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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The decision below authorizes juries to undo carefully crafted environmental remediation plans that EPA has been overseeing for decades under a complex federal scheme. Atlantic Richfield and the government identified no fewer than *three* separate federal-law bars to suits interfering with CERCLA cleanups. But the Montana Supreme Court blew past all that, without even acknowledging the government's view that the suit was barred and would harm the environment. Plaintiffs do not dispute that the question whether restoration-damages suits may go forward is monumentally important. The government views this case as so significant that it filed an uninvited brief in state trial court. Three amicus briefs, from ten local and national organizations, detail the havoc this decision is now wreaking. The court's radical rewriting of CERCLA is obstructing massive EPA-ordered cleanups across the state. The case presents a clean vehicle to resolve questions of paramount, recurring importance, and the Court should not delay review.

I. This Court Has Jurisdiction

The decision below was a final judgment under 28 U.S.C. § 1257. This matter arose on a "Writ of Supervisory Control"—an "ORIGINAL PROCEEDING" in the Montana Supreme Court, App. 1a—and the court's decision finally terminated the proceeding. A "writ of supervisory control issued by the Montana Supreme Court is a final judgment within our [§ 1257] jurisdiction" and "not equivalent to an [interlocutory] appeal." *Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 385 n.7 (1976) (per curiam); *see Kennerly v. District Court of Ninth Judicial Dist.*, 400 U.S. 423, 424 (1971) (per curiam).

Fisher and *Kennerly* apply the settled, centuries-old principle that state-high-court decisions resolving extraordinary writs are final judgments. *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931) (citing cases dating to 1829). Any "state court judgment" that "conclusively determine[s] the right of the applicant to the writ sought" is final under § 1257. Shapiro et al., *Supreme Court Practice* § 3.8, at 171-72 (10th ed. 2013).

Even absent this controlling precedent declaring the decision below *non*-interlocutory, the Court would still have jurisdiction under the fourth exception of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). A suit for restoration damages is a distinct claim under Montana law, App. 5a-6a; reversal of the state court's judgment would dispose of it, *Cox*, 420 U.S. at 482. And failure to intercede would seriously erode federal policy, *id.* at 482-83, for the reasons discussed, Pet. 30-36.

II. The Court Should Decide These Important Questions Now

The petition describes the many harms that the Montana Supreme Court's decision will inflict. The decision permits juries to second-guess EPA at Superfund sites across Montana and exposes ongoing remediations to interference and delay. Pet. 30-32. It jeopardizes the environment and residents' health. Pet. 32-33. It upsets longstanding reliance interests and injects massive uncertainty into critical negotiations. Pet. 33. It threatens to impose immense, unforeseeable costs on private companies working alongside EPA to remediate the nation's most hazardous waste sites. Pet. 34-36. It obstructs ongoing efforts to negotiate consent decrees in Anaconda and elsewhere in Montana. Pet. 34-36.

The decision below "threatens to lay waste to years of EPA work" by permitting plaintiffs "simultaneously to extend, to complicate, and to foil the cleanup process." WLF Br. 9, 20. Now "any interested party" is "free to file a lawsuit for restoration damages to conduct the remedial actions EPA rejected." Chamber Br. 18. For industry stakeholders, that "will make it difficult, if not impossible, … to work with federal regulators, to compromise and agree to settlements, … and to participate in ongoing regulatory efforts not yet finalized." Treasure State Br. 22. The potential costs are crippling. The decision could force companies to foot the bill for an endless set of conflicting remedies imposed by multiple juries. WLF Br. 21.

Plaintiffs dispute none of this. Their only response is to speculate that a jury might reject their claims. Opp. 39. But that misses the point. Regardless of what happens at trial in this case, the legal precedent the court set will control all future cases. "[I]n Montana it is now open season for attacking CERCLA cleanup plans." WLF Br. 21. Plaintiffs' counsel are mustering plaintiffs for new suits. Pet. 35. EPA is actively remediating 17 Superfund sites in Montana alone. Pet. 34-36. Each is now at risk of the interference, delay, environmental harm, and upset reliance that Atlantic Richfield faces at the Anaconda Smelter site. And there is no end in sight. Even if the jury disagrees with plaintiffs here, different plaintiffs could sue tomorrow.

