No. 18-1160

IN THE

Supreme Court of the United States

TECK METALS LTD., FKA 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

BRIEF IN OPPOSITION OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

PAUL J. DAYTON
Counsel of Record
BRIAN S. EPLEY
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, WA 98164
(206) 447-7000
pdayton@omwlaw.com

Counsel for Respondent the Confederated Tribes of the Colville Reservation

287537

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Petitioner Teck Metals Ltd. and its predecessors (Teck) has for more than a century operated a smelter located on the bank of the Columbia River ten miles north of the United States-Canada border. Teck dumped its smelting waste (slag and liquid effluent) into the river and most of the wastes flowed downstream into the Upper Columbia River (UCR) in the state of Washington. Teck admits it was using the UCR as, in its words, a "free" and "convenient disposal facility." After Teck refused to comply with a United States order requiring it to investigate and study response to its contamination of the UCR, this litigation ensued. From the outset, Teck has denied that it was subject to U.S. environmental law. Its arguments did not convince the district court or the court of appeals and, in 2008, this Court denied Teck's Petition for Writ of Certiorari. After the mandate returned, Respondents the Confederated Tribes of the Colville Reservation (Colville Tribes) and the State of Washington (State) prevailed on claims against Teck under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et. seq.,* (CERCLA). The court of appeals affirmed. Teck now renews its petition on questions one and three listed below and also requests review of the court of appeals' decision affirming personal jurisdiction.

The questions presented are:

1. Whether CERCLA is being applied domestically to releases of hazardous substances from Teck's waste at a facility (the UCR) located wholly within the United States.

2. Whether Teck subjected itself to personal jurisdiction based on its practice of using the Upper Columbia River in the state of Washington as a "free" and "convenient disposal facility" for its hazardous wastes.

3. Whether CERCLA applies to persons and entities that arrange to dispose hazardous substances at a facility without involvement of a third party.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Cited Authorities

Page

Page

Page

STATUTES AND OTHER AUTHORITIES

STATEMENT OF THE CASE

Teck is a large mining company with international operations. Among these is the Trail Smelter located on the shores of the Columbia River ten miles north of the Canadian—U.S. border. Pet. App. 96a.

The smelter processes ore and refines it to pure metal. The smelting process creates waste in the form of slag and liquid effluent. Pet. App. 96a-97a. The slag contains various metals including iron, copper, lead, zinc, arsenic, cadmium, barium, antimony, chromium, cobalt, manganese, nickel, selenium, and titanium. Pet. App. 96a. The liquid effluent also contains mercury, arsenic, and cadmium among other hazardous substances. Pet. App. 97a-98a. For decades, Teck dumped these wastes into the Columbia River—at least 9.97 million tons of it. Pet. App. 96a-97a. At Teck's Trail Smelter, the river is free-flowing, and it takes Teck's wastes south into the United States. Pet. App. 2a, 4a. Teck now concedes that most of its wastes moved across the U.S border and that some are found in Lake Roosevelt, the large lake formed by the Grand Coulee Dam. Pet. App. 97a-98a.

Teck's disposal of its wastes in the United States was part of a plan to dispose of its wastes without cost. As its Environmental Manager stated and the trial court found, Teck used Lake Roosevelt as a "free" and "convenient disposal facility." Pet. App. 103a-104a. Decades ago, it acknowledged internally that it was "in effect dumping waste into another country—a waste they classify as hazardous material." Pet. App. 103a. Yet it persisted in discharging its slag and effluent to the Columbia River. As the trial court found, it was not only the inevitable

consequence but the "very purpose of Teck's disposal practices that the substances would come to be located" in Lake Roosevelt and the UCR. Pet. App. 129a.

In 1992, the government of British Columbia concluded that Teck's slag was toxic to fish and demanded that it cease such discharges. Pet. App. 107a-108a. In 1995, slag discharges were nearly eliminated. Pet. App. 111a. But, British Columbia did nothing to require Teck to address its contamination of the Columbia River in the United States.

Since time immemorial, the Colville Tribes have lived on the shores of the Columbia River south of the Canadian—U.S. border. In 1999, the Colville Tribes petitioned the United States Environmental Protection Agency (EPA) pursuant to CERCLA, 42 U.S.C. § 9605, to assess hazardous substance contamination in the Columbia River extending 150 river miles south from the Canadian—U.S. border. Pet. App. 154a. EPA responded and in 2003 issued a Unilateral Administrative Order (UAO) finding that wastes from Teck's Trail Smelter were prevalent in the 150 mile stretch of the UCR and had released hazardous substances to the environment. Pet. App. 62a-64a. Consequently, Teck was identified as a responsible party under CERCLA. Pet. App. 135a. The order required Teck to conduct a Remedial Investigation and Feasibility Study (RI/FS) to evaluate site conditions and necessary cleanup activities. *Id.*

