *any* costs, or forbidding landowners from any activities under § 106(a), would equally raise constitutional concerns. And respondents' position has no logical endpoint. If Congress cannot require non-polluting landowners to obtain EPA approval before interfering with EPA's cleanups, Congress cannot apply § 122(e)(6) to culpable landowners, either.

B. Respondents Are Not "Contiguous Landowners"

Respondents (at 47-49) raise the eleventh-hour claim that they are not PRPs because they are not "[c]overed persons" under the "contiguous landowner" exception. 42 U.S.C. § 9607(q)(1)(A). Respondents' brief in opposition never argued this, as this Court's rules require. S. Ct. R. 15.2. Regardless, respondents' contention lacks merit. First, CERCLA requires *respondents* to "establish by a preponderance of the evidence" that they satisfy eight criteria, 42 U.S.C. § 9607(q)(1)(B); *contra* Resps' Br. 48-49. No court has found that respondents did so.

Respondents also must show they did "not know or have reason to know" about contamination when they bought land. *Id.* § 9607(q)(1)(A)(viii). But they bought properties neighboring a Washington Monument-sized smelter. "[E]vidence of public knowledge" of contamination was "almost overwhelming." *Christian v. Atl.*

Richfield Co., 358 P.3d 131, 154-55 (Mont. 2015). Opportunity was a company town; virtually all property included easements *authorizing* waste deposits. *Id.* at 137-38.[5]

Further, respondents' restoration remedy disregards a contiguous landowner's duty to take "reasonable steps" to "prevent any threatened future release" or "prevent or limit" exposure. 42 U.S.C. § 9607(q)(1)(A)(iii). The same goes for their duty to provide "full cooperation, assistance, and access" to EPA, *id.* § 9607(q)(1)(A)(iv), or not to "impede the effectiveness or integrity of any institutional control," *id.* § 9607(q)(1)(A)(v).

C. Remand Is Pointless

Respondents acknowledge that, if they are PRPs, they need EPA's approval to execute their remediation plan. They never explain why they failed to approach EPA in the eleven years since they filed suit. Respondents (at 49) nonetheless invite a remand for state courts to decide if the possibility of future EPA approval is enough for respondents' remedy to proceed. But respondents have never argued that state law would allow their remedy to proceed without EPA's approval. Instead, they concede that state law *requires* them to effectuate any jury-approved cleanup—an outcome that § 122(e)(6) precludes absent EPA's authorization. Br. 11-12, 52; BIO 8; Pet. App. 5a, 13a. The decision below thus never questioned that, if respondents are PRPs, they cannot pursue their restoration remedy; there is no further state-law inquiry. Pet. App. 15a-17a.

---

[5] Respondents (at 49 n.10) invoke the bona-fide-prospective-purchaser exception, but no court has even considered if they met their burden to satisfy six prerequisites. 42 U.S.C. §§ 9601(40)(B), 9607(r)(1).

IV. Preemption Principles Require Reversal

Respondents (at 50, 59, 60) attack an argument no one makes: that CERCLA "broadly preempts state-law remedies for quintessential state-law property torts." No matter what, CERCLA permits respondents' request for traditional compensatory damages and even *punitive* damages for their nuisance and trespass claims.

But respondents want more, namely a state-law restoration remedy that uniquely imposes a duty to implement a remediation plan on a Superfund site without EPA's approval. Federal law bars petitioner from effectuating non-EPA-approved remediation. When federal law requires a party to turn right, but state law requires a left, federal law controls. Allowing landowners to invoke state law to impose their own cleanups would also vitiate CERCLA's statutory directives that EPA oversee site-wide cleanups and settle with PRPs.

A. Impossibility Preemption Applies

1. A state law is preempted if "federal law forbids an action that state law requires." *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486 (2013). Respondents' restoration remedy requires restoring land to its pre-pollution condition. State law requires petitioner to pay for that remediation—and once petitioner puts up the money, state law obligates respondents to execute their cleanup. Br. 43-44.

Respondents (at 51, 53-55) portray restoration damages as "simply the 'sanction'" for breaching a state-law duty to avoid polluting. But if petitioner had "polluted," then restored the property, restoration damages would be unavailable, as respondents (at 55) concede. It is the failure to restore—the failure to perform a duty that federal law prohibits—that triggers the duty to pay restoration

damages. If Montana authorized injunctions compelling petitioner to implement respondents' remediation plan, CERCLA would surely preempt that remedy. Like injunctive relief, restoration damages are not "simply a measure of the *damages* Landowners may secure." *Cf.* Resps' Br. 51; States' Br. 27-28. Restoration damages presuppose that state-law-required restoration has not occurred, and impose a binding obligation to restore the polluted land. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1087 (Mont. 2007); *supra* p. 16. Preemption does not disappear just because States label something "relief," not a "claim."

