No. 17-1498

IN THE

Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

GREGORY A. CHRISTIAN, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, NATIONAL MINING ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AND SUPERFUND SETTLEMENTS PROJECT SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a "challenge" to 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 EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup.

3. Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

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INTEREST OF *AMICI CURIAE*[1]

Amici are six national trade associations. Their members include many businesses that are involved in the cleanup of Superfund sites across the country and, accordingly, have a direct interest in the outcome of this case. *Amici* all have strong interests in reversing the

[1] Petitioner's counsel of record and respondents' counsel of record consented to the filing of this brief. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

decision below and preserving the U.S. Environmental Protection Agency's (EPA) authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to comprehensively, efficiently, and with finality address remediation issues at Superfund sites.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. A vital function of the Chamber is to represent the interests of its members in matters before this Court. The Chamber regularly files *amicus curiae* briefs in cases such as this one that raise issues of concern to the Nation's business community.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Mining Association (NMA) is a national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral-processing machinery, equipment, and supplies; and engineering and consulting firms, financial

institutions, and other firms serving the mining industry. NMA is U.S. mining's advocate and the only national trade organization that represents the interests of mining before Congress, the administration, federal agencies, and the judiciary. NMA has participated as an *amicus curiae* in numerous cases in this Court, including cases involving application of CERCLA and other environmental laws.

American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all refining and petrochemical manufacturing capacity in the United States. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses. Among its other missions, AFPM engages in legal advocacy on issues important to its members.

The American Petroleum Institute (API) is a national trade association representing more than 600 companies involved in all aspects of the oil-and-natural-gas industry. API frequently advocates for the interests of its members by participating as an *amicus curiae* in cases that are important to the oil-and-natural-gas community.

The Superfund Settlements Project (SSP) is an association of major companies from many different sectors of American industry. It was organized in 1986 in order to help improve the effectiveness of the Superfund program by encouraging settlements, streamlining the settlement process, and reducing transaction costs for all concerned. SSP provides constructive input to EPA, other federal agencies, and Congress on critical policy issues affecting the cleanup of contaminated sites and engages in legal advocacy in the CERCLA arena.

SUMMARY OF ARGUMENT

"As its name implies, CERCLA is a comprehensive statute that grants the President broad power to

command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). CERCLA aims to place a premium on efficient cleanup, which often can be achieved only through settlement with private parties. The statute delegates decision making about the type and degree of cleanup to EPA, with significant opportunity for public input, while limiting any party's ability to challenge those decisions. See 42 U.S.C. § 9613(h). Meanwhile, any "potentially responsible parties" can be held jointly and severally liable for cleanup costs, regardless of their degree of responsibility. *Id.* § 9607. For some sites, those costs can stretch into the billions of dollars.

For all of its imperfections, this system provides a silver lining for those facing liability—relative certainty. CERCLA cleanups and settlements can set fixed liabilities, which ensure a stable environment for businesses, shareholders, insurers, creditors, and others to make decisions about future investments. Indeed, the statute creates heavy incentives for early settlement among potentially responsible parties and EPA.[2] Those incentives would be meaningless without a degree of certainty regarding the ultimate financial exposure (*i.e.*, cleanup costs) and a relatively "hard target" for parties negotiating among themselves to fund the cleanup.

In the decision below, the Montana Supreme Court created a new regime in which EPA's generally binding remediation decisions under CERCLA are viewed as

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[2] For example, § 9613(f)(2) shields those who resolve liability to the United States or a state from contribution claims by others, and § 9622(f) authorizes EPA to include a covenant not to sue in its settlement agreements with potentially responsible parties. Section 9607(c)(3) exerts settlement pressure from another angle by exposing potentially responsible parties who are uncooperative to treble damages.

mere suggestions, with any jury having the power to order other remediation efforts—even ones that EPA specifically considered and rejected. Opening the doors for anyone to second-guess EPA's Superfund remediation decisions through state tort law is incompatible with the text and function CERCLA. The Montana Supreme Court's approach destroys the stability CERCLA promises to the business community and imperils EPA's ability to achieve CERCLA's central purpose—the prompt cleanup, based on sound science, of the Nation's thousands of contaminated Superfund sites.

If this approach were to become the law of the land, the result would be chaos across the Nation's Superfund sites, with EPA pursuing one remediation course and various ad hoc private lawsuits mandating different, potentially dangerous or conflicting remediation work. Worse yet, the business community—which bears the remediation costs—would face significant additional liability, for the decision below hampers EPA's ability to enter into settlements that definitively fix remediation obligations. Businesses would thus have a reduced incentive to cooperate with EPA by entering into settlements, further prolonging what Congress intended to be an efficient and definitive cleanup process. All of that flies in the face of CERCLA's core aim of promoting expeditious and effective remediation of Superfund sites for the protection of human health and the environment.

Beyond the clear errors in statutory interpretation catalogued by the petitioner, the decision below cannot be defended on public-policy grounds. CERCLA and its accompanying regulations offer numerous opportunities for public involvement in the Superfund process. Those avenues ensure that interested parties, such as the respondents, can make their voices heard. But EPA has the final say under CERCLA—or at least it did until now. The Montana Supreme Court has created a

blueprint for making precisely the type of challenge Congress, in CERCLA, sought to prevent: any interested party who fails to obtain its desired remediation plan from EPA is now free to pursue its preferred plan in collateral litigation. That renders CERCLA's robust public-participation provisions redundant and frustrates its most central goals.

