No. 18-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Teck Metals Ltd. (Teck) owns a smelter that has operated in British Columbia, Canada for over a century. During that time, Teck and its predecessors have reached agreements with U.S. authorities, with the support of the Canadian government, to address cross-border air and water pollution concerns associated with the smelter's operations. Respondents nevertheless brought private suits under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for declaratory relief, response costs, and natural-resource damages for smelter discharges into the Columbia River in Canada that were carried into and ultimately settled in Washington State.

The questions presented are:

1. Whether the Ninth Circuit, in conflict with *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), and *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), correctly concluded that holding Teck liable for its discharges in Canada was not an impermissible extraterritorial application of CERCLA.

2. Whether the Ninth Circuit, in conflict with this Court's decision in *Walden* v. *Fiore*, 571 U.S. 277 (2014), and the Second, Fifth, and Seventh Circuits, correctly held that a State may exercise specific personal jurisdiction over a defendant because the defendant knew its conduct would have in-state effects, where the defendant's relevant conduct occurred elsewhere.

3. Whether the Ninth Circuit, in conflict with the First Circuit and in tension with the opinions of this Court and several other circuits, correctly held that a defendant can be an "arranger" under CERCLA even if the defendant did not arrange for anyone else to dispose of or treat the waste.

PARTIES TO THE PROCEEDING

Teck Metals Ltd., petitioner on review, was the defendant-appellant below under its former name, Teck Cominco Metals, Ltd.

The Confederated Tribes of the Colville Reservation, respondent on review, was plaintiff-appellee below.

The State of Washington, respondent on review, was intervenor-plaintiff-appellee below.

CORPORATE DISCLOSURE STATEMENT

Teck Metals Ltd., formerly known as Teck Cominco Metals, Ltd., is a Canadian corporation. The parent corporation of Teck Metals Ltd. is Teck Resources Limited, also a Canadian corporation.

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Teck Metals Ltd. (Teck) respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's relevant opinions (Pet. App. 1a-57a and Pet. App. 60a-92a) are reported at 905 F.3d 565 and 452 F.3d 1066, respectively. The District Court's relevant opinions (Pet. App. 93a-131a, Pet. App. 132a-170a, and Pet. App. 179a-216a) are unreported, but are available at 2012 WL 6546088, 2016 WL 4258929, and 2004 WL 2578982, respectively. The District Court's entry of partial final judgment (Pet. App. 171a-178a) is unreported. The Ninth

Circuit's order denying panel rehearing and rehearing en banc (Pet. App. 58a-59a) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on September 14, 2018. Pet. App. 1a. Teck timely petitioned for rehearing, which was denied on December 4, 2018. *Id.* at 58a-60a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

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

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> * * *
>
> (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 * * * shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

INTRODUCTION

Teck is a Canadian company. It operates only in Canada. It owns a century-old smelter that over the decades has been the subject of successful diplomatic efforts to resolve concerns about air emissions affecting the United States. When the United States became concerned in the early 2000s about discharges from the smelter that had flowed down the Columbia River and ultimately settled in Washington State, it reached a negotiated settlement with Teck with the support of the Canadian government. Teck's American affiliate has cooperated with the U.S. Environmental Protection Agency (EPA) under that agreement for nearly 14 years to study the environmental impact of the smelter's past discharges and determine what, if any, response is warranted.

Respondents here—an Indian Tribe whose Reservation abuts a portion of the Columbia River, and Washington State—nevertheless pursued a private CERCLA lawsuit against Teck in Washington federal court. In a pair of decisions spanning almost 13

years, the Ninth Circuit ruled that the District Court had not impermissibly applied CERCLA extraterritorially in holding Teck liable for Canadian discharges; that the District Court could exercise personal jurisdiction over Teck for the company's Canadian conduct; and that CERCLA arranger liability did not require Teck to arrange *with* anybody else, CERCLA's text notwithstanding.

All three holdings are wrong. And more important for this petition, all three are the subjects of entrenched circuit splits, significant international tension, or both.

First, the Ninth Circuit's extraterritoriality ruling cannot be squared with this Court's recent decisions holding that courts must assume a statute does *not* apply extraterritorially unless a contrary intent appears in the text, *see Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 265 (2010), and that a court must look at where the targeted conduct takes place to determine whether a statute is being applied extraterritorially, *see RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090, 2101 (2016). CERCLA does not evince any intent to apply extraterritorially, and Teck's relevant conduct took place in Canada. Failing to correct the Ninth Circuit leaves in place a dangerous precedent—one that foreign sovereigns may apply to U.S. firms. And the harms from the Ninth Circuit's rulings will be difficult to reverse if, as can be expected, they undermine the current international norm favoring diplomatic resolution of cross-border environmental disputes.

Second, by relying almost exclusively on *Calder* v. *Jones*, 465 U.S. 783 (1984), for its personal-jurisdiction analysis, the Ninth Circuit has (yet

again) set itself apart on a pivotal personal-jurisdiction issue, this time splitting with three other circuits that have interpreted *Walden* v. *Fiore*, 571 U.S. 277 (2014), to significantly cabin *Calder*. The Ninth Circuit held that jurisdiction over Teck was proper in Washington State because the company knew its discharges in Canada would ultimately end up there. But *Walden* holds that foreseeable harm in the forum is not sufficient to create personal jurisdiction over an out-of-state defendant, which is why the Second, Fifth, and Seventh Circuits read *Walden* to foreclose the argument the Ninth Circuit accepted.

Third, to effectuate its extraterritorial application, the Ninth Circuit literally rewrote CERCLA by modifying the statute's express requirement that arranger liability requires the defendant to have arranged with another to dispose of or treat hazardous substances. The Ninth Circuit's analysis squarely conflicts with the First Circuit's. And it is incongruous with this Court's explanations of arranger liability, as well as those of other courts of appeals.

The Court should grant the petition and reverse.

STATEMENT

A. Factual Background

1. Teck, a Canadian company, owns and operates a metals smelter in Trail, British Columbia. Pet. App. 4a, 63a, 96a. Located along the banks of the Columbia River, north of the United States-Canada border, the Trail Smelter heats lead and zinc ore to a molten state to separate impurities from the raw ore. *Id.* at 4a.

