No. 18-1160

IN THE
Supreme Court of the United States

TECK METALS LTD., formerly known as TECK COMINCO METALS, LTD.,
Petitioner,
v.
THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The dominant narrative of the briefs in opposition is that nothing has changed since Teck's 2007 petition. But quite a bit has.

The case law has changed. The Court has sharpened its presumption against extraterritoriality. It has clarified the principles of personal jurisdiction. And it has explained CERCLA "arranger" liability in a way that cannot be reconciled with the Ninth Circuit, as have other circuits.

The procedural posture has changed, too. In 2007, Teck petitioned from an interlocutory Ninth Circuit decision and challenged an Environmental Protection

Agency unilateral order that had been withdrawn by then. Pet. 6-9. Today, Teck seeks review of a final judgment obtained by private parties. *Id.* at 9-10. Those distinctions make a difference: This Court regularly denies certiorari in an interlocutory posture, but grants it following final judgment. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., statement respecting the denial of certiorari) (collecting cases). The Solicitor General recommended in 2007 that certiorari was not warranted "at th[at] time." Brief for the United States as Amicus Curiae (CVSG Br.) 6-7, *Teck Cominco Metals, Ltd.* v. *Pakootas*, No. 06-1188 (Nov. 20, 2007). It is warranted now.

Two things have *not* changed. The Canadian and British Columbian governments confirm that this case still presents serious comity concerns and breaches the international norm of resolving transnational pollution concerns through sovereign negotiations. And the Ninth Circuit's holdings are just as incorrect as they were in 2007. It is perhaps for that reason that Respondents do not much defend the Ninth Circuit's actual reasoning; they instead offer rationales the decisions below did *not* employ. But even Respondents' new reasons are wrong.

This is an internationally important case that is now in a prime procedural posture. The writ should be granted.

ARGUMENT

I. THE NINTH CIRCUIT'S EXTRATERRITORIAL APPLICATION OF CERCLA CONTRAVENES THIS COURT'S PRECEDENTS AND THREATENS INTERNATIONAL COMITY.

Since Teck's last petition, this Court has clarified that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). That canon "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). The Ninth Circuit's extraterritorial application of CERCLA violates that rule, and—as Canada and British Columbia make clear—invites international friction.

1. All agree that CERCLA does not apply to extraterritorial conduct. *See* Pet. App. 197a. Respondents nonetheless contend that the Ninth Circuit applied CERCLA "domestically" when it held a Canadian firm operating entirely in Canada liable for arranging in Canada to dispose of slag. Washington Br. 10-16; Tribes Br. 8-11. They are wrong.

Respondents argue that the conduct that is CERCLA's focus occurred in the United States because Teck arranged to dispose slag in the Columbia River, which transported some of it to Washington. Washington Br. 15; Tribes Br. 9-10. That is not what the Ninth Circuit held. It said this case "involves a domestic application of CERCLA" because *releases* from the slag "took place in the United

States." Pet. App. 82a-83a. But Respondents are not suing the slag. They are suing Teck. *See Conduct*, Black's Law Dictionary (10th ed. 2014) (conduct is "*[p]ersonal* behavior" or "*a person's* deeds") (emphases added). The conduct in this Court's past extraterritoriality cases is human activity, including "manipulating * * * financial models," "purchases and sales of securities," and "racketeering activity." *Morrison*, 561 U.S. at 266; *RJR Nabisco*, 136 S. Ct. at 2101. Chemical reactions in slag are not "conduct."

More generally, although a release is one element of CERCLA liability, 42 U.S.C. § 9607(a)'s focus is to define who is a "[c]overed person[ ]." As relevant here, a covered person is one who "arranged for disposal." *Id.* § 9607(a)(3). If, as Respondents claim, Teck "arranged" when it "made preparations for" disposal (Washington Br. 27), that occurred in Canada where Teck operates. Pet. 15. This case therefore "involves an impermissible extraterritorial application." *RJR Nabisco*, 136 S. Ct. at 2101.

2. Respondents downplay the foreign-relations risk from the Ninth Circuit's decision. Washington Br. 16-18; Tribes Br. 14-16. But Canada and British Columbia understand their own interests. And *they* say that the Ninth Circuit's decision has "enormous" consequences "for Canada/U.S. relations and the North American economy," British Columbia Br. 3, and "accords insufficient weight to principles of international comity and the history of successful diplomatic efforts between the U.S. and Canada to comprehensively resolve matters of cross-border pollution," Canada Br. 1-2.

