No. 17-1498

IN THE

# Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,

*Petitioner,*

v.

GREGORY A. CHRISTIAN, et al.,

*Respondents.*

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

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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## QUESTIONS PRESENTED

The Petitioner presents three questions:

1. Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a "challenge" to the EPA's cleanup jurisdictionally barred by § 113 of CERCLA.

2. Whether a landowner at a Superfund site is a "potentially responsible party" that must seek the EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if the EPA has never ordered the landowner to pay for a cleanup.

3. Whether CERCLA preempts a state common-law claim for restoration that seeks cleanup remedies that conflict with EPA-ordered remedies.

Although each of these questions warrants review, we address only the third.

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## INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF has appeared as *amicus curiae* before this Court in important CERCLA cases. See *Burlington N. & S. F. R. Co. v. United States*, 556 U.S. 599 (2009); *United States v. Bestfoods, Inc.*, 524 U.S. 51 (1998). It has also appeared as *amicus curiae* in important preemption cases, urging the Court to ensure that federal law operates efficiently and uniformly—as Congress intended. See, e.g., *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015); *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013); *Bruesewitz v. Wyeth*, 562 U.S. 223 (2011).

CERCLA prohibits a State or a private party from using state law to interfere with the EPA-directed cleanup of an environmental-hazard site. Yet the decision below allows Montana landowners to do just that. WLF believes that the decision, if allowed to stand, will undercut the federal government's ability efficiently and effectively to manage environmental restoration under CERCLA.

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, WLF notified each party's counsel of record of WLF's intent to file the brief. Each party's counsel of record has consented in writing to the brief's being filed.

## STATEMENT OF THE CASE

Marcus Daly came to western Montana in 1876 to manage a small silver mine. He soon realized, however, that the region's most abundant natural resource was not silver but copper. So in 1881 he bought a small local prospect called Anaconda and, with financial support from George Hearst (William Randolph Hearst's father), established the Anaconda Copper Mining Company. Within a decade the Anaconda mine was the largest copper mine on earth, and the area was producing more than a quarter of the world's copper supply. In the following decades the Anaconda Company essentially built the economy and infrastructure of Montana.

In 1977 Atlantic Richfield acquired the Anaconda Company, and, in 1980, Atlantic Richfield closed operations at Anaconda. See Lydia Chavez, *When ARCO Left Town*, N.Y.Times, July 25, 1982, https://www.nytimes.com/1982/07/25/business/when-arco-left-town.html (accessed May 29, 2018) ("Anaconda had lost the employer who for decades had maintained its parks, built its medical centers, [and] treated its sewage.").

Nineteen-eighty happens also to be the year that Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Congress enacted CERCLA to ensure that the Nation's hazardous-waste sites are cleaned promptly and effectively. *Burlington*, 556 U.S. at 602. CERCLA empowers the EPA to order and to oversee the cleanup of such sites—often called "Superfund" sites, evoking a cleanup trust

fund established by the government—in accord with an EPA-directed plan. 42 U.S.C. § 9604. The EPA may require parties responsible for the hazard to pay for and conduct the cleanup. *Id.*; 42 U.S.C. §§ 9606(a), 9607(a). With exceptions irrelevant here, no one may challenge the EPA's cleanup plan in court while the cleanup is ongoing. 42 U.S.C § 9613(h). Also, no one associated with the site may conduct cleanup there absent EPA approval. 42 U.S.C. § 9622(e)(6).

In 1983 the EPA declared the Anaconda mining and smelting area a Superfund site. The Anaconda Smelter site is one of the largest Superfund sites in the country. Atlantic Richfield has spent around $470 million cleaning it. Pet. Br. 8. The EPA has devoted millions of dollars and thousands of workhours to the project. Pet. App. 65a. Atlantic Richfield and the EPA estimate that, by the end of major restoration work in 2025, Atlantic Richfield will among many other things have "removed tens of millions of cubic yards of hazardous smelting waste" from the site. Pet. Br. 9.

A group of landowners on the Anaconda Smelter site sued Atlantic Richfield in 2008 for, among other things, land-restoration damages. Atlantic Richfield objected that, because the restoration damages would be spent on cleaning the land, and because the plaintiffs' cleanup plan conflicts with the site's CERCLA plan, the plaintiffs improperly seek (1) to evade the statutory bar to challenging an ongoing CERCLA plan, (2) to undertake a cleanup unapproved by the EPA, and (3) to obtain money for cleanup through a state-law claim preempted by federal law. The trial court

denied Atlantic Richfield's motion for summary judgment and allowed the plaintiffs' damages claim to proceed.