The Trail Smelter has operated since 1896. *Id.* at 96a. Before modern environmental laws, smelters in

both the United States and Canada commonly discharged directly into rivers without significant controls, and at least five smelters discharged slag into the Columbia River. C.A. ER 784. The Trail Smelter was no different; it discharged "slag"—a byproduct formed by the impurities separated from the ore during smelting—into the Columbia River until British Columbia enacted regulations limiting such discharges in 1995. *Id.* at 4a, 63a, 96a. By then, however, slag deposits had built up in portions of the Upper Columbia River on the Washington side of the border. *Id.* at 5a, 63a.

2. In 2003, EPA issued an administrative order under CERCLA commanding Teck to conduct a remedial investigation and feasibility study[1] of the Upper Columbia River. *Id.* at 5a, 64a-65a & n.8, 135a. Teck questioned whether it was subject to CERCLA in the first place, and EPA opted not to enforce its order while it negotiated with the company. *Id.* at 5a, 65a, 135a.

With the support of the Canadian government, EPA and Teck ultimately entered into a non-CERCLA settlement agreement, under which Teck agreed to fund, through its American affiliate, a

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[1] A CERCLA remedial investigation "collect[s] data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives." 40 C.F.R. § 300.430(d)(1). A CERCLA feasibility study builds on the remedial investigation "to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected." *Id.* § 300.430(e)(1).

remedial investigation and feasibility study at the site. *Id.* at 6a, 136a-137a. EPA then withdrew its administrative order. *Id.* The Canadian government has described the settlement as "the culmination of years of concerted diplomatic efforts by Canada and the United States." Br. of the Government of Canada as *Amicus Curiae* in Support of Petitioner 3 n.3, *Teck Cominco Metals, Ltd.* v. *Pakootas*, No. 06-1188 (U.S. May 2, 2007).

3. The remedial investigation and feasibility study has cost more than $90 million to date. Both Washington State and the respondent Tribes are participants in the study, and their study-related expenses have been paid out of those funds. *See* C.A. ER 250-252. The study remains ongoing, but results so far have been encouraging. *See id.* at 246-247. In the meantime, Teck's American affiliate has voluntarily funded some United States soil-remediation efforts. *See id.* at 248.

B. Procedural History

1. While negotiations between EPA and Teck were ongoing, but before the settlement was reached, two individual members of the Tribes tried to enforce EPA's administrative order through a CERCLA citizen suit. Pet. App. 5a, 135a. They were later joined by the Tribes and by Washington State. *Id.*

Teck moved to dismiss the action, arguing that the Respondents were impermissibly attempting to apply CERCLA extraterritorially to Canadian conduct. Pet. App. 180a-181a. Teck also argued that "arranger" liability under CERCLA required that Teck have "arranged" for waste disposal with someone else. *Id.* at 201a. Respondents had not alleged that Teck had discharged waste in concert with anyone; the compa-

ny had "arranged for disposal" with itself. *Id.* at 201a & n.10.

Citing "the purpose of CERCLA," the District Court concluded that it "expect[ed] that Congress intended" for CERCLA to apply "regardless of the location of the agents" responsible. *Id.* at 215a (citation omitted). It therefore denied Teck's motion. *Id.*

2. The Ninth Circuit accepted Teck's interlocutory appeal and affirmed. *Id.* at 60a-92a. The court of appeals concluded that the relevant "releases" under CERCLA were the leaching of chemicals from slag that had settled in the United States. *Id.* at 82a-83a. The court reasoned that because the eventual "leaching of hazardous substances from slag * * * took place in the United States," Respondents' case involved a "domestic" application of CERCLA. *Id.* at 83a.

The court also found Teck potentially liable as a one-entity CERCLA arranger. CERCLA imposes liability on:

> 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.

42 U.S.C. § 9607(a)(3). Declaring that text "a quagmire," the Ninth Circuit concluded that it "must be given a liberal judicial interpretation . . . consistent with CERCLA's overwhelmingly remedial statutory scheme." Pet. App. 89a (ellipses in original, internal

quotation marks and citation omitted). The court harmonized the statutory language with that intent by editing Congress's handiwork, removing a comma and inserting an "or," so that § 9607(a)(3) would apply to arranging the disposal of "hazardous substances owned or possessed by such person [or] by any other party or entity." *See id.* at 87a, 90a-92a. With that alteration, the phrase "by any other party or entity" would not modify "disposal or treatment," but rather "owned or possessed by such person." *See id*. And under that reading, a defendant could dispose of hazardous substances itself and still be liable as an "arranger." *Id.*

Teck petitioned this Court for a writ of certiorari from the Ninth Circuit's interlocutory ruling, but the petition was denied. *Teck Cominco Metals, Ltd.* v. *Pakootas*, 552 U.S. 1095 (2008) (mem.).

3. On remand, Respondents pursued their claims for declarations of liability, response costs, and natural-resource damages. *Id.* at 6a-7a. The District Court trifurcated the proceedings into three phases: (1) whether Teck was liable as a potentially responsible party under CERCLA; (2) the amount and recoverability of Respondents' alleged response costs; and (3) natural-resource damages. *Id.* at 7a.

After trial on the first phase, the District Court found Teck liable as an "arranger," rejecting the company's argument that the court lacked personal jurisdiction over it. *Id.* In the second phase, Teck settled with the State for its alleged past response costs, and the District Court after trial awarded the Tribes over $8.5 million in "response costs"—namely, the Tribes' costs to litigate the first phase. *Id.* at 8a. The District Court then entered partial final judg-

ment for the first two phases under Federal Rule of Civil Procedure 54(b), and Teck appealed. *Id.*

4. Much had changed since the first appeal. Since the Ninth Circuit last considered CERCLA's extraterritorial application, this Court in *Morrison* swept away lower courts' methods of "divining" whether Congress would have wanted a statute to apply extraterritorially, replacing "judicial-speculation-made-law" with a clear rule that when the text of a statute "gives no clear indication of an extraterritorial application, it has none." 561 U.S. at 255, 261. The Court also clarified that a case involving "*some* domestic activity" does not make it a domestic application of the statute. *Id.* at 266. Then, in *RJR Nabisco*, the Court elaborated that courts must evaluate the extraterritorial reach of a statute before deciding whether the particular application is domestic and that an application is only domestic if "the conduct relevant to the statute's focus occurred in the United States." 136 S. Ct. at 2101. But despite this seismic shift, the Ninth Circuit declined to reconsider its prior extraterritoriality ruling, viewing it as the "law of the case." Pet. App. 35a n.13.

