No. 17-1498

In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

GREGORY A. CHRISTIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
ERIC GRANT
Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
MATTHEW R. OAKES
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Respondents own property within a site designated for cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* They sued petitioner in state court, seeking "restoration damages" for cleanup activities that the Environmental Protection Agency (EPA) had not required in its CERCLA response action. The questions presented are as follows:

1. Whether respondents' claims for restoration damages present "challenges" to an EPA response action within the meaning of Section 113(h) of CERCLA, 42 U.S.C. 9613(h).

2. Whether respondents are "potentially responsible part[ies]" who are prohibited by Section 122(e)(6) of CERCLA, 42 U.S.C. 9622(e)(6), from undertaking remedial action without EPA authorization.

3. Whether CERCLA preempts respondents' claims for restoration damages.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule: Page

Miscellaneous:

In the Supreme Court of the United States

No. 17-1498

ATLANTIC RICHFIELD CO., PETITIONER

v.

GREGORY A. CHRISTIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Petitioner owns a former copper smelter that is now part of a Superfund site in Montana. Pet. App. 4a. Respondents, who own land within the site, brought an action in state court seeking "restoration damages" to fund cleanup actions beyond those ordered by the Environmental Protection Agency (EPA). *Id.* at 4a-5a. Petitioner contended that the claims were barred or preempted by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The state court denied petitioner's motion for summary judgment. After

granting a writ of supervisory control before trial, the Montana Supreme Court affirmed. Pet. App. 1a-40a.

1. Congress enacted CERCLA "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 4 (2014) (citation and internal quotation marks omitted). CERCLA authorizes the President to respond to the "release of a hazardous substance" by taking certain actions "necessary to protect the public health or welfare or the environment." 42 U.S.C. 9606(a); see 42 U.S.C. 9604(a).[1] The federal government may conduct its own CERCLA cleanup actions, "or it may compel responsible parties to perform the cleanup." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). "In either case, the Government may recover its response costs." *Ibid.* Specifically, CERCLA "lists four classes of potentially responsible persons (PRPs) and provides that they 'shall be liable' for, among other things, 'all costs of removal or remedial action incurred by the'" federal government. *Ibid.* (quoting 42 U.S.C. 9607(a)(4)(A)).

Under CERCLA Section 113(b), federal district courts "have exclusive original jurisdiction over all controversies arising under [CERCLA], without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. 9613(b). CERCLA Section 113(h) provides:

---

[1] Most of the President's CERCLA authority relevant here has been delegated to EPA by executive order. See 61 Fed. Reg. 45,871 (Aug. 30, 1996); 52 Fed. Reg. 2923 (Jan. 23, 1987).

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [in five enumerated circumstances].

42 U.S.C. 9613(h).

Under CERCLA Section 122(e)(6), "[w]hen either the President, or a [PRP] * * * has initiated a remedial investigation and feasibility study for a particular facility * * * , no [PRP] may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U.S.C. 9622(e)(6).

CERCLA includes several savings clauses. Under 42 U.S.C. 9614(a), "[n]othing 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." Under 42 U.S.C. 9652(d), "[n]othing 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 releases of hazardous substances or other pollutants or contaminants." Under 42 U.S.C. 9659(h), CERCLA "does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in [42 U.S.C.] 9613(h)."

2. This case involves an EPA response action at the site of the former Anaconda Smelter, which "processed

copper ore from Butte," Montana, "for nearly one hundred years before shutting down in 1980." Pet. App. 4a. In 1983, EPA designated the Anaconda Smelter and surrounding areas a Superfund site, and for several decades petitioner has conducted extensive remediation work there at EPA's direction. *Ibid.* Among other actions, "EPA required [petitioner] to remediate residential yards within the [Superfund] Site harboring levels of arsenic exceeding 250 parts per million in soil, and to remediate all wells used for drinking water with levels of arsenic in excess of ten parts per billion." *Ibid.*

