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

SUPPLEMENTAL BRIEF FOR PETITIONER

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Key portions of the United States' brief reinforce why this Court's review is especially warranted. The United States does not deny that all three questions presented are worthy of certiorari: a state supreme court has grossly misapplied CERCLA and flagrantly ignored the views of the United States. Indeed, the United States agrees that federal law *triply* bars plaintiffs' state law restoration-damages claim. The United States also agrees that the decision below splits with decisions of "multiple federal courts of appeals," and that the Ninth Circuit would have rejected this lawsuit outright had this case been heard in federal rather than state court. U.S. Br. 11, 15.

The United States further agrees that this lawsuit "conflict[s] with the federal scheme," U.S. Br. 22, and that plaintiffs' proposed restoration "conflicts in important ways with EPA's" ongoing remediation, U.S. Br. 15. Thousands of tons of dirt, shovels, and trucks would be employed to undo decades of EPA-ordered cleanup. Nor does the United States dispute Atlantic Richfield's argument—echoed by ten amici—that restoration claims destroy the primary incentives to settle with the EPA in the first place: closure and predictability. Reply 3. The United States made the same point below. Pet. App. 71a.

Ordinarily, when the United States acknowledges that the lower courts are split and that the decision below was rife with serious, consequential errors, the upshot is that this Court should step in. Certainly, no jurisdictional barriers exist to doing so now. The United States does not deny that the decision below is a final judgment. U.S. Br. 8-10. The United States agrees that §§ 113(h) and 113(b) divest state and federal courts alike of jurisdiction over "challenges" to

EPA cleanups. U.S. Br. 11, 15-16. Trial will not make this case a better vehicle for this Court's review. No additional evidence at trial will affect whether plaintiffs' lawsuit constitutes a "challenge" under § 113(h); whether plaintiffs are "potentially responsible parties" for purposes of § 122(e)(6); or whether federal law preempts proposals that the United States already knows are "plainly inconsistent with EPA's cleanup." Pet. App. 73a.

Yet, rather than encouraging review, the United States urges this Court to wait and see how a trial turns out. After all, the United States reasons, if plaintiffs succeed at trial on their restoration-damages claims, EPA could seek to enjoin the plaintiffs from actually conducting a restoration. U.S. Br. 11, 12. But that Kafkaesque approach is no reason to wait. Denying review now would force Atlantic Richfield and plaintiffs to engage in an expensive and burdensome trial for no legitimate reason whatsoever. The most that plaintiffs could achieve is an order requiring Atlantic Richfield to fund remedies that *can never be carried out*. Even the decision below recognized a trial should not go forward if federal law bars this claim; that's why the Montana Supreme Court granted an extraordinary writ and sought the United States' views (only then to ignore them anyway).

Although the United States embraces the only sensible view of how CERCLA should work, it ultimately urges delay because the EPA henhouse is safe from this particular fox. But the United States has no response to the intractable quandary the decision creates for private parties across the state of Montana. Leaving the decision below in place means companies like Atlantic Richfield must serve two masters: EPA

on the one hand, and state-court juries that may disagree with EPA's cleanup decisions on the other hand. Congress intended to prevent such conflicts, and that is precisely why CERCLA protects private parties from lawsuits like this one that challenge the correctness of EPA-ordered cleanups. All three issues are fully joined, indisputably important, and certworthy. This Court should not tolerate the erosion of protections that Congress and the Supremacy Clause provide, and should take up this case now.

I. The Decision's Devastating and Destabilizing Effect on Private Parties Warrants Immediate Review

The United States agrees that the Montana Supreme Court got three out of three questions of federal law wrong, because § 113(h), § 122(e)(6), and conflict preemption each independently bar plaintiffs' restoration-damages claims. The United States repeatedly confirms that granting the relief plaintiffs seek here would actively interfere with EPA's remedy and would "overrule[] EPA's judgment" and "require[] undoing the work [EPA] directed." U.S. Br. 13-15, 21-22. Three times the United States explains that restoration claims seek to "undo" EPA's cleanup. U.S. Br. 13, 14, 21.