This Court should reverse the decision below and restore the carefully calibrated Superfund framework that CERCLA demands.

ARGUMENT

I. THE MONTANA SUPREME COURT'S DECISION IS INCOMPATIBLE WITH CERCLA'S TEXT, FRUSTRATES CERCLA'S GOALS, AND IMPERILS SUPERFUND CLEANUPS

One of CERCLA's primary goals is to promote "timely cleanup of hazardous waste sites." *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 602 (2009). Two important and necessary tools to achieve that goal are EPA's exclusive decision-making authority and CERCLA's emphasis on settlements as a means to effectuate cleanup. The Montana Supreme Court's decision cannot be reconciled with CERCLA's grant of authority to EPA in this sphere. The resulting interference with EPA's authority frustrates EPA's efforts to achieve CERCLA's primary goal and, indeed, undermines the entire statutory and regulatory program of Superfund cleanups.

A. CERCLA seeks to promote effective and expeditious cleanups by mandating a regimented remedy-selection procedure and prohibiting challenges to EPA's remedial decisions

CERCLA (1) mandates that EPA follow a regimented remedy-selection process and (2) bars any collateral challenges to EPA's remedial decisions pursuant to that

process. It is through the combination of those two features that CERCLA acts as a powerful force for the effective and expeditious cleanup of Superfund sites.

1. CERCLA and its accompanying regulations establish a strict path for EPA to follow when selecting a remedy to clean up a Superfund site. Required steps include: (1) conducting a remedial preliminary assessment, 40 C.F.R. § 300.420(b); (2) undertaking a remedial site inspection, *id.* § 300.420(c); (3) conducting a remedial investigation that collects "data necessary to adequately characterize the site for purposes of developing and evaluating effective remedial alternatives," *id.* § 300.430(d); (4) drafting a feasibility study that evaluates and provides a detailed analysis of "appropriate remedial alternatives," *id.* § 300.430(e); (5) presenting to the public a proposed plan detailing the preferred remedial alternative, *id.* § 300.430(f)(2); (6) soliciting comment from the public on the proposed plan, *id.* § 300.430(f)(3); (7), reassessing EPA's "initial determination" regarding its preferred alternative and factoring in any new information and community comments before making a final remedy-selection decision, *id.* § 300.430(f)(4); and (8) documenting EPA's final remedy-selection decision through the issuance of a record of decision, *id.* § 300.430(f)(5).[3]

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[3] Once selected, the remedial action will be conducted either by EPA or by a potentially responsible party with substantial EPA oversight. 42 U.S.C. § 9604(a)(1); see also EPA, Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties (Interim Final), EPA/540/G-90/001, OSWER 9355.5-01(April 1990), https://semspub.epa.gov/work/11/174047.pdf. For any remedy where hazardous substances remain on site above levels that permit unrestricted use and unlimited exposure, EPA, in addition, must conduct a review of the remedy no less often than every five years after initiation of the remedial action to assure that the remedy remains protective of human health and the environment

The following depiction that EPA recently provided in connection with a different Superfund site visually illustrates the myriad steps involved in this detailed, orderly process from site selection to completion of remediation:

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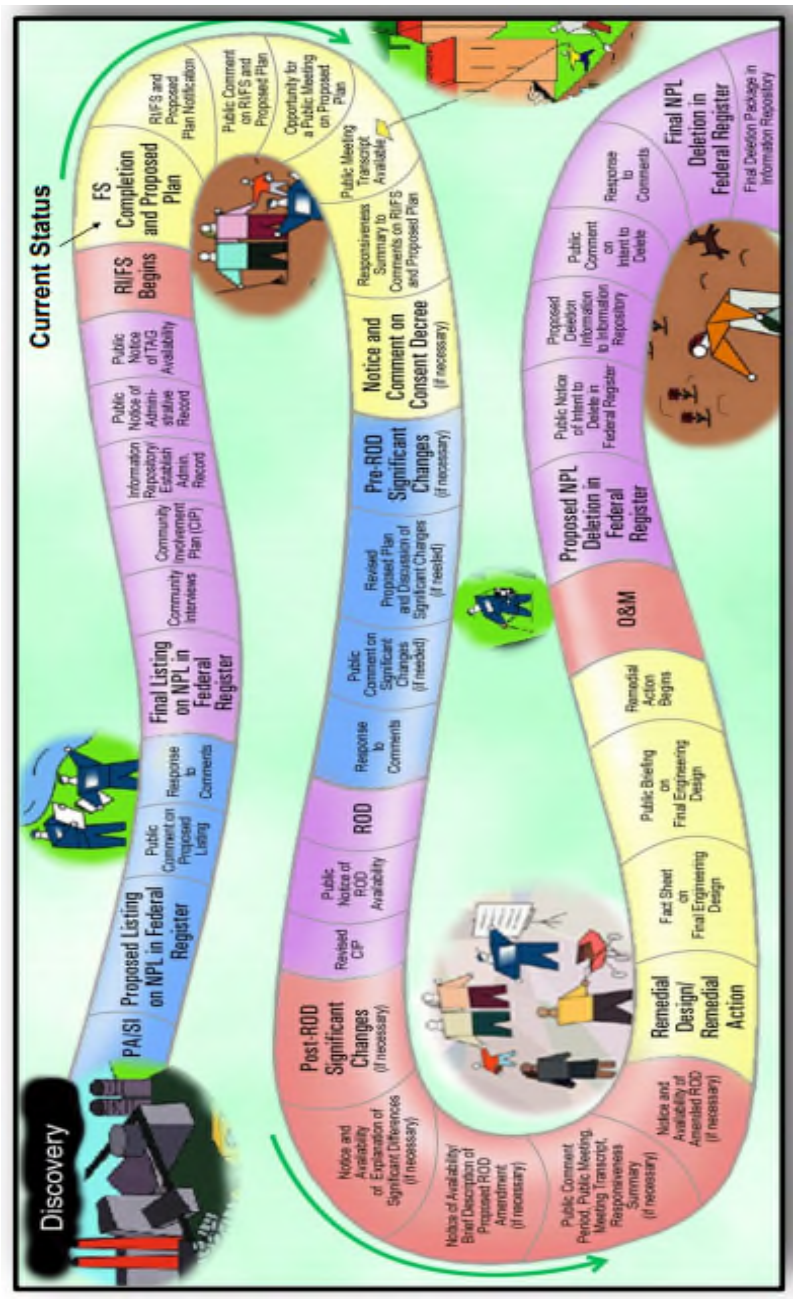
and, if it does not, initiate action to make it so. 42 U.S.C. § 9621(c); see also 40 C.F.R. § 300.430(f)(4)(ii).