In 2008, respondents—landowners within the Superfund site—sued petitioner in Montana state court. Pet. App. 4a-5a. Respondents asserted claims based on common-law trespass, nuisance, and strict liability, and sought multiple forms of damages. *Id.* at 5a-6a. Of central relevance here, respondents sought "restoration damages," a common-law remedy available in Montana when (a) damages for lost market value are inadequate to "afford[] full compensation" to a property owner, (b) "the injury to the property is reasonably abatable," and (c) the property owner will use the damages to repair the damaged property. *Id.* at 6a; see *Sunburst Sch. Dist. No. 2* v. *Texaco, Inc.*, 165 P.3d 1079, 1087-1089 (Mont. 2007).

In assessing "what actions would be necessary to fully restore [respondents'] properties to pre-contamination levels," experts recommended that respondents "remove the top two feet of soil from affected properties and install permeable walls to remove arsenic from the groundwater." Pet. App. 4a. Both those proposals "required restoration work in excess of what the EPA required * * * in its selected remedy." *Ibid.* Respondents' experts also sought "to apply a soil action

level of 8 ppm for arsenic rather than the 250 ppm level set by EPA" at that time, and to "transport[] the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA." *Id.* at 72a.[2]

3. Petitioner sought to remove the case to federal court on grounds of fraudulent joinder or federal-officer removal, see 28 U.S.C. 1442, but the federal district court remanded the case to the state trial court, No. 08-cv-45, 2008 U.S. Dist. LEXIS 123882. The state court held that respondents' claims were untimely, but the Montana Supreme Court reversed. 358 P.3d 131. Petitioner then moved for summary judgment on respondents' restoration-damages claims. Petitioner contended that (1) CERCLA Section 113(h), 42 U.S.C. 9613(h), barred the state court from adjudicating the restoration-damages claims because those claims constituted "challenges" to EPA's response action; (2) respondents were PRPs who could not "undertake any remedial action" without EPA approval under CERCLA Section 122(e)(6), 42 U.S.C. 9622(e)(6); and (3) respondents' restoration-damages claims were preempted by CERCLA. The state trial court rejected each of those arguments. Pet. App. 41a-55a.

4. Petitioner petitioned the Montana Supreme Court for a writ of supervisory control, "an extraordinary remedy" that is "sometimes justified" when, *inter alia*, "the case involves purely legal questions." Mont. R. App. P. 14(3). The court granted "the writ for the limited purpose of considering the" denial of petitioner's motion for summary judgment on respondents' restoration-damages claims. Pet. App. 5a. The court

---

[2] EPA has subsequently amended some aspects of its remedy. Respondents have also submitted additional expert reports.

invited the United States to participate as amicus curiae, and the government filed a brief contending that the trial court should be reversed on each of the three issues it had resolved. *Id.* at 56a-80a.

The Montana Supreme Court affirmed. Pet. App. 1a-40a. The court observed that CERCLA Section 113(h)'s withdrawal of jurisdiction over "'challenges'" to EPA remedies "[c]onspicuously" lacks "any reference to state court jurisdiction." *Id.* at 9a (citation omitted). The court did not resolve that issue, however, because it concluded that respondents' claims were not "challenges" within the meaning of Section 113(h). *Id.* at 10a. In the court's view, "a § 113(h) challenge must actively interfere with EPA's work, as when the relief sought would stop, delay, or change the work EPA is doing." *Id.* at 11a. Because respondents were "not seeking to enjoin any of EPA's activities, or requesting that EPA be required to alter, delay, or expedite its plan in any fashion," the court held that respondents' claims were not "challenges." *Id.* at 13a.

Next, the Montana Supreme Court determined that respondents were not PRPs subject to CERCLA Section 122(e)(6)'s requirement that PRPs obtain EPA authorization before "undertak[ing] any remedial action." 42 U.S.C. 9622(e)(6). The court observed that respondents had not caused the contamination and had "never been treated as PRPs for any purpose." Pet. App. 16a. The court declined to treat respondents as PRPs "solely for the purpose of using § 122(e)(6) to bar their claims for restoration damages." *Id.* at 17a.