Nor is this case a one-off. *See* Washington Br. 16; Tribes Br. 16. The threat to comity is not just the Ninth Circuit's judgment, but how it undermines the international norm of resolving transboundary disputes diplomatically and serves as a precedent for foreign countries to apply their own laws against American companies' American operations. Pet. 17-20. Canada explains that the Ninth Circuit's decision invites "further lawsuits by private parties on both sides of the U.S.-Canada border" and "hamper Canada in its ability to discourage or divert copycat lawsuits." Canada Br. 8. And British Columbia warns "that unlimited private litigation over transboundary environmental disputes poses a threat of international discord, destabilizing the North American economy." British Columbia Br. 10-11 (internal quotation marks and alterations omitted).[1]

Respondents' suit also undermines the voluntary agreement between EPA and Teck. Pet. 18-19. Again, you need not take Teck's word for it. Canada explains that the "cooperative solution brokered by the United States and Canada has been repeatedly undermined by the continuation of Respondents' lawsuit." Canada Br. 17. The Tribes (at 12-13 & n.7)

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[1] The Tribes' cases (at 14-15 & n.10) are not to the contrary. None involved an American firm being sued in Canada for American conduct. *See*, *e.g.*, *United States* v. *Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 975 (2d Cir. 1984) (Ontario seeking damages against an American firm in an *American* court for transboundary pollution). And in *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 502-503 (1971), the Court *denied* leave to file an original action against a Canadian company in deference to the International Joint Commission and "many [other] competent adjudicatory and conciliatory bodies."

assert that EPA supports Respondents' suit, but their only evidence is an eleven-year-old letter from a regional administrator, and even that letter laments that the litigation has caused "communication challenges among all the parties" and hopes the case ends "so that the parties can focus more clearly" on the remedial study. C.A. SER 206-207. If the Court wonders about the United States' current views, the Court should call for them. *See Google LLC* v. *Oracle Am., Inc.*, No. 18-956 (Apr. 29, 2019) (calling for the views of the Solicitor General a second time in the same case).

Respondents imply that Teck is an environmental scofflaw they must curb. Washington Br. 3-4, 34; Tribes Br. 2-3. Hardly. Teck has funded, through its American affiliate, a comprehensive, EPA-led remedial study costing over $90 million—so far. Canada Br. 16-17; Pet. 18. Teck's affiliate has also voluntarily cleaned up areas such as the "Black Sand Beach" that Washington (at 3) highlights with a nine-year-old photograph taken before the clean-up. C.A. ER 248. Teck has publicly and repeatedly committed to address risks to human health or the environment arising from its historic activities, and has been doing so. The Court should grant the petition to hold that Teck need not pay for extraneous civil litigation, as well.[2]

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[2] Insofar as the parties incur costs to participate in EPA's investigation, Teck advances those expenses under the EPA-Teck settlement agreement.

II. THE NINTH CIRCUIT'S KNOWLEDGE-FOCUSED PERSONAL-JURISDICTION TEST CONFLICTS WITH THIS COURT'S PRECEDENT AND SPLITS WITH OTHER CIRCUITS.

The Ninth Circuit's holding—that *Calder* v. *Jones*, 465 U.S. 783 (1984), allowed Washington to exercise personal jurisdiction on the basis of Teck's knowledge that its pollutants would enter the State—conflicts with *Walden* v. *Fiore*, 571 U.S. 277 (2014). Pet. 20-26. And it splits with several circuits that have read *Calder* much more narrowly. *Id.* at 20-21, 27-29.

1. Respondents contend that the Ninth Circuit's personal-jurisdiction holding is consistent with *Walden*, because Teck "purposefully" targeted Washington to dispose of its slag. Washington Br. 18; Tribes Br. 20. That (again) is not what the Ninth Circuit held. It held that Teck used the river to avoid accumulating slag near the smelter. Pet. App. 16a. For the Ninth Circuit, it was sufficient that Teck knew its waste was heading towards Washington. *Id*. Respondents defend an opinion the Ninth Circuit never wrote. And for good reason: The opinion the Ninth Circuit *did* write is indefensible. *See* Pet. 21-26.

Respondents' revisionist take also is unsupported by the record. Respondents' single citation is the District Court's statement that Teck's "very purpose" was to deposit waste in the Upper Columbia River. Washington Br. 22-23 (quoting Pet. App. 128a-129a); Tribes Br. 19, 22 (same). But the District Court made that passing statement in evaluating Teck's legal liability under CERCLA, not jurisdiction. Pet.

