No. 06-1188

In the Supreme Court of the United States

TECK COMINCO METALS, LIMITED, PETITIONER

v.

JOSEPH A. PAKOOTAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Petitioner is a Canadian company that owns and operates a smelter approximately ten miles north of the United States border. The smelter discharged slag containing hazardous substances into the Columbia River, which carried the slag into the United States. Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, the Environmental Protection Agency (EPA) issued a unilateral administrative order requiring petitioner to conduct a remedial investigation/feasibility study at an affected site in the United States. After respondents filed this citizen suit to enforce that order, EPA withdrew the order pursuant to a settlement agreement with petitioner. The questions presented are:

1. Whether respondents' citizen suit is moot now that EPA has withdrawn the order that respondents seek to enforce.

2. Whether a foreign person who discharged hazardous substances in a foreign country in a manner that directly and foreseeably caused those substances to become deposited in the United States may be held liable under CERCLA for the cleanup of affected sites in the United States.

3. Whether a person may be held liable under CERCLA as having "arranged" for disposal of hazardous substances within the meaning of 42 U.S.C. 9607(a)(3) if that person disposed of hazardous substances itself, without the involvement of another party.

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This brief is filed 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

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, in response to the serious environmental and health dangers posed by sites contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA provides the President, who has delegated the relevant authority to the Environmental Protection Agency (EPA) (Exec. Order No. 12,580, 3 C.F.R. 193 (1987)), with multiple options for cleaning up contaminated sites. For example, EPA may undertake a response action

(including cleanup), 42 U.S.C. 9604 (2000 & Supp. IV 2004), or may compel, by means of an administrative order or a request for judicial relief, a party to undertake a response action. 42 U.S.C. 9606. A party is generally liable under CERCLA if there was a release or threatened release of a hazardous substance from a facility and the defendant falls within the definition of an owner or operator, past owner or operator, arranger, or transporter. 42 U.S.C. 9607(a).

2. Petitioner is a Canadian corporation that operates the world's largest zinc and lead smelter in Trail, British Columbia, approximately ten miles north of the United States border. For 90 years, from 1906 until 1995, petitioner's smelter discharged up to 145,000 tons of slag annually (13 million tons total) into the Columbia River. That river flows directly into the United States. Pet. App. 4a-5a, 72a.

In August 1999, the Confederated Tribes of the Colville Indian Reservation petitioned EPA, pursuant to 42 U.S.C. 9605, to conduct an assessment of hazardous substance contamination along the Columbia River. EPA investigated the Upper Columbia River Site Assessment Area, which extends downstream from the border for approximately 70 miles. In the river and on adjacent beaches, EPA found contaminants associated with petitioner's slag, including arsenic, cadmium, copper, lead, mercury, and zinc, all of which are harmful to human and aquatic life. Pet. App. 70a-72a.

EPA spent more than a year attempting to negotiate a settlement with petitioner and its American affiliate, Teck Cominco American Inc. (TCAI), without success. In October 2003, EPA sent TCAI a draft administrative order on consent, requesting that it voluntarily undertake a remedial investigation/feasibility study (RI/FS)

under CERCLA. TCAI responded with a proposal that, EPA concluded, would not have provided the information necessary for EPA to select an appropriate remedy. Pet. App. 73a-75a.

On December 11, 2003, EPA issued a unilateral administrative order directing petitioner to conduct an RI/FS of the Upper Columbia River Site. Pet. App. 68a-99a. Petitioner responded that it did not consider itself subject to that order. *Id.* at 102a-104a.

3. In July 2004, respondents Joseph A. Pakootas and Donald R. Michel filed a complaint pursuant to CERCLA's citizen-suit provision, 42 U.S.C. 9659(a)(1), which authorizes a citizen to bring suit against "any person * * * who is alleged to be in violation of any * * * order which has become effective pursuant to [CERCLA]." See Pet. App. 105a-112a. The complaint sought a declaration that petitioner was violating EPA's order, an injunction enforcing that order, civil penalties, and attorney's fees. *Id.* at 111a. The State of Washington intervened as a plaintiff and filed a substantially similar complaint. *Id*. at 113a-119a.