Teck refused. Pet. App. 135a. When EPA did not act to enforce the UAO, the Colville Tribes funded a citizen suit by two of its leaders, Joseph Pakootas and DR Michel, to enforce the UAO, and the State of Washington joined

the case as an intervenor-plaintiff. Pet. App. 135a-136a. Teck immediately moved to dismiss the case arguing lack of personal jurisdiction and impermissible extraterritorial application of U.S. law. Pet. App. 136a. The district court denied Teck's motion to dismiss[1] and only then did Teck negotiate an agreement with EPA to conduct a RI/FS similar to but not governed by CERCLA. Pet. App. 136a. It did not agree to any cleanup of the site, Pet. App. 6a, and pursued appeal. *See Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006) (*Pakootas I*). Its appeal targeted the district court's ruling on extraterritoriality and did not challenge the district court's adverse decision on personal jurisdiction. *See* Appellant's Opening Brief, *Pakootas I,* 452 F.3d 1066 (No. 05-35153), 2005 WL 2106416. Its appellate brief briefly raised the "arranger" argument presented here but cited no case law supporting its argument.[2] Appellant's Opening Brief at 38-39, *Pakootas I,* 452 F.3d 1066 (No. 05-35153).

The court of appeals affirmed the district court, finding that CERCLA was being applied domestically to releases of hazardous substances in the UCR, and rejecting Teck's argument that arranger liability requires a third party. *See* Pet. App. 60a-92a; *Pakootas I,* 452 F.3d 1066. Teck moved for en banc review and lost. It petitioned for a Writ of Certiorari from this Court on both points

1. *Pakootas v. Teck Cominco Metals, Ltd.,* No. CV-04-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).

2. A few weeks before oral argument, Teck's counsel submitted a letter identifying two cases it believed supported its argument: *American Cyanamid Co. v. Capuano,* 381 F.3d 6, 23-24 (1st Cir. 2004) and *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.,* 976 F.2d 1338, 1341 (9th Cir. 1992).

addressed by the court of appeals. In 2008, after receiving an amicus brief from the United States counseling against review, this Court denied Teck's petition. *Teck Cominco Metals, Ltd. v. Pakootas*, 552 U.S. 1095 (2008).

After this Court denied the writ, litigation continued. The Colville Tribes and the State pressed claims for declaratory relief establishing Teck's liability under CERCLA and its responsibility to pay their response costs. Teck denied liability and, in Phase I, the district court addressed liability for declaratory relief. Before trial, Teck stipulated to the elements of arranger liability, including the fact that it had deposited 9.97 million tons of hazardous wastes in the Columbia River, some of which is now found in the UCR. Pet. App. 144a. Teck did not concede personal jurisdiction and a trial was held. After trial, the trial court entered findings of fact on personal jurisdiction and Teck's liability as an "arranger" under Section 9607(a)(3). Pet. App. 93a-131a. Relevant to jurisdiction, the trial court found that Teck knew it was "in effect dumping waste into another country—a waste that they classify as a hazardous material." Pet. App. 103a. It further found that Teck recognized that it had "been using Lake Roosevelt as a "free' 'convenient disposal facility' for its wastes." Pet. App. 103a-104a. Indeed, the trial court found that the "very purpose" of Teck's waste disposal practices was to use the UCR Site as the place its wastes would come to be located. Pet. App. 129a.

Based on these and other findings, the district court applied *Calder v. Jones,* 465 U.S. 783 (1984), and found that Teck intentionally disposed of its waste "intending to take advantage of the natural transport mechanism the river offered, with knowledge its waste would repose

in Washington State." Pet. App. 116a. The trial court concluded that Teck's intentional actions were "expressly aimed at" and "specifically targeted at Washington State." Pet. App. 116a-117a. These findings were not challenged on appeal. The trial court found personal jurisdiction exists and determined that Teck's admissions proved the elements of arranger liability. Pet. App. 121a, 126a, 129a. It ordered that Teck was jointly and severally liable to the Colville Tribes and State in any subsequent action or actions to recover past or future response costs at the UCR site. Pet. App. 129a.

In Phase II, the district court addressed Teck's responsibility for the State and Colville Tribes' response costs. The State settled its response cost claim before trial, but trial was held on the Tribes' claim. The district court awarded the requested amount of $8,253,676.65, plus interest. Pet. App. 169a.

Teck's CERCLA-like RI/FS also went forward under direction of EPA. Investigation of Teck's contamination of the UCR Site has proved complex and lengthy. Work started in 2006 and is still not done. Teck reports spending more than $90 million and the current estimated completion date is several years away.

