No.

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) makes liable "any person who . . . arrange[s] for disposal . . . of hazardous substances . . . by any other party or entity, at any facility . . . from which there is a release . . . of a hazardous substance." 42 U.S.C. § 9607(a)(3)-(4). Petitioner, a Canadian company, disposed of hazardous substances at its facility in Canada in accordance with that country's laws, and without the assistance of any "other person or entity." Some of those substances were carried to the United States by the flow of surface water. The questions presented are:

1. Whether the Ninth Circuit erred in concluding, in derogation of numerous treaties and established diplomatic practice, that CERCLA (and, by extension, other American environmental laws) can be applied unilaterally to penalize the actions of a foreign company in a foreign country undertaken in accordance with that country's laws; and

2. Whether the Ninth Circuit erred in concluding, in direct and acknowledged conflict with the First Circuit, that "arranger" liability under CERCLA does not require the involvement of any "other party or entity."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Teck Cominco Metals, Ltd. is a Canadian corporation; the parent corporation of Teck Cominco Metals, Ltd. is Teck Cominco Limited, also a Canadian corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Teck Cominco Metals, Ltd. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 452 F.3d 1066. The opinion of the district court (App., *infra*, 29a-59a) is not officially reported but is electronically reported at 2004 WL 2578982.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2006. A timely petition for rehearing was denied on October 30, 2006. App., *infra*, 60a-61a. On January 12, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including February 27, 2007. No. 06A686. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a) provides in relevant part:

§ 9607. Liability

(a) Covered persons . . .

(3) 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 or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable . . . .

Other pertinent provisions of CERCLA are reproduced in the appendix, *infra*, at 62a-67a.

STATEMENT

1. Petitioner is a Canadian corporation that owns and operates a smelting and refining complex in the city of Trail, which is in the province of British Columbia, in the sovereign nation of Canada. The Trail Smelter is located along the banks of the Upper Columbia River, approximately ten miles north of Canada's border with the United States. Today it is the largest lead-zinc smelter in the world. App., *infra*, 106a.

For nearly a century after it was built in 1895, waste generated by the Trail Smelter—known as "slag"—was discharged into the Upper Columbia River. Such disposal activities were, at all times, conducted in accordance with applicable laws of Canada and British Columbia—the governmental entities with authority to regulate operations at the Trail Smelter. During the twentieth century, such disposals were common among industrial plants sited along the Canadian and American banks of the Upper Columbia River. *See* App., *infra*, 71a ("Sources [of pollution in the Upper Columbia River] . . . include releases from mining and milling operations, fertilizer production, smelting operations, pulp and paper production, sewage treatment plants, and other industrial activities").

The Trail Smelter stopped discharging slag directly into the river in 1995. *See* Superfund Technical Assessment and Response Team, Region 10, U.S. EPA, TD: 01-02-0028, Upper Columbia River Expanded Site Inspection Report 2-13 (2003) ("2003 Report").

Residents of Washington State have periodically complained of pollution emanating from the Trail Smelter. In the 1920s, for example, air currents regularly carried sulfur dioxide emissions from the Trail Smelter south into the United States, triggering complaints by the citizens of Northport, Washington. Those complaints were resolved by diplomatic negotiations and, eventually, binding arbitration between governments. *See infra* at 10-11.

In 1999, the Confederated Tribes of the Colville Indian Reservation, which is located in Washington State, petitioned the U.S. Environmental Protection Agency ("EPA") to conduct an assessment of hazardous-substances contamination of the Upper Columbia River and surrounding lands in northeastern Washington. App., *infra*, 70a. The petition alleged that the Upper Columbia River had been polluted by Canadian and American smelters, pulp mills, and mining operations. *Id.* at 72a. In 2003, EPA issued findings that the U.S. portion of the Upper Columbia River had been contaminated by hazardous substances and that slag discharged from the Trail Smelter, carried downstream by surface water, was the primary source of that contamination. 2003 Report at 8-2.

In December of 2003, EPA issued a Unilateral Administrative Order ("UAO") pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a) (App. *infra*, 63a-65a), ordering petitioner—a Canadian company with no operations in the United States—to undertake a Remedial Investigation/Feasibility Study ("RI/FS") of the portion of the Upper Columbia River located in the United States. App., *infra*, 68a-69a. Section 106(a) of CERCLA permits the President to issue "such orders as may be necessary to protect public health and welfare and the environment" from an "actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a) (App., *infra*, 63a). EPA concluded that the "Upper Columbia River Site"—defined as "the areal extent of contamination *in the United States* associated with the Upper Columbia River, and all suitable areas in proximity to the

contamination necessary for implementation of response action"—was a CERCLA "facility." App., *infra*, 69a, 75a (emphasis added); *see* 42 U.S.C. § 9601(9) (defining a "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located") (App., *infra*, 62a). EPA further determined that the "potential migration of hazardous substances currently located at or emanating from the Site, . . . constitute actual and/or threatened 'releases.'" App., *infra*, 75a; *see* 42 U.S.C. § 9601(22) (defining "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment") (App., *infra*, 62a-63a).

The President's authority to issue investigation or remediation orders under CERCLA § 106(a) properly extends only to "responsible parties." *See Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). EPA declared petitioner to be a "responsible party" subject to presidential authority under 42 U.S.C. §§ 9604, 9607, and 9622, which lay out the scope of the President's authority to order remedial actions. App., *infra*, 76a. This legal conclusion was predicated on EPA's factual finding that petitioner had "arranged for disposal of its hazardous substances" by discharging slag "into the Columbia River through several outfalls at the Trail Smelter," located *in Canada*. *Id.* at 72a.

Soon after the entry of the UAO, the Canadian government sent a diplomatic note to the U.S. State Department, expressing grave concern over EPA's "attempt[ ] to enforce . . . [CERCLA] on Teck Cominco Metals, a Canadian company operating in Canadian territory." App., *infra*, 100a. The Canadian government warned that "issuance of the Unilateral Administrative Order may . . . caus[e] transboundary environmental liability cases to be initiated in both Canada and the United States." *Ibid.* Canada urged the United States to withdraw the UAO and to negotiate outside of the coercive framework of CERCLA toward a "mutually acceptable and

enforceable agreement" based on Teck Cominco's longstanding offer "to undertake an environmental and health risk assessment." *Id.* at 100a-101a.