The Montana Supreme Court granted interlocutory review. The United States submitted an *amicus* brief supporting Atlantic Richfield's appeal. It endorsed each of Atlantic Richfield's three arguments. In support of the preemption argument—the principal subject of this brief—the government explained how the plaintiffs' and the EPA's cleanup plans conflict. The plaintiffs' plan requires, for instance, deeper soil excavation, an extensive new system of trenches, and dramatically lower (in truth likely impossible) soil pollutant levels. Pet. App. 72a.

The Montana Supreme Court affirmed. It concluded that a jury may award money for the plaintiffs' plan even if the plan changes or undoes parts of the EPA's plan. Rejecting Atlantic Richfield's and the United States' preemption argument, it declared that CERCLA's two savings clauses bless all state causes of action—even those that thwart specific provisions of CERCLA. Pet. App. 17a-18a; see 42 U.S.C. § 9614(a) (stating that CERCLA does not preempt a State from "imposing any additional liability" for "the release of hazardous substances within such State"), § 9652(d) (stating that CERCLA does not "affect" anyone's "liabilities" under "State law, including common law, with respect to releases of hazardous substances").

Justice McKinnon dissented. She concluded that because the plaintiffs' plan conflicts with the EPA's plan, the majority's ruling is "inconsistent

with CERCLA and federal precedent." Pet. App. 23a-24a. CERCLA's savings clauses change nothing, Justice McKinnon said, because "a savings clause is not intended to allow specific provisions of the statute that contains it to be nullified." Pet. App. 33a.

## SUMMARY OF ARGUMENT

When NASA designs a rocket, no one empanels a jury to check the math. Congress would never let twelve people walk in off the street, watch a tutorial on astrophysics, take a Saturn V apart, "improve" its Stage II liquid hydrogen-liquid oxygen propulsion system, and then reassemble it for liftoff.

Restoring the environment is not rocket science—but it is often pretty close. Just as it would not let a jury tinker with a space launch, Congress would not let a jury reorganize a major environmental-restoration project. But that did not stop the Montana Supreme Court from holding that a state-court jury may review and alter the EPA's $500 million-plus cleanup plan for the Anaconda Smelter Superfund site. Montana's justices based their ruling almost entirely on CERCLA's savings clauses. To do so, they had to duck a long line of this Court's cases and at least five parts of CERCLA itself.

Although the Court should review all three issues presented in Atlantic Richfield's petition, WLF writes separately to focus primarily on the preemption issue. The Montana Supreme Court's preemption ruling should be reviewed for three reasons:

1. CERCLA is an exhaustive statute that grants the federal government broad power to orchestrate the prompt and efficient cleanup of hazardous-waste sites. In several discrete ways, CERCLA's detailed remedial scheme instructs States and private parties not to second guess the federal government's judgments about how a site cleanup should proceed. The Montana Supreme Court made a hash of this scheme, gutting at least five parts of CERCLA on its way to holding that a jury may authorize a private cleanup plan at odds with an EPA-directed CERCLA plan. This Supremacy-Clause-defying approach to CERCLA should not stand. The EPA cannot clean a hazardous-waste site effectively if a jury may review the EPA's plan and then, substituting its judgment for the EPA's, start issuing competing directives.

2. This Court has rejected—repeatedly—the argument on which the Montana Supreme Court based its decision. Many federal laws contain a broad savings clause that protects state law-making power or preserves state-law remedies. Several times, a State or a private party has argued that a savings clause permits a state law or remedy to work against the very federal law in which the savings clause appears. And several times, this Court has rejected this argument and held that a savings clause is not some kind of statutory self-destruct mechanism. The decision below conflicts with this Court's common-sense reading of federal savings clauses.

3. This case matters. The decision below allows a jury to undermine, even wreck, decades of

work by the EPA's experts. It exposes Atlantic Richfield to tens if not hundreds of millions of dollars in new liability. It sets a path to similar outcomes at Montana's sixteen other Superfund sites. And it invites other courts to engage in similar ham-fisted interpretation of other federal laws. In a variety of obvious ways—by a bar on challenges to an ongoing EPA-directed cleanup, a bar on cleanup activity unapproved by the EPA, and more—Congress told the Montana Supreme Court not to do this. The court did it anyway. Such blatant subversion of the Supremacy Clause should not go unaddressed.