The United States also does not dispute that allowing these lawsuits to go forward conflicts with the purpose and plain text of CERCLA. Allowing these suits upsets negotiation and cooperation between EPA and companies working hard to clean up Superfund sites, imperils settlements, and invites thousands more lawsuits that waste money and threaten to undo EPA remedies. Pet. 30-36. Three amicus briefs, from ten local and national organizations, detail the havoc

the decision below would wreak on the business community, including by disrupting remedies thought to be long settled and undermining companies' abilities to work with EPA. WLF Br. 9, 20-21; Chamber Br. 18; Treasure State Br. 17, 22. The United States does not disagree with amici's views.

The United States observes that, as a non-party to this suit, it is not bound by the decision under review. U.S. Br. 8, 9 n.4, 16, 20. It notes that EPA can block plaintiffs from interfering with its cleanup plan by litigating in federal court, where Ninth Circuit law deems this lawsuit a prohibited challenge and deems plaintiffs "potentially responsible parties" barred from undertaking unauthorized remedial activity. U.S. Br. 16-17, 20.

But this is no way to administer a uniform federal statute. If federal law bars this lawsuit and any order to Atlantic Richfield to pay to fund conflicting remedies, this Court should say so now, just like the Montana Supreme Court conclusively decided these issues, albeit wrongly, before trial. The Court should not stay its hand and invite the state court system to waste time and resources adjudicating claims and remedies on the assumption that a lower federal court in another case will enjoin those remedies under CERCLA. Basic principles of federalism and comity counsel strongly in favor of granting certiorari to allow for a decision by this Court, not denying certiorari so that the Montana Supreme Court and the Ninth Circuit can duke it out later. *See* S. Ct. R. 10.

Nor does the United States' proposal protect private parties facing collateral, state-law-based attacks on settled remedies. The United States agrees with Atlantic Richfield that § 113(h)'s bar on "challenges" includes claims for money damages against private

parties. U.S. Br. 14-15. So do "multiple federal courts of appeals." U.S. Br. 11. It is thus flatly inconsistent with § 113(h) to force private parties to shoulder the burden of defending against state-court challenges—and to pay money damages to fund plaintiffs' preferred remedies—simply because the United States may go into a different court to halt the bulldozers. That does not help companies like Atlantic Richfield, which will have spent years on wasteful litigation—as well as money that could have gone to fund an EPA-authorized cleanup. Nor does the United States explain how companies that are ordered to fund these yet-to-be-enjoined remedies can hope to someday get their money back.

All three questions are fully joined in this petition, and the best course is to decide them now rather than subject companies to orders to fund remedies that the United States itself agrees conflict with EPA's cleanup. U.S. Br. 12-15, 21-22. Congress did not want state courts or state juries to superintend cleanups. That is the whole point of the three federal barriers at issue in this case—§ 113, § 122(e)(6), and CERCLA preemption. Each is aimed at protecting EPA remedies and Superfund sites from the very sort of lawsuit plaintiffs have filed.

II. There Are No Jurisdictional Barriers to Review, and Trial Will Not Aid This Court's Review

The jurisdictional issue the United States raises presents no barrier to review, and no other reason counsels for postponing review until after trial.

A. This Court has jurisdiction to hear this case under § 1257, and the United States does not argue otherwise. U.S. Br. 9. Two decisions of this Court hold that resolution of a Montana writ of supervisory con-

trol is final for purposes of § 1257. *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). The United States notes that *Fisher* involved a Montana writ of supervisory control finally resolving a state-court *jurisdictional* question, U.S. Br. 9, but so does this case: the § 113 issue is jurisdictional. The fact that the Montana Supreme Court got two *more* questions of federal law wrong hardly deprives this Court of jurisdiction. And the United States in any event does not explain *why* the § 1257 finality inquiry would turn on the nature of the legal question finally resolved by the lower court. The only thing that matters is whether the judgment below "terminate[d] original proceedings in [the] state appellate court." *Fisher*, 424 U.S. at 385 n.7. The Montana Supreme Court's judgment did just that.