Petitioner thereafter notified EPA that it would not comply with an order premised on the American President's regulatory authority under CERCLA, but reiterated its willingness to enter into an "unequivocal[ ]" and "enforceable" agreement "to assume voluntarily the costs of investigation of the alleged contamination from the Trail Smelter, and the costs of appropriately addressing risks from that contamination." App., *infra*, 103a. EPA never moved to enforce the UAO and in June 2006, EPA and a U.S.-based affiliate of Teck Cominco reached a settlement—outside the CERCLA framework—under which the affiliate would conduct a study of the Site under EPA's supervision. *Id.* at 120a. Pursuant to that settlement, EPA withdrew the UAO. *Ibid.*

2. In July 2004, two residents of the Colville Reservation, Joseph A. Pakootas and Donald R. Michel, brought a citizen suit against petitioner, seeking to compel petitioner to comply with the UAO and to impose on petitioner statutory penalties for its alleged noncompliance. App., *infra*, 105a-112a; *see also* 42 U.S.C. § 9659(a) (providing for citizen suits to enforce "any . . . order which has become effective pursuant to this chapter") (App., *infra*, 67a); *id.* § 9606(b)(1) (providing for fines of up to $25,000 per day for failure to comply with "any order of the President under [Section 9606(a)]") (App., *infra*, 63a). The State of Washington later intervened as a plaintiff, filing a complaint in intervention substantially identical to that filed by Pakootas and Michel. App., *infra*, 113a-119a.

The two complaints closely tracked the UAO's factual findings and legal conclusions. They alleged that petitioner disposed of slag "directly into the Columbia River" in Canada, and that some portion of those hazardous substances migrated "downstream into waters of the United States." App.,

infra, 107a, 115a. The plaintiffs further alleged that a "significant volume" had accumulated on the U.S. side of the border, and that decay of the slag was releasing hazardous substances into the U.S. environment. *Ibid.*

Petitioner moved to dismiss the complaints on the ground, *inter alia*, that it was not a "responsible party" under CERCLA § 107(a). *See* 42 U.S.C. § 9607(a) (App., *infra*, 65a). Petitioner argued, first, that in light of the strong presumption against the extraterritorial application of U.S. law (*e.g.*, *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*ARAMCO*)), CERCLA should not be construed to extend to a foreign party operating exclusively in a foreign country in compliance with that country's laws. Second, petitioner explained that it could not be liable as an "arranger" under CERCLA because there was no allegation that any "other party or entity" participated in the petitioner's disposal of waste in Canada.

a. The district court denied the motion to dismiss, concluding that petitioner was a potentially responsible "arranger" subject to presidential authority under CERCLA. App., *infra*, 29a-59a.

The district court acknowledged that, because petitioner's disposal activities took place only "at [petitioner's] 'facility' in Canada," App., *infra*, 51a, its ruling amounted to an "extraterritorial application of CERCLA." *Id.* at 55a. Although the district court could locate "no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States," *id.* at 57a, it nevertheless found that "extraterritorial application of CERCLA is appropriate in this case." *Id.* at 44a. The presumption against extraterritorial application of U.S. law does not apply, the court reasoned, whenever "failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Ibid.*

The district court also rejected petitioner's argument that one cannot be a covered "arranger" unless a third party disposes of the hazardous substances generated by the purported "arranger." The district court recognized that "[t]he 'plain language' of § 9607(a)(3) would appear to require another party, other than just the defendant, be involved in the disposal of the hazardous substances." *Id.* at 47a. Nevertheless, the district court held that "'arranger' liability under CERCLA cannot be ruled out for [petitioner]." *Id.* at 49a.

b. The Ninth Circuit affirmed.[1] Addressing the presumption against extraterritorial application of U.S. law, the Ninth Circuit interposed the "threshold question" of "whether this case involves a domestic or extraterritorial application of CERCLA." App., *infra*, 12a. Rejecting the view of the district court, the Ninth Circuit concluded that the UAO represented only a "domestic application of CERCLA," because "the operative event creating a liability under CERCLA is the release . . . of a hazardous substance," *id.* at 19a, and "the actual or threatened release here, the leaching of hazardous substances from slag that settled at the [Upper Columbia River] Site, took place in the United States." *Id.* at 21a. The court of appeals opined that the "location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially." *Id.* at 20a. Accordingly, the Ninth Circuit did not address petitioner's argument—supported by the Governments of Canada and British Columbia as *amici curiae*—that the definitions of "covered persons" set out in Section 9607(a) should not be considered to apply to a foreign entity operating only in a foreign country in accordance with that country's laws.

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[1] As a threshold matter, the court of appeals concluded that EPA's June 2006 withdrawal of the UAO had not affected its jurisdiction. App., *infra*, 9a n.10. Whatever effect the withdrawal might have had on respondents' claims for injunctive and declaratory relief, "Pakootas's claims for civil penalties and for attorneys' fees are not moot." *Ibid.*