No government has invoked any treaty or related process to address Teck's contamination of the UCR.

Teck appealed the Phase I and Phase II district court judgments establishing its liability and responsibility for response costs and, in 2018, the court of appeals unanimously affirmed the district court. Pet. App. 1a-59a; *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th

Cir. 2018) (*Pakootas II*). Teck requested en banc review, received no votes for review, and the request was denied.[3] This Petition ensued.

Teck alleges three bases for issuance of the writ. Two of them—extraterritorial application of law and "arranger" liability—were previously rejected by this Court in its 2008 order. The court of appeals' 2006 decisions on these points have held up well. No court has criticized the opinion on either holding. On extraterritoriality, the court of appeals anticipated the framework for analysis stated in *Morrison v. National Australia Bank Limited*, 561 U.S. 247 (2010). Teck may disagree with the result, but the standard was correctly framed. As for "arranger" liability, *Pakootas I* applied "arrange" as the term was subsequently defined in *Burlington Northern & Santa Fe Railway Co. v. United States,* 556 U.S. 599, 610-11 (2009). Teck and amici concede that there is no split in the circuits on this issue.[4] Indeed, *Pakootas I* is the only appellate court to have decided the question. When Teck revisited the issue in its 2017 appellate brief, it cited only *Capuano*, the principal circuit case cited in its failed 2007 petition for Writ of Certiorari. Its current Petition to this Court reaches more broadly to discuss cases discussing whether an "arranger" must also be an "owner" and *dicta* from this Court's decision in *Burlington Northern,* but Teck was unable to find a single case holding contrary to *Pakootas I*.

---

3. *Pakootas v. Teck Cominco Metals, Ltd.,* No. 16-35742, Dkt. 71 (9th Cir. Dec. 4, 2018) (order denying petition for panel rehearing and rehearing en banc).

4. Teck and amici argue for a "tension" with decisions addressing the different question of whether ownership of hazardous wastes is required for "arranger" liability.

Finally, the court of appeals' personal jurisdiction decision correctly applied the well-established *Calder* test. Teck makes much of this Court's recent decision in *Walden v. Fiore*, 571 U.S. 277 (2014), but the court of appeals' opinion fits comfortably with its focus on conduct related to the forum state, and Teck again could not find disagreement among the circuits regarding its application.

REASONS FOR DENYING THE PETITION

I. CERCLA IS BEING APPLIED TO ADDRESS DOMESTIC CONDITIONS AND THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF U.S. LAW IS NOT IMPLICATED.

A. The Court of Appeals' Opinion Correctly Applied CERCLA to Remedy Contamination of a Domestic Site.

This Court's jurisprudence on the presumption against extraterritorial application of U.S. law is well established. Congress' legislation "is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). This presumption is a canon of construction "whereby unexpressed congressional intent may be ascertained." *Id.* (quoting *Foley Bros.*, 336 U.S. at 285). The presumption 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).

Mindful of these principles, the court of appeals' analysis of Teck's extraterritoriality challenge began by determining whether this case involves a domestic or extraterritorial application of CERCLA. Pet. App. 72a. The court noted that unlike other United States environmental laws, such as the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA), CERCLA is not a regulatory statute. It imposes liability based on "release or threatened release of hazardous substances into the environment." Pet. App. 72a. *Accord Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (CERCLA imposes liability to remediate a site based on such releases).

Applying the elements of Section 9607(a)(3) "arranger" liability, the court determined that arranging for disposal in Canada is not sufficient for liability to attach, and that the "operative event creating a liability under CERCLA is the release or threatened release of a hazardous substance." Pet. App. 81a. As the "actual or threatened release" at issue—the leaching of hazardous substances from slag that settled at the UCR Site—"took place in the United States," the court of appeals concluded that "this case involves a domestic application of CERCLA." Pet. App. 82a-83a.

Almost thirteen years later, the court of appeals' opinion has held up well. No case has criticized its reasoning. Teck urges that this Court's subsequent decision in *Morrison*, in which it rejected an "effects" exception to the extraterritoriality presumption in a case applying U.S. securities laws to transactions on foreign exchanges, altered the applicable analysis of whether a statute is being applied domestically. There is no substance to this

argument. *Morrison* and the Court's subsequent decision in *RJR Nabisco, Inc. v. European Community,* __ U.S. __, 136 S. Ct. 2090 (2016), examined and rejected an exception to the extraterritoriality presumption but did not address or modify the considerations applicable to determining when a statute is being applied domestically. Certainly, these opinions did not criticize or even cite the court of appeals' analysis of this issue in *Pakootas I.* Rather than criticizing the *Pakootas I* opinion, in directing reviewing courts to determine whether the statute in question has a domestic focus, the Court implicitly endorsed the approach the court of appeals applied here.