Finally, the Montana Supreme Court concluded that CERCLA did not preempt respondents' restoration-damages claims "for the same reason that § 113(h) does not apply: the [respondents' claims do] not prevent the

EPA from accomplishing its goals at the" cleanup site. Pet. App. 17a. The court added that CERCLA's savings clauses "expressly contemplate the applicability of state law remedies." *Ibid.*

Justice Baker issued a concurring opinion. Pet. App. 19a-23a. She emphasized that, "if [petitioner] contends [at trial] that [respondents'] proposed remedy conflicts with or requires modification of measures [petitioner] already has taken to clean up the site, [petitioner] must be able to address those conflicts in seeking to rebut [respondents'] claim on the essential elements of proof under our standards for a restoration damages claim." *Id.* at 22a.

Justice McKinnon dissented. Pet. App. 23a-40a. In her view, CERCLA Sections 113(b) and (h), 42 U.S.C. 9613(b) and (h), "in conjunction * * * divest state courts of jurisdiction to review any state law claim which amounts to a challenge of a CERCLA removal or remedial action." Pet. App. 29a. She would have held that "[a]n action constitutes a challenge" within the meaning of Section 113(h) "if it is *related to the goals of the cleanup*." *Id.* at 30a (citation omitted). Applying that standard, she would have held that respondents' restoration-damages claims are "challenges" because they are "plainly contrary to EPA's remediation plan." *Id.* at 38a-39a.[3]

DISCUSSION

Although the Montana Supreme Court erred in its analysis of the questions presented here, this Court's review would be premature at the present time. The

---

[3] "For purposes of brevity," Justice McKinnon did not address petitioner's other contentions. Pet. App. 24a n.1.

current interlocutory posture of the case creates uncertainty about this Court's appellate jurisdiction and could complicate the Court's review of the merits issues even if the Court concludes that jurisdiction is proper. If proceedings on remand culminate in a judgment in petitioner's favor, this Court's review will be unnecessary. And if respondents prevail on remand, those proceedings may clarify the precise nature of the proposed remedial activities for which respondents seek compensation, which in turn would aid courts in the application of the relevant CERCLA principles.

Deferring review in this manner would have limited practical consequences. EPA is not a party to the case and is not bound by the Montana Supreme Court's judgment. EPA therefore retains power to protect its cleanup plan against challenges by respondents at this Superfund site or potential challenges by landowners at other Superfund sites in Montana. Given the limited reach of the decision below and the procedural complications that immediate review would entail, the petition for a writ of certiorari should be denied.

A. The Current Interlocutory Posture Of This Case Creates A Jurisdictional Question And Counsels Against Review At This Time

1. This Court has jurisdiction to review certain "[f]inal judgments * * * rendered by the highest court of a State." 28 U.S.C. 1257(a). "To be reviewable by this Court, a state-court judgment must be * * * final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997) (citation and internal quotation marks omitted). The Montana Supreme Court's decision is "avowedly interlocu-

tory" because it "remand[s] the case for further proceedings," including "a trial on the merits of the state-law claims." *Ibid.*; see Pet. App. 5a, 18a.

Petitioner contends (Pet. Reply Br. 1-2) that the decision is "final" under Section 1257(a) because it finally resolved the petition for a writ of supervisory control. This Court has twice exercised jurisdiction to review Montana Supreme Court decisions granting writs of supervisory control. See *Fisher* v. *District Court*, 424 U.S. 382, 385 (1976) (per curiam); *Kennerly* v. *District Court*, 400 U.S. 423, 424 (1971) (per curiam). In *Fisher*, the Court explained that a "judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final" for purposes of Section 1257(a), "even if further proceedings are to be had in the lower court." 424 U.S. at 385 n.7. That statement does not squarely support jurisdiction here, however, because the decision below was not one "in which the *only* issue decided concerns the jurisdiction of a lower state court." *Ibid.* (emphasis added). The court's analysis of CERCLA Section 113(h) concerns jurisdiction, see *Pakootas* v. *Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1218-1219 (9th Cir. 2011), but its rulings on Section 122(e)(6) and preemption do not. Exercising jurisdiction in this case thus would require an extension of the rationale articulated in *Fisher*.[4]