The district court denied petitioner's motion to dismiss. Pet. App. 29a-59a. The court found that it had personal jurisdiction over petitioner because, under the facts alleged in respondents' complaints, petitioner's "dispos[al] of hazardous substances into the Columbia River is an intentional act expressly aimed at the State [of] Washington" that "causes harm which [petitioner] knows is likely to be suffered downstream by" respondents. *Id.* at 34a-35a.

The district court next "assume[d] this case involves an extraterritorial application of CERCLA to conduct occurring outside U.S. borders." Pet. App. 38a. The court held, however, that the presumption against extra-

territorial application of United States laws is inapplicable here because it "generally does not apply where conduct in a foreign country produces adverse effects within the United States," and "CERCLA affirmatively expresses a clear intent by Congress to remedy 'domestic conditions' within the territorial jurisdiction of the U.S." *Id.* at 44a, 57a. The court then stated that, while petitioner did not "appear" to be liable as an owner or operator of the Upper Columbia River Site, or as a transporter of hazardous substances, *id.* at 46a, "'arranger' liability under CERCLA cannot be ruled out," *id.* at 49a. Accordingly, the court denied the motion to dismiss, but certified its order for immediate appeal under 28 U.S.C. 1292(b). Pet. App. 59a.

4. After the court of appeals granted petitioner's request for interlocutory appeal, EPA, petitioner, and TCAI entered into a settlement agreement. See Pet. App. 9a n.10. TCAI agreed to undertake an RI/FS in accordance with standards promulgated under CERCLA, and EPA agreed to withdraw the unilateral administrative order and not to seek civil penalties or injunctive relief for petitioner's prior non-compliance with the order. Pet. C.A. Request for Judicial Notice, Exh. 2, at 1-2, 22, 25 (June 2, 2006) (Settlement Agreement) <http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter>.[1]

5. The court of appeals affirmed the district court's order. Pet. App. 1a-28a. The court took judicial notice of the settlement agreement and EPA's withdrawal of

[1] In November 2005, while the interlocutory appeal was pending, respondents amended their complaints in the district court to add claims seeking recovery of response costs and natural resource damages, pursuant to 42 U.S.C. 9607(a)(4). See Am. Compl. 7-8; First Am. Compl. in Intervention 7-8.

its order. *Id.* at 9a n.10. After explaining that "[t]he parties are agreed that the settlement * * * does not render this action moot," the court stated that "it is sufficient for us to note that [respondents'] claims for civil penalties and for attorneys' fees are not moot." *Ibid.* The court of appeals "le[ft] for the district court to decide in the first instance whether the claims for injunctive and declaratory relief are moot." *Ibid.*

The court of appeals next determined that the presumption against extraterritoriality is inapplicable because this case involves a domestic application of CERCLA. Pet. App. 12a-23a. The court reasoned that CERCLA liability turns on the release of hazardous substances from a "facility," and here, the facility (the Upper Columbia River Site) is located within the United States, and the relevant release—the leaching of hazardous substances from slag that had settled at the site—also occurred within the United States. *Id.* at 13a-15a.

Finally, the court of appeals rejected petitioner's argument that it was not liable as an arranger because it had "disposed of the slag itself," without the involvement of a third party. Pet. App. 23a. CERCLA's arranger-liability provision refers to:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility.

42 U.S.C. 9607(a)(3). The court interpreted the phrase "by any other party or entity" to mean that an arranger could be liable for disposal of hazardous substances that were owned or possessed "by such person" or "by any other party or entity." Pet. App. 24a. Thus, the court

rejected petitioner's argument that a person can be liable as an arranger only if one person disposed of another person's waste. See *id.* at 25a-26a. In so holding, the court emphasized that neither respondents' complaints nor EPA's order "specifically allege[d] that [petitioner] is an arranger," and the court "express[ed] no opinion" on whether petitioner is also liable as an owner, operator, or transporter. *Id.* at 23a & n.19.