The *Pakootas I* opinion on domestic application of CERCLA anticipated the Court's statement that in determining whether a case involves a domestic application of a statute, it must "look[] to the statute's 'focus.'" *See RJR Nabisco,* 136 S. Ct. at 2101.[5] The appellate court observed that CERCLA targets "cleanup of sites where there is a release or threatened release of hazardous substances into the environment." Pet. App. 72a. It reasoned that RCRA, not CERCLA, governs liability for "generation and disposal of hazardous waste, whereas CERCLA imposes liability to clean up a site where there are actual or threatened releases of hazardous substances into the environment." Pet. App. 84a. This examination of the statute's focus is what *RJR Nabisco* requires.

5. That the court of appeals anticipated and adhered to *Morrison* and *RJR Nabisco's* concentration on a statute's "focus" is unsurprising given that *Morrison* cited the *Aramco* Court's conclusion that was predicated on the "focus" of Title VII. *Morrison,* 561 U.S. at 266 (citing *Aramco,* 499 U.S. at 255).

Teck claims that the court of appeals applied a "domestic effects" exception to the presumption against extraterritorial application of United States law, but its citation does not support its claim. The court of appeals' conclusion that CERCLA was being applied domestically meant that it had no need to take up application of extraterritoriality principles. Pet. App. 84a-85a.

Teck then argues that even if the focus of CERCLA is on releases of hazardous substances—which indisputably occurred in the United States—Teck's conduct occurred only in Canada. Teck's attempted compartmentalization of its conduct overlooks the trial court's findings and reads "conduct" too narrowly. The Colville Tribes and State proved in the trial court that Teck had purposefully disposed of its wastes in Lake Roosevelt, using it as a "free" "convenient disposal facility." The conduct of arranging to use the Columbia River to transport wastes to the disposal site did not stop at the end of the chute at the Trail Smelter. The conduct is the disposal of hazardous substances, and the disposal was complete when wastes came to repose in Lake Roosevelt in the United States, exactly as Teck intended. *See, e.g.,* Pet. App. 129a (district court found that it was "not only the inevitable consequence, but the very purpose of Teck's disposal practices that the substances would come to be located at the UCR Site"). Teck's cabined account of its disposal practices clashes with CERCLA's focus on cleanup of domestic sites. *Key Tronic Corp. v. United States,* 511 U.S. 809, 814 (1994) ("CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites"); *Arc Ecology v. U.S. Dep't of Air Force,* 411 F.3d 1092, 1094 (9th Cir. 2005) (CERCLA's primary objectives are "to ensure the

prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created") (quoting *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997)) (alteration in original). That is precisely how it is being applied here. If CERCLA cannot reach the hazardous substances found in this Site, Congress' objectives in passing CERCLA cannot be accomplished.

B. Application of U.S. Law Has Enabled, Not Disrupted, Resolution of Environmental Disputes.

Teck's warnings that applying CERCLA to its disposal of hazardous substances in the UCR Site will harm the United States' foreign relations have no grounding in evidence and certainly not the trial court findings. Teck made similar arguments in its 2007 Petition for Writ of Certiorari and drew this rebuke from the Government of Canada: "[T]he Government of Canada does not condone—indeed it disagrees with—Petitioner's assertions that the Ninth Circuit's decision 'could provoke retaliatory actions against American interests by Canada or her courts,'…and reflect a complete misunderstanding of Canadian governmental policy and process." Brief of the Government of Canada as Amicus Curiae 3-4, n.4, *Teck Cominco Metals, Ltd. v. Pakootas,* 552 U.S. 1095 (2008) (No. 06-1188) (May 2, 2007) (2007 Br. of Canada).

Teck argues that applying CERCLA will increase cross-border friction by infringing on Canadian sovereignty. This has no force because Teck cites no conflicting Canadian law nor any Canadian law applicable

to cleanup of the wastes transported to the United States. To the contrary, the record shows that there is no clash between United States and Canadian law and that Canadian law does not provide for remediation of any site located in the United States.[6]

Teck's claim of inconsistency with the laws of Canada may be based on the Province of British Columbia's statement that its laws do not provide for private enforcement of cleanup responsibilities. Pet. 17. This is off point because the plaintiffs in the current claims are both government entities—not private parties. Moreover, the previous citizen suit that originated this action enforced an UAO issued by the United States EPA pursuant to CERCLA and was not a private action.