Respondents (at 52) contend that since they will wield the shovels, petitioner faces no remediation obligation. But the restoration remedy requires petitioner to effectuate respondents' remediation plan. By discharging a duty to pay restoration damages, defendants compel plaintiffs to devote that award to their jury-approved plan, not EPA's. *Sunburst*, 165 P.3d at 1087; Br. 43-44. Petitioner can avoid that obligation only by implementing respondents' plan itself. Respondents (at 52) call such conduct optional damages mitigation. But this same argument would apply had respondents sued for injunctive relief and petitioner implemented respondents' plan to avoid the injunction. Either way, state law makes petitioner an indispensable agent in uprooting its own EPA-mandated work.

Federal law commands petitioner *not* to effectuate the precise work state law would require. CERCLA prohibits petitioner from "undertak[ing] any remedial action" without EPA's approval. 42 U.S.C. § 9622(e)(6); Br. 44-46; U.S. Br. 30-31; Resps' Br. 54. Petitioner cannot evade federal law by paying respondents to dig the dirt themselves.

E.g., Black's Law Dictionary 1369 (5th ed. 1979) (to "undertake" includes "[t]o take on oneself" and "to covenant" or "contract" for).

2. Respondents argue (at 54) that petitioner must prove EPA "would *deny*" their cleanup plan for federal law to conflict. But this Court has already "reject[ed]" the argument that "when a private party's ability to comply with state law depends on approval and assistance from [a federal agency], proving pre-emption requires that party to demonstrate that the [agency] would not have allowed compliance with state law." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620 (2011). It is irrelevant whether some parts of respondents' plan "might be something that EPA could authorize." Resps' Br. 56. "The question for 'impossibility' is whether the private party could independently do under federal law what state law requires of it." *Mensing*, 564 U.S. at 620.

Respondents contend (at 54-55) these preemption principles apply only to generic-drug manufacturers. But there is no pharmaceuticals-only edition of the Supremacy Clause. *Mensing* spoke categorically: "[P]re-emption analysis should not involve speculation about the ways in which federal agency and third-party actions could potentially reconcile federal duties with conflicting state duties." *Id.* at 623. Nor do generic-drug manufacturers "fac[e] inconsistent legal obligations" different from petitioner's. *Cf.* Resps' Br. 55. Sure, petitioner could "eliminate any ultimate restoration-damages award by conducting the cleanup" before the jury's verdict. *Id.* But that would violate federal law and trigger severe penalties. Br. 44-45.

Respondents are wrong (at 56) that *Wyeth v. Levine*, 555 U.S. 555 (2009), requires proof EPA would reject respondents' plan. That standard applies when federal law

authorizes defendants (in *Wyeth*, brand-drug manufacturers) to act unilaterally, subject to possible federal disapproval later. *Mensing*, 564 U.S. at 620, 624 & n.8. Here, defendants need EPA approval up front to satisfy state-law obligations. *Id.* at 620.

Regardless, EPA *has* rejected the pillars of respondents' plan, including different soil action levels for arsenic and different soil excavation depths. Br. 14, 17-18; U.S. Br. 20-21. Respondents suggest (at 56) that EPA signaled possible later approval of their underground trench by deeming it "technically impracticable" instead of environmentally risky. That phrase is not exactly encouraging; besides, EPA further concluded that respondents' plan risks environmental harm, U.S. Br. 20, and all respondents have safe drinking water, rendering remediation unnecessary, J.A. 158, 338; Br. 18. Finally, respondents erroneously suggest (at 58) that EPA rejected further pasture-land remediation only because it involved tilling. *Cf.* Mont. S. Ct. Supp. App. 182. EPA refused because it did not want the land disturbed; it frequently orders tilling. *E.g.*, ARWWS ROD §§ 7.1.1(4), 9.4.3.[6]

B. Obstacle Preemption Applies

Allowing state-law restoration remedies on Superfund sites would eviscerate policy mandates enshrined in CERCLA's text. Br. 48-51; Chamber Br. 17-23; Wash. Legal Found Br. 7-13. First, §§ 117 and 121 require EPA to balance myriad factors and accommodate the State's and community's views in selecting a site-wide cleanup, 42 U.S.C. §§ 9617, 9621. Respondents never explain how

[6] Respondents argue (at 56) that petitioner waived conflict preemption in trial court. Petitioner argued conflict preemption before the Montana Supreme Court, which addressed the issue. Pet. App. 17a-18a.

EPA's community-wide determinations could govern if the hundreds of thousands of landowners on Superfund sites could supplant EPA's plans. Second, § 122(a) instructs EPA to settle and secure PRPs' cooperation in expeditious remediation. *Id.* § 9622(a). But respondents' restoration remedy would deter PRPs like petitioner from cooperating in efforts that landowners could undo later. Respondents ignore these provisions, which provide ample textual "[e]vidence of preemptive purpose." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993).

Respondents refute strawmen. Of course CERCLA does not "confer permanent polluter immunity," Resps' Br. 2, or "*preclude* state-law tort claims holding polluters liable," *id.* at 59. While CERCLA preserves trespass and nuisance actions seeking various damages, CERCLA rules out dueling remediation plans.