The court of appeals also concluded that the District Court had personal jurisdiction over Teck because the company knew its pollutants were accumulating downstream, in Washington State. *Id.* at 16a-17a. The Ninth Circuit's holding relied almost entirely on *Calder* v. *Jones*, a 1984 case that considered the "effects" the defendants' out-of-state activity had inside the forum. 465 U.S. 783. But 30 years later, in *Walden* v. *Fiore*, this Court clarified that "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether

the defendant's conduct connects him to the forum in a meaningful way." 571 U.S. at 290. *Walden* further clarified that the defendants in *Calder* had a sufficiently strong relationship with the forum because their tortious conduct "actually occurred *in* [the State]," *id.* at 288, not because their conduct was "expressly aimed" or had an "effect" there.

5. Teck's petition for panel rehearing and rehearing en banc was denied. *See* Pet. App. 58a-59a. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

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

A. The Ninth Circuit's Extraterritorial Application Of CERCLA Cannot Be Reconciled With *Morrison* And *RJR Nabisco*.

1. Whether or not the Ninth Circuit's 2006 extraterritoriality ruling was defensible at the time, it was fatally undermined by this Court's subsequent opinions in *Morrison* and *RJR Nabisco*. By adhering to its prior ruling, *see* Pet. App. 35a & n.13, the Ninth Circuit has re-ignited a conflict with this Court's decisions.[2]

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[2] This Court's prior denial of certiorari does not prevent it from reviewing the Ninth Circuit's earlier interlocutory extraterritoriality ruling in this petition. *See Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per

Morrison affirmed and clarified the presumption that, "unless a contrary intent appears," Congress's legislation "is meant to apply only within the territorial jurisdiction of the United States." 561 U.S. at 255 (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*)). That presumption means that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

Morrison abrogated earlier Second Circuit cases that asked "whether it would be reasonable * * * to apply the statute to a given situation." *Id.* at 257. The Court criticized both the Second Circuit's "effects test," which asked "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens," and its "conduct test," which asked "whether the wrongful conduct occurred in the United States." *Id.* (quoting *SEC* v. *Berger*, 322 F.3d 187, 192-193 (2d Cir. 2003)). The Court explained that those purposive tests had no "textual or even extratextual basis." *Id.* at 258. And the Court criticized the Ninth Circuit for applying a similarly flawed version of the presumption, which treated it "as essentially resolving matters of policy." *Id.* at 259 (citing *Grunenthal GmbH* v. *Hotz*, 712 F.2d 421, 424-425 (9th Cir. 1983)).

Morrison explained that "[r]ather than guess anew in each case," courts should "apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 261. A statute must have a "clear

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curiam); *Hamilton-Brown Shoe* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

statement" that it applies extraterritorially, and when a statute has such a statement, "the presumption against extraterritoriality operates to limit th[e] provision to its terms." *Id.* at 265.

The Court also clarified that the fact that "*some* domestic activity is involved in the case" does not automatically make a statute's application domestic. *Id.* at 266. The extraterritoriality analysis examines the conduct that is "the 'focus' of congressional concern." *Id.* (quoting *Aramco*, 499 U.S. at 255).

Six years later, this Court in *RJR Nabisco* reiterated that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." 136 S. Ct. at 2100. "The question is not whether we think Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court, but whether Congress has affirmatively and unmistakably instructed that the statute will do so." *Id*. (internal quotation marks omitted).

RJR Nabisco further clarified the two-step inquiry to determine whether a statute is improperly being applied extraterritorially. At the first step, courts "ask whether the presumption against extraterritoriality has been rebutted." *Id.* at 2101. If not, at the second step, courts "determine whether the case involves a domestic application of the statute" by "looking to the statute's 'focus.' " *Id.* "[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id*.

2. The Ninth Circuit's extraterritoriality ruling flouts both *Morrison* and *RJR Nabisco*. As the

District Court below recognized, "[t]here is no dispute that CERCLA, its provisions and its 'sparse' legislative history, do not clearly mention the liability of individuals and corporations located in foreign sovereign nations for contamination they cause within the U.S." Pet. App. 197a. Under *Morrison*, CERCLA therefore only applies "within the territorial jurisdiction of the United States." 561 U.S. at 255 (citation omitted).

Then comes *RJR Nabisco*'s second step: Whether the Ninth Circuit's imposition of CERCLA liability on Teck "involves a domestic application of the statute." 136 S. Ct. at 2101. And here the Ninth Circuit's analysis breaks from *Morrison* in two important ways.

First, the Ninth Circuit applied a "'domestic effects' exception to the presumption against extraterritorial application of United States law," whereby a statute's application is not extraterritorial where the effects of the defendant's conduct are felt in the United States. Pet. App. 80a. But *Morrison* held that a test for extraterritoriality that evaluates whether "the wrongful conduct had a substantial effect in the United States or upon United States citizens" led to "unpredictable and inconsistent" results and rejected it. 561 U.S. at 257, 260 (citation omitted). The Ninth Circuit's use of a repudiated extraterritoriality standard is reason enough to grant review.

The Ninth Circuit pushed the "effects test" even further. It concluded that "where a party arranged for disposal * * * of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially." Pet.

App. 82a. It held that CERCLA is being applied domestically so long as the *CERCLA site* is "in the United States," regardless of where the defendant's conduct took place. *Id.* at 83a.

That reasoning contradicts *RJR Nabisco*'s command to evaluate whether "the *conduct* relevant to the statute's focus occurred in the United States." 136 S. Ct. at 2101 (emphasis added). The conduct relevant to CERCLA's focus for arranger liability is "arrang[ing] for disposal * * * of hazardous substances." 42 U.S.C. § 9607(a)(3). Any arranging Teck did took place in Canada. The Ninth Circuit's extension of CERCLA to Teck, then, was an extraterritorial application unsupported by CERCLA's text.