The petition for a writ of certiorari should be granted.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW CREATES NUMEROUS OBSTACLES TO THE PROPER OPERATION OF CERCLA.

A state law is conflict-preempted (1) if complying with both the state law and federal law "is a physical impossibility" (i.e., "impossibility" preemption) or (2) if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (i.e., "obstacle" preemption). *Arizona v. United States*, 567 U.S. 387, 399 (2012).

As Atlantic Richfield explains in its petition (Pet. Br. 28), this case should have been a classic instance of impossibility preemption. It is impossible, in short, for the EPA cleanup plan and

the plaintiffs' cleanup plan to coexist at the Anaconda Smelter site.

As Atlantic Richfield also mentions (*id.*), and as we discuss at greater length here, the case should have been a classic instance of obstacle preemption as well. In ruling the wrong way, the Montana Supreme Court created at least five major obstacles to the implementation of federal policy.

### A. The Decision Below Obstructs Implementation Of The CERCLA-Mandated National Contingency Plan.

A CERCLA cleanup must proceed in accord with a "national contingency plan for the removal of oil and hazardous substances" published, following notice and comment, by the EPA. See 42 U.S.C. § 9605. The National Contingency Plan is an extensive exercise of agency expertise; it sets forth, in great detail, methods for identifying and cleaning contaminated sites. *Id.*; see *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed.Reg. 8666 (Mar. 8, 1990).

The history of the EPA-directed cleanup at the Anaconda Smelter site perfectly illustrates how much work and expertise goes in to a National Contingency Plan-consistent cleanup. The EPA's "remedial orders total more than 1,300 pages and consist of detailed soil and water reports, topographical surveys, scientific analyses, and countless charts, tables, and graphs supporting EPA's decisions." Pet. Br. 7; see EPA, *Fifth Five-Year Review Report: Anaconda Smelter Superfund Site*,

goo.gl/7RLczh (2015). The cost and complexity of federally directed cleanups confirms that Congress wanted such cleanups to be exclusive.

There is also evidence of this intent in CERCLA itself. CERCLA states that "the response to * * * damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions" of the National Contingency Plan. 42 U.S.C. § 9605(a).

The decision below authorizes a jury to adopt its own cleanup plan. Pet. App. 13a. In other words, it allows a jury to second guess both the National Contingency Plan and the EPA's experts. This outcome cannot be squared with Congress's intent that the EPA, guided by the National Contingency Plan, direct site cleanups nationwide.

### B. The Decision Below Flouts CERCLA's Bar On Independent Site Cleanups.

Confirming that CERCLA aims to facilitate a single and unified cleanup at each site, CERCLA § 122(e)(6), entitled "Inconsistent response action," states that, once a CERCLA site study has begun, "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized" by the EPA. 42 U.S.C. § 9622(e)(6). The decision below allows PRPs to skirt this protection of the EPA-directed cleanup and implement their own multitudinous and conflicting cleanup plans. See Pet. Br. 19-21. It allows PRPs simultaneously to extend, to complicate, and to foil the cleanup process.

Congress "designed [CERCLA] to promote the timely cleanup of hazardous waste sites." *Burlington*, 556 U.S. at 602. It hardly needs saying that the EPA cannot fulfill Congress's intent if others, proceeding without the EPA's expertise or approval, may alter or undo the site work the EPA has completed or ordered. See *United States v. Denver*, 100 F.3d 1509, 1513 (10th Cir. 1996) ("to hold that Congress intended that non-uniform and potentially conflicting [state practices] could override CERCLA remedies would fly in the face of Congress's goals of effecting prompt cleanups" of hazardous-waste sites).

### C. The Decision Below Flouts CERCLA's Bar On Legal Challenges To An EPA-Crafted Cleanup Plan.

CERCLA § 113(h) generally deprives a court of jurisdiction to review an ongoing CERCLA cleanup plan. 42 U.S.C. § 9613(h) (setting forth the jurisdictional bar, and listing exceptions not pertinent here); see Pet. Br. 15-18. "In enacting section 113(h), Congress intended to prevent time-consuming litigation which might interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites." *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 674 (8th Cir. 1998).

Here is yet another sign that the decision below flouts Congress's will. In brushing § 113(h) aside and allowing the plaintiffs' suit to proceed, the decision below approves and even promotes "time-consuming litigation" likely to obstruct "the prompt cleanup" of CERCLA sites.