---

[4] Petitioner also relies (Pet. Reply Br. 2) on this Court's statement in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), that jurisdiction may exist under Section 1257(a) "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482-483. That contention is unpersuasive. As explained

2. Even if the Court has jurisdiction, the interlocutory posture of the case counsels against review. See, *e.g.*, *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568 (1947) (finding jurisdiction to review state-court disposition of a writ of prohibition, but declining to exercise that jurisdiction). The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari) (collecting authorities). Petitioner could prevail at trial, thus obviating any need for this Court to resolve the questions presented. And if respondents prevail at trial, petitioner could "rais[e] the same issues" presented here "in a later petition, after final judgment has been rendered." *Ibid.* Such trial proceedings would also clarify the relationship between respondents' proposed restoration work and EPA's cleanup plan, both of which have evolved during the litigation. See p. 5 n.2, *supra*. Sound reasons thus exist for adhering to the usual practice of waiting for final judgment.

B. The Montana Supreme Court's Narrow Interpretation Of The Term "Challenges" In CERCLA Section 113(h) Is Erroneous But Does Not Now Warrant This Court's Review

Subject to exceptions that are not applicable here, CERCLA Section 113(h) states that "[n]o Federal court shall have jurisdiction under Federal law other than under [diversity jurisdiction] or under State law which is

---

further below, "a refusal immediately to review the state-court decision" would not "seriously erode federal policy," *id.* at 483, because EPA is not bound by the Montana Supreme Court decision and may compel compliance with its cleanup plan through administrative orders or enforcement actions, see 42 U.S.C. 9606(a).

applicable or relevant and appropriate under [42 U.S.C. 9621] (relating to cleanup standards) to review any challenges to removal or remedial action selected under [42 U.S.C. 9604]." 42 U.S.C. 9613(h). As the government contended below, respondents' restoration-damages claims are "challenges" to the "remedial action selected" by EPA. *Ibid.* The Montana Supreme Court's contrary conclusion is erroneous and conflicts with decisions of multiple federal courts of appeals.

This case, however, is not an attractive vehicle for resolution of that conflict because the case presents a complex antecedent jurisdictional question. By its terms, Section 113(h) is a limitation on the jurisdiction of any "[f]ederal court," and this case arises in state court. Petitioner contends (Pet. 24), and the United States argued below (see Pet. App. 67a n.2), that the Montana state courts were divested of jurisdiction by the combination of Section 113(h) and Section 113(b), which gives federal courts "exclusive original jurisdiction over all controversies arising under [CERCLA]." 42 U.S.C. 9613(b). But neither the Montana Supreme Court's decision nor the petition for certiorari contains any sustained analysis of Section 113(b). To the extent that the meaning of the word "challenges" in Section 113(h) warrants clarification by this Court, that clarification could better be provided in a federal-court suit where Section 113(h) unambiguously applies. In the interim, the decision below will have limited practical consequences because EPA retains authority to prevent challenges to on-site activities that would undermine its response action at this Superfund site and others in Montana.

1. The Montana Supreme Court erred in concluding that respondents' claims for restoration damages did

not constitute "challenges" to EPA's selected response action within the meaning of CERCLA Section 113(h), 42 U.S.C. 9613(h).

a. When (as here) "CERCLA does not specifically define" a term, this Court "give[s] the [term] its ordinary meaning." *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 610-611 (2009). Consistent with the ordinary meaning of "challenge," federal courts of appeals have explained that a suit is a "challenge[]" under CERCLA Section 113(h) if it "calls into question," *New Mexico* v. *General Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006); *Broward Gardens Tenants Ass'n* v. *United States EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002), or "would second-guess," *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 330 (9th Cir.), cert. denied, 516 U.S. 807 (1995), EPA's selected response action. Other courts of appeals have applied functionally similar formulations, concluding that a suit is a Section 113(h) "challenge[]" if it would "impact the implementation of the remedy" that EPA selected, *Schalk* v. *Reilly*, 900 F.2d 1091, 1097 (7th Cir.), cert. denied, 498 U.S. 981 (1990), or would "interfere with" EPA's response, *El Paso Natural Gas Co.* v. *United States*, 750 F.3d 863, 881 (D.C. Cir. 2014).