Discovery
PA/SI
Proposed Listing on NPL in Federal Register
Public Comment on Proposed Listing
Response to Comments
Final Listing on NPL in Federal Register
Community Interviews
Community Involvement Plan (CIP)
Information Repository Established Admin Record
Public Notice of Administrative Record
Public Notice of TAG Availability
RI/FS Begins
FS Completion and Proposed Plan
RI/FS and Proposed Plan Notification
Public Comment on RI/FS and Proposed Plan
Opportunity for a Public Meeting on Proposed Plan
Public Meeting Transcript Available
Responsiveness Summary to Comments on RI/FS and Proposed Plan
Notice and Comment on Consent Decree (if necessary)
Pre-ROD Significant Changes (if necessary)
Revised Proposed Plan and Discussion of Significant Changes (if needed)
Public Comment on Significant Changes (if needed)
Response to Comments
ROD
Public Notice of ROD Availability
Revised CIP
Post-ROD Significant Changes (if necessary)
Notice and Availability of Explanation of Significant Differences (if necessary)
Notice of Availability/ Brief Description of Proposed ROD Amendment (if necessary)
Public Comment Period, Public Meeting, Meeting Transcript, Responsiveness Summary (if necessary)
Notice and Availability of Amended ROD (if necessary)
Remedial Design/ Remedial Action
Fact Sheet on Final Engineering Design
Public Briefing on Final Engineering Design
Remedial Action Begins
O&M
Proposed NPL Deletion in Federal Register
Public Notice of Intent to Delete in Federal Register
Proposed Deletion Information to Information Repository
Public Comment on Intent to Delete
Response to Comments
Final NPL Deletion in Federal Register
Final Deletion Package in Information Repository
Current Status

EPA, Superfund Program Proposed Plan, BF Goodrich Superfund Site, Calvert City, Marshall County, Kentucky, at 2 (Nov. 30, 2017).[4]

2. Navigating through this comprehensive process can, and does, take years or even decades. Recognizing the need to prevent collateral attacks from short-circuiting EPA's deliberate progression through these steps, "Congress enacted [42 U.S.C.] § 9613(h) to prevent judicial interference, however well-intentioned, from hindering EPA's efforts to promptly remediate sites that present significant danger to public health and the environment." *Clinton Cty. Comm'rs* v. *EPA*, 116 F.3d 1018, 1023 (3d Cir. 1997); see also *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (Section 9613(h) "protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort.") (emphasis omitted). That provision bars "any challenges to * * * remedial action" outside of certain defined circumstances not implicated here.[5] 42 U.S.C. § 9613(h); see also Pet. Br. 27 (explaining that § 9613(b)'s grant of exclusive jurisdiction to federal courts over "all controversies arising under" CERCLA "[e]xcept as provided in subsections (a)

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[4] https://semspub.epa.gov/work/04/11095220.pdf.

[5] For instance, if EPA initiates suit to recover response costs or enforce a cleanup order, CERCLA permits the defendant potentially responsible parties to challenge the cleanup plan as "arbitrary and capricious or otherwise not in accordance with law." 42 U.S.C. §§ 9613 (j)(2), (h)(1), (h)(2); see, *e.g.*, *United States* v. *P.H. Glatfelter Co.*, 768 F.3d 662, 668 (7th Cir. 2014). It should be noted, however, that allowable suits challenging remedy selection before implementation are infrequent. For EPA to bring a suit to enforce a cleanup order, for instance, it must first issue a unilateral administrative order under CERCLA Section 106 and the potentially responsible party must refuse to comply. Since such refusal risks daily penalties and treble damages, 42 U.S.C. §§ 9606(b)(1), 9607(c)(3), suits by EPA to enforce these orders are typically unnecessary.

and (h)" deprives state courts of jurisdiction over challenges barred under § 9613(h) as well); Pet. App. 67a n.2 (U.S. *amicus* brief) ("[S]tate courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim.").