App. 128a-129a. And even in this excerpt, the District Court referred simply to Teck's "belief and knowledge" that some of its waste would end up in Washington as enough for CERCLA liability to attach. *Id.* Those conclusions had no bearing on its knowledge-based personal jurisdiction analysis. *See id.* at 115a-117a.

Respondents similarly latch on to the Ninth Circuit's statement that Teck "deliberately sent" its waste to Washington. Washington Br. 23. But Teck's conduct was deliberate only insofar as it discharged waste into the Columbia River and "knew" the waste would travel downstream. Pet. App. 16a. The court did not find that Teck purposefully targeted Washington, as this Court's cases require. *See* Pet. 24-25.

Respondents similarly distort the Ninth Circuit's interpretation of *Walden* and *Calder*. They argue that the Ninth Circuit simply followed *Walden* and *Calder*'s instruction to look at the "relationship between the defendant, the litigation, and the forum" to determine if jurisdiction exists. Washington Br. 19; *see Walden*, 571 U.S. at 284; *Calder*, 465 U.S. at 788. But the Ninth Circuit never cited that portion of *Calder*—and never cited *Walden* at all. *See* Pet. 24-25. The court's actual analysis of *Calder* focused on the defendants' mere *knowledge* that they would cause the plaintiff reputational harm in the forum. *See id.* at 23; Pet. App. 15a. Respondents do not try to defend that critical—and flawed—aspect of the Ninth Circuit's opinion.

2. Respondents rely on the same fictional holding to argue that the Ninth Circuit's decision does not conflict with other circuits. Respondents contend

that because it does "not anchor its analysis in mere 'knowledge,' " there is no split. Tribes Br. 22; *accord* Washington Br. 23. But that simply is not so. Pet. App. 16a; *supra* pp. 7-8. Respondents do not explain how the Ninth Circuit's persistently broad reading of *Calder* aligns with the three other circuits that read *Walden* to narrow its scope. *See* Pet. 27-28.

Respondents' arguments about the disagreement among the circuits on the "effects test" fare no better. Respondents assert that the Third and Eleventh Circuits also require an "intentional act" before applying the effects test. Tribes Br. 22-23. Not so. The Ninth Circuit's effects test considers the *conduct* alleged and accordingly imposes an "'intentional act' element." *Brayton Purcell LLP* v. *Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010); *see also Haisten* v. *Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1399 (9th Cir. 1986) (applying the "effects test" to an insurance claim). The Third and Eleventh Circuits look to the *claim* brought, holding that the effects test is unavailable when an intentional tort is not at issue. *Louis Vuitton Malletier, S.A.* v. *Mosseri*, 736 F.3d 1339, 1357 & n.11 (11th Cir. 2013); *see also Isaacs* v. *Arizona Bd. of Regents*, 608 F. App'x 70, 75 (3d Cir. 2015) (per curiam) ("effects test requires the plaintiff to show" the "defendant committed an intentional tort"). That claim-focused rule cannot be squared with the Ninth Circuit's conduct-focused one. And it is dispositive here, because CERCLA claims are not intentional torts. *See* Pet. 28-29. In the Third and Eleventh Circuits, Respondents could not invoke the effects test—and could not establish personal jurisdiction over Teck on their claims. *Id.* at 29. The Court

should grant certiorari to resolve that outcome-determinative disagreement.

III. THE NINTH CIRCUIT'S EDITING OF THE "ARRANGER" STATUTE CONFLICTS WITH CERCLA'S PLAIN MEANING AND WITH THIS COURT'S AND OTHER CIRCUITS' DECISIONS.

1. On "arranger" liability, Respondents barely defend the Ninth Circuit's blue-penciling of the statute. *See* Pet. 31-32. They instead argue that Teck's conduct falls within the plain meaning of "arrange." *See* Washington Br. 27-28; Tribes Br. 26. But the Court does not "construe statutory phrases in isolation; [it] read[s] statutes as a whole." *Samantar* v. *Yousuf*, 560 U.S. 305, 319 (2010) (internal quotation marks omitted). A CERCLA arranger need not just "arrange" for the disposal of waste; it must arrange to have waste that it "owned or possessed" disposed of "by any other party or entity." 42 U.S.C. § 9607(a)(3).