Under any of those related formulations, respondents' restoration-damages claims are "challenges" to EPA's selected response action at the Superfund site. 42 U.S.C. 9613(h). As the government explained in detail below, the remediation measures recommended by respondents' experts "second guess" EPA's response action in numerous ways "related to the goals of the cleanup." *McClellan*, 47 F.3d at 330. Among other contradictions, respondents' experts proposed (1) "to apply a soil action level of 8 ppm for arsenic rather than the

250 ppm level set by EPA"; (2) to excavate soil up "to two feet rather than EPA's chosen depth of 18 inches"; (3) to transport "excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA"; and (4) to construct "a series of underground trenches and barriers for capturing and treating shallow groundwater" that EPA had determined "could upset a balance that currently protects human health and the environment." Pet. App. 72a, 74a.

Those proposals do not seek simply to supplement the CERCLA cleanup; they would directly "impact the implementation of," *Schalk*, 900 F.2d at 1097, and "interfere with," *El Paso*, 750 F.3d at 881, EPA's selected remedy. For example, the proposal to excavate soil in residential yards to two feet rather than 18 inches would not simply require extra digging. When petitioner finishes remediating a yard, the EPA remedy requires that the yard be "capped or backfilled with clean soil." Pet. App. 73a. "Tearing up that protective cap or layer of soil * * * could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion." *Ibid.* Similarly, "[o]ffsite disposal of excavated soil," as respondents' experts propose, "would also increase the risk of dust transfer or contaminant ingestion." *Ibid.* And the underground "barriers proposed by [respondents'] experts * * * could unintentionally contaminate groundwater and surface water." *Id.* at 74a. Under the most natural understanding of the statutory term, a plan that overrules EPA's judgments and requires undoing the work it directed constitutes a "challenge[]" to its selected response action. 42 U.S.C. 9613(h); accord Pet. App. 37a-39a (McKinnon, J., dissenting).

b. The Montana Supreme Court adopted a narrower reading, under which a suit must seek to "stop, delay,

or change the work EPA is doing" in order to constitute a Section 113(h) "challenge." Pet. App. 11a; see *id.* at 13a, 14a (similar formulations). That interpretation is inconsistent with the federal court of appeals decisions cited above. The Montana Supreme Court contemplated that respondents would "present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan," *id.* at 13a, even though EPA had assessed and rejected many aspects of that plan, see *id.* at 72a-76a. Allowing respondents to pursue damages claims premised on "their own" remedial plan, even though that plan conflicts with—indeed, requires undoing parts of—EPA's plan, plainly "calls into question," "would second-guess," "impacts," and "interfere[s] with" EPA's selected response action. Federal courts of appeals accordingly would have deemed respondents' claims "challenges" under Section 113(h). See p. 12, *supra*.

The Montana Supreme Court attempted to distinguish the conflicting federal appellate precedents referenced above by observing that those decisions did not "involve a claim by private property owners, against another private party, seeking money damages for the purpose of restoring their own private property." Pet. App. 12a. The court appeared to conclude that, because the entry of a money judgment against petitioner by itself would not compromise EPA's cleanup, respondents' restoration-damages claims did not constitute "challenges" under Section 113(h). That analysis reflects an unduly narrow conception of the statutory term.