The Ninth Circuit also rejected petitioner's argument that "arranger" liability under Section 9607(a)(3) requires the involvement of a third party. App., *infra*, 23a-28a. The Ninth Circuit declared that the statute "does not make literal or grammatical sense as written," and that the phrase "by any other party or entity" was "ambiguous" and susceptible to multiple interpretations. *Id.* at 23a-24a, 26a. The court of appeals acknowledged that the phrase could be read as modifying the earlier phrase, "disposal or treatment," such that the statute would require "any other party or entity"—*i.e.*, someone other than the person who "owned or possessed" the hazardous substance—to be involved in the "disposal or treatment." *Id.* at 25a. But the court held that "by any other party or entity" also could be read as expanding the clause immediately preceding it, "owned or possessed by such person." This construction "require[d] reading the word 'or' into the provision," thus "modif[ying]" "[t]he text of § 9607(a)(3)" to encompass "'any person who . . . **arranged for disposal** or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity** . . . .'" *Id*. at 24a (emphasis and alteration in original). In electing to rewrite the statute in this fashion, the Ninth Circuit departed company from the First Circuit, which had rejected precisely the textual modification embraced by the Ninth Circuit, and had concluded that "for arranger liability to attach, the disposal or treatment must be performed by another party or entity." *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 24 (1st Cir. 2004); *see also* App., *infra*, 25a-26a (rejecting First Circuit's conclusion). CERCLA, the Ninth Circuit said, required "'a liberal judicial interpretation.'" *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided that American environmental laws can be applied to the activities of a foreign company in a foreign country in compliance with that country's laws. That holding is based on a clear misreading of CERCLA and departs widely from this Court's interpretation of statutes. It also departs from the bilateral diplomacy that has traditionally marked U.S.-Canadian relations and threatens to disrupt our ties with Canada, a key military and economic ally. Moreover, the Ninth Circuit has held that "*arranger*" liability can attach to the unilateral acts of a company in the absence of any *arrangement*. In so doing, the court of appeals created a direct and acknowledged split with the First Circuit.

I. THE NINTH CIRCUIT'S APPLICATION OF U.S. LAW TO CANADIAN CONDUCT DISREGARDS CORE PRINCIPLES OF INTERNATIONAL COMITY

The United States and Canada share a five-thousand-mile border, including approximately 150 rivers and lakes, which constitute over 90 percent of North America's and 20 percent of the world's fresh surface water. Noah Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, 21-SUM Nat. Res. & Env't 18, 18 (2006). Both are highly industrialized nations and economic activity in one country will have an inevitable impact upon the environment of the other. Indeed, it has been said that "pollution respects no borders." Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail For CERCLA*, 14 N.Y.U. Envtl. L. J. 233, 235 (2006). That pollution can travel long distances means that pollution generated in one nation often will cause effects in another. *See, e.g.*, Environment Canada, *Acid Rain and the facts*, http://www.ec.gc.ca/acidrain/acidfact.html (last visited Feb. 25, 2007) (noting that sulfur dioxide emissions from the United States contribute to "acid rain" conditions in Eastern Canada).

A. The Decision Below Upsets A Century-Old Tradition Of Bilateral Solutions To Transboundary Pollution Problems

Since the Industrial Revolution, the United States and Canada have resolved their transboundary pollution problems bilaterally, including government-to-government diplomatic negotiations and, occasionally, arbitrations between the sovereigns. In the 1909 Boundary Waters Treaty, Great Britain (on behalf of Canada) and the United States established an International Joint Commission ("IJC") and granted it jurisdiction over not only "cases involving the use or obstruction or diversion" of the navigable waters shared by the two nations, but also "any other questions or matters of difference arising between them involving the rights . . . of either in relation to the other or to the inhabitants of the other, along the common frontier." *See* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, ("1909 Boundary Waters Treaty"), 36 Stat. 2451-52.

In the late 1920s, when sulfur dioxide emissions from the Trail Smelter—the very same smelter at issue in this case—were carried by air currents to Northport, Washington, the United States presented an official complaint to the Government of Canada. *See* D. H. Dinwoodie, *The Politics of International Pollution Control: The Trail Smelter Case*, 27 Int'l J. 219, 221-22 (1971-72). Later that year, the United States suggested that the dispute be submitted to the IJC created by the 1909 Boundary Waters Treaty. *See* John E. Read, *The Trail Smelter Dispute*, 1 Can. Y.B. Int'l L. 213, 214 (1963). In 1932, the IJC recommended an award for damages, but the United States rejected the award as insufficient. Dinwoodie, *supra*, at 227. After two more years of unfruitful bilateral negotiations, the countries agreed to submit the dispute to binding arbitration before a three-member tribunal. Read, *supra*, at 214. The tribunal ultimately affirmed the IJC's award of damages. *Id.* at 214.

The Trail Smelter Case established the now-rudimentary principle of international environmental law that every nation "is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state . . . ." Restatement (Third) of the Foreign Relations Law of the United States § 601(1) (1987); *see also* 1909 Boundary Waters Treaty, 36 Stat. 2450 ("waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other"). When the inhabitants of one nation do cause injury to the environment of another, the injured nation may seek reparations "either through diplomatic channels *or through any procedure to which the two states have agreed*." Restatement (Third) of the Foreign Relations Law of the United States § 902(1) (emphasis added).

In keeping with these foundational principles of international law, the United States and Canada have continued to search out cooperative solutions to environmental issues of shared concern. In 1978, confronting the pollution of the Great Lakes shared by the two nations, the United States and Canada developed a comprehensive agreement to clean up and protect those natural resources. *See* Great Lakes Water Quality Agreement, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383. Later, the United States and Canada entered into an agreement that specifically provided that disputes between the United States and Canada on air quality issues should be handled diplomatically in the first instance, and if intractable, should be submitted by the sovereigns to binding arbitration. *See* Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676. And after the ratification of the North American Free Trade Agreement, the United States, Canada, and Mexico entered into a series of side agreements that provide for environmental cooperation

and, significantly, stipulate procedures by which the countries can address another nation's failure to enforce its own environmental laws. *See* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (pts. 1-3); 32 I.L.M. 605 (pts. 4-8) (entered into force Jan. 1, 1994).

It was against this backdrop of cooperative solutions to transboundary environmental problems—a backdrop of which Congress certainly was aware, *see* United States-Canadian Negotiations on Air Quality, Pub. L. No. 95-426, 92 Stat. 990 (1978) (recognizing that "the United States and Canada have a tradition of cooperative resolution of issues of mutual concern which is nowhere more evident than in the environmental area")—that Congress enacted CERCLA. *Cf. Chew Heong* v. *United States*, 112 U.S. 536, 550 (1884) ("When the act of 1882 was passed, congress was aware of the obligation this government had recently assumed, by solemn treaty"); *see generally Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988) ("Congress understands the state of existing law when it legislates").