### D. The Decision Below Disrupts CERCLA's Settlement Scheme.

CERCLA contains a detailed section on settlement between a potentially responsible party and the federal government. 42 U.S.C. § 9622. A settlement benefits the government, the PRP, and the land itself by quickly clarifying the parties' respective cleanup responsibilities and enabling an organized cleanup to commence.

An implicit term of a settlement, for both the EPA and the PRP, is that the jurisdictional bar in § 113(h) will insulate the PRP from other lawsuits while the site cleanup proceeds. If, suddenly, a PRP must contend with additional litigation challenging the cleanup plan, the settlement's terms are altered. Now the PRP must pay additional legal fees. And if the PRP, who is already paying to restore the land under the settlement, loses the litigation, it will have to pay additional, even duplicative, restoration costs—costs that can exceed the land's market value. At that point, the PRP might well "find it economically advantageous to walk away from further cleanup efforts" or to "use the threat of bankruptcy as [a] hammer to hold over the EPA's head." *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1221-22 & n.46 (9th Cir. 2011). The settlement could collapse. Future settlements will be harder to reach. Cf. *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 771 (7th Cir. 1994) (Easterbrook, J., concurring in part and dissenting in part) ("Risk that in the name of 'equity' a court will disregard * * * the parties' bargain * * * will lead potentially

responsible parties to fight harder to avoid liability (and to pay less in settlements)[.]").

As the United States explained below, allowing "actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA." Pet. App. 71a.

### E. The Decision Below Disrupts CERCLA's Contribution Scheme.

CERCLA enables a PRP that spends money on a cleanup to seek contribution from another responsible party—so long as the PRP spent its money in compliance with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(B). "When the requirement" of consistency with the National Contingency Plan "is flouted, contribution is denied; that is the sanction for the violation." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). Conversely, of course, the right to seek contribution is the reward for complying with the plan.

The decision below distorts this scheme. A PRP can defeat a plaintiff's state-law restoration claim only by cleaning a site to the plaintiff's liking. Such a cleanup, however, will usually violate the EPA's cleanup plan and thus conflict with the National Contingency Plan. Under the rule set by the decision below, therefore, a PRP can avoid state-law liability only by forfeiting its right to seek contribution under CERCLA.

Congress has set a policy of rewarding PRPs that comply with federal cleanup standards. The decision below obstructs that policy.

* * *

Congress enacted a law that empowers the EPA to clean hazardous-waste sites without having to deal with lawsuits or environmental vigilantes. It enacted a law, moreover, that encourages PRPs to cooperate with the EPA and to pay their share for environmental restoration. Wherever the Montana Supreme Court's reading of CERCLA takes hold, Congress's careful design will, quite simply, no longer work right.

## II. THE MONTANA SUPREME COURT'S FAULTY CONSTRUCTION OF CERCLA'S SAVINGS CLAUSES CONFLICTS WITH THIS COURT'S CASE LAW ON THE RELATIONSHIP BETWEEN SAVINGS CLAUSES AND FEDERAL LAW.

In reading CERCLA's savings clauses expansively, the decision below ignores basic rules of statutory construction. More than that, the decision's interpretation conflicts with this Court's rule against construing a statute's savings clause in a fashion that undermines specific provisions of the statute.

### A. The Montana Supreme Court Erroneously Adopted The Broadest Possible Reading Of CERCLA's Savings Clauses.

The Montana Supreme Court relied on two of CERCLA's savings clauses. A subpart of § 114, entitled "Relationship to other law," provides:

> Nothing in [CERCLA] 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). And § 302(d), part of a section entitled "Effective dates; savings provisions," states:

> Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to the releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d). The Montana Supreme Court adopted a sweeping construction of these provisions. The savings clauses, it said, ensure that any state-law claim that does not "*actively* interfere with EPA's work" may proceed. Pet. App. 11a (emphasis added). According to the Montana Supreme Court, in fact, a state-law claim that seeks to undo aspects of a completed EPA cleanup plan "is exactly the sort

contemplated in CERCLA's savings clauses." Pet. App. 11a-12a, 17a.