DISCUSSION

Respondents brought this action under CERCLA's citizen-suit provision to enforce EPA's unilateral administrative order. Now that EPA has withdrawn that order, respondents' citizen-suit claims—the only claims considered by the lower courts—are moot. While respondents amended their complaints in the district court during the pendency of the interlocutory appeal to add additional claims that do not depend on the continued existence of EPA's order, those claims have not been considered by the courts below, and petitioner may have additional defenses to the new claims. Further proceedings on remand may thus shed significant light on the validity of respondents' remaining claims. The current posture of this case therefore counsels strongly against this Court's review.

In any event, the questions presented do not merit review at this time. There is no division among the circuits on those questions. Instead, the decision below turns on an issue of first impression—whether, or under what circumstances, CERCLA applies when a foreign company discharges hazardous substances abroad in such a manner as to produce a subsequent release at a facility in the United States. While international pollution can be diplomatically sensitive, the comity concerns

invoked by petitioner are unusually weak here, because petitioner dumped millions of tons of slag into a river just upstream of the border. Accordingly, there is no need for immediate review, and this case would provide a particularly poor vehicle for considering the comity issue in any event.

A. Respondents' Challenge To Petitioner's Failure To Comply With EPA's Now-Withdrawn Order Is Moot

Respondents brought this action under CERCLA's citizen-suit provision, which authorizes suit "against any person * * * who is alleged to be in violation of a[n] * * * order which has become effective" pursuant to the statute. 42 U.S.C. 9659(a)(1). As the original complaints make clear, respondents seek "to enforce the [order] issued to [petitioner]." Pet. App. 105a-106a; accord *id.* at 106a, 114a, 115a. Indeed, all of the claims in the original complaints—the only complaints that were before the courts below—are expressly premised on petitioner's failure to comply with EPA's unilateral administrative order. *Id.* at 110a-111a, 118a. Following EPA's withdrawal of that order, there is no longer an "order" for respondents to enforce through this citizen suit under Section 9659(a)(1).

Without analysis, the court of appeals "note[d]" in a footnote that respondents' requests for civil penalties and attorney's fees are not moot, and "le[ft] for the district court to decide in the first instance whether the claims for injunctive and declaratory relief are moot." Pet. App. 9a n.10. The court of appeals may have relied in large part on petitioner's concession that respondents' requests for civil penalties and attorney's fees were not moot. See Pet. C.A. Request for Judicial Notice 5. But this Court must assure itself of its jurisdiction, *Steel Co.*

v. *Citizens for a Better Env't*, 523 U.S. 83, 93 (1998), and petitioner is mistaken in conceding that the case is not moot.

1. In construing analogous citizen-suit provisions in other environmental statutes, this Court has emphasized that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 187-188 (2000) (quoting *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)); see *Steel Co.*, 523 U.S. at 105-108. A citizen suit must be brought against a person "who is alleged to be in violation of" law. 42 U.S.C. 9659(a)(1). As this Court explained in construing the Clean Water Act's similar citizen-suit provision, "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation," as opposed to a past violation. *Gwaltney*, 484 U.S. at 57. Moreover, before a plaintiff may file a citizen suit under CERCLA, it must provide the potential defendant and the United States with 60 days' advance notice. 42 U.S.C. 9659(d)(1). Like the Clean Water Act's analogous notice requirement, that provision would be "incomprehensible" if citizens could sue based on past violations, because "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney*, 484 U.S. at 59-60.

In light of those authorities, respondents' citizen suit is moot. The complaints gave rise to a live case or controversy at the time they were filed, because petitioner was not complying with EPA's order. But EPA's withdrawal of that order means that petitioner is no longer

violating it. Thus, there is no longer any basis for this citizen suit seeking to enforce a now non-existent order.