Under Montana law, respondents' entitlement to restoration damages depends on proof that their own proposed restoration activities are feasible and appropriate. See Pet. App. 14a (noting that respondents seek

damages "for purposes of funding an eventual restoration according to [respondents'] plan"); see also Restatement (Second) of Torts § 929(1)(a) (1979) (Restatement) (explaining that damages of this kind are available only "in an appropriate case"); *Lampi* v. *Speed*, 261 P.3d 1000, 1006 (Mont. 2011) (relying on Restatement § 929 in analyzing restoration-damages claim). As explained above, however, the restoration plan that respondents' experts have heretofore described conflicts in important ways with EPA's selected response action. See pp. 12-13, *supra*. An attempt to persuade a state-court jury that such a restoration plan is proper constitutes a "challenge[]" to EPA's selected response, even though the requested relief is in the form of money damages.

2. As explained above, Section 113(h) states that "[n]o Federal court shall have jurisdiction * * * to review any challenges" to EPA's selected response actions. 42 U.S.C. 9613(h). Petitioner does not appear to argue that Section 113(h) standing alone bars respondents' state-court suit from going forward. Rather, petitioner contends that Section 113(h) has that effect "when read together" (Pet. 24) with Section 113(b), which vests federal courts with "exclusive jurisdiction" over "controversies arising under" CERCLA. 42 U.S.C. 9613(b). The Ninth Circuit has endorsed that view of the two provisions' combined effect, see *ARCO Envtl. Remediation, LLC* v. *Department of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (2000); *Fort Ord Toxics Project, Inc.* v. *California EPA*, 189 F.3d 828, 832 (1999), as did the government's brief in the Montana Supreme Court, see Pet. App. 67a n.2. Section 113(h) thus strips jurisdiction only from "federal courts" because

"only federal courts * * * have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place." *Fort Ord*, 189 F.3d at 832.

The Montana Supreme Court acknowledged both the "conspicuous[]" absence of "any reference to state court jurisdiction" in Section 113(h) and the Ninth Circuit's view that every "challenge[] to removal or remedial action" under Section 113(h) is a "controversy arising under [CERCLA]" within the meaning of Section 113(b), and thus is subject to exclusive federal jurisdiction. Pet. App. 9a. The court did not decide whether the Ninth Circuit's understanding is correct, however, because it concluded that respondents' suit is not a Section 113(h) "challenge." *Id.* at 10a-15a. And, as respondents note (Br. in Opp. 26-27), some courts have read the statute in the way respondents suggest. See *In re Williams Pipeline Co.*, 597 N.W.2d 340, 344 (Minn. Ct. App. 1999) (adopting respondents' position); see also *United States* v. *Colorado*, 990 F.2d 1565, 1579 (10th Cir. 1993) (suggesting, without squarely holding, that CERCLA does not always bar state-court jurisdiction over a Section 113(h) challenge), cert. denied, 510 U.S. 1092 (1994). The presence of a complex jurisdictional question that the courts below did not resolve and the parties have not thoroughly briefed counsels against this Court's review.

3. Two additional considerations reinforce the conclusion that the Court's review is not warranted at this time. First, the Montana Supreme Court's erroneous interpretation of the term "challenges" in Section 113(h) creates no immediate risk to EPA's selected response action. The government was not a party to the decision below and is not bound by the court's judgment. If respondents seek to undertake remedial

measures that are inconsistent with EPA's cleanup, the government can use any of the mechanisms that CERCLA provides, including administrative orders and enforcement actions, to ensure that EPA's remedy is not undermined. See 42 U.S.C. 9606(a). Any such suits could be filed in federal courts that would not be bound by the Montana Supreme Court's decision. The same would be true if landowners at other Montana Superfund sites brought similar claims. Cf. Pet. Reply Br. 3.