The Montana Supreme Court ignored two fundamental rules of statutory construction. First, the court failed to read CERCLA's savings clauses in the context of CERCLA itself. "A statute's meaning does not always turn solely on the broadest imaginable definition of its component words." *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 *16 (U.S. May 21, 2018). A court, after all, "construe[s] statutes, not isolated provisions." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). It is important, therefore, that a court "read [a statute's] words in their context and with a view to their place in the overall statutory scheme." *Id.* As seen above, in Section I, reading a savings clause out of context can wreak havoc on the operation of the rest of the statute.

Second, the court ignored "the commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *Id.* That is the situation here, where a general savings clause runs counter to specific provisions ensuring that a single, EPA-directed cleanup proceed in accord with the National Contingency Plan.

Reasonably construed, CERCLA's savings clauses establish merely that CERCLA does not preempt the field of hazardous-waste cleanup. A

state law may complement CERCLA; it may not impede it.

### B. The Montana Supreme Court's Decision Conflicts With This Court's Cases Addressing The Proper Scope Of A Remedies Savings Clause.

Many savings clauses in other federal laws are nearly identical to CERCLA's savings clauses. This Court has been asked to interpret several of these clauses, and, in each instance, it has read the savings clause before it in a fashion incompatible with the Montana Supreme Court's approach here. Review is warranted to resolve the conflict between the decision below and this Court's case law.

1. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), addresses whether the Airline Deregulation Act preempts state laws governing deceptive advertising.

The ADA bars the States from enforcing laws that affect airline prices, routes, or services. *Id.* at 378-79. In passing the ADA, however, Congress left in place a broad savings clause in the Federal Aviation Act. Nothing in the FAA, the savings clause says, "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Id.* at 378.

Note the similarity of the broad language in the FAA and CERCLA savings clauses:

> Nothing "shall *in any way* abridge" remedies "now existing at common law or by statute" (FAA (emphasis added)).
>
> Nothing shall "*in any way*" modify the "liabilities of any person under other Federal or State law, including common law" (CERCLA (emphasis added)).

The similarity of the language notwithstanding, this Court in *Morales* and the court below here reached *opposite* conclusions. Whereas the court below used CERCLA's savings clauses to discard specific provisions of CERCLA (see Section I, above), *Morales* uses the ADA's specific provisions to limit the scope of the FAA's savings clause.

Specifically, *Morales* dismisses a state-law claim for deceptive advertising as preempted by the ADA. Rejecting the plaintiffs' argument that the FAA savings clause saved their claim, *Morales* states: "It is a commonplace of statutory construction that the specific governs the general." *Id.* at 385. In other words, a specific provision in the ADA revealing Congress's intent to preempt certain state-law claims trumps a general savings clause that sweepingly suggests a contrary intent to let any state-law claim proceed. Congress, *Morales* concludes, does not "undermine [a] carefully drawn statute through a general saving clause." *Id.*

2. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), addresses the interplay between state law and the Communications Act of 1934.

"Nothing in this [law]," the Communications Act says, "shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414. This savings clause is identical to the one in the FAA. Like the FAA savings clause, therefore, the Communications Act's savings clause is quite similar to the savings clauses in CERCLA.

Like *Morales*, *AT&T* concludes—contrary to the court below—that a savings clause does not undermine specific provisions of the very law in which it appears. A telephone-service broker sued AT&T for breach of contract and tortious interference. A set of rules in the Communications Act required AT&T to sell its services only at rates it filed with the government; yet the broker's state-law claims, if successful, would entitle the broker to service from AT&T at a rate lower than AT&T's filed rates. *Id.* at 222-23. The Communications Act's rate-filing rules therefore preempted the broker's state-law claims. The Communications Act's general savings clause, the Court said, did not alter the effect of the specific rate-filing rules:

> The saving clause cannot in reason be construed as continuing in customers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.

*Id.* at 227-28 (quoting *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

3. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), addresses whether a safety regulation implemented under the National Traffic and Motor Vehicle Safety Act (Vehicle Safety Act) preempts a state tort action.

Like CERCLA's savings clauses, the Vehicle Safety Act's savings clause appears—when read in isolation—quite broad. It says that "'compliance with' a federal safety standard 'does not exempt any person from *any* liability under common law.'" 529 U.S. at 868 (emphasis added). Once again, however, the Court, faced with an apparent conflict between a general savings clause and a specific statutory (or regulatory) provision, did the opposite of what the Montana Supreme Court did here.