Independently, the fourth *Cox* exception supports jurisdiction. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); Pet. Reply 2. The decision below seriously erodes federal interests because it profoundly undermines CERCLA. *See* U.S. Br. 22. That the impacts fall initially and most heavily on private parties does not change the gravity of the intrusion on federal interests.

B. The United States alternatively urges the Court to wait until trial as a prudential matter. U.S. Br. 10. But waiting would impose needless expense and uncertainty. The Montana Supreme Court did not merely deny summary judgment to Atlantic Richfield; it affirmed a grant of summary judgment *for the plaintiffs* on these questions. Pet. App. 3a. Thus, none of the three questions presented are open on remand, and none will receive further elucidation in subsequent appeals because the Montana Supreme

Court's decision is final on the three questions presented.

A trial would not clarify anything relevant to the questions presented. The § 113 question presents a split on the legal definition of a challenge, Pet. 15-16, and the United States agrees that under every federal circuit court's formulation, this lawsuit is a prohibited challenge, U.S. Br. 12. The United States contends—and several courts of appeals agree—that *any* proposed alteration to EPA's remedial plan is a prohibited challenge. U.S. Br. 11, 21-22. So, no matter how plaintiffs tweak or "clarify" their plan at trial, U.S. Br. 10, because the plan would still differ from EPA's ordered remedy, the suit is a challenge and thus barred. Likewise, the § 122(e)(6) question presents the purely legal issue of who qualifies as a "potentially responsible party"; no new facts could be presented at trial that bear on that inquiry.

Nor could the preemption question turn on facts developed at trial. The court below held that CERCLA's savings clauses preclude the ordinary working of conflict preemption. Pet. App. 17a. That is a legal conclusion involving no facts. Because plaintiffs' remedial plan "would conflict with, and in significant respects would undo, EPA's selected response action," it is preempted. U.S. Br. 21.

This Court regularly grants certiorari in situations where the lower court denied a preemption motion before trial. *See, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 138 S. Ct. 2705 (2018) (mem.) (granting review of denial of summary judgment on preemption grounds); *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1196-97 (2017) (same); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1598-99 (2015) (same);

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2204 (2012) (reviewing denial of dismissal on jurisdictional grounds). In such situations, one could always argue that the defendant could have prevailed at trial. But that possibility has never deterred this Court from reviewing substantial preemption questions sooner rather than later.

Postponing review would be especially perverse because the legal principles involved—the state court's jurisdiction and federal preemption—are by their nature designed to be decided before trial. If Congress intended § 113 to deprive the state courts of jurisdiction—or CERCLA to preempt conflicting state law—forcing a party to go to trial under the jurisdiction of a state court applying state law would undermine the very protections Congress ordered.

The Montana Supreme Court issued the extraordinary writ of supervisory control for precisely these reasons. Although the court answered the questions presented wrong, it properly understood that these questions should be resolved before trial. They are outcome-determinative regardless of what evidence comes in at trial. They are also otherwise clearly worthy of this Court's attention, and the Court should grant review.

III. There Are Three Square Splits

This case involves three clear conflicts, each of which independently merits this Court's review.

A. The United States agrees that the Montana Supreme Court's interpretation of the term "challenge" under § 113(h) squarely conflicts with the decisions of at least five courts of appeals. U.S. Br. 12. The United States nonetheless argues that the antecedent question of whether § 113(h) applies in state court

suggests that the Court should take up the conflict in a federal case. U.S. Br. 11.