Courts have taken a commonsense approach to determining when a lawsuit constitutes a "challenge" that would interfere with EPA's implementation of its selected remedial plan. The term "challenge" naturally encompasses lawsuits directly seeking a change or alteration in EPA's cleanup plan, but it also includes other suits that are "related to the goals of a cleanup." *Razore* v. *Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Accordingly, courts have barred suits that seek to impose additional reporting and permitting requirements on an ongoing CERCLA cleanup because, even though such requirements might not directly change the substance of the work, "such relief would constitute the kind of interference with the cleanup plan that Congress sought to avoid or delay by the enactment of Section [9613(h)]." *McClellan Ecological Seepage Situation*, 47. F.3d at 330. The same goes for claims for injunctive relief that seek to implement "stricter standards in the remedial plan." *Broward Gardens Tenants Ass'n* v. *EPA*, 311 F.3d 1066, 1070, 1073 (11th Cir. 2002). The guiding principle in these decisions is that if EPA could have ordered certain measures, but "chose not to do so," Section 9613(h) bars any challenge to that choice. See *id.* at 1073 ("Asserting that a remedial plan is inadequate because it fails to include a measure that [EPA] could have included is challenging the plan for section [9613(h)] purposes.").

B. The Montana Supreme Court's decision conflicts with CERCLA's prohibition against challenging EPA's remedial decisions

1. The Montana Supreme Court adopted an unreasonable interpretation of Section 9613(h)'s prohibition against "challenge[s]" to EPA's remedy-selection decisions. Contrary to uniform federal law, it held that a private lawsuit does not constitute a "challenge" to EPA's remedy selection unless it would "stop, delay, or change the work EPA is doing." Pet. App. 11a-12a. Using that logic, the court permitted local landowners to proceed with their lawsuit that sought "restoration work *in excess of what the EPA required* * * * in its selected remedy." *Id.* at 4a (emphasis added). In other words, the court found no problem with EPA's proceeding with its Atlantic Richfield-funded remedial plan in parallel to the landowners' forcing Atlantic Richfield to fund their *different* preferred remediation plan, provided that "a jury of twelve Montanans" agree with them. *Id.* at 13a.

The court was unmoved by the fact that EPA had considered—and rejected—the restoration work the landowners were pursuing in their lawsuit. For example, the landowners sought to "remove the top two feet of soil from affected properties" and "install permeable walls to remove arsenic from the groundwater." *Id.* at 4a, 72a. But EPA had already "considered construction of an underground Permeable Reactive Barrier (PRB), similar to the barrier proposed by the landowners" and concluded "that this approach would not necessarily achieve the human health standard in Willow Creek and would not eliminate exceedances of arsenic in downstream receiving waters." *Id.* at 63a (United States' *amicus* brief below); see also EPA and Montana Department of Environmental Quality, Record of Decision Amendment, Anaconda Regional Water, Waste,

and Soils Operable Unit, § 6.4.2 (Sept. 2011).[6] In addition, the remedial work the landowners seek would require "[t]earing up" the protective layer of soil EPA chose to put in place as part of its selected remedy, which "could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion." Pet. App. 73a (U.S. *amicus* brief).[7]

2. While such a direct clash with CERCLA's text should never be countenanced, it was particularly inexcusable here. EPA followed CERCLA's rigorous decisional procedures. EPA conducted extensive studies of the arsenic issue and ultimately concluded that "it was technically impracticable to reduce arsenic concentrations below 10 ppb" in groundwater in one of the relevant areas of the site and "therefore did not select below-ground structures to address groundwater arsenic concentrations." Pet. App. 63a (U.S. *amicus* brief); Record of Decision Amendment § 6.4.4; see also EPA, Summary of Technical Impracticability Waivers at National Priorities List Sites, at A-80 (Aug. 2012).[8] EPA thus issued a technical impracticability waiver related to groundwater restoration for a portion of the site.

The technical-impracticability-waiver process demands a careful, regimented analysis. "EPA expects to return usable groundwaters to their beneficial uses *wherever practicable*, within a timeframe that is reasonable given the circumstances of the site." 40 C.F.R. § 300.430(a)(1)(iii)(F) (emphasis added). But the