To be sure, CERCLA liability also requires "a release, or a threatened release * * * of a hazardous substance." *Id.* § 9607(a)(4). But the release of a substance from inanimate slag is not Teck's conduct. *See RJR Nabisco*, 136 S. Ct. at 2101. And even if that release were somehow relevant, the Ninth Circuit's imposition of CERCLA liability on Teck would still contradict *Morrison*. The *Morrison* plaintiffs argued that their suit was not seeking to apply the Exchange Act extraterritorially because the defendants' "deceptive conduct," which was the basis of their fraud suit, had occurred in Florida. 561 U.S. at 266. This Court disagreed. It explained that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States," but "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* Just as fraud is an element of proving liability under the Exchange

Act, so too is a release an element of proving liability under CERCLA. Yet *Morrison* holds that facts underlying one element of the claim occurring the United States does not make a statute's application domestic.

In holding (and reiterating its holding) that CERCLA was being applied "domestically" to foreign conduct, the Ninth Circuit broke from this Court's precedents.

B. The Ninth Circuit's Erroneous Extraterritoriality Ruling Will Harm The United States' Foreign Relations.

The Ninth Circuit's extraterritoriality holding is not only inconsistent with *Morrison* and *RJR Nabisco*. It also allows unilateral private civil enforcement of American environmental law against a foreign company's foreign conduct, threatening the United States' foreign relations.

1. Under the decision below, foreign companies whose foreign discharges end up in the United States can be held liable under CERCLA. Pet. App. 81a-83a. That imposition of liability risks precisely the cross-border friction the presumption against extraterritoriality is meant to avoid: "[T]he international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco*, 136 S. Ct. at 2100.

The Ninth Circuit's holding also risks infringing on the sovereignty of other countries in precisely the way that this Court has repeatedly warned against. And the threat is more than hypothetical here. The Canadian government has previously explained that "[r]esolution through private litigation is both un-

necessary and, in this case, incompatible with the basic principle of comity of nations." Br. of the Government of Canada as *Amicus Curiae* in Support of Petitioner, *Teck Cominco Metals, Ltd.*, *supra*, at 6. British Columbia has likewise explained that Respondents' case is "antithetical to the province's environmental policy" because its CERCLA analogue is "enforced exclusively by the provincial government, not private litigation," with "formal enforcement actions as a last resort." Br. of Amicus Curiae Her Majesty the Queen in Right of the Province of British Columbia in Support of Petitioner 8, 18, *Teck Cominco Metals, Ltd.*, No. 06-1188 (U.S. May 2, 2007).

None of this is to say that the United States is powerless to act against cross-border pollution. To the contrary: The United States and Canada have for over a century addressed the issue through bilateral agreements.

The 1909 Boundary Waters Treaty created an International Joint Commission (IJC) to resolve any "matters of difference" regarding the nations' shared navigable waters. *See* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada art. IX, Gr. Brit.-U.S., Jan. 11, 1909, 36 Stat. 2448, 2452.

The IJC process works. In fact, the IJC arbitrated disputes over the Trail Smelter's air emissions in the late 1920s and early 1930s. That "most famous international environmental law dispute" to this day "remains the only decision of an international court or tribunal that deals specifically, and on the merits, with transfrontier pollution." Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, Interna-*

tional Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes, 85 B.U. L. Rev. 363, 365 (2005) (internal quotation marks and citations omitted).

Beyond the Boundary Waters Treaty, the United States and Canada have compacted to clean up the Great Lakes, and have, through the North American Free Trade Agreement, agreed to environmental cooperation and enforcement. *See* Agreement on Great Lakes Water Quality, Can.-U.S., Nov. 22, 1978, 30 U.S.T. 1383; North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (pts. 1-3); 32 I.L.M. 605 (pts. 4-8). Such agreements are the correct way to resolve cross-border environmental disputes.

That includes this case. The United States recognized as much when EPA reached—with Canada's support—a negotiated agreement with Teck and withdrew its administrative order. Under that agreement, Teck and EPA have cooperated for over a decade, with Teck's American affiliate having spent more than $90 million on those efforts, including several million dollars paid to Respondents. *See* C.A. ER 248-252.

But foreign firms like Teck will have little future incentive to cooperate with the United States if States, Tribes, or individuals can pile on with separate CERCLA suits. The United States said in 2007 that it "strongly share[d]" Canada's preference to resolve this dispute through negotiation. Br. of the United States as Amicus Curiae 16, *Teck Cominco Metals, Ltd.*, No. 06-1188 (Nov. 20, 2007). Teck and EPA reached just such a resolution; yet Respondents have continued to drag Teck through this litigation

for well over a decade. This Court's intervention is essential to protect negotiated solutions to cross-border pollution—now and in the future.

2. The Ninth Circuit's extraterritoriality decision could also trigger reciprocal action against American firms by foreign countries.

The potential for such action is real. The Ontario Superior Court in 2008 permitted a Canadian national's suit against Michigan-based D.T.E. Energy to proceed on claims the company had contaminated a border river in violation of a Canadian statute. *Edwards* v. *D.T.E. Energy Co.*, [2008] O.J. No. 4433, para. 90 (Can. Ont. Super. Ct. J.). The case was saved from trial only by international cooperation: EPA and Michigan adopted stricter regulations on mercury emissions, and the plaintiff dropped his case. Dylan Neild, *Edwards v. DTE: Case Closed*, Lake Ontario Waterkeeper, at 16:58 (April 13, 2010), http://www.waterkeeper.ca/blog/17193. If the Ninth Circuit's holding remains, there will be another *Edwards*; and this time, Canadian courts may apply their own environmental laws against American companies.

The risk of retaliation stretches worldwide. Given increasing concern over atmospheric pollution and greenhouse gasses, countries may be tempted to impose extraterritorial liability on deep-pocketed foreign companies for emissions far outside the countries' territorial boundaries. *See, e.g.*, Jonathan Remy Nash, *The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws*, 50 Va. J. Int'l L. 997, 1013 (2010) (observing that for "global pollutants, such as carbon dioxide and other greenhouse gases," "the geographic location of their

emission is irrelevant" so that a "molecule of carbon dioxide emitted in Florida causes the same degradation as a molecule emitted in Germany, China, South Africa, or anywhere else in the world").