B. The Decision Below Improperly Disregards The Presumption Against Extraterritorial Application Of U.S. Law

This Court has consistently adhered to the "longstanding principle of American law" that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *ARAMCO*, 499 U.S. at 248 (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). This presumption against extraterritoriality flows naturally from the "commonsense notion that Congress generally legislates with domestic concerns in mind," *Smith* v. *United States*, 507 U.S. 197, 204 n.5 (1993), and, as this Court explained in *ARAMCO*, "serves to protect against unintended clashes between our laws and those of other nations." 499 U.S. at 248; *see also American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) (Holmes, J.) (explaining that "if [another jurisdiction] should happen to

lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent").

This case represents a very real "clash" between the laws of separate sovereigns. Canada (at the national level) and British Columbia (at the provincial level) regulate petitioner's Canadian operations, including discharges from the Trail Smelter. Those governments have made clear through both diplomatic and judicial channels that they do not agree with EPA's attempt to exercise unilateral authority over petitioner pursuant to CERCLA. *See, e.g.*, Gov't of Canada C.A. Br. 3 ("The Government of Canada has a strong interest in preserving from interference, by private litigation in U.S. courts, its sovereign right to regulate Canadian persons and companies operating in Canada"); *see also* App., *infra*, 101a. Only if the statute unequivocally *required* the exercise of such authority would the Judiciary be warranted in disregarding the views of our neighbors to the North. Of course it does not.

To overcome the presumption against extraterritoriality, the intention of Congress to apply the statute beyond the borders of the United States must be "clearly expressed." *ARAMCO*, 499 U.S. at 248 (internal quotation omitted). The "possibility" that Congress anticipated an extraterritorial application "is not a substitute for the affirmative evidence of intended extraterritorial application that our cases require." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993); *see also Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (holding that Labor Management Relations Act did not apply to a labor dispute involving a foreign-flagged ship because Congress had not "clearly expressed" its "affirmative intention" to reach such conduct). A *clear* expression of congressional intent is needed because a decision to apply U.S. law extraterritorially inevitably reverber-

ates through the "delicate field of international relations." *Benz*, 353 U.S. at 147. "The Judiciary has neither aptitude, facilities nor responsibility" for decisions of this nature. *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

A corollary to this requirement of "affirmative evidence" of congressional intent, *see Sale*, 509 U.S. at 176, is that courts must strictly construe statutes in light of the presumption against extraterritoriality. Thus, in *Small v. United States*, 544 U.S. 385 (2005), the Court held that a general term such as "any court" presumptively "refers only to domestic courts, not to foreign courts." *Id.* at 394. And in *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), this Court instructed that as long as a "statute's language reasonably permits an interpretation " that avoids extraterritorial application, a court "should adopt it." *Id.* at 174. Indeed, even where "the more natural reading of the statutory language" would permit extraterritorial application of the statute, courts should reject that construction unless the language itself demonstrates that the court "*must* accept that reading." *Ibid.*

1. The Ninth Circuit held that the imposition of liability on a Canadian corporation for disposal activities undertaken exclusively in Canada "involves a domestic application of CERCLA," and thus that the presumption against extraterritoriality did not apply. App., *infra*, 3a. That conclusion is incorrect for at least three reasons.

First, the notion that the court of appeals was applying CERCLA only domestically is bottomed on its deeply flawed premise that "the operative event creating a liability under [Section 9607(a)(3) of] CERCLA is the release or threatened release of a hazardous substance." App., *infra*, 19a. Based on that premise, the Ninth Circuit concluded that "[t]he location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing

whether CERCLA is being applied extraterritorially." *Id.* at 20a. But contrary to the Ninth Circuit's reasoning, CERCLA does not create, upon the release of a hazardous substance, "a liability" in the abstract. Section 9607 of CERCLA—entitled "Liability"—imposes liability for cleanup costs on "any person" who engages in particular categories of *conduct*. *See* 42 U.S.C. § 9607(a) (App., *infra*, 65a). To be sure, just as there can be no crime of murder without a death, there can be no liability under CERCLA without a release. *See id.* § 9607(a)(4). But that a release is *necessary* for CERCLA liability, or a death necessary for murder liability, hardly makes either *sufficient* to establish that liability. Liability under CERCLA is triggered only by the *conduct* described in Section 9607(a)—which, in this case, occurred entirely in Canada.

Second, and relatedly, this Court often enough has recognized that the canon against extraterritorial application of U.S. law applies whenever the statute purports to proscribe conduct outside of the United States. *See Smith*, 507 U.S. at 203-04 (applying canon to hold that Federal Tort Claims Act does not apply to claims arising in Antarctica); *ARAMCO*, 499 U.S. at 249-51 (applying canon to hold that Title VII of the Civil Rights Act of 1964 does not regulate the employment practices of American firms employing American citizens abroad). If, as in *Smith* and *ARAMCO*, the extraterritoriality canon can prevent a U.S. statute from reaching the overseas conduct of a *U.S. person*, it applies *a fortiori* to restrict statutes from reaching the overseas conduct of *foreign persons*. *See, e.g.*, *Empagran*, 542 U.S. at 174 (applying canon against extraterritoriality to Sherman Act claim against foreign defendant for price-fixing activities outside of the United States).