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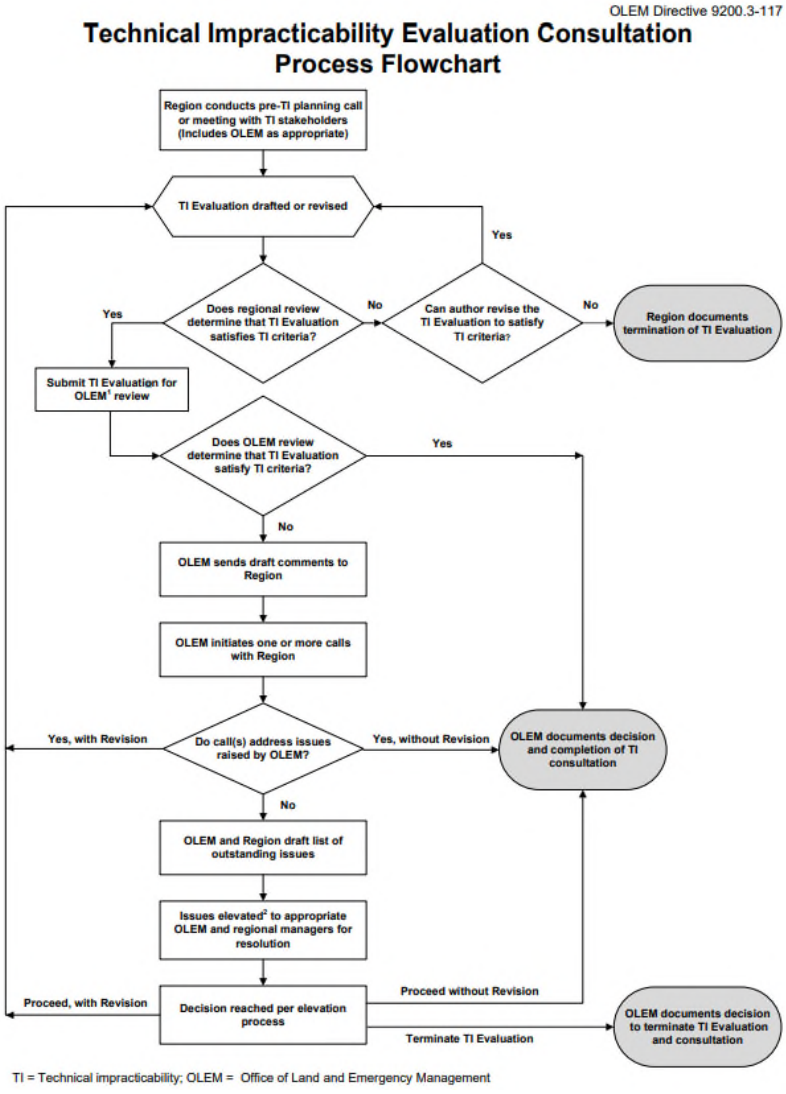
[6] https://semspub.epa.gov/work/08/1211311.pdf.

[7] Importantly, those impacts would be from the Superfund site, and EPA and Atlantic Richfield would then be required to address those impacts under CERCLA. See, *e.g.*, 40 C.F.R. § 300.430(a)(iii)(A) (In developing remedial plans "EPA expects to use treatment to address *the principal threats posed by a site*, wherever practicable.") (emphasis added).

[8] https://semspub.epa.gov/work/HQ/175391.pdf.

governing regulation permits waiving that requirement when it "is technically impracticable from an engineering perspective." *Id.* § 300.430(f)(1)(ii)(C)(3). EPA has expounded on these directives in multiple guidance documents addressing the technical-impracticability-waiver process for groundwater at Superfund sites, culminating in a 2016 guidance document designed to compile and clarify all "existing relevant Superfund policy and guidance" on the subject. Woolford, Office of Superfund Remediation and Technology Innovation, Clarification of the Consultation Process for Evaluating the Technical Impracticability of Groundwater Restoration at CERCLA Sites, OLEM Directive 9200.3-117, at 1 (Dec. 28, 2016).[9] It includes a flowchart to illustrate the intricate workings of the technical-impracticability-waiver process:

[9] https://semspub.epa.gov/work/HQ/198193.pdf.



Id. at Attachment 1.

As a result of that thorough, mandatory decisional process, EPA concluded that a technical impracticability waiver was warranted for groundwater at a portion of the site. Respondents do not contend that this technical-

impracticability-waiver process or the underlying regulations are unlawful. Yet the Montana Supreme Court's exempting of state-law tort remedies from Section 9613(h)'s bar has empowered a "jury of twelve Montanans" to overrule EPA on this point (and any other Superfund remedial decision), thereby opening the door to all manner of challenges to EPA's remedial decisions at Superfund sites. Pet. App. 13a.

3. CERCLA not only jurisdictionally bars respondents' restoration remedy, but also preempts it. CERCLA enshrines EPA's remedial decisions as the final say on the matter. "[L]ooking to the text and context of the law in question," *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1901 (2019), § 9613(h)'s plain language flatly bars "any challenges to * * * remedial action." 42 U.S.C. § 9613(h). CERCLA further prohibits Atlantic Richfield or any other potentially responsible party from "undertak[ing] any remedial action at the facility unless such remedial action has been authorized." 42 U.S.C. § 9622(e)(6). A state-law restoration remedy that mandates different remedial action than that ordered by EPA under the aegis of CERCLA is incompatible with those provisions. See Pet. Br. 41-47. "What the text states, context confirms." *Virginia Uranium*, 139 S. Ct. at 1902. The context of CERCLA—with its principal aim of orderly, comprehensive, and definitive remediation plans for heavily polluted sites—reinforces that commonsense conclusion.

The state-law restoration remedy imposed here thus conflicts with CERCLA, and "it has long been settled that state laws that conflict with federal law are 'without effect.'" *Mut. Pharm. Co., Inc.* v. *Bartlett*, 570 U.S. 472, 479-480 (2013) (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981)). The fact that it is impossible to both

comply with EPA's exclusive and comprehensive remedial plan and undertake the different remedial action required under the state-law restoration remedy only underscores that conclusion. See *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1679 (2019) (state law must yield in the event of "an actual conflict between state and federal law such that it [is] impossible to comply with both").

C. Historical Superfund projects and practical considerations illustrate how the decision below conflicts with CERCLA and would frustrate its goals

The Montana Supreme Court's weakening of Section 9613(h)'s prohibition on challenging EPA's remedial decisions threatens the core goals of CERCLA. Effective and expeditious cleanup is impossible if third parties are allowed to second-guess every EPA remedial decision before a jury. Avoiding the chaos that would result from such challenges is the entire point of Section 9613(h)'s bar. Yet under the Montana Supreme Court's decision, that chaos—and the resultant undermining of CERCLA's central purpose—will become the norm.