The Tribes argue (at 28-29) that the Court might as well embrace the Ninth Circuit's editing, because "the commas surrounding 'by any other party'" are superfluous under Teck's reading. But the commas separate clauses, and "[i]t has often been said that punctuation is not decisive of the construction of a statute." *Costanzo* v. *Tillinghast*, 287 U.S. 341, 344 (1932). It is one thing to disagree on comma placement; it is quite another to *add a word*.

Respondents also emphasize that a potentially responsible party can arrange by "contract, agreement, *or otherwise*" as evidence of the statute's broad reach. Washington Br. 32-33; Tribes Br. 26-27

(emphasis added). But no matter the means, the disposal must be done "by any other party or entity." 42 U.S.C. § 9607(a)(3). Contracts and agreements are both plainly made with another party, suggesting that any "otherwise" arrangement should be as well. *See* Chamber Br. 8-9. Far from superfluous (*cf.* Washington Br. 32-33), "otherwise" clarifies that a *formal* contract or agreement is unnecessary and a sale may suffice.

Respondents' interpretation of "arrange" also is in tension with *Burlington Northern & Santa Fe Railway Co.* v. *United States*, 556 U.S. 599, 609-610 (2009). Respondents acknowledge that *Burlington Northern*—two years after Teck's last petition—consistently assumed the involvement of another party. Washington Br. 28; Tribes Br. 25-26. Taken together, both CERCLA's text and *Burlington Northern* show the Ninth Circuit's rewrite of arranger liability was misguided.

Respondents ultimately defend the Ninth Circuit's version of the statute on policy grounds. Washington Br. 33-34; Tribes Br. 29. But a court may not "rewrite the statute to reflect a meaning [it] deem[s] more desirable." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 228 (2008). And in any event, the "midnight dumper[ ]" Respondents fear would proliferate in the absence of the Ninth Circuit's approach (Washington Br. 34) would be liable as an "operator." Chamber Br. 19 n.10.

2. The Ninth Circuit's arranger holding puts it at odds with the First, Third, Sixth, Eighth, and Tenth Circuits. Pet. 34-36. Respondents say that there is no split with the First Circuit because *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 24 (1st Cir.

2004)'s statement that "for arranger liability to attach, the disposal or treatment must be performed by another party or entity" was not necessary to the case's outcome. Washington Br. 29-30; Tribes Br. 24-25. But the question the court answered—whether "arranger liability can only be imposed on a party that owned or possessed hazardous materials," *American Cyanamid*, 381 F.3d at 24—is directly linked to whether arranger liability requires another party. The First Circuit's holding that an arranger must own or possess the waste, at least constructively, forecloses the Ninth Circuit's revision, whereby the waste can be possessed by the arranger *or* "by any other party or entity." *See* Pet. App. 87a. As we explained (Pet. 34), the First Circuit has adhered to its view of arranger liability since 2007, holding that its purpose is to prevent "contracting away" responsibility for waste to another party. *United States* v. *General Elec. Co.*, 670 F.3d 377, 382 (1st Cir. 2012).

The other circuits are of a piece. Respondents contend they cannot constitute a split because they considered only whether the arranger must own or possess the disposed-of waste. Washington Br. 30-31; Tribes Br. 30-31. But—again—a holding that *the arranger* must own or possess the waste is a holding irreconcilable with the Ninth Circuit's interpolation of "or" into CERCLA's text. The Tenth Circuit explained precisely that, after Teck's 2007 petition, when it expressly disagreed with the Ninth Circuit's conclusion that the arranger need not own or possess the waste. *Chevron Mining Inc.* v. *United States*, 863 F.3d 1261, 1281-82 (10th Cir. 2017). If this case were brought in those circuits, it would come out the other way.

3. Respondents question the importance of the arranger issue. Washington Br. 34-36; Tribes Br. 25, 31. But we now know that arranger liability is dispositive of Teck's liability (Pet. App. 125a-128a), eliminating the United States' earlier doubts. CVSG Br. 20.

Moreover, the ownership issue has great significance because, as the Chamber and National Mining Association explain, the Ninth Circuit's interpretation "extend[s] arranger liability to cover parties who never * * * even come in contact with hazardous waste." Chamber Br. 13. It could impose strict liability on even "a passive broker who is only tangentially involved in facilitating waste disposal." *Id.* at 14 n.4. And it could undermine cases holding that States regulating waste are not arrangers if they do not actually own or possess the waste. *See, e.g.*, *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1452 (E.D. Cal. 1995) (collecting cases). Respondents contend that such troubling results are unlikely. Washington Br. 35; Tribes Br. 25. But that is belied by the divergent cases and industry's experience. Chamber Br. 11-15.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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