Teck argues that application of U.S. law will deter negotiated settlements, but it fails to acknowledge that it has never agreed to clean up its contamination of the UCR Site. Contrary to Teck's argument, it appears this litigation encouraged Teck's settlement with EPA as it did not agree to perform a CERCLA-like RI/FS until after it lost its motion to dismiss in the district court. The United States disagrees with Teck's assessment of the value of this litigation, and in 2008 told the district court that it welcomed early resolution of the liability

6. *See* Declaration of Professor Richard Kyle Paisley, *Pakootas I,* 452 F.3d 1066 (No. 05-35153), Dkt. Nos. 25 (Paisley declaration) & 49 (court of appeals' Order granting State's motion for leave to file expert declaration as addendum) (describing Canadian and British Columbia law, explaining absence of conflict with CERCLA, and explaining that neither Canadian nor British Columbia law empowers a Canadian agency to order remediation of a site located in the United States).

issue, which would be beneficial to cleanup at the Site. SER 206-07.[7]

As in its 2007 Petition,[8] Teck has made the parade of horribles argument suggesting that its liability in this case will lead to reciprocal enforcement action by other nations. Leaving aside whether such events are just, in the subsequent twelve years that has not happened. Teck cites a single case from 2008. Based on Teck's account, it appears that litigation was productive as it led to government implementation of stricter environmental standards. Pet. 19. The United States previously explained that this concern of unbridled transboundary litigation was unfounded. Brief of the United States as Amicus Curiae at 18, *Teck Cominco Metals, Ltd. v. Pakootas,* 552 U.S. 1095 (2008) (No. 06-1188) (Nov. 20, 2007) (Br. of United States). And in this it seems to agree with the Government of Canada. 2007 Br. of Canada 3-4, n.4.

---

7. There is no basis for amicus Canada's claim that this lawsuit has "repeatedly undermined" the "cooperative solution" brokered by the United States and Canada. Brief for *Amicus Curiae* the Government of Canada in Support of Petitioner (2019 Br. of Canada), 17. As the United States' letter explains, expeditious resolution of the lawsuit will hasten cleanup at the Site once the RI/FS is complete. SER 207. And Canada's suggestion it "brokered" the 2006 Settlement Agreement, *id.*, has no basis in the record. In fact, the only signatories to the RI/FS agreement are Teck and the United States, and it does not allude to involvement by the Government of Canada. ER 1361-1440.

8. Petition for Writ of Certiorari at 22-24, *Teck Cominco Metals, Ltd., v. Pakootas*, 552 U.S. 1095 (2008) (No. 06-1188), 2007 WL 621960.

C. The Court of Appeals' Opinion Comports with Comity Concerns and International Law.

1. The Court of Appeals' Decision Does Not Threaten International Comity and Foreign Relations.

The principle of international comity is not violated unless application of CERCLA to Teck makes it impossible for Teck to comply with United States and Canadian law. *See Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 799 (1993) (no conflict exists where a person subject to regulation by two states can comply with laws of both); *Société Nationale Industrielle Aéropastiale v. United States Dist. Ct. for S. Dist. Of Iowa,* 482 U.S. 522, 555 (1987) ("[T]he threshold question in a comity analysis is whether there is a true conflict between domestic and foreign law"). Application of U.S. law to foreign conduct causing domestic injury does not violate comity principles. *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 165 (2004). Having failed to explain how remediating its hazardous substances in the United States will make it impossible to comply with Canadian law, Teck and amici have not established any comity concern.

Teck raised the same comity concerns it does here in its 2007 petition. The United States government previously explained these concerns are greatly overstated and do not warrant granting Supreme Court review. *See* Br. of United States 15-18.

Contrary to Teck's insinuation, the United States and Canada have dealt with international pollution issues in various ways, including litigation in federal courts. *See*

Br. of United States 15. First, the United States often attempts to achieve diplomatic solutions to transnational pollution issues. *Id.* Second, as Teck notes, the United States has discretion under the Boundary Waters Treaty (BWT)[9] to seek advice or dispute resolution, and has previously sought such advice jointly with Canada, though the treaty does not require the United States to do so. *Id.* Finally, there has been litigation of transborder pollution disputes in the United States courts. *Id.* 15-16 (citing *Her Majesty the Queen in Right of Ontario v. United States EPA,* 912 F.2d 1525 (D.C. Cir. 1990); *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.,* 495 F.2d 213 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974)).[10] Thus, in practice, the United States and Canada have resolved transnational pollution issues satisfactorily in various ways, including litigation, without adverse implications for international comity. *See* Br. of United States 16.[11]

---

9. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Gr. Brit.-U.S., Jan. 11, 1909, 36 Stat. 2448.