Contrary to the court of appeals' assumption, respondents' request for civil penalties does not change that conclusion. Civil penalties are paid to the United States, *not* to citizen-plaintiffs. 26 U.S.C. 9507(b)(4); see *Steel Co.*, 523 U.S. at 106. And because citizen suits must be based on ongoing violations, this Court has held that "citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney*, 484 U.S. at 59; see *Laidlaw*, 528 U.S. at 188 ("[P]rivate plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations."); *Steel Co.*, 523 U.S. at 106. Of particular relevance here, plaintiffs may not seek such penalties when it is "merely speculative" whether the "deterrent effect" of their imposition would cause the defendant to alter its behavior in such a way as to redress the plaintiffs' injuries. *Laidlaw*, 528 U.S. at 186-187; see *Steel Co.*, 523 U.S. at 106-107. Now that EPA has withdrawn the order, civil penalties would not (and could not) encourage compliance with that non-existent order, but instead would be strictly backward-looking. Petitioners' requests for the imposition of civil penalties are therefore moot.

Nor can respondents' requests for attorney's fees keep their citizen-suit claims alive. A party's "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," including where, as here, the claim became moot during the litigation. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990); see *Laidlaw*, 528 U.S. at 192 n.5 (instructing the lower courts to "use caution to avoid carrying forward a

moot case solely to vindicate a plaintiff's interest in recovering attorney's fees"); *Steel Co.*, 523 U.S. at 107 (holding that plaintiff lacked standing because "[t]he litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself").

2. Respondents may contend that their claims are not moot because petitioner might not comply with the settlement agreement, and EPA might therefore issue another order against petitioner. This Court's decisions in *Gwaltney*, *Laidlaw*, and *Steel Co.* primarily considered plaintiffs' standing to sue at the outset of those cases. Mootness differs from standing in that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. Here, however, the mooting event is *EPA's* withdrawal of the order, not *petitioner's* voluntary compliance with it. In fact, petitioner never complied with the order, voluntarily or otherwise. Instead, it entered into a separate agreement with EPA. Thus, the voluntary-cessation exception does not apply here.

Even if petitioner failed to comply with the settlement agreement, EPA would not necessarily issue another administrative order. The agreement specifies dispute-resolution procedures, as well as significant penalties (other than issuance of a new order) for non-compliance. Settlement Agreement 14-16, 23-25. EPA could take aim at petitioner's violation of the agreement, rather than initiate another order targeted at petitioner's underlying primary conduct. And even if another order were issued, it could differ significantly from the withdrawn one, based on intervening developments.

The conclusion that respondents' claims are now moot is buttressed by the United States' agreement, as part of the settlement, "not to sue or take administrative action" for "civil penalties or injunctive relief for non-compliance with the" order, unless petitioner fails to perform its obligations under the agreement. Settlement Agreement 22. It would make little sense to permit respondents to sue for civil penalties payable to the United States when the United States has not only withdrawn the order underlying respondents' claims, but has also waived, as part of a settlement, the right to seek penalties unless petitioner fails to comply with the agreement. As this Court explained in *Gwaltney*, permitting citizens to sue for civil penalties after EPA agreed not to do so as part of a settlement would "curtail[] considerably" EPA's "discretion to enforce the Act in the public interest." 484 U.S. at 61.

Principles of *res judicata* also bar respondents' citizen-suit claims. The settlement agreement resolved the government's claims for civil penalties or injunctive relief for petitioner's non-compliance with EPA's now-withdrawn order. Settlement Agreement 22. As *parens patraie*, the United States acts on behalf of its citizens in litigating or resolving environmental enforcement actions. Where, as here, the government has already resolved its claims for the same relief sought in the citizen suit, preclusion principles bar a citizen-plaintiff's attempt to obtain such relief. See, *e.g.*, *Ellis* v. *Gallatin Steel Co.*, 390 F.3d 461, 476 (6th Cir. 2006); *United States EPA* v. *City of Green Forest*, 921 F.2d 1394, 1403-1404 (8th Cir. 1990), cert. denied, 502 U.S. 956 (1991).