But whether § 113(h) applies in state courts is itself certworthy and the subject of a split, something the United States acknowledges. U.S. Br. 16. And it is the Montana Supreme Court—not a federal court of appeals—that has misinterpreted § 113(h). The federal courts of appeals all agree that the type of claim at issue in this case is a "challenge." U.S. Br. 12. It would make no sense for this Court to wait for an instance where a court got it right, when presented *now* with an instance where the court got it wrong.

The United States also observes that the Montana Supreme Court did not decide whether § 113(h) applies in state court. U.S. Br. 16. But the issue was fully briefed below and there is no obstacle to its resolution by this Court. And now that the Montana Supreme Court has decided that restoration claims for money damages against private parties can never constitute § 113(h) "challenges," there will never be a better vehicle from Montana to address the question whether § 113(h) applies in state court. Claims against the federal government will be removed to federal court, and Montana courts will allow claims against private parties to proceed on the basis of the decision below without needing to address the question whether § 113(h) applies in state court.

Significantly, the United States agrees that § 113(h), in conjunction with § 113(b), *does* apply to state court actions and so argued below. U.S. Br. 15. Denying certiorari on the basis of the antecedent jurisdictional question would give state courts license to ignore § 113(h), significantly undermining congressional purpose. This Court will have to resolve the question whether § 113(h) applies in state court to

prevent the precise situation this suit exemplifies: the same claims will rise or fall under federal law depending on whether they are filed in Montana state court or federal court. The application of federal law should not turn on the happenstance of whether there is a basis for federal diversity jurisdiction.

B. The United States agrees that plaintiffs are "potentially responsible parties," or PRPs, barred from undertaking unauthorized remediations under § 122(e)(6), and that the Montana Supreme Court's contrary conclusion is incorrect and inconsistent with this Court's precedent. U.S. Br. 18-20. The United States urges the Court to deny review on the ground that there is no "square" conflict. U.S. Br. 18, 20. But there is. *See* Pet. 19-21. The United States presumably means that the cases the petition identifies do not involve § 122(e)(6). But the cases all interpret the term PRP in ways that squarely conflict with the interpretation adopted by the Montana Supreme Court, and the term must have a consistent meaning throughout CERCLA. If this Court reverses and holds that plaintiffs are PRPs, the lawsuit will be barred by § 122(e)(6).

The United States argues that this Court should deny review because EPA has told plaintiffs that they are PRPs and therefore cannot restore the site. U.S. Br. 20. But this lawsuit is proceeding on the basis of the state court's conclusion that plaintiffs are *not* PRPs and *can* get relief—including actual implementation of their conflicting remedies. It is no comfort to Atlantic Richfield that EPA is "not bound" by a state-court order, U.S. Br. 20, when Atlantic Richfield *is* bound by the decision below and could be forced to fund remedies Congress intended to prohibit under § 122(e)(6).

C. The United States also agrees that the state court's preemption analysis is wrong: "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." U.S. Br. 22. That is exactly why certiorari should be granted.

The United States says there is no "square" split because no other case specifically addresses Montana's "restoration-damages" tort. U.S. Br. 22. But there is a square split on the question whether CERCLA's savings clauses preclude ordinary principles of conflict preemption. *See* Pet. 21-23. The United States also questions whether the Montana Supreme Court "categorically" held that CERCLA's savings clauses save all common-law claims from preemption, as opposed to just holding that CERCLA's savings clauses preclude conflict preemption in this case. U.S. Br. 22. But either holding would be wrong and create a split; the courts of appeals properly hold that CERCLA's savings clauses are irrelevant to the operation of conflict preemption. Pet. 21-23.

* * * * *

The United States agrees that the questions presented are important and worthy of this Court's review—just not right now. But delay would accomplish nothing useful while imposing devastating costs on companies like Atlantic Richfield that have spent hundreds of millions of dollars cooperating with the EPA, only to have the rug pulled out from under them. Only this Court can prevent that harm by granting review now to bring uniformity and integrity to an important federal law.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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May 14, 2019