10. *See also Ohio v. Wyandotte Chems. Corp.,* 401 U.S. 493, 506-08 (1971) (litigation over pollution by Dow Canada that eventually harmed Lake Erie); *United States v. Hooker Chems. & Plastics Corp.,* 749 F.2d 968, 975 (2d Cir. 1984) (Province of Ontario suing to protect Canadian citizens harmed by U.S. company's pollution of Lake Ontario and the Niagara River); *Government of Province of Manitoba v. Norton,* 398 F. Supp. 2d 41 (D.D.C. 2005) (suit by Province of Manitoba against U.S. Secretary of Interior over water diversion project that could pollute Canadian waters).

11. In fact, the Government of Canada previously conceded that "some cases involving transboundary pollution may appropriately be resolved in the domestic courts of Canada or the United States." 2007 Br. of Canada 6.

Furthermore, the United States has explained that the unique and compelling nature of this case mitigates any comity concerns. Notably, the UAO issued to Teck represents the first time in 39 years since CERCLA's enactment that EPA has sought to compel a foreign party to take a response action with respect to domestic pollution resulting from actions in a foreign country. Br. of United States 16. These unique circumstances are unlikely to recur in a substantial way that would heighten the issue of comity. Moreover, the court of appeals' opinion does not threaten to disrupt the country's ties with Canada. *Id.* The United States explained that the assertion of jurisdiction is consistent with considerations of international comity given the "direct and compelling United States interest" involved. *Id.*

Finally, notwithstanding Teck and amici's references here, neither Canada nor the United States have invoked the BWT or any other treaty in the 15 years this case has been pending. To claim now that courts should defer to these institutions when no nation has even attempted to invoke them does not persuade.

2. The *Charming Betsy* Doctrine Does Not Dictate a Different Result.

The *Charming Betsy*[12] doctrine does not support reversal.[13] First, no conflict with international law or

12. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

13. Also, Teck waived this argument by not raising it in the trial court or court of appeals (both in this appeal and the 2006 interlocutory appeal).

comity exists. The concerns underlying the canon are "much less serious" where the Executive Branch urges the interpretation that allegedly violates international law. *ARC Ecology,* 411 F.3d at 1102. In such circumstances, courts presume the President has "evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *Id.* Here, the United States has concluded that, because of the "direct and compelling United States interest" involved, the court of appeals' decision does not violate treaties with Canada or threaten to disrupt ties with Canada. Br. of United States, 15-16. And it was the United States EPA that first asserted CERCLA against Teck by issuing the UAO.

Second, the *Charming Betsy* doctrine is inapplicable because there is "no conflict with international law to avoid." *United States v. Corey,* 232 F.3d 1166, 1179 (9th Cir. 2000). Amicus Canada cites three international treaties that it contends conflict with the court of appeals' opinion: the BWT, the International Joint Commission, and the Ottawa Convention. 2019 Br. of Canada 13-14. But these international agreements merely create an optional means for governments to resolve transboundary disputes—they do not implicitly or explicitly require all qualifying disputes to be resolved thereunder. Thus, pursuing litigation does not directly conflict with any the aforementioned treaties.

Moreover, nothing in international law or comity requires a court to defer to an optional diplomatic process. *See Fed. Trade Comm'n v. Compagnie De Saint-Gobain-Pont-A-Mousson,* 636 F.2d 1300 (D.C. Cir. 1980) (refusing to defer to optional processes in Hauge Convention);

Wyandotte, 401 U.S. at 507 (Douglas, J., dissenting on other grounds) (BWT "does not evince a purpose on the part of the national governments of the United States and Canada to exclude…other remedies for water pollution").

Finally, even applying the *Charming Betsy* doctrine does not support Teck. This canon of construction presumes that Congress intended to comply with international law absent its express indication to the contrary. Amicus Canada's argument assumes that international law prohibits CERCLA from applying in this case. 2019 Br. of Canada 11-12. This assumption is wrong. International law recognizes the "general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control…"[14] International law permits nations to prescribe and enforce laws to protect their territorial interests from transboundary harm. Restatement (Third) of Foreign Relations Law of the United Sates (Restatement) §402(1)(c). When a nation has jurisdiction to prescribe, it "may employ judicial or nonjudicial measures to induce or compel compliance with its laws or regulations." Restatement §431(1). The court of appeals' decision is consistent with international law and the *Charming Betsy* doctrine therefore has no application here.[15]

14. Legality of the Threat of Use of Nuclear Weapons in Armed Conflicts, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

15. *See also* Br. of United States 17-18.

II. PERSONAL JURISDICTION WAS ESTABLISHED BASED ON TECK'S PURPOSEFUL USE OF THE UCR AS ITS CHOSEN DISPOSAL FACILITY.

Teck argues that the court of appeals' application of the well-established "effects" test from *Calder* to its "intentional" and "purposeful" disposal of its wastes in the UCR did not take account of this Court's decision in *Walden* and conflicts with decisions from other circuits. This argument misreads *Calder* and *Walden* and is foreclosed by the trial court's findings of fact. Teck's intentional, extensive, and purposeful use the UCR as a free waste disposal facility makes personal jurisdiction plain.