3. The mootness of respondents' citizen-suit claims does not necessarily require vacatur of the court of appeals' judgment. If a case "has become moot" through

"happenstance" while "on its way here or pending [this Court's] decision on the merits," vacatur of the court of appeals' judgment may be appropriate. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 & n.3 (1994). Here, however, respondents' claims became moot *before* the court of appeals entered judgment, the court of appeals expressly addressed mootness (albeit erroneously), and neither party sought review of the court of appeals' mootness determination. Moreover, as explained below, the petition would not warrant this Court's review even if respondents' citizen-suit claims remained live, which further counsels against vacatur when the mooting event predated the court of appeals' decision and was not raised by either party. In any event, the mootness of respondents' citizen-suit claims poses a formidable barrier to this Court's review of any issue on the merits.

B. The Interlocutory Posture Of This Case Counsels Against This Court's Review

1. After petitioner filed its interlocutory appeal to the Ninth Circuit, respondents amended their complaints in the district court to add claims seeking recovery of response costs and natural resource damages, pursuant to 42 U.S.C. 9607(a)(4). See Am. Compl. 7-8; First Am. Compl. in Intervention 7-8. Those claims seek relief for injuries allegedly incurred by respondents, *ibid.*, and they are not subject to the limitations on citizen suits discussed above.

Nonetheless, because respondents first asserted their new, live claims after petitioner filed its interlocutory appeal, those claims were not considered or resolved by the courts below, and thus they are not prop-

erly before this Court. "[T]his is a court of final review and not first view." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (citation omitted). Moreover, respondents' new claims do not and could not fall within the scope of the district court's order certifying an interlocutory appeal under Section 1292(b), because respondents had not yet asserted those claims at the time of the district court's order.

It is also unclear whether the questions presented here will be dispositive of respondents' new claims. For example, the court of appeals correctly observed that, "[i]n private cost recovery actions under § 9607(a), the claimant must incur response costs that are both 'necessary' and 'consistent with the national contingency plan.'" Pet. App. 13a n.13 (quoting 42 U.S.C. 9607(a)(4)(B)). The court did not consider whether those requirements are met here, however, because they do not apply to respondents' citizen-suit claims, which were the only claims before the court of appeals. Thus, the appropriate course is for the district court to adjudicate, in the first instance, respondents' new cost-recovery and natural-resources-damages claims.

2. Even in cases where the claims considered by the lower courts have not become moot, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of the petition for a writ of certiorari). The lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

That principle, while far from absolute, has particular force here, not only for the reasons discussed above, but also because further factual development could shed

light on the questions presented. For example, petitioner argues (Pet. 25-29) that it is not liable as an arranger because no third party was involved in the relevant discharges. Even if petitioner's legal argument is correct, however, it is at least possible that discovery will reveal that petitioner hired an independent contractor to assist in the discharges. Alternatively, respondents might argue on remand that, regardless of any liability as an arranger, petitioner is liable as an operator or transporter. The court of appeals correctly observed that EPA's (now-withdrawn) order is not explicitly predicated on an arranger theory of liability, and that court left open the question whether petitioner could be held liable as an operator or transporter. Pet. App. 23a & n.19. Nor has the district court squarely foreclosed that possibility. See *id.* at 46a (noting only that petitioner did not "appear" to be liable as an owner or operator). This Court and the courts of appeals have construed CERCLA's operator and transporter provisions broadly. See, *e.g.*, *United States* v. *Bestfoods*, 524 U.S. 51, 65 (1998) (noting that operator liability could encompass "even a saboteur who sneaks into [a] facility at night to discharge its poisons"); *Kaiser Aluminum & Chem. Corp.* v. *Catellus Dev. Corp.*, 976 F.2d 1338, 1343 (9th Cir. 1992) (holding that company that excavated and graded contaminated soil within a facility may be liable as an operator and transporter).

C. The Court of Appeals' Decision Does Not Conflict With Decisions Of Other Appellate Courts And Lacks Sufficient Importance To Warrant This Court's Review At This Time

Even setting aside the procedural impediments to this Court's review, the petition presents a question of first impression that should be permitted to percolate in

the lower courts and that lacks sufficient importance to warrant this Court's review at this time.