CERCLA §§ 114(b) and 309 do not insulate state-law restoration remedies. *Cf.* Resps' Br. 61-62. Section 114(b) reinforces the exclusivity of EPA's cleanup. Private parties can recover cleanup costs incurred "consistent with the national contingency plan," 42 U.S.C. § 9607(a)(4)(B)—*i.e.*, as part of *EPA's* cleanup—but § 114(b) prevents recovery of the *same* costs under state law, *id.* § 9614(b). Section 309 extends state-law limitations periods for actions for "personal injury, or property damages." *Id.* § 9658(a)(1). That provision does not authorize respondents' injunction-like remedy.

Allowing landowners on Superfund sites to impose competing cleanups would replace EPA's consideration of Congress' cleanup criteria under §§ 117 and 121 with do-it-yourself plans. Respondents (at 65) belittle this point as horror "that juries might determine the extent of polluters' liability." But the problem is not the jury system.

It is that no one involved in these competing plans, including juries, need consider the risks to the community or other statutory factors, as EPA must. Br. 48-50; U.S. Br. 28-30; Chamber Br. 23.

Respondents express indifference whether their restoration remedy would eliminate EPA's key bargaining chip in fulfilling its statutory mandate to secure settlements and cooperation from PRPs. 42 U.S.C. § 9622(a). Of course, such settlements may not eliminate polluters' liability, Resps' Br. 65, but settling with EPA resolves the biggest costs and uncertainties PRPs face, Br. 50. PRPs like petitioner will not devote decades to collaborating with EPA if the whole enterprise is a Sisyphean effort that individual landowners can undo. *Id.*

At bottom, respondents would replace Congress' choices with their parochial preferences. Respondents (at 7-10, 56-58) accuse EPA of conducting a bargain-rate cleanup that consigns children to arsenic-laden daycares. But EPA designed its cleanup after consulting with landowners across the site, 99% of whom did not join this suit. CERCLA requires EPA to "attain a degree of cleanup … which assures protection of human health and the environment," 42 U.S.C. § 9621(d)(1), and EPA's remedy cannot compromise health. 40 C.F.R. § 300.430(f)(1)(i)(A).

EPA's arsenic cleanup levels—which other agencies and Montana agree are safe—reflect careful risk assessments. Br. 13-14; J.A. 63, 82, 89. Community residents do not have elevated levels of lead or arsenic. Anaconda Smelter Superfund Site, Summary of ATSDR's Exposure Investigation (2019), https://bit.ly/2r13MQY. Petitioner tested all of respondents' properties and remediated every property exceeding EPA's action levels. *Cf.* Resps'

Br. 9-10. All residents have safe drinking water; nonetheless, EPA ordered continued monitoring. Br. 14, 18.

Meanwhile, respondents (at 65-66) dismiss their plan's dangers. Respondents' underground trenches affect everyone's groundwater; any contamination they introduce would spread community-wide. Respondents' soil-excavation plan risks spreading currently contained arsenic everywhere. And this Court's holding applies nationwide. Affirmance would let hundreds of thousands of landowners impose their own risky plans, even at Superfund sites containing the most hazardous pollutants. Br. 18, 51.

Respondents (at 65) argue that EPA can always sue to prevent imminent harm under § 106(a). But forcing EPA to sue entire communities to comply with EPA's cleanup is upside-down; parties unhappy with EPA's cleanup eventually can sue EPA, not the other way around. 42 U.S.C. §§ 9613(h), 9659(a).

C. CERCLA's Savings Clauses Do Not Bar Preemption

This Court has interpreted savings clauses materially identical to CERCLA's to mean that Congress did not intend to occupy a given field, not that Congress preserved state laws that conflict with federal law. So too here. CERCLA §§ 114(a), 302(d), and 310(h) leave room for states to impose additional environmental regulation and polluter liability. But state-law remedies that defy Congress' statutory judgments—like this one—remain preempted. Br. 51-54; Wash. Legal Found. Br. 14-15.

Respondents (at 62-63) interpret CERCLA §§ 114(a) and 302(d) to preserve "claim[s] for additional cleanup costs" or blanket "exempt[ions of] polluters from further cleanup liability." But respondents' restoration remedy

involves jettisoning EPA's plan. That is no mere additional or complementary duty. Br. 53-55. If respondents' remedy indeed conflicts with CERCLA, respondents never explain how these clauses would foreclose preemption when this Court has held that similar and broader savings clauses do not. Br. 52-53.

Section 310(h)—which respondents previously disavowed, Resps' Mont. S. Ct. Br. 24-25—changes nothing. Br. 52. CERCLA would still preempt respondents' restoration remedy, just as federal law preempted conflicting state-law claims despite similarly worded savings clauses. Br. 52; *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907).

Respondents (at 64) dismiss this Court's cases finding preemption notwithstanding savings clauses as instances where specific federal prohibitions overcame generic savings-clause language. But *Geier* holds that the existence of a savings clause "does *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. 861, 869 (2000). Nothing in these savings clauses suggests Congress sought to preserve state-law claims that would undo the very remedies Congress charged EPA with implementing at America's most hazardous waste sites.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

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

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

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

Counsel for Petitioner

NOVEMBER 14, 2019