Third, even if the Ninth Circuit were correct that the application of CERCLA in this case was, in some sense, domestic, it would not follow that the court of appeals was at liberty to disregard the canon against extraterritoriality. In

Small, this Court recognized that "the presumption against extraterritorial application does not apply directly to th[e] case" (which reviewed a criminal conviction for being a felon in possession of a firearm in the United States), but nevertheless found that an "ordinary assumption" "about the reach of domestically oriented statutes" necessarily guided its construction of the general term "any court." 544 U.S. at 389-90. In the absence of any indication that Congress intended the general term to include foreign courts, this Court held that the term must be construed to "refer[ ] only to domestic courts, not to foreign courts." *Id*. at 394.[2]

2. Respondents also argued below—as the district court had held, App., *infra*, 38a—that the presumption against extraterritorial application of U.S. law did not apply "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects in the United States." Pakootas C.A. Br. 20 (quoting *Environmental Def. Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993)). Respondents argued that this exception, which supposedly is triggered

[2] Addressing *Small*, the court of appeals appeared to hold that Congress intended to include foreign corporations within CERCLA's general term "any person." App., *infra*, 17a; *see also* 42 U.S.C. § 9601(21) (defining "person"). But the question before the court of appeals was whether Congress intended the term "any person who arranges for disposal or treatment" to include persons who dispose of waste outside of the United States. Tellingly, the Ninth Circuit avoided any straightforward or detailed analysis of this Court's decision in *Small*, preferring instead to determine whether application of CERCLA to foreign corporations would pass muster under *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818), on which "[t]he decision in *Small* was based in part." App., *infra*, 16a. *Small*, however, cited *Palmer* only in a six-case string cite. And *Palmer* itself dealt with the reach of a statute addressing piracy on the high seas. 16 U.S. at 630. The Court concluded that a crime of robbery on the high seas *on a vessel belonging to a foreign state* against foreign persons was not within the ambit of the relevant statute. *Id.* at 633-34. *Palmer* is thus another example of a case in which the Court did not read Congress as intending a statute to reach acts undertaken in a foreign jurisdiction.

whenever a plaintiff alleges that foreign conduct has adverse effects in the United States, is rooted primarily in this Court's decision in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287-88 (1952). Pakootas C.A. Br. 21-23; *see also* App., *infra*, 19a. But *Steele* does not remotely establish the encompassing exception which the district court envisioned.

In *Steele*, the Court confronted a trademark infringement action brought against a U.S. citizen and resident who manufactured and sold counterfeit watches in Mexico. 344 U.S. at 284-85. Stressing that the United States can "govern[ ] the conduct of *its own citizens* . . . in foreign countries," the *Steele* Court noted that Steele's "purchases in the United States . . . were essential steps in the course of business consummated abroad." *Id.* at 285-86, 287 (emphasis added). The Court further noted that "by his own deliberate acts, *here and elsewhere*, [Steele has] brought about forbidden results within the United States." *Id.* at 288 (internal quotation marks omitted and emphasis added). Holding him liable for such acts, the Court concluded, would not "impugn foreign law" or "interfere[ ] with the sovereignty of another nation." *Id.* at 285. In contrast, petitioner is *not* a U.S. citizen, did *not* commit any acts in the U.S., and holding it liable *would* disrupt foreign relations. In these circumstances, *Steele* does not apply. *See Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 642 (2d Cir. 1956); *McBee* v. *Delica Co.*, 417 F.3d 107, 118 (1st Cir. 2005).

Moreover, even when Congress has made clear that a statute applies to foreign conduct—as it has with the Sherman Act, *see Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993)—the presumption remains relevant to determining the *extent* of a statute's extraterritorial reach. *See Empagran*, 542 U.S. at 173-74 (applying presumption to limit Sherman Act's application to foreign conduct). Particularly where the extraterritorial application advanced by a party will cause "unreasonable interference with the sovereign authority of other nations," *id.* at 164, in the absence of

"affirmative evidence" that Congress intended the statute to reach the foreign conduct at issue, *Sale*, 509 U.S. at 176, a court "*must* accept" any "reasonably permi[ssible]" reading of the statutory language that will avoid that discordant result. *Empagran*, 542 U.S. at 174 (emphasis in original).

C. The Decision Below Misconstrues CERCLA's Text and Structure

Here, CERCLA's "statutory language" not only "reasonably permits an interpretation" that avoids its extraterritorial application, but the relevant statutory language indisputably compels that interpretation.

Petitioner cannot be held liable under CERCLA unless it is a "covered person" under Section 9607(a). *See Cooper Indus.*, 543 U.S. at 161. The court of appeals held that petitioner is a "covered person" because Section 9607(a)(3) "applies to 'any person' who arranged for the disposal of hazardous substances." App., *infra*, 16a. This reading badly misapprehends the statutory text.

In relevant part, Section 9607(a)(3) is a sentence fragment that provides that "any person who by contract, agreement, or otherwise arranged for disposal . . . 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). Subsections (a)(1) and (a)(2) likewise are sentence fragments. *See, e.g.*, 42 U.S.C. § 9607(a)(1) ("the owner and operator of a vessel or a facility"). The courts of appeals uniformly have recognized that the last clause of Section 9607(a)(4)—"from which there is a release . . . of a hazardous substance, shall be liable for"—modifies *all four* subparts of Section 9607(a). *See, e.g.*, *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1043 n.16 (2d Cir. 1985).[3] Thus, the arranger liability provision actually reads as follows:

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[3] As the Second Circuit explained: "The phrase 'from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance' is incorporated in and seems to flow as if

> any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . .from which there is a release . . . of a hazardous substance, shall be liable for—.

42 U.S.C. § 9607(a)(3)-(4).

To be a covered "arranger," therefore, one must "arrange[ ] for *disposal* . . . of hazardous substances . . . *at any facility . . . from which there is a release*." *Id.* (emphases added). This language makes absolutely clear that the "disposal" must take place at the same "facility" "from which there is a release." The statutory text does not permit liability to attach when a person arranges for disposal at one "facility," and the pertinent "release" emanates from some other "facility." Yet that is precisely the allegation in this case: The "disposal" occurred at a "facility" in Canada, while the "release" emanated from a different "facility" entirely within the United States. *See* App., *infra*, 14a ("The Order defines the facility as being entirely within the United States").