1. The Court need not guess at how the Montana Supreme Court's overhaul of CERCLA will play out. The history of other Superfund projects is fertile ground for posing counterfactuals regarding what would have occurred had this new legal regime been in place at other Superfund sites.

Consider the Portland Harbor Superfund Site in Oregon and the Grasse River Superfund Site in New York. At Portland Harbor, EPA developed and evaluated nine separate remedial alternatives for cleaning up contaminated sediments at the bottom of the harbor. EPA, Record of Decision, Portland Harbor

Superfund Site, Portland, Oregon § 10 (Jan. 2017).[10] In conducting that analysis, EPA concluded that dredging could be counterproductive in some areas because disturbing contaminated sediment would risk additional "potential releases to the environment." *Id.* § 10.2.8. For that and other reasons, EPA chose to dredge only a portion of the site. *Id.* §§ 10.2.6, 14.

Similarly, at Grasse River, EPA specifically considered whether it could "return[] the lower Grasse River to its previous pristine conditions" by dredging all river sediment areas containing a threshold level of polychlorinated biphenyls (PCBs). EPA, Grasse River Superfund Site Cleanup Decision Announced, at 2 (April 2013).[11] EPA instead selected a cleanup plan that would dredge only some areas of contamination, based on the following three conclusions: (1) dredging all areas of contamination would not "return the lower Grasse River to pristine conditions"; (2) the short-term impacts of such a path forward would be "severe" and require off-site disposal of 1.5 million cubic yards of dredged sediment, which carries its own set of risks; and (3) a complete dredge of the river would take "nearly three times as long as the selected remedy to achieve PCB interim target levels in fish." *Ibid.*

EPA's final decisions were given their binding effect under CERCLA in those instances. But under the Montana Supreme Court's decision, those remedial choices would be reduced to mere suggestions. Interested parties would be free to invoke state tort law and hold jury trials over whether the entire sites should be dredged as "restoration work in excess of what EPA required." Pet. App. 4a. While that remedy would

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[10] https://semspub.epa.gov/work/10/100036257.pdf.

[11] https://www.epa.gov/sites/production/files/2017-03/documents/fact sheet_alcoa_4-2013.pdf.

directly contradict EPA's remedial decisions and risk further contamination, it would pass muster under the decision below because it would not "stop, delay, or change the work EPA is doing." *Id.* at 11a.

The UGI Columbia Gas Plant Superfund Site in Pennsylvania offers another disturbing window into the future under the Montana Supreme Court's vision of CERCLA. There, EPA issued a technical-impracticability waiver after finding that complete restoration of the groundwater at that site would cause more harm than good. Summary of Technical Impracticability Waivers at National Priorities List Sites, at A-45. Specifically, EPA determined that the remaining contamination at the site was related to dense non-aqueous phase liquid (DNAPL), which could be removed only by first mobilizing it and then extracting it. *Ibid.* EPA determined that while mobilizing the DNAPL was possible, there existed no known technologies capable of extracting it from the complicated fractured bedrock geologic system. *Ibid.* Moreover, mobilizing the DNAPL was a risky endeavor because any attempt to do so "may cause ecological and human health risks, which currently do not exist in the vicinity of the site and Susquehanna River." *Ibid.* EPA thus made a decision, based on site-specific conditions, available technology, sound science, and risk considerations, that complete removal of DNAPL was not warranted. *Ibid.* But under the Montana Supreme Court's approach, private litigants would be free to convince a jury that attempting DNAPL removal—"restoration work in excess of what the EPA required," Pet. App. 4a—was in fact warranted despite the risks and seemingly insurmountable technical challenges.

Another example is the Silver Bow Creek/Butte Area Site, for which EPA issued a technical-impracticability waiver because it concluded that the remedy could not

reduce concentrations of arsenic, cadmium, lead, copper, and sulfate to levels normally required in a Superfund cleanup. Summary of Technical Impracticability Waivers at National Priorities List Sites, at A-73. Specifically, EPA reasoned:

> A [technical-impracticability waiver] is required because * * * the extremely large horizontal and vertical extent of the contamination problem—the sheer size of the source, calculated to be 27 billion cubic yards—would leave an open pit about 62 times larger than the current Berkeley Pit, would eliminate the historic city of Butte, and would have untold environmental consequences.

Ibid. EPA further considered, and rejected, all "potentially applicable remediation technologies" to address the groundwater contamination at that site, concluding that such an attempt would be ineffective at best and could "reverse the currently observable trends of improving bedrock quality" at worst. *Ibid.* Yet under the Montana Supreme Court's ruling, any interested party remains free to file a state-law tort action for restoration damages to conduct the remedial actions EPA rejected—despite EPA's determinations that such remediation would be infeasible, could do more harm than good, and would wipe an entire city off the map.