Applied here, *Calder* requires proof that Teck (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. The court of appeals' application of this test was compelling and dispositive. The trial court found that Teck's leadership knew Trail smelter wastes travelled downstream to Washington, where its slag was found on Washington beaches. Teck knew its wastes were harming the Washington environment and that it was, in effect, "dumping waste into another country" and "using the Columbia River as a 'free' and 'convenient disposal facility." The trial court determined that "the very purpose of Teck's disposal practices [was] that the substances would come to be located at the UCR Site." Pet. App. 129a. Based on this and other evidence, the court was satisfied Teck had "expressly aimed" its waste at the State of Washington, supporting jurisdiction in the district court.

Moreover, exercising jurisdiction here cannot be said to "offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457 (1940)). As the court of appeals observed, "there would be no fair play and no substantial justice if Teck could avoid suit in the place where it deliberately sent its toxic waste." Pet. App. 17a.

The court of appeals' opinion fits well with this Court's subsequent opinion in *Walden*. In addressing a claim of jurisdiction in Nevada based on a wrongful seizure of money in Georgia, the Court counseled that the constitutionally required "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden,* 571 U.S. at 285. That is exactly what the trial court and the court of appeals did here by focusing on Teck's purposeful use of the land and waters of the State of Washington as a "free" disposal facility. That the State of Washington is one of the plaintiffs only affirms that the injury at issue was suffered by the forum state.

Teck ignores this guidance in *Walden* and argues instead that the jurisdictional focus must be on its compartmentalized understanding of its conduct, claiming that its conduct occurred exclusively in Canada and not in Washington. This misreads *Walden* because the question is whether the conduct has sufficient relation to the forum state, not strictly where the conduct occurred. *Walden* explains that defendant's suit-related conduct must "create a substantial connection with the forum state" and that "the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State."

Walden, 571 U.S. at 284 (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985)) (emphasis in original). This standard is easily met here based on the trial court's findings that Teck purposefully availed itself of Lake Roosevelt as a free disposal facility for its smelter wastes.

Walden rejected jurisdiction grounded merely in contact with the plaintiffs and not the forum state. *Walden,* 571 U.S. at 284-85. This guidance has no application here because the case is not grounded in a transaction or event divorced from the forum state. Teck chose to use the UCR as a "convenient disposal facility," fully aware that hazardous substances would be released into Washington's environment. Teck could have—as it does now—hauled its waste away for terrestrial disposal. Its unilateral decision to dispose of millions of tons of hazardous substances in the UCR for decades unquestionably "connects [Teck] to the forum in a meaningful way." *Walden,* 571 U.S. at 290.

Teck employs a selected, partial reading of the court of appeals' opinion to conjure a circuit conflict regarding application of *Walden*. Teck begins by suggesting that the court of appeals found jurisdiction solely because Teck "knew the Columbia River carried waste…downstream," Pet. 23 (quoting Pet. App. 16a), and suggesting that jurisdiction was grounded solely in knowledge of a foreseeable impact in the forum state. In making this argument, Teck ignores the much stronger findings of fact cited by the court of appeals demonstrating that Teck purposely availed itself of Lake Roosevelt in the forum state as a free disposal site for almost ten million tons of waste. Like the Florida-based libelous article in *Calder,* this remote action had intended consequences in the forum state sufficient for jurisdiction. Teck argues that *Walden*

"cabined" the *Calder* effects test in footnote seven. Pet. 25. Rather than limiting *Calder,* the footnote endorsed its reach to authorize jurisdiction for remote conduct with knowledge of substantial impact in the forum state. Teck's conduct easily meets that test.

Teck's citation of *Ariel Investments, LLC v. Ariel Capital Advisors, LLC,* 881 F.3d 520 (7th Cir. 2018) is no help because there the defendant had no connection with the forum state and was located thousands of miles away—not unlike the facts in *Walden. Id.* at 521-22. In *Ariel,* the plaintiff, located in Illinois (the forum state), had the same name as a firm located in Florida, creating potential Lanham Act liability based on customer confusion. *Id.* The defendant had no contact with Illinois, so jurisdiction could not be found. These facts have no resemblance to Teck's conduct here.

Teck urges that the Second and Fifth circuits differ from the Ninth Circuit by rejecting arguments that defendant's knowledge is sufficient. Pet. 27-28. This does not persuade because the Ninth Circuit did not anchor its analysis in mere "knowledge," and applied the trial court's findings showing that Teck intentionally availed itself of the forum state with the "very purpose" of using it as a free and convenient waste disposal site. Pet. App. 129a.