With plaintiffs and the Ninth Circuit having defined the relevant "facility . . . from which there is a release" as being "entirely within the United States," App., *infra*, 37a, CERCLA "arranger" liability could attach only if petitioner "arranged for disposal" of its hazardous substances at *that same U.S. facility*. But the Ninth Circuit's opinion is ex-

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[Footnote continued from previous page]
it were a part only of subparagraph (4), but it is quite apparent that it also modifies subparagraphs (1)-(3) inclusive." *Shore Realty Corp.*, 759 F.2d at 1043 n.16. The Second Circuit reviewed the relevant statutory history and noted that originally "the commencing clause 'from which there is a release' was printed as a new line." *Ibid.*; *see also Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 934 n.7 (8th Cir. 1995) (same); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 257 n.4 (3d Cir. 1992) (same); *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 n.4 (1st Cir. 1989) (same).

pressly premised on the allegation that "Teck . . . arrang[ed] in *Canada* for disposal of the slag." *Id.* at 16a (emphasis added). And rightly so: The UAO is absolutely clear that petitioner's disposal activities took place in Canada "through several outfalls at the Trail Smelter," *id.* at 72a, and the operative complaints similarly acknowledge that, only after petitioner disposed of its waste slag in Canada, was it "carried downstream into the waters of the United States." *Id.* at 107a, 115a. Where the CERCLA "facility" is located in the United States, a correct reading of CERCLA's "arranger" liability provision does not permit disposal activities outside of the United States to trigger liability.[4]

It was only by reading Section 9607(a)(3) in isolation from the last clause of subsection (a)(4)—contrary to the otherwise unanimous view of the Circuits—that the Ninth Circuit could find that petitioner's disposal of slag in Canada could make petitioner liable for a subsequent release from a facility in the United States. By construing CERCLA's arranger liability provision to reach persons who dispose of

[4] Any suggestion that, because it knew some portion of its slag would be carried into the United States, Teck Cominco should be deemed to have disposed of its waste in the United States would have been legally defective. Such a suggestion would require a court to construe the term "disposal" to include passive migration of waste subsequent to its initial introduction into the environment. The en banc Ninth Circuit rejected a similar passive migration claim in *Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001). *See also* App., *infra*, 19a n.17 ("'passive' terms . . . are not included in the definition of 'disposal'") (quoting *Carson Harbor Vill.*, 270 F.3d at 878 (internal quotation marks omitted)); *see also United States* v. *150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000) (concluding that absent "any evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property," there is no "disposal"); *ABB Indus. Sys., Inc.* v. *Prime Tech., Inc.*, 120 F.3d 351, 357-58 (2d Cir. 1997) ("gradual spreading of hazardous chemicals already in the ground" is not "disposal"); *United States* v. *CDMG Realty Co.*, 96 F.3d 706, 722 (3d Cir. 1996) ("[T]he passive spreading of contamination in a landfill does not constitute 'disposal' under CERCLA").

waste outside the United States, the Ninth Circuit disregarded this Court's clear instruction that, in the absence of evidence of congressional intent to the contrary, general terms should be construed to refer only to domestic persons or conduct. *See Small*, 544 U.S. at 394. And by rejecting a construction of the statute limited to domestic conduct that was not only "reasonably permi[ssible]," but indeed *compelled* by the plain text of the statute, the Ninth Circuit disregarded this Court's teaching that courts "should adopt" such constructions. *Empagran*, 542 U.S. at 174. The Ninth Circuit's refusal to faithfully apply these controlling authorities warrants this Court's review. *See* Sup. Ct. R. 10(c).

D. The Decision Below Threatens To Disrupt The Foreign Policy Of The United States

If there were *any* doubt that CERCLA should not be construed to apply to the foreign operations of a foreign company conducted pursuant to foreign law, it would be dispelled by the longstanding rule that American statutes should not be read as transgressing the law of nations. *See, e.g.*, *Hartford Fire Ins.*, 509 U.S. at 815 ("statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law"); *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

The Ninth Circuit's conclusion that EPA can *unilaterally* impose CERCLA liability on a Canadian company doing business in Canada in compliance with Canadian law, over the strong objections of the Canadian national and provincial governments, would wreck the elegant bilateralism that has distinguished U.S.-Canadian environmental relations for the past century. The Ninth Circuit's decision, if allowed to stand, would usurp the foreign-relations powers of the political branches and could provoke retaliatory actions against American interests by Canada or her courts. And it would do

so entirely unnecessarily, because the ordinary presumption against the extraterritorial effect of American law is sufficient cause to construe the statute in a way that both effectuates the intent of Congress and avoids a crisis of international comity.

Private litigation over this and similar transboundary pollution disputes would place at risk the President's ability to conduct foreign policy, because the Executive's reasoned policy decisions regarding America's dealings with other nations would be supplanted by the choices of self-interested litigants. Particularly where environmental issues are concerned, the formulation of foreign policy requires the balancing of many possibly conflicting considerations. *See*, *e.g.*, Press Release, President Bush Discusses Global Climate Change (June 11, 2001) (last visited Feb. 25, 2007), http://www.whitehouse.gov/news/releases/2001/06/print/20010611-2.html (observing that adherence to the Kyoto Protocol on global climate change would have a negative economic impact within the United States). And indeed, in some circumstances, the President's foreign policy goals may dictate the temporary subordination of environmental concerns so that other more pressing matters may be addressed. For example, the President might find it difficult to press the Canadian government to continue its military presence in Afghanistan if Canadians were preoccupied with the prospect of being sued by EPA and private U.S. parties in American courts for conduct that occurred in Canada and in compliance with Canadian law.

While the President (and Congress) are well suited to the balancing of several policy considerations, it is universally acknowledged that "the Judiciary has neither aptitude, facilities nor responsibility," *Chicago & S. Air Lines*, 333 U.S. at 111, to navigate "the[se] possibilities of international discord." *Benz*, 353 U.S. at 147. Yet "international discord" is precisely what the Ninth Circuit's decision has sown, and will continue to sow. *See* Gov't of Canada C.A. Br. 3. With

a single decision, a three-judge panel of one intermediate appellate court has deeply undermined the elaborate bilateral framework agreed to by sovereign governments over long decades of negotiations.