Waiting for trial here will only exacerbate these problems. While companies cooperating with EPA wait for plaintiffs to try to convince juries to adopt their half-baked plans, new challenges will be filed; crucial consent decrees will go unsigned; and vital cleanups will be delayed. The settlement and finality

interests CERCLA promotes are utterly incompatible with the decision below and with plaintiffs' cynical suggestion that this Court postpone review for years.

Plaintiffs twice assert incorrectly (at 17, 39) that the same trial on their other claims will occur whether the Court grants certiorari or not. Trial would surely be stayed if the petition is granted. And it is doubtful plaintiffs would proceed at all if this Court reverses; restoration is the only non-de-minimis claim. Five of plaintiffs' six disclosed experts will speak to restoration; plaintiffs failed in response to interrogatories to quantify any other damages. Plaintiffs referred to restoration as "the big one" below. 6/20/2016 Tr. 69, 139.

Plaintiffs argue (at 40) that this Court should await resolution of factual issues at trial, but tellingly do not say what factual determination is necessary for this Court to decide the questions presented. This petition presents purely legal questions, which is why the state supreme court ruled on the existing record.

III. The Decision Creates Three Splits

A. The Conflict Over a CERCLA "Challenge"

In each federal circuit to have addressed the issue—including Montana's home circuit—plaintiffs' restoration-damages claim would constitute a § 113(h) "challenge." Plaintiffs emphasize (or invent) trivial factual distinctions in individual cases. But the bottom line is that Montana courts now have a materially different legal standard than any other court.

1. In the Ninth Circuit, a suit "challenge[s]" an EPA cleanup "if it is related to the goals of the cleanup." *ARCO Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th

Cir. 2000). Plaintiffs ignore this language. They do not dispute that their restoration-damages suit is related to the goals of the cleanup. That alone is reason to grant. As plaintiffs also acknowledge, the Ninth Circuit deems suits "challenges" where plaintiffs seek to force responsible parties at Superfund sites to comply with requirements "EPA had expressly chosen *not* to enforce," Opp. 20; *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011), or to "dictate specific remedial actions," Opp. 26; *ARCO*, 213 F.3d at 1115. That is all true here. Pet. 16-17. The dissent, applying Ninth Circuit precedent, readily found a challenge. App. 23a-24a.

Plaintiffs attempt (at 19-20) to distinguish these cases by repeating the same immaterial or erroneous distinctions recited by the court below and refuted in the petition. Pet. 18, 25. Each distinction is irrelevant to the *legal standard* the Ninth Circuit applies. Pet. 15-17. Plaintiffs say *Pakootas* involved CERCLA citizens' suits, Opp. 19, but *Pakootas* itself recognizes that § 113(h)'s jurisdictional bar covers *all* challenges, whether "made in citizen suits [or] under non-CERCLA statutes." 646 F.3d at 1220. And *Pakootas* held that a "demand [was] still a challenge" even though no injunctive relief was sought. *Id.* at 1221.

Beck v. Atlantic Richfield Co., 62 F.3d 1240 (9th Cir. 1995) (per curiam), confirms the conflict. *Beck* approved compensatory damages for "crop loss, lost profits, and property devaluation," *id.* at 1242—damages Atlantic Richfield agrees § 113(h) permits. Pet. 9. But *Beck* held that § 113(h) *did* bar *other* claims that, like those here, sought to alter EPA's cleanup. 62 F.3d at 1242-44 & n.3.

The Montana Supreme Court's reading of "challenge" is equally out of step with the five federal cir-

cuits that pronounce a "challenge" any suit that "calls into question" or "impacts" EPA's cleanup or contests "what measures actually are necessary." Pet. 17. Plaintiffs attempt to distinguish the cases factually, but they cannot dispute that their suit is a "challenge" under the legal standards these courts announced. Opp. 21-22. As for *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006), the cleanup here is also "ongoing." Opp. 22-23. EPA says "significant work remains," through "approximately 2025." Pet. 9; App. 62a.[1]

2. On the merits, plaintiffs focus everywhere but the actual holding below defining a "challenge." They contend that § 113(h) does not apply to state-law claims, or at least "ARAR" claims or diversity jurisdiction cases. Opp. 23-24. But this is neither an "ARAR" nor a diversity suit, and regardless the Ninth Circuit has rejected as "nonsensical" the notion that § 113(h) exempts state laws. *Fort Ord Toxics Project, Inc. v. California E.P.A.*, 189 F.3d 828, 831 (9th Cir. 1999). Plaintiffs next contend that § 113(h) applies only in federal court, but the Ninth Circuit squarely rejects that view too. App. 9a; Pet. 24.