1. Petitioner does not assert a conflict among the circuits on the first question presented (involving international comity), and indeed does not identify any other decisions addressing that question. The fact that the comity question in this case is apparently arising now for the first time, notwithstanding the decades-old potential for disputes concerning cross-border pollution, strongly suggests that it lacks the recurring importance that petitioner attributes to it.

As a practical matter, the United States has dealt with international pollution issues in a variety of ways. First, as it did here, the United States often attempts to achieve diplomatic solutions to transborder pollution issues.[2] Second, in disputes with Canada, the United States has discretion to seek advice or dispute resolution under the Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, Arts. IX, X, 36 Stat. 2448, 2452, 2453, and has sought such advice jointly with Canada in the past, though the treaty does not require the United States to do so. See *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 507 (1971) (Douglas, J., dissenting). Third, there has been some litigation of transborder pollution disputes in the United States courts. See, *e.g.*, *Her Majesty the Queen in Right of Ont.* v.

[2] EPA attempted to negotiate with Canada regarding a study of cross-border pollution on the Columbia River, but negotiations broke down. The United States also involved Canada in developing the settlement agreement with petitioner, and agreed to give Canada an enhanced consultative role in the remedial investigation process. A representative of the Canadian government has been actively participating in technical discussions related to that process.

United States EPA, 912 F.2d 1525 (D.C. Cir. 1990); *Michie* v. *Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir.), cert. denied, 419 U.S. 997 (1974).

In practice, therefore, issues have been resolved satisfactorily in various ways, without the need for a definitive resolution of the comity question. The order issued to petitioner represents the only time in the 27 years since CERCLA's enactment that EPA has sought to compel a foreign party to take a response action with respect to domestic pollution resulting from actions in a foreign country, and EPA has now withdrawn that order. The United States is aware of only one other effort (by private parties) to apply CERCLA in an international setting, and the Ninth Circuit correctly rejected that effort because the facility was outside of the United States. See *ARC Ecology* v. *United States Dep't of the Air Force*, 411 F.3d 1092 (2005).

2. The court of appeals' decision does not (Pet. 9) "threaten[] to disrupt our ties with Canada." Because this case involves a direct and compelling United States interest, an assertion of jurisdiction to prescribe law would be consistent with considerations of international comity. Indeed, the Province of British Columbia recognizes that, "to the extent [petitioner] is responsible for polluting the Columbia River, it may be required to contribute to the cleanup costs." B.C. Amicus Br. 12 n.6; see *id.* at 15 n.8. While Canada and British Columbia would prefer to resolve this dispute through diplomatic channels and negotiation rather than litigation in United States courts—a preference the United States strongly shares—Canada correctly "recognizes the possibility that some cases involving transboundary pollution may appropriately be resolved in the domestic courts of Canada or the United States." Can. Amicus Br. 6.

Canada argues that the court of appeals erred by "not even acknowledg[ing], let alone analyz[ing], the relevant factors for determining whether a state may reasonably prescribe laws with respect 'to a person or activity having connections with another state.'" Can. Amicus Br. 13 (quoting Restatement (Third) of Foreign Relations Law of the United States § 403(1), at 244 (1987) (Restatement)). Assuming *arguendo* that the Restatement analysis is relevant, however, it only confirms that comity concerns would not preclude an assertion of jurisdiction to prescribe in the circumstances of this case. According to the Restatement, "a state has jurisdiction to prescribe law with respect to * * * conduct outside its territory that has or is intended to have substantial effect within its territory." *Id.* § 402(1)(c) at 227-228. The Restatement provides, however, that a state may not exercise such jurisdiction in situations where it would be "unreasonable" to do so. *Id.* § 403(1), at 244. The Restatement illustrates its approach by explaining that assertion of jurisdiction based on domestic effects is "not controversial with respect to acts such as shooting * * * across a boundary." *Id.* § 402 cmt. d at 239. Indeed, "[t]he traditional example" is that "when a malefactor in State *A* shoots a victim across the border in State *B*, State *B* can proscribe the harmful conduct." *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984).