Moreover, it is not just American relations with the government of Canada that could be affected by extraterritorial application of CERCLA. The United States shares a long southern border with Mexico. Many of America's coastal States (Alaska, for instance) are close to territory controlled by other sovereigns. And mercury emitted by smokestacks in Asia can ride the prevailing winds across the Pacific Ocean before being deposited in the lakes and streams of California. *See*, *e.g.*, Douglas J. Steding & A. Russell Flegal, *Mercury Concentrations in Coastal California Precipitation: Evidence of Local and Trans-Pacific Fluxes of Mercury to North America*, 107 J. Geophysical Res. ACH 11-1, 11-6 (2002). Even if only a relatively small amount of the hazardous substances were attributed to the Asian source, that could be enough both to convert that foreign entity into a "potentially responsible party" subject to Section 113 contribution actions and to permit imposition of liability for cleanup costs. *See* 42 U.S.C. § 9613(f)(1) (App., *infra*, 66a). The Ninth Circuit's decision thus threatens to interfere the Executive's ability to conduct foreign policy not only within North America, but anywhere air and ocean currents may carry pollutants—potentially, anywhere in the world.

Committing transboundary pollution disputes to private litigation would, in the long run, have a deleterious effect on U.S. interests. The Ninth Circuit's extraterritorial application of CERCLA could cause other nations to enact or interpret reciprocal laws to make U.S. polluters liable for the foreign effects of their U.S. activities. *See*, *e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of California*, 512 U.S. 298, 324 n.22 (1994) (noting the "retaliatory legislation" enacted by Great Britain in response to California's enactment of worldwide income reporting requirement). And, given the Ninth Cir-

cuit's large size and the great length of its borders with Canada and Mexico, that would remain the case even if no other American court adopted the Ninth Circuit's construction of the statute. Indeed, the Canadian government has already foreshadowed such a result, warning in its diplomatic note that the UAO "may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in *both Canada and the United States*." App., *infra*, 100a (emphasis added).

U.S. interests would suffer gravely under the Ninth Circuit regime. The United States is a net exporter of certain types of pollution. *See*, *e.g.*, Environment Canada, *supra*, (observing that, in the year 2000, the United States emitted six times as much sulfur dioxide as Canada). It accordingly stands to reason that U.S. polluters may cause more environmental problems in foreign nations than foreign polluters cause in the United States. If Canada and other nations were to enact or enforce legislation similar to the court of appeals' interpretation of CERCLA, U.S. interests could send abroad more money to clean up foreign lands than they would recover from foreign entities for the cleanup of American lands.

The decision below thus portends both to constrain the President's ability to conduct foreign policy and to consign U.S. firms to underwrite massive environmental cleanup efforts in Canada and beyond. The fact that the Ninth Circuit proffered no basis whatever for believing that Congress intended such hugely significant and untoward results marks this case as one of exceptional importance warranting this Court's review.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE FIRST CIRCUIT'S CONCLUSION THAT "ARRANGER" LIABILITY REQUIRES THE INVOLVEMENT OF A THIRD PERSON

Even if this case did not raise an exceedingly grave question of international relations, which it does, it would warrant review because the decision below creates a direct conflict of federal appellate authority on one of CERCLA's core liability provisions.

1. In *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6 (1st Cir. 2004), the First Circuit considered whether brokers of waste—individuals who facilitated the disposal of waste generated by another party—could be liable as "arrangers." The defendants argued that, under the plain language of Section 9607(a)(3), they could not be liable as an arranger unless they "owned or possessed" the hazardous substances that were subsequently released in the environment. 381 F.3d at 23; *see also* 42 U.S.C. § 9607(a)(3) ("any person . . . who arrange[s] for disposal . . . of hazardous substances owned or possessed by such person"). The plaintiff, on the other hand, argued that the defendants could be held liable as an "arranger" whether or not they "owned or possessed" the hazardous substances. 381 F.3d at 23-24. The plaintiff contended that the clause "by any other party or entity" expands disjunctively the preceding clause—"owned or possessed by such person"—such that "any person" could be liable for arranging for the disposal of hazardous substances "owned or possessed by such person [or] *by any other party or entity*." *Id.* at 23; *see also Am. Cyanamid Co.* v. *Capuano*, No. 03-2143, Br. of Appellee at 67-68.

The First Circuit flatly rejected the plaintiff's argument. "The sentence structure of § 9607(a)(3)," the First Circuit concluded, "makes it clear" that "'by any other party or entity'" "modif[ies] the words 'disposal or treatment,'" and "clarifies that, for arranger liability to attach, the disposal or

treatment must be performed *by another party or entity*." 381 F.3d at 24 (emphasis added). The "plain language of the statute" mandates that an "arranger" have owned or possessed the hazardous substances in issue. *Id.* at 23-24.[5]

The First Circuit's construction, moreover, was in accord with the substantially uniform view of the Circuits. *GenCorp, Inc.* v. *Olin Corp.*, 390 F.3d 433, 448 (6th Cir. 2004) ("the statute requires ownership or possession of the waste"); *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 677 (3d Cir. 2003) ("First, proof of ownership, or at least possession, of the hazardous substance is required by the plain language of the statute"); *Raytheon Constructors Inc.* v. *Asarco Inc.*, 368 F.3d 1214, 1219 (10th Cir. 2003) ("To be held liable under CERCLA as an arranger, a party must . . . 'own' or 'possess' the hazardous substance at issue"); *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 810 (8th Cir. 1995) ("Liability under § 9607(a)(3) requires, among other things, that the hazardous substances be 'owned or possessed by' the person who arranged for the disposal"). *But see Cadillac Fairview/Cal., Inc.* v. *United States*, 41 F.3d 562, 565 (9th Cir. 1994) ("Liability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process").