Second, as explained above, respondents' state-law entitlement to restoration damages depends on proof that their proposed remedial activities are feasible and appropriate. See pp. 14-15, *supra*. Even under the Montana Supreme Court's interpretation of Section 113(h), petitioner can argue at trial that the proposed activities are *not* feasible or appropriate because they would be contrary to federal law, and that the state-law prerequisites to a restoration-damages award therefore are not satisfied. See Pet. App. 15a ("[N]othing in our holding here should be construed as precluding [petitioner] from contesting [respondents'] restoration damages claim on its own merits.").[5] Thus, the concurring justice below observed that, "if [petitioner] contends [on remand] that [respondents'] proposed remedy conflicts with or requires modification of measures [petitioner] already has taken to clean up the site, [petitioner] must be able to address those conflicts in seeking to rebut [respondents'] claim on the essential elements of proof under our standards for a restoration damages claim."

---

[5] The Montana Supreme Court noted that the state trial court had granted respondents' "motion in limine to preclude [petitioner] from presenting evidence regarding its compliance with EPA requirements," Pet. App. 14a, but it did not suggest that petitioner is foreclosed from arguing that respondents' proposal violates federal law.

Id. at 22a (Baker, J., specially concurring). In particular, the concurrence noted that petitioner "may * * * offer evidence to support its claim that [respondents'] proposed restoration plan is not feasible and thus does not qualify as a temporary injury." *Ibid.* For that reason among others, the legal and practical significance of the Montana Supreme Court's decision is likely to be clearer after proceedings on remand have concluded.

C. The Montana Supreme Court's Decision On CERCLA Section 122(e)(6) Is Erroneous But Does Not Warrant This Court's Review

The Montana Supreme Court also erred in concluding that respondents were not PRPs subject to CERCLA Section 122(e)(6)'s requirement to obtain EPA authorization before proceeding with remediation. Pet. App. 15a-17a. But the decision does not create a square conflict, and EPA remains free to enforce Section 122(e)(6)'s requirement against respondents. This Court's review is not warranted.

1. CERCLA Section 122(e)(6) provides that, "[w]hen either the President, or a [PRP] * * * has initiated a remedial investigation and feasibility study for a particular facility * * * , no [PRP] may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U.S.C. 9622(e)(6). It is undisputed that EPA and petitioner (which is a PRP acting at EPA's direction) have "initiated a remedial investigation and feasibility study for" the Anaconda Smelter site. *Ibid.* It is likewise clear that EPA has not "authorized" the "remedial action" respondents propose to "undertake." *Ibid.*; see 42 U.S.C. 9601(24) (defining "remedial action" to include, *inter alia*, "cleanup

of released hazardous substances," "dredging or excavation," or "offsite transport" and "disposition of hazardous substances").

CERCLA contains no definition of the term "potentially responsible party." This Court's decisions, however, have treated the term as corresponding to the "[c]overed persons" identified in CERCLA Section 107(a), which imposes liability for the costs of a CERCLA cleanup (subject to defenses and exceptions elsewhere in Section 107). 42 U.S.C. 9607(a) (emphasis omitted); see *Burlington Northern*, 556 U.S. at 608; *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 131-132 (2007); *Cooper Indus., Inc.* v. *Aviall Servs.*, *Inc.*, 543 U.S. 157, 161 (2004). Of particular relevance here, the covered persons identified in Section 107(a) include the "owner" of a "facility," 42 U.S.C. 9607(a)(1), which is defined as "any site or area where a hazardous substance has been deposited," 42 U.S.C. 9601(9)(B). Because respondents own land where a hazardous substance has been deposited, they are "covered persons" under a straightforward reading of the statutory text.

2. The Montana Supreme Court acknowledged that PRPs include "all current owners of property at a CERCLA facility," a "category" that includes respondents. Pet. App. 15a. The court declined to "treat [respondents] as PRPs under § 122(e)(6)," however, because respondents were not responsible for the contamination or the costs of the cleanup. *Id.* at 16a. That reading conflates *status* as a PRP with being held responsible for the payment of response costs based on that status. Cf. Br. in Opp. 31-32 (contending that respondents are not PRPs because "they face no prospect of liability").