Once the norm in favor of diplomatic resolution of cross-border pollution has eroded, this Court will be hard-pressed to rehabilitate it after the fact.[3]

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

The Ninth Circuit below applied *Calder* v. *Jones*, 465 U.S. 783 (1984), to hold that because Teck "knew" or "acknowledged" its actions would impact Washington State, personal jurisdiction existed over Teck in Washington. Pet. App. 13a-17a. But the court ignored *Walden* v. *Fiore*, 571 U.S. 227 (2014), which considerably constrained *Calder* on the very point for which the Ninth Circuit invoked it.

The decision below thus conflicts with this Court's precedent—and splits with three other circuits, to boot. The Ninth Circuit misread *Calder*'s core holding; impermissibly imposed a tort-specific "effects test"; and replaced this Court's 2014 jurisdictional test with the 1984 version, one where a defendant's

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[3] The Court is also considering a petition asking whether a plaintiff's purchase of securities in the United States alone surmounts the presumption against extraterritoriality. The Solicitor General has been invited to express his views. *See Toshiba Corp.* v. *Automotive Indus. Pension Tr. Fund*, __ S. Ct. __, 2019 WL 177587 (Jan. 14, 2019) (mem.). The Court may wish to do the same here.

knowledge of in-state harm suffices. The Second, Fifth, and Seventh Circuits have correctly interpreted *Walden* to "foreclose[ ]" the arguments the Ninth Circuit accepted. *Waldman* v. *Palestine Liberation Org.*, 835 F.3d 317, 337 (2d Cir. 2016); *see also Ariel Invs., LLC* v. *Ariel Capital Advisors*, *LLC*, 881 F.3d 520, 522 (7th Cir. 2018); *Sangha* v. *Navig8 Ship-Management Private Ltd.*, 882 F.3d 96, 104 n.3 (5th Cir. 2018). Relying on *Walden*, those circuits have held that "[k]nowing about a potential for harm in a particular state is not the same as acting *in* that state." *Ariel Invs.*, 881 F.3d at 522. This Court should resolve the conflict and limit the Ninth Circuit's exercise of personal jurisdiction to its proper bounds.

A. The Decision Below Conflicts With *Walden*, *Calder*, And This Court's Broader Personal-Jurisdiction Case Law.

1. The plaintiff in *Calder* sued a national magazine's editor and one of its reporters in California, claiming they had defamed her in an article they wrote in Florida. 465 U.S. at 784. This Court held that California could exercise personal jurisdiction over the defendants because "California [was] the focal point both of the story and of the harm suffered" and because of "the 'effects' of their Florida conduct in California." *Id.* at 789. *Calder* also observed that, unlike defendants charged with negligence, the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California." *Id.*

In *Calder*'s wake, some circuits—including the Ninth—held that *Calder*'s "effects test" allowed personal jurisdiction in a forum whenever a defend-

ant's intentional act is "targeted at a plaintiff whom the defendant knows to be a resident of the forum state," and the defendant knows "harm * * * is likely to be suffered in the forum state." *E.g.*, *CollegeSource, Inc.* v. *AcademyOne, Inc.*, 653 F.3d 1066, 1077, 1079 (9th Cir. 2011) (citations omitted).

Then came *Walden*. The Court explained that although *Calder* spoke of the "effects" of the defendants' conduct in the forum, *Calder*'s personal-jurisdiction holding rested on the *defendants'* ties to California—not the injury of a plaintiff that resided there. *Walden*, 571 U.S. at 290-291. The Court emphasized that "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 290. And, as a result, where all of a defendant's "relevant conduct" occurs outside the forum, "the mere fact that [its] conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction." *Id.* at 291.

Walden further clarified that because the *Calder* defendants wrote the defamatory piece "for publication in California," defendants' libelous conduct "actually occurred *in* California." *Id.* at 287-288. The particular "nature of the libel tort" was therefore largely responsible for the "strength" of defendants' connection to the forum. *Id.* The Court did not mention "express aiming" at all, except to note that *Calder* had used the phrase in rejecting the defendants' arguments that they could not be subject to jurisdiction because their employer chose to circulate the magazine in California. *Id.* at 288 n.7.

Contrast all this with the Ninth Circuit below. Without so much as mentioning *Walden*, it held that Teck could be haled into court in Washington State under a *Calder* "effects test." Pet. App. 14a-16a. According to the court of appeals, Teck had "expressly aimed" waste at Washington because it "knew the Columbia River carried waste * * * downstream." *Id.* at 16a. The court likened Teck's conduct to the *Calder* defendants', where their "actions simply involved writing and editing an article about a person in California, an article that the defendants knew would be circulated and cause reputational injury in that forum." *Id.* at 15a.

That decision conflicts with *Walden* and *Calder* thrice over. *First*, the Ninth Circuit misinterpreted *Calder*'s core holding. The Ninth Circuit read *Calder* to mean that because the defendants "wr[ote] and edit[ed] an article about a person in California, an article that the defendant knew would be circulated and cause reputational injury in that forum," California had personal jurisdiction over them. *Id.* But *Walden* explained that a fair reading of *Calder* required more. In *Calder*, the strength of the defendants' connection to California "was largely a function of the nature of a libel tort," whereby the "defendants' intentional tort actually occurred *in* California." *Walden*, 571 U.S. at 287. Teck's only jurisdictionally relevant conduct here was the "discharge" of "waste into the river." Pet. App. 16a. That discharge occurred *in Canada*, and the conduct underlying Respondents' claims therefore did not "actually occur[ ]" *in* Washington. *Walden*, 571 U.S. at 287; *see also Ariel Invs.*, 881 F.3d at 522.

Compounding its error, the Ninth Circuit focused exclusively on the part of *Calder* that *Walden* later pared back. *Calder*'s core holding is that jurisdiction was proper because "California [was] the focal point both of the story and of the harm suffered." 465 U.S. at 789. The "expressly aimed" language the Ninth Circuit seized on responded to the defendants' particularized argument that California could not exercise jurisdiction over *employees* of a company that distributed magazines to the State. *See id.* at 789-790. *Walden* relegated that analysis to a footnote and excluded it when explaining how *Calder* faithfully "appl[ied]" longstanding jurisdictional "principles." *Walden*, 571 U.S. at 286-288 & n.7; *see also Ariel Invs.*, 881 F.3d at 522; *Sangha*, 882 F.3d at 103-104. The Ninth Circuit erred by myopically focusing on that part of *Calder*, rather than reading the decision as a cohesive whole.