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[5] Notwithstanding the plaintiffs' erroneous construction of the statute, the First Circuit affirmed the district court's imposition of "arranger" liability, holding that the facts found by the district court sufficed to establish defendants' "constructive possession of the waste." *Id.* at 25. The court's conclusion that "the disposal or treatment must be performed by a third party," cannot, however, be dismissed as mere *dicta*. *Id.* at 24. That conclusion followed ineluctably from the First Circuit's interpretation of "by any other party or entity" as modifying "disposal or treatment"—a construction that is binding on the courts subject to the First Circuit's appellate supervision. *See, e.g.*, *Eulitt* v. *Maine*, 386 F.3d 344, 349 (1st Cir. 2004).

2. The Ninth Circuit looked at the same text as the First Circuit and adopted precisely the construction that the First Circuit rejected. App., *infra*, 25a-26a. Echoing the reasoning of the First Circuit, petitioner argued that the clause "'by any other party or entity'" modifies "'disposal or treatment'" and "clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity." *American Cyanamid*, 381 F.3d at 24; *see* Pet. C.A. Br. 38-9. The Ninth Circuit rejected that construction, holding that, rather than modify "disposal or treatment," "by any other party or entity" should be read as a disjunctive clause expanding upon "owned or possessed by such person." App., *infra*, 24a.[6]

In the Ninth Circuit's view, "[t]he text of § 9607(a)(3)" should be "modified" to read, "any person who . . . arranged for disposal or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity** . . . ." App., *infra*, 24a (emphasis in original). The Ninth Circuit thus expressly—and unilaterally—inserted into the statute a word that the political branches did not see fit to include, in derogation of the settled principle that "[courts]

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[6] The Ninth Circuit justified its textual modification, in part, on the basis that the First Circuit's construction "would leave a gaping and illogical hole in the statute's coverage." App., *infra*, 26a. Specifically, the court of appeals fretted that a generator of waste who "disposed of the waste on the property of another"—the so-called "midnight dumper"—could escape liability. *Ibid.* It is well-established, though, that a person who disposes of waste on another's property may be held liable as an "operator" of that "facility" under 42 U.S.C. § 9607(a)(2) (App., *infra*, 65a). *See, e.g.*, *American Cyanamid*, 381 F.3d at 23; *see also United States* v. *Bestfoods*, 524 U.S. 51, 66 (1998) (defining operators as those who "manage, direct, or conduct operations specifically related to pollution"). And, contrary to the suggestion in the decision below, in the Ninth Circuit at least, a generator who transports his own waste may be held liable as one who "accepted any hazardous substances for transport" under 42 U.S.C. § 9607(a)(4). *See Pritikin* v. *Department of Energy*, 254 F.3d 791, 795 (9th Cir. 2001).

have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *United States* v. *Temple*, 105 U.S. 97, 99 (1882).

The Ninth Circuit thus adopted exactly the textual "modifi[cation]" that the First Circuit rejected as "clear[ly] . . . [in]correct." *Am. Cyanamid*, 381 F.3d at 24. The appellate adoption of mutually exclusive interpretations of a provision of CERCLA is, of course, a sufficient basis for a grant of certiorari. *See, e.g.*, *United States v. Atlantic Research Corp.*, 127 S. Ct. 1144 (2007) (order granting certiorari). Here, furthermore, the need for this Court's review is amplified by the fact that the First and Ninth Circuits' mutually exclusive interpretations of "by any other party or entity" implicate two separate aspects of CERCLA "arranger" liability.

First, in adopting its countertextual construction, the Ninth Circuit—concededly—set itself at loggerheads with the First Circuit's conclusion that the "by any other party or entity" clause confirmed that a third party—someone other than he who "otherwise arrange[s] for disposal"—must dispose of the hazardous substances at issue. *Compare* App., *infra*, 28a ("the arranger element can be met when disposal is not arranged 'by any other party or entity'") *with Am. Cyanamid*, 381 F.3d at 24 ("the disposal or treatment must be performed by another party or entity"); *cf. United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) ("'[o]therwise arranged' is a general term following in a series of two specific terms and embraces the concepts similar to those of 'contract' and 'agreement'").

Second, in holding that "'by any other party or entity' refers to ownership of the waste, such that one may be liable under § 9607(a)(3) if they arrange for disposal of their own waste or someone else's," App., *infra*, 28a, the Ninth Circuit deepened a pre-existing circuit conflict on the question whether an "arranger" must have owned or possessed the

waste at issue. As noted *supra* at 26, in the First, Third, Eighth, and Tenth Circuits (at least), arranger liability extends only to persons who "owned or possessed" the hazardous substances." *E.g.*, *Morton Int'l*, 343 F.3d at 677 ("First, proof of ownership, or at least possession, of the hazardous substance is required by the plain language of the statute"). In the Ninth Circuit, however, arranger liability may reach to *any* person who "otherwise arrange[s] for disposal or treatment . . . hazardous substances," regardless of their ownership or possession of the waste.[7]

Thus, as things now stand, one can be held liable in the Ninth Circuit as a responsible "arranger" absent both the involvement of a third party and any ownership or possession the hazardous substances in issue; but that same person, if sued in the First Circuit, could not be held so responsible. A single company with nationwide operations, therefore, could be subject to CERCLA penalties if sued in Washington but not in Maine—even for the identical conduct. Such a state of affairs is antithetical to the uniform remedial scheme that Congress envisioned in enacting CERCLA. This direct and acknowledged conflict warrants review and resolution by this Court.

CONCLUSION

In light of the patent incorrectness of the decision below, the conflict it creates with prior decisions, and its potential to disrupt international relations, the petition for a writ of certiorari should be granted. At minimum, the Court should invite the Solicitor General to explain whether the President actu-

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[7] This construction seems to have rendered irrelevant the statutory phrase "owned or possessed by such person [or] by any other party or entity." On the Ninth Circuit's view, omission of that language does not alter the ambit of the statute. But this Court has long held that that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (internal quotation omitted).

ally supports such an unprecedented, and potentially deleterious, expansion of American authority, in derogation of the statute enacted by Congress and the canons of construction adopted by this Court.

Respectfully submitted.

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