Here, petitioner's deliberate, 90-year discharge of millions of tons of hazardous substances into a river just upstream from the United States directly and foreseeably caused harmful effects in the United States. Petitioner's conduct could arguably be analogized in some respects to firing a gun across the border, because it was inevitable that the river would carry the pollution di-

rectly into the United States. Moreover, the slag at the bottom and on the beaches of the Columbia River is clearly identifiable and directly attributable to petitioner's actions. Pet. App. 5a.[3]

Petitioner contends (Pet. 9, 23) that the court of appeals' decision paves the way for suits over trans-oceanic pollution such as acid rain or mercury from Asia. Distant sources that contribute to widespread and diffuse air pollution, however, present a much different case from this one, and are in no way analogous to the "traditional example" (*Laker Airways*, 731 F.2d at 922) of a gun being fired across a border. Thus, it would not necessarily follow from the assertion of jurisdiction in this case that the courts of the United States would exercise jurisdiction in the cases posited by petitioner. Moreover, this Nation's courts might lack personal jurisdiction in those cases. Cf. Pet. App. 34a-35a (basing personal jurisdiction in this case on respondents' allegation that petitioner intentionally aimed its slag at the United States and caused harm that petitioner knew was likely to be suffered downstream).

3. The arranger-liability question does not independently warrant this Court's review. CERCLA's arranger-liability provision refers to:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment,

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[3] The position of the United States is that the reasonableness test set forth in the Restatement does not restrict the United States' jurisdiction to prescribe. Nonetheless, that test, which Canada invoked, confirms that considerations of comity would not preclude an assertion of jurisdiction to prescribe in the circumstances of this case.

> of hazardous substances owned or possessed by such person, by any other party or entity, at any facility.

42 U.S.C. 9607(a)(3). Petitioner argues (Pet. 25-29) that it is not liable as an arranger because it disposed of the slag itself, without involving a third party.

There is no conflict among the circuits on that question. In *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6 (1st Cir. 2004), on which petitioner relies (Pet. 25-26), the owner of hazardous substances arranged with a broker to dispose of them. 381 F.3d at 25. Thus, that case did not present the question whether a person who disposes of hazardous substances *without* the involvement of a third party can be liable as an arranger; instead, the question was whether "arranger liability can only be imposed on a party that owned or possessed hazardous materials, not on a party that brokered the disposal of hazardous material." *Id.* at 23. After determining that arranger liability is not limited to owners of hazardous substances, the court upheld the imposition of arranger liability in that case. *Id.* at 25. The First Circuit's imposition of arranger liability in *American Cyanamid* in no way conflicts with the court of appeals' determination that, if the allegations of respondents' complaints are true, petitioner is also liable as an arranger under the far different circumstances of this case.

To be sure, in reaching its conclusion, the First Circuit construed the statutory phrase "by any other party or entity" to modify "disposal or treatment," rather than "owned or possessed by such person." *American Cyanamid*, 381 F.3d at 23-24. And the court said in passing that a consequence of its reading is that, "for arranger liability to attach, the disposal or treatment must be performed by another party or entity, as was the case here." *Id.* at 24. But that passing observation was *dic-*

tum because, as the court observed, a third party was involved there. See *ibid.*

In any event, the arranger-liability question presented here seldom has practical significance because, if a party is liable as an arranger on the theory adopted by the court of appeals, it ordinarily will also be liable as an owner, operator, or transporter. When all of the relevant conduct occurs domestically, the relevant "facility" normally includes the entire affected area, in which case it is generally clear that an owner or operator released hazardous substances within the facility. Alternatively, operator or transporter liability can attach to surreptitious dumping or other activity on another person's land. See, *e.g.*, *Bestfoods*, 524 U.S. at 65; *Kaiser Aluminum*, 976 F.2d at 1343.

Thus, petitioner cites *no* case in which the arranger-liability question at issue here was outcome-determinative. In *American Cyanamid* itself, the court of appeals' imposition of arranger liability was an alternative holding, because the court held that the arranger was also liable as an operator. 381 F.3d at 22-25. As discussed, it is not even clear that the arranger-liability question presented here will ultimately be dispositive in this case. See pp. 13-14, *supra*. Thus, that question does not independently warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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