Second, the Ninth Circuit in *Walden* had applied a tort-specific jurisdictional test to determine whether Nevada had personal jurisdiction. *See Fiore* v. *Walden*, 688 F.3d 558, 576 (9th Cir. 2011) (citing *Brayton Purcell LLP* v. *Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (analyzing "purposeful direction under the three-part test derived from *Calder* v. *Jones*, commonly referred to as the *Calder*-effects test") (internal citation omitted)). And this Court reversed. It rejected the Ninth Circuit's approach, as well as the "substantially similar analysis" the plaintiffs had proposed. *Walden*, 571 U.S. at 289 & n.8. The Court explained that "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 290.

The Ninth Circuit below nonetheless *again* applied a special "*Calder*-effects test," focusing on whether Teck "expressly aimed" its conduct at Washington. Pet. App. 14a-16a. Indeed, it relied on the same Ninth Circuit precedent this Court rejected in *Walden*. *See id.* at 14a (citing *Brayton*, 606 F.3d at 1128). And it did so without mentioning *Walden*'s rejection of the "effects test" or its cabining of *Calder*'s "expressly aimed" language. *See id.* at 13a-17a. This Court should grant the petition to reverse that category error.

Third, the Ninth Circuit held that jurisdiction is proper when a defendant "knew" or "acknowledged" that some of its waste would end up in the forum State. *Id.* at 16a. But a court's exercise of personal jurisdiction passes constitutional muster only when a defendant has "*purposefully* 'reach[ed] out beyond' [its] State and into another." *Walden*, 571 U.S. at 285 (emphasis added) (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 479-480 (1985)). For personal jurisdiction, knowledge and purpose are not the same thing. *See Asahi Metal Indus. Co.* v. *Superior Court,* 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.) ("defendant's awareness" that its product will end up in the forum State does not show it acted "purposefully" toward the forum State). As this Court has held, "a person who causes a particular result" acts "purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct,' while he is said to act knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *United States* v. *Bailey*, 444 U.S. 394, 404 (1980) (citation omitted).

Walden and *Calder* bear out that distinction. In *Walden*, the defendant *knew* that the plaintiffs would suffer harm in Nevada but did not "consciously desire[ ]" that result. *Bailey*, 444 U.S. at 404 (citation omitted). Indeed, had the plaintiffs lived in New York, the defendant would have had the exact same connection to New York as he had to Nevada. In *Calder*, by contrast, the defendants purposefully reached out to California sources and wrote about events that took place in California to a substantially Californian audience. *See Walden*, 571 U.S. at 287 (describing those California contacts as "ample"). Their conduct displayed a conscious desire to connect with and cause harm specifically "*in* California." *Id.* at 288.

Teck fits comfortably on the *Walden* side of that divide. Even under the Ninth Circuit's view of the facts, the company discharged slag into a Canadian river without evincing a conscious desire that the slag specifically end up in Washington. Just as in *Walden*, if Teck's pollutants had landed in a different State, a different country, or in international waters, Teck would have the exact same relationship with those jurisdictions as it currently has with Washington. At most, then, Teck had the "mere knowledge" that some pollutants would end up and cause harm in Washington. *Waldman*, 835 F.3d at 338. That is not enough to establish specific personal jurisdiction. *Id.*; *see also Ariel Invs.*, 881 F.3d at 522 ("Knowing about a potential for harm in a particular state is not the same as acting *in* that state * * * ."). The Ninth Circuit's break from *Walden* warrants this Court's intervention.

B. The Circuits Are Divided Over How To Interpret *Calder* In Light Of *Walden*.

1. The Ninth Circuit's analysis also departs from that of the Second, Fifth, and Seventh Circuits. Each of those courts has rejected the effects-based arguments accepted by the Ninth Circuit below, recognizing that *Walden* limits *Calder*'s previously broad reach.

The Seventh Circuit has rejected a plaintiff's argument that "a defendant should be subject to personal jurisdiction in any state at which it 'aimed its actions.' " *Ariel Invs.*, 881 F.3d at 522. The Seventh Circuit explained that the plaintiff's "aiming" argument was "incompatible with *Walden*; it is exactly what [the Ninth Circuit] had held, and not a single Justice accepted the position." *Id.* The Seventh Circuit also rejected the plaintiff's argument that *Calder* allows for knowledge of in-state harm to confer personal jurisdiction. *Id.* at 522-523. "As *Walden* observed, because publication to third parties is an element of libel, the defendants' tort [in *Calder*] occurred in California." *Id.* at 523. Read through *Walden*'s lens, *Calder* simply reinforces that "[k]nowing about a potential for harm in a particular state is not the same as acting *in* that state." *Id.* at 522.

The Second and Fifth Circuits have also relied on *Walden* to reject arguments that a defendant's knowledge drives the personal-jurisdiction inquiry. The Second Circuit held that where there is no "purposeful connection to the forum," it is "impermissible to speculate" on what the defendants "intended to do." *Waldman*, 835 F.3d at 338. The Second Circuit thus rejected the plaintiffs' attempt to

invoke *Calder*. *Id.* at 340. The "jurisdictional inquiry in *Calder* focused on the relationship among the defendant, the forum, and the litigation," not on the foreseen effects of defendant's out-of-state conduct. *Id.* (citing *Walden*, 571 U.S. at 287). The Fifth Circuit adopted the same interpretation of *Walden*—simply being "aware" that the effects of one's tortious conduct would be "felt in [the forum]" does not establish personal jurisdiction. *Sangha*, 882 F.3d at 104 n.3. (citing *Walden*, 571 U.S. at 289-290).

The division between the Ninth Circuit on the one hand and the Seventh, Second, and Fifth Circuits on the other is outcome-determinative. Under the Ninth Circuit's test, it was sufficient that Teck supposedly knew that its act of discharging slag in Canada would have downstream effects in Washington. In these other circuits, however, Respondents' claims would have been dismissed.