A woman crashed a 1987 Honda Accord into a tree. She sued Honda, contending that it had negligently omitted an airbag from the car's design. Honda invoked a Vehicle Safety Act regulation that declared airbags merely an optional safety feature; it argued that this regulation preempted the woman's claim. The woman answered with the Vehicle Safety Act's savings clause. But the Court, *American Honda* says, "has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 870. The Vehicle Safety Act's savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869. And under those principles, preemption occurs not only when a statute contains "an express statement of pre-emptive intent," but also when an "actual conflict" exists between a federal standard and a state standard. *Id.* at 884; see *id.* at 885 ("one can assume

that Congress or an agency ordinarily would not intend to permit a significant conflict" between state and federal law). Because the pertinent regulation deliberately made airbags optional, *American Honda* declares the plaintiff's state-law claims, which could succeed only if airbags were required, preempted—the savings clause notwithstanding. *Id.* at 874-86.

* * *

If a general savings clause could override a statute's specific dictates, all manner of state-law claims could countermand the statute, which could therefore be said "to destroy itself." *AT&T*, 524 U.S. at 228. The decision below conflicts with this Court's assumption, grounded in sound principles of statutory interpretation, that Congress does not place such loopholes in its laws.

Congress, it is often said, does not hide elephants in mouseholes. Equally does it not dig holes only to let others fill them back up.

## III. THIS IS AN IMPORTANT CASE THAT WARRANTS REVIEW.

The Montana Supreme Court's decision threatens to lay waste to years of EPA work, and it immediately exposes Atlantic Richfield, along with potentially responsible parties at Montana's sixteen other Superfund sites—many of whom already face large financial obligations under CERCLA—to massive new liability. The decision is a troubling violation of the Supremacy Clause. This Court should review it before its reasoning has a chance to spread.

### A. The Decision Below Creates Large And Immediate Adverse Consequences.

The outcome the Montana Supreme Court has approved is immensely wasteful. The EPA, funded by the American taxpayer, has spent decades creating and adjusting a plan to restore the Anaconda Smelter site to environmental health. Atlantic Richfield has spent around $470 million fulfilling the EPA's plan. The decision below allows a jury to require Atlantic Richfield to spend untold millions more to reverse the work it undertook at the EPA's direction. See Pet. Br. 33 (noting the plaintiffs' expert's estimate that just one piece of their cleanup plan will cost as much as $57.6 million to implement).

What's more, in Montana it is now open season for attacking CERCLA cleanup plans. The plaintiffs here seek to add a second cleanup plan to the Anaconda Smelter site. Others may now seek to add a second plan to Montana's sixteen other Superfund sites. And yet others may then seek to add third plans, and fourth plans, and fifth plans, each of which may impede and uproot the others. Like Disney's Mad Tea Party ride, this regime will move a lot around while taking no one anywhere.

Although it mentions putting money "in trust," the decision below never explicitly postpones implementation of the plaintiffs' separate cleanup plan. At most the decision tells the plaintiffs not actively to disrupt any ongoing aspects of the EPA's plan until after those aspects are fully implemented.

There is a risk that, as soon as they obtain an award (if any) of restoration damages, the plaintiffs may immediately begin disrupting any parts of the EPA-directed cleanup that are already complete. The Court should review this case before that can happen.

Further, the decision below offers a way to evade all sorts of federal statutes. Broad savings clauses are ubiquitous in federal law. If savings clauses mean what the Montana Supreme Court says they mean, federal laws with savings clauses are in effect no longer protected by any form of conflict preemption. The Court should review this case now, before other courts can follow the Montana Supreme Court's lead.

### B. The Decision Below Disrupts Our Federalized System Of Government.

The decision below is not a subtle encroachment on federal power. It is, rather, an aggressive nullification of federal law. As the Supremacy Clause shows, "the constitution has presumed * * * that State attachments, State prejudices, State jealousies, and State interests might some times obstruct * * * the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347 (1816). This appears to be such a time.

The Montana Supreme Court may uphold state interests; but this Court should respond when the Montana Supreme Court subverts federal interests. This the Court has done several times

recently. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (ruling that the Montana Supreme Court erred in declaring Montana's courts to have general jurisdiction over an out-of-state railroad); *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012) (summarily reversing a Montana Supreme Court decision defying *Citizens United v. FEC*, 558 U.S. 310 (2010)); *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012) (ruling that the Montana Supreme Court erred in allowing Montana to seize title to federally owned riverbeds). The Court should defend federal interests here too. A state court must not be allowed to place a State's ends above the national government's ability to address national problems.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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