To be sure, EPA has not sought to recover response costs from respondents under CERCLA Section 107(a), and the landowners could assert any applicable defense to such a claim. See, *e.g.*, 42 U.S.C. 9607(b)(3) (providing a defense for innocent landowners that meet statutory criteria). But whether a party is responsible for the contamination or ultimately held liable for response costs is immaterial to whether it is a PRP. "[E]ven parties not responsible for contamination may fall within the broad definitions of PRPs in" Section 107(a). *Atlantic Research*, 551 U.S. at 136. Thus, even an "'innocent' * * * landowner whose land has been contaminated by another" party may be a PRP. *Ibid.* The Montana Supreme Court's contrary reasoning contradicts the statute and this Court's precedent.

3. The Montana Supreme Court's error, however, does not warrant this Court's review. CERCLA Section 122(e)(6) is a rarely litigated provision, and petitioners do not identify any decision that squarely conflicts with the holding of the court below. As explained above, moreover, EPA is not a party to this case and therefore is not bound by the Montana Supreme Court's conclusion that respondents are not PRPs under Section 122(e)(6). Indeed, EPA informed respondents in April 2018 that the government considers them PRPs for purposes of Section 122(e)(6), and that they cannot proceed with any remedial action without EPA's authorization. Respondents do not appear to dispute this understanding. The court's error on this issue accordingly has little practical effect.

D. The Montana Supreme Court's Preemption Analysis Is Flawed, But The Issue Does Not Warrant This Court's Immediate Review

The Montana Supreme Court devoted only a single paragraph of its opinion to petitioner's conflict-preemption argument. See Pet. App. 17a-18a. The apparent thrust of the court's analysis was that, because respondents do not seek a judicial order that would prevent EPA from conducting its own response action, their state-law claims cannot be preempted. In reaching that conclusion, the court relied in part on CERCLA's savings clauses. See *ibid.* The court's analysis reflects an unduly narrow conception of the scope of conflict preemption under CERCLA.

As explained above, the remedial plan that respondents have heretofore proposed would conflict with, and in significant respects would undo, EPA's selected response action. See pp. 12-13, *supra*. Actual implementation of respondents' remedial plan therefore would impede EPA's enforcement of CERCLA, even if respondents did not commence on-site activities until EPA's response action was complete. And the presence of saving clauses "does *not* bar the ordinary working of conflict pre-emption principles." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494, 497 (1987) (finding conflict preemption under the Clean Water Act despite savings clauses); see also *New Mexico*, 467 F.3d at 1247 (same under CERCLA).

To be sure, purely monetary relief would not, in and of itself, undo or impair the effectiveness of the on-site remedial measures undertaken as part of EPA's response action. Under Montana law, however, restoration damages must be used for specified remedial

measures. See Pet. App. 6a, 14a-15a. Petitioner has already spent substantial sums implementing the remedial measures required by EPA. See Pet. 8 (stating that petitioner "has spent approximately $470 million implementing EPA's orders"). Requiring petitioner to pay additional sums as state-law restoration damages to fund additional cleanup measures, based on a state jury's finding that remedial measures inconsistent with EPA's were feasible and appropriate, would conflict with the federal scheme. That is so even though EPA, as a non-party to this lawsuit, would not be bound by the state court's judgment and could seek to prevent the actual implementation of on-site activities it viewed as inconsistent with its own response action.

Largely for the reasons discussed above, however, this aspect of the Montana Supreme Court's decision does not warrant this Court's immediate review. Although the state court's preemption analysis was flawed, it does not create any square conflict in authority. No federal court of appeals or other state court of last resort has addressed whether CERCLA preempts restoration-damages claims—a question that does not appear to have arisen with any frequency in other States. And although the Montana Supreme Court placed too much reliance on CERCLA's savings clauses, it did not, as petitioner suggests (Pet. 23), hold "that CERCLA's savings clauses categorically save all state common-law claims from preemption." Finally, the proceedings at trial, including any changes that respondents may make to their proposed remedial activities, may shed further light on the conflict-preemption issue by clarifying the relationship between those proposed remedial activities and EPA's response action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
ERIC GRANT
Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
MATTHEW R. OAKES
Attorney

APRIL 2019