3. If there is anything left of *Calde*r's ancillary "expressly aimed" framework at all, it is limited to "defendants' intentional tort." *Walden*, 571 U.S. at 288 & n.7. CERCLA is a strict-liability statute, *see Burlington Northern & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 608 (2009), not an intentional tort. In applying an "[e]xpress aiming" test to Teck (Pet. App. 15a-16a), the Ninth Circuit created a second, independent split with the Eleventh and Third Circuits.

The Eleventh Circuit considers "express aiming" only when the plaintiff has brought an "intentional tort" claim—not just claims that are deemed akin to torts. *Aviation One of Fla., Inc.* v. *Airborne Ins. Consultants (PTY), Ltd.*, 722 F. App'x 870, 882 (11th Cir. 2018) (per curiam); *see also Licciardello* v.

Lovelady, 544 F.3d 1280, 1287-88 (11th Cir. 2008). Indeed, in the Eleventh Circuit, express aiming does not apply to torts based on negligence. *Louis Vuitton Malletier, S.A.* v. *Mosseri*, 736 F.3d 1339, 1357 n.11 (11th Cir. 2013) (cited by *Aviation One*, 722 F. App'x at 882). The Third Circuit, too, has held that an intentional-tort claim is required to trigger a *Calder* analysis. *Marten* v. *Godwin*, 499 F.3d 290, 297 (3d Cir. 2007); *see also Isaacs* v. *Arizona Bd. of Regents*, 608 F. App'x 70, 74 (3d Cir. 2015) (per curiam). In keeping with that analysis, the Tenth Circuit has "question[ed]" whether, in view of *Walden*, *Calder*'s analysis "extend[s] beyond the defamation context" at all. *Old Republic Ins. Co.* v. *Continental Motors, Inc.*, 877 F.3d 895, 916 n.34 (10th Cir. 2017).

This difference is (again) dispositive. Respondents' claims would have been dismissed for lack of jurisdiction in the Eleventh and Third Circuits. *See, e.g.*, *Andy's Music, Inc.* v. *Andy's Music, Inc.*, 607 F. Supp. 2d 1281, 1283-84 (S.D. Ala. 2009) (requiring in-state contacts beyond the activity giving rise to the suit because "this case is not an 'intentional tort' case"); *see also Goldstein* v. *Berkowitz*, No. 10-4644 (FLW), 2011 WL 1043235, at *8 (D.N.J. Mar. 18, 2011). For this reason, too, the Ninth Circuit's decision is an outlier that this Court should correct.

III. THE NINTH CIRCUIT'S VERSION OF "ARRANGER" LIABILITY CONFLICTS WITH CERCLA'S PLAIN MEANING AND WITH THIS COURT'S AND OTHER CIRCUITS' CASE LAW.

CERCLA places liability on four types of parties: owners or operators of a CERCLA facility; past owners or operators; those who arranged for disposal

of hazardous substances; and those who transported and released hazardous substances. *See* 42 U.S.C. § 9607(a). Because CERCLA facilities must be within U.S. jurisdiction, *see ARC Ecology* v. *U.S. Dep't of Air Force*, 411 F.3d 1092, 1098-1001 (9th Cir. 2005), Teck—a Canadian company operating only in Canada—could not be liable as an owner or operator. And there were no allegations that Teck accepted hazardous substances for transport to the United States.

That left arranger liability. CERCLA's arranger provision covers any person who "arranged for disposal" of waste, "by contract, agreement, or otherwise," with some "other party or entity." 42 U.S.C. § 9607(a)(3). In holding that Teck could be liable as an arranger for arranging *with itself*, the Ninth Circuit placed itself on the wrong side of CERCLA's text, on the wrong side of this Court's interpretations of arranger liability under CERCLA, and on the wrong side of a circuit split.

A. The Ninth Circuit's Interpretation of Arranger Liability Is Wrong And In Tension With This Court's Case Law.

1. CERCLA provides that an arranger is:

> 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.

42 U.S.C. § 9607(a)(3).

The Ninth Circuit opined that the text was "by no means clear to what the phrase 'by any other party or entity' refers." Pet. App. 86a. So, faced with what it considered ambiguity, the Ninth Circuit applied "a liberal judicial interpretation consistent with CERCLA's overwhelmingly remedial statutory scheme." *Id.* at 89a (ellipses and citation omitted).[4]

To effectuate that "liberal judicial interpretation," the court found it necessary to "read[ ] the word 'or' into the provision, so that the relevant language would 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." *Id.* at 87a (alterations in original, emphasis omitted). The court concluded after editing the statute that "one may be liable under [CERCLA] if they arrange for disposal of their own waste or someone else's waste, and that the arranger element can be met when disposal is not arranged 'by any other party or entity.' " *Id.* at 91a-92a.

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[4] The Ninth Circuit was motivated by a policy concern that a textually faithful interpretation of the statute "would create a gap in the CERCLA liability regime by allowing a generator of hazardous substances potentially to avoid liability by disposing of wastes without involving a transporter as an intermediary." Pet. App. 88a. That rationale underscores the Ninth Circuit's misguided extraterritoriality analysis. *See supra* pp. 13-16. The potential "gap"—which is only likely to exist when foreign conduct is involved, because otherwise the defendant would likely be an owner or transporter—underscores CERCLA's domestic focus.

But a court is "not at liberty to rewrite the statute to reflect a meaning [it] deem[s] more desirable." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 228 (2008). Nor was it necessary to do so, because the text, while bulky, is clear. Parsing the sentence without adding or removing any words, the *who* covered is (1) "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or" (2) "arranged with a transporter for transport for disposal or treatment." 42 U.S.C. § 9607(a)(3). The *what* covered is disposal or treatment "of hazardous substances owned or possessed by such person." *Id.* The *how*—by whom is the disposal or treatment to be done?—covered is "by *any other* party or entity." *Id.* (emphasis added). And finally, the *where* of the disposal or treatment covered is "at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances." *Id.* The phrases modifying "disposal or treatment" may make the sentence long, but judges are no more entitled to revise long sentences than they are short ones.

Read together, this language applies to persons who arrange "by contract" or by "agreement[ ] or otherwise" or "with a transporter." *Id.* These transactional phrases all indicate that another party must be involved. One cannot contract with oneself.