2. Permitting circumvention of Section 9613(h)'s bar undermines CERCLA in less obvious, but no less important, ways as well. In order to promote expeditious remediation of Superfund sites, CERCLA authorizes EPA to negotiate settlements with responsible parties to fund or perform investigation and cleanup efforts. 42 U.S.C. § 9613(f)(2); see generally Gelber, U.S. Department of Justice, Memorandum Defining "Matters Ad-

dressed" in CERCLA Settlements, at 4 n.3 (Mar. 14, 1997).[12]

With that settlement authority, EPA wields the power to fix a responsible party's otherwise open-ended liability at a definite sum in return for cooperation during the cleanup efforts. 42 U.S.C. § 9613(f)(2). This ability to bring certainty to a responsible party's remediation obligations is a crucial tool for negotiating quick cleanup of Superfund sites because, as the Government explained below, "the main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations." Pet. App. 71a. Indeed, § 9613(f)(2) was added to CERCLA as part of the 1986 Superfund Amendments and Reauthorization Act in an effort to induce responsible parties to settle their liability with the agency overseeing the cleanup so the settling party would have a "measure of finality." *United States* v. *Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990). Incentivizing settlement was intended by Congress to "encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups." H.R. Rep. No. 99-253, at *6 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2840-41; see also 131 Cong. Rec. 24725, 24730 (1985) (statement of Sen. Domenici) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

These settlements have downstream predictability effects as well. An EPA settlement with one responsible

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[12] https://www.epa.gov/sites/production/files/2013-09/documents/defin-cersett-mem.pdf.

party gives the other potentially responsible parties an idea of what kind of settlement EPA will accept for them. EPA's reaching settlements with all of the largest potentially responsible parties often sets the practical upper limit on all potentially responsible third parties' total combined liability. That is because at many sites EPA focuses its enforcement efforts on a subset of responsible parties and leaves it to those parties who settle to bring contribution claims against the non-settling potentially responsible parties to recover a portion of the monies paid in settlement. 42 U.S.C. § 9613(f)(3)(B). The settlement mechanism thus can sometimes inform the outer bounds of liability for the non-settling potentially responsible parties too.

The Montana Supreme Court's decision removes that incentive for cooperation and the ability of potentially responsible parties to fix their liability because it strips EPA of the power to bring certainty and finality to a potentially responsible party's remediation obligations. Instead, private litigants can file lawsuits seeking additional "restoration work in excess of what the EPA required" in any settlement agreement. Pet. App. 4a. Permitting such lawsuits prevents responsible parties from ever obtaining the final resolution of their liability that CERCLA empowered EPA to provide. The Montana Supreme Court's decision thus frustrates EPA's ability to bring parties to the bargaining table and achieve CERCLA's goal of a prompt cleanup.[13]

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[13] In absence of settlement, EPA must either conduct the cleanup itself and then pursue potentially responsible parties for reimbursement, or try to force the potentially responsible parties to perform the cleanup through administrative order or court action. See *Gen. Elec. Co.* v. *Jackson*, 610 F.3d 110, 114 (D.C. Cir. 2010) (summarizing EPA's four options for conducting cleanup at a Superfund site). These routes typically take longer, jeopardizing EPA's ability to ob-

3. Allowing private lawsuits also distorts the holistic lens through which Congress required EPA to assess remediation. Interested parties may want to challenge cleanup plans because they believe their preferred approach would be better *for them*, regardless of the negative externalities it may inflict on the rest of the site or the general public. But CERCLA charges EPA to identify the solution that is best for "the public health" and "environment" *as a whole*. 42 U.S.C. § 9604(a)(1); National Oil and Hazardous Substances Pollution Contingency Plan Preamble, 55 Fed. Reg. 8666, 8695 (Mar. 8, 1990) (CERCLA remedial actions should "comprehensively address all threats at a site."). Allowing a jury to evaluate third parties' preferred remedy addresses only a fraction of the relevant question and, worse, can lead to a result that is detrimental to the larger community. CERCLA allows interested parties to make their individualized interests known through the public-input process but assigns EPA the task of selecting the optimal measures for the entire affected population. The decision below departed from this design by permitting third parties to elevate their narrow self-interest above that of the broader public.

4. The state-law restoration remedy also "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" when it enacted CERCLA. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). It "upset[s] the careful balance struck by Congress" when it crafted such a uniquely comprehensive statute. *Edgar* v. *MITE Corp.*, 457 U.S. 624, 634 (1982). Accordingly, the state law must yield so that the federal statute can apply as Congress intended. See *Geier* v. *Am. Honda Motor Co., Inc.*, 529 U.S. 861, 881 (2000) ("Because the

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tain prompt cleanup and straining limited Government resources by requiring the Government to pay or litigate in the first instance.

rule of law for which petitioners contend would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed, it is pre-empted.") (quoting *Hines*, 312 U.S. at 67).

II. CERCLA'S ROBUST PUBLIC OUTREACH MECHANISMS PROVIDE THE PROPER MEANS FOR INFLUENCING EPA'S REMEDIAL DECISIONS

Reversing the Montana Supreme Court's decision and restoring the congressional vision of CERCLA would not thwart public involvement in EPA's remedy-selection process. Far from it. While court challenges to EPA's selected remedy would be prohibited, CERCLA provides many other avenues for interested parties to make their voices heard at the appropriate time and venue. Reversal of the decision below would thus ensure that interested parties' concerns will be channeled into the statutory mechanisms Congress designed for precisely that purpose.