Plaintiffs argue (at 24-25) that § 113(h) bars challenges only until "EPA's efforts are complete." But again, EPA's remediation of the Anaconda Smelter site is not "complete." App. 62a. Plaintiffs also suggest that they will not begin their remediation until *after* EPA pulls up stakes. Opp. 25. But § 113(h) bars challenges to (*i.e.*, litigation about) EPA plans. It makes no sense to litigate the sufficiency of EPA's remedy before the remedy is complete. Pet. 25.

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[1] Atlantic Richfield argued below that *plaintiffs*' cases were not on-point, not that no case besides *New Mexico* was. *Cf.* Opp. 22.

3. There are no vehicle problems. The Court cannot await cases arising from federal court (Opp. 27); future cases will be brought in state court to evade Ninth Circuit precedent barring these claims. This case is cert-worthy precisely because the Montana Supreme Court held that state-law restoration-damages claims are not § 113(h) challenges even where they require remedies EPA rejected, under a standard that *conflicts* with every relevant federal appellate decision. The Court's only opportunity to rein in the Montana high court is through a state-law case from state court.

Atlantic Richfield did not seek review of the circuit split on whether § 113(h) applies in state court (Opp. 26-27) because the court below did not decide the question; it held that the lawsuit was not a challenge. App. 9a-15a. But the existence of the split merely underscores the present confusion concerning § 113(h), an extremely important and oft-litigated provision of CERCLA, Pet. 17, 30, and the split thus bolsters the case for review. Plaintiffs are free to argue their reading of § 113 on the merits before this Court.

Nor is any further "factual development" (Opp. 27) needed to know this case involves a challenge to EPA's plan, under any conceivable definition. We know the government's view, which the court below ignored. The government extensively detailed the differences between its plan and plaintiffs' plan, as did the dissent and the petition. Pet. 6-9, 27-29; App. 36a-38a, 72a-75a. The government did not state at oral argument that "some aspects" of plaintiffs' plan "would not constitute a 'challenge.'" Opp. 27. It merely acknowledged that it could not say that every single feature directly conflicted, because plaintiffs hadn't formally submitted the plan for EPA review—

as the Montana Supreme Court has now held they need not do. But the government *has* made abundantly clear that the most salient features conflict. App. 63a-80a; *cf.* Opp. 27.

Trial will not produce a "better-developed record" on the government's views of the § 113(h) question. Opp. 40; *see* Opp. 27. Plaintiffs successfully moved to *bar* Atlantic Richfield from mentioning EPA or its views at trial. Order Granting Plaintiffs' Motion in Limine (EPA Evidence), Sept. 7, 2016.

B. The Conflict Over the Definition of "PRP"

Section 122(e)(6) bars unauthorized cleanup actions by PRPs, Pet. 19, and a PRP is anyone within the "four categories of PRPs" in CERCLA § 107(a)(1)-(4), including current owners of contaminated property within Superfund sites. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 131-32, 134 n.2 (2007). Plaintiffs are unquestionably such current owners, and in four circuits, they would be barred from pursuing their proposed remediation. Pet. 19-21.

1. Plaintiffs claim that these cases do not "address the application of Section 122(e)(6)," "turn on an interpretation of the term 'potentially responsible party,'" or "involve[] parties … who own property indisputably polluted by *another* entity, and who would be shielded from CERCLA liability by the statute of limitations." Opp. 27-28. The first proposition is irrelevant, the second is false, and the third is both.

First, Atlantic Richfield identified a split over who counts as a PRP because that is an outcome-determinative question here. It is undisputed that, if the Montana Supreme Court had deemed plaintiffs PRPs, then § 122(e)(6) would bar their unauthorized remediation.

Second, all of the cited cases held that parties were PRPs because they were Superfund owners or operators.

Third, the cases hold that property owners are PRPs even where the property was "polluted by another entity." *Cf.* Opp. 28; *see Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1239-42 (7th Cir. 1997); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010); *Litgo N.J. Inc. v. Commissioner N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 381-82 (3d Cir. 2013). Those holdings mirror this Court's holding—which the decision below flouted—that "even parties not responsible for contamination" are PRPs. *Atlantic Research*, 551 U.S. at 136. Plaintiffs proceed as if *Atlantic Research* does not exist. And whether an entity has a defense to liability under § 107(b)'s innocent landowner provision (Opp. 29) is irrelevant to PRP status under § 107(a), and certainly does not bear on whether there is a circuit split.