2. The Ninth Circuit's arranger-liability ruling is also undermined by this Court's subsequent opinion in *Burlington Northern*, which assumed that arranger liability requires another party. *Burlington Northern* held that an alleged arranger—who had transferred the hazardous substances to another party—could not be liable simply because it knew

there would be accidental, unintended spills along the way. 556 U.S. at 612-613.

The Court elaborated on arranger liability in reaching that conclusion. The Court explained that "[i]t is plain from the language of the statute that [arranger] liability would attach * * * if an entity were to *enter into a transaction* for the sole purpose of discarding a used and no longer useful hazardous substance." *Id.* at 609-610 (emphasis added). "It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product * * * ." *Id.* at 610. "[W]hether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction * * * ." *Id*. All these hypotheticals assume a transaction between two parties.

Burlington Northern also assumes that the arranging party in fact owns or possesses the hazardous substance. *See id.* at 610-612. Under the Ninth Circuit's revision, by contrast, arranger liability applies to "any person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person [*or*] by any other party or entity." Pet. App. 87a (ellipses in original, emphasis altered). Thus, anybody may own or possess the substances—not just the arranger—for liability to apply. That reading's inconsistency with *Burlington Northern* further undercuts the Ninth Circuit's construction.

B. The Ninth Circuit's Arranger-Liability Ruling Conflicts With The First Circuit And Is Inconsistent With Other Circuits' Treatment Of Arranger Liability.

1. The First Circuit has refused to blue-pencil the statute as the Ninth Circuit did. *See American Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 23-24 (1st Cir. 2004). It read "by any other party or entity" to modify "the words 'disposal or treatment,' which would make the sentence read 'any person who . . . arranged for disposal or treatment . . . by any other party or entity.' " *Id.* at 24 (alterations original). As the court explained, "[t]he sentence structure of § 9607(a)(3) makes it clear that" its "interpretation is the correct one." *Id.* "The clause 'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity * * * ." *Id.* In the First Circuit, Respondents' claims against Teck would have been dismissed long ago.

2. The split continues to this day. Eight years after *American Cyanamid* and six years after the Ninth Circuit's initial arranger holding, the First Circuit explained that "arranger liability was intended to deter and, if necessary, to sanction parties seeking to evade liability by 'contracting away' responsibility." *United States* v. *General Elec. Co.*, 670 F.3d 377, 382 (1st Cir. 2012). The court explained that the paradigmatic case of arranger liability is "if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance." *Id.* (quoting *Burlington Northern*, 556 U.S. at 610). "At the other end of the liability spectrum, an entity that sells a useful product which is

later disposed of in an improper manner without the seller's knowledge would not be liable as an arranger under CERCLA." *Id.* at 382-383.

Notice what both examples have in common: The alleged arranger contracted with another person, and that person disposed of the hazardous substance. The First Circuit has thus internalized the plain-language interpretation from *American Cyanamid*. And in so doing, it has perpetuated a split requiring this Court's resolution.

3. No other circuit has answered the precise question of whether arranger liability requires that the defendant arrange with some "other party or entity." But the Sixth Circuit accords with *Burlington Northern* and the First Circuit in assuming that arranger liability involves some kind of transaction. It explained that "the requisite inquiry" for arranger liability "is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances." *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996).

And several circuits have adopted a requirement of ownership or possession that is inconsistent with the Ninth Circuit's tortured reading of arranger liability. The Tenth Circuit, for instance, has held that "[a]rranger liability under CERCLA applies only to a person who arranges for disposal 'of hazardous substances *owned or possessed by such person*.'" *Chevron Mining Inc.* v. *United States*, 863 F.3d 1261, 1281 (10th Cir. 2017) (emphasis in original and citation omitted). The Third Circuit likewise has held that "proof of ownership, or at least possession, of the hazardous substance is required by the plain

language of the statute." *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 678 (3d Cir. 2003). And the Eighth Circuit has held that arranger liability "requires, among other things, that the hazardous substances be 'owned or possessed by' the person who arranged for the disposal." *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 810 (8th Cir. 1995) (citation omitted). All of these statements, however, make no sense under the Ninth Circuit's revised edition of the statute.

The Court should grant the petition to bring the Ninth Circuit into line with its sister circuits.

IV. THE THREE QUESTIONS PRESENTED ARE IMPORTANT, AND THIS CASE IS A GOOD VEHICLE TO ANSWER THEM ALL.

It is rare to find a case with two well-developed questions suitable for certiorari. Rarer still to find three. And yet all three questions presented here are compelling candidates for review, and this case is a good vehicle to resolve them.

1. CERCLA is both a strict-liability and an *in terrorem* statute; it can impose enormous liability. *See Burlington Northern*, 556 U.S. at 608; *Commander Oil Corp.* v. *Barlo Equip. Corp.*, 215 F.3d 321, 330 (2d Cir. 2000) (noting potential "massive environmental liability" under CERCLA). In a legal area of such blunt impact, defendants should know whether the statute has extraterritorial effect, and when they may be found liable. And as explained, extraterritorial application of CERCLA risks undermining efforts at diplomatic resolution of cross-border issues and triggering retaliation from other Nations. *See supra* pp. 16-20.

The personal-jurisdiction question, for its part, has ramifications not only for CERCLA defendants, but for *any* defendants whose activities result in incidental effects within the Ninth Circuit. Just as it was critical for this Court to (unanimously) reverse the Ninth Circuit's loose exercise of personal jurisdiction in both *Walden* and in *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), so too should it bring the Ninth Circuit into line with its sister circuits in applying *Walden*.

2. For the two questions implicating circuit splits, the split is dispositive. If this suit were brought in a district court within any of five other circuits, Teck would not be subject to personal jurisdiction. *See supra* pp. 27-29. And if Teck's smelter were near the Maine-New Brunswick border and not the Washington-British Columbia border, it would have no CERCLA arranger liability. *See supra* pp. 34-35.

3. This case is also an excellent vehicle to answer each of the three questions presented. Each is squarely presented, and each would entirely resolve this case if decided in Teck's favor. And because there is a final judgment against Teck under Rule 54(b), the case is ripe for review. Pet. App. 2a, 13a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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