A. CERCLA establishes a robust public-participation framework. Before adopting a remediation plan, EPA must "[p]ublish a notice and brief analysis of the proposed plan and make such plan available to the public." 42 U.S.C. § 9617(a). EPA then must "[p]rovide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan." *Ibid.* Reflecting the importance of this notice-and-comment process, EPA's "final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted." *Id.* § 9617(b). Similar obligations apply after adoption of a final remediation plan. If EPA's later actions "differ[] in any significant

respects from the final plan," then it "shall publish an explanation of the significant differences and the reasons such changes were made." *Id.* § 9617(c). By implementing a notice-and-comment process and imposing on EPA a continuing obligation to explain its rejection of any significant comments, these statutory mandates ensure that the interested parties have a voice in the remedy-selection process.

CERCLA's regulations add more public-participation mandates on top of those statutory requirements, ensuring that EPA consults with interested parties at nearly every step in the Superfund process. Before placing a site on the National Priorities List, EPA must publish notice in the Federal Register, solicit comments, and "make available a response to each significant comment and any significant new data submitted during the comment period." 40 C.F.R. § 300.425(d)(5). Then, before commencing the remedial investigation, EPA must (1) conduct "interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns and information needs," *id.* § 300.430(c)(2)(i), and (2) prepare a "formal community relations plan" to "ensure the public appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy," *id.* § 300.430(c)(2)(ii). Additionally, EPA maintains an administrative record for each site so that any person has easy access to relevant studies, data, and information. See generally 40 C.F.R. Part 300, Subpart I.

The regulations continue to impose public-participation obligations after EPA has made an initial determination regarding the preferred remedy. At that point, it must "[p]rovide a reasonable opportunity * * *

for submission of written and oral comments on the proposed plan and the supporting analysis" and hold a "public meeting * * * at or near the site at issue." *Id.* § 300.430(f)(3)(i). Following the comment period on the proposed plan, EPA must "reassess its initial determination[,] * * * factoring in any new information or points of view expressed by the * * * community during the public comment period." *Id.* § 300.430(f)(4)(i). Indeed, the regulations specifically contemplate that "comments may prompt [EPA] to modify aspects of the preferred alternative or decide that another alternative provides a more appropriate balance." *Ibid.* Taking all of this into account, EPA then must document and justify its final remedy selection in a publicly available record of decision. *Id.* § 300.430(f)(3), (5). Before carrying out the final plan, EPA must determine whether it is necessary to revise its community-relations plan to "describe further public involvement activities." *Id.* § 300.435(c)(1).

In sum, there is no shortage of public involvement in EPA's Superfund identification and remediation process. Preventing interested parties from challenging EPA's remediation decisions through private lawsuits would enforce the statutory design, while leaving ample means of public expression. Indeed, interested parties would continue to actively participate through the host of carefully calibrated mechanisms provided by CERCLA and its regulations, just as Congress intended.

B. Examples of a few EPA community-relations plans provide a real-world glimpse into the functioning of CERCLA's public-participation mechanisms.

At the Grasse River Superfund Site, EPA engaged the public with fact sheets, flyers, public notices, door-to-door solicitations, school outreach, mail, email, websites, and social media. EPA, Grasse River Superfund Site Community Involvement Plan for Remedial Design and

Remedial Action, at 19-23 (Aug. 2014).[14] That was in addition to EPA's coordination efforts with state and tribal authorities. *Ibid.* This aggressive public-outreach strategy paid dividends, as the Community Advisory Panel "played a valuable role in representing community viewpoints * * * [and] helped guide and inform the EPA's decision-making process at the site." *Id.* at 23.

Community involvement at the Colorado School of Mines Research Institute Superfund Site likewise proved effective. The public there had a demonstrably direct impact on the remedial alternatives considered: "By going to the community up front, EPA was able to screen out remedial alternatives that the community simply would not accept prior to spending EPA resources on analysis of their feasibility." EPA, Community Advisory Groups: Partners in Decisions at Hazardous Waste Sites, Case Studies, at 40 (Winter 1996).[15]

The record similarly reflects the public-participation process for the Anaconda Smelter Superfund Site at issue here. As the Government's *amicus* brief below detailed, EPA has ensured that "[t]he remedy-selection process continues to respond to public concerns and new data. For example, EPA significantly amended the [records of decision] in 2011 and 2013 based on new information." Pet. App. 65a. On the September 2011 Record of Decision Amendment alone, EPA received and responded to comments from Anaconda-Deer Lodge County, the Clark Fork River Technical Assistance Committee, the Clark Fork Coalition, the Arrowhead Foundation, and others. Record of Decision Amendment, Anaconda Regional Water, Waste, and Soils Operable Unit, Responsiveness Summary & Appendix A.

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[14] https://www.epa.gov/sites/production/files/2017-03/documents/grasse-river-cip.pdf.

[15] https://semspub.epa.gov/work/HQ/174150.pdf.

C. Respondents were well aware of CERCLA's public-participation framework. Indeed, respondent Penny Ryan submitted a number of comments to EPA objecting to various aspects of its remediation plan. *Id.* at Responsive Summary § 6.0.C. EPA considered and responded to her comments. *Ibid.* Then it rendered its own expert decision on how to move forward with the cleanup. The court below erred by allowing collateral attacks on the outcome of this process.

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CERCLA's text, structure, and purpose cannot countenance interference through private lawsuits by interested third parties. Yet that is precisely what the decision below enables. The Court should reverse the decision below and restore the comprehensive Superfund structure that CERCLA mandates.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted.

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