As for the "statute of limitations," Opp. 28, § 122(e)(6) is not a liability provision and has no statute of limitations, Pet. 26-27. Nor does § 107(a), which defines categories of PRPs. PRP status matters for reasons other than liability, as § 122(e)(6) shows: even landowners with defenses to liability may not initiate EPA-unauthorized cleanups. In any event, the decisions Atlantic Richfield cited involve PRP status 15 years or more after cleanup began and necessarily reject the notion that PRP status is time-limited. Pet. 20-21.

2. The conflict over CERCLA's definition of a PRP is not a "state-law issue." Opp. 33. If plaintiffs are PRPs, then federal law precludes their state-law restoration-damages claim. Plaintiffs cite no state-

law authority for their notion that Montana law might permit them to receive a restoration-damages award *now* on the possibility that their currently unlawful proposal might *later* be approved by EPA and rendered lawful. The court below regarded the definition of a PRP as dispositive, and its conclusion rested entirely on federal law.

C. The Conflict Over CERCLA Preemption

1. Plaintiffs do not dispute that, if the decision below held that CERCLA's savings clauses preclude ordinary conflict preemption, that holding splits with the Seventh, Ninth, and Tenth Circuits, and would merit this Court's review. Pet. 21-23. Plaintiffs instead argue that the Montana Supreme Court did not so hold. Opp. 34-35. But they cannot rewrite the decision. The court cited the mere *existence* of the CERCLA savings clause as the *sole* reason to reject two of Atlantic Richfield's conflict preemption arguments. Pet. 23; App. 17a-18a. Plaintiffs say that the court invoked the saving clauses to reject a "categorical rule," Opp. 34, but the "rule" proposed by Atlantic Richfield was ordinary conflict preemption: where plaintiffs' remedy conflicts with EPA's chosen remedy—*e.g.*, by imposing "alternative standards"—it is preempted. App. 17a. The new cases plaintiffs cite (Opp. 35) simply hold that CERCLA does not preempt state remediation actions in the *absence* of an EPA-ordered plan. Likewise, *Manor Care, Inc. v. Yaskin* held that CERCLA preserves "complementary state remedies," *i.e.*, it does not preempt "the field," but "[o]f course" ordinary *conflict* preemption applied. 950 F.2d 122, 126-27 (3d Cir. 1991).

Plaintiffs seize on the Montana court's assertion that the restoration-damages claim here "does not prevent the EPA from accomplishing its goals." App.

17a. EPA disagrees, App. 77a-78a—but more importantly, the court offered that response to only *one* of Atlantic Richfield's preemption points. The court's view that savings clauses negate conflict preemption was its only response to the others.

2. On the merits, conflict preemption is clear as day. Pet. 27-29. That Atlantic Richfield could "pay[] damages" to plaintiffs while still complying with EPA's plan does not defeat preemption (Opp. 36); if it did, no tort suit would ever be preempted. The question is whether the state-law *duty* that gives rise to monetary liability—*e.g.*, a duty to build plaintiffs' proposed trench—conflicts with federal law. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000). Plaintiffs claim that the summary judgment record lacked evidence of conflict, Opp. 36, but ignore the extensive contrary record evidence, Pet. 6-9, 27-29; App. 36a-38a, 71a-75a.[2]

Since the filing of the petition, the Second Circuit has confirmed that CERCLA "preempts the residents' attempts to impose state tort law liability on [the defendant] for not going above and beyond a[n EPA-selected] testing regime." *Bartlett v. Honeywell Int'l Inc.*, 2018 WL 2383534, at *5 (2d Cir. May 25, 2018) (summary order). That is what plaintiffs seek to do here. App. 4a; Treasure State Br. 17. In federal court, this claim would be preempted, and this Court should not allow the Montana state courts to shield litigants who seek to evade and obstruct federal law.

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[2] The court squarely addressed preemption; there are no preservation issues. *Cf.* Opp. 9, 12, 36-37.

CONCLUSION

Inviting the views of the United States is unnecessary; the case is plainly cert-worthy and the government's brief below states its position on all three questions. A six-month delay for an invited brief exposes Atlantic Richfield to a wasteful trial, and parties across Montana to months more of crippling uncertainty. The Court should grant certiorari now.

Respectfully submitted,

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