Finally, Teck argues that *Calder* applies only to intentional torts. The cases it cites principally refuse to apply *Calder* to mere negligence. *E.g. Louis Vuitton Malletier, S.A. v. Mosseri,* 736 F.3d 1339, 1357, n.11 (11th Cir. 2013).[16] In this, they are in agreement with

16. Nor is there a circuit conflict because the *Louis Vuitton* court merely commented as dicta in a footnote that it did not disagree

the Ninth Circuit. Pet. App. 15a (*Calder* does not apply to claims of undifferentiated negligence). This is mandated by the "intentional act" requirement for *Calder* "effects" jurisdiction. *Id.* Nothing in either *Calder* or *Walden* indicates that "effects" jurisdiction turns on the classification of the form of action. The circuit cases Teck cites also fall short because, while they distinguish between negligence and intentional torts for jurisdictional purposes, they do not reject application of *Calder* to strict liability statues involving intentional conduct, such as this case. *See, e.g., Marten v. Godwin,* 499 F.3d 290, 296-97 (3d Cir. 2007).

III. *PAKOOTAS I* CORRECTLY ANALYZED THE SCOPE OF "ARRANGER" LIABILITY UNDER § 9607(a)(3) AND THIS COURT'S STANDARDS FOR REVIEW ARE NOT MET.

Since 2008, when this Court denied Teck's Petition for Writ of Certiorari on this issue, the legal landscape regarding this issue has not changed. The *Pakootas I*

---

with "dicta in a footnote" from another case. *Louis Vuitton,* 736 F.3d 1357 n.11 (citing *Oldfield v. Pueblo De Bahia Lora, S.A.,* 558 F.3d 1210, 1220 n.28 (11th Cir. 2009)). Teck cites several Third Circuit cases applying the effects test to intentional tort claims, but none of the cases holds the test applies *exclusively* to intentional torts. *See* Pet. 29 (citing *Isaacs v. Arizona Bd. of Regents,* 608 Fed. Appx. 70, 74-75 (3d Cir. 2015); *Marten v. Godwin,* 499 F.3d 290, 297-99 (3d Cir. 2007)). Finally, Teck's citation to a Tenth Circuit decision applying the effects test in a strict liability products liability claim certainly does not conflict with the court of appeals' opinion. *See Old Republic Insur. Co. v. Continental Motors, Inc.,* 877 F.3d 895, 907-08, 916. n.34 (10th Cir. 2017) (merely "question[ing]" in dicta whether the test applies beyond the defamation context).

opinion on this point has not been criticized by any court. In fact, other than *Pakootas I*, no court of appeals has decided the question of whether liability under Section 9607(a)(3) requires involvement of a third party. Thus, there is no reason for this Court to review this decision.

In its 2007 petition to this Court, Teck claimed a "direct conflict" regarding the requirements of Section 9607(a)(3) based on the First Circuit decision in *Capuano,* 381 F.3d 6.[17] Teck now labels this a tension, Pet. 30, implicitly recognizing that *Capuano* did not decide the question at issue here. In *Capuano,* the owner of hazardous substances arranged with a broker to dispose of them. *Capuano,* 381 F.3d at 25. As the United States observed in its 2007 amicus brief, *Capuano* "did not present the question whether a person who disposes of hazardous substances *without* the involvement of a third party can be liable as an arranger." Br. of United States 19 (emphasis in original). It instead answered the different question of whether arranger liability may only be imposed on the owner or possessor of hazardous wastes, and not on a party brokering disposal. *Capuano,* 381 F.3d at 23. The court's passing comment that "disposal or treatment must be performed by another party or entity" was *dictum* as a third party was involved in that case.[18] The United States' amicus brief rightly concluded that Teck had cited

17. Petition for Writ of Certiorari at 25-28, *Teck Cominco Metals, Ltd., v. Pakootas*, 552 U.S. 1095 (2008) (No. 06-1188), 2007 WL 621960.

18. Moreover, the defendant broker was also found liable as an "operator," so the appellate court's comments regarding arranger liability were unnecessary to affirm liability. *Capuano,* 381 F.3d at 22-23.

no case in which the arranger-liability question at issue here was outcome-determinative. Br. of United States 20. In short, there was no direct conflict between the circuits warranting this Court's review.[19] That remains the case.

Any tension in the cases has not been noted in subsequent decisions. Neither Teck nor amici identifies any case decided since *Pakootas I* in which any court has even taken up the question of whether arranger liability requires the involvement of a third party. In fact, it appears that *Pakootas I* is the only case deciding this question. As the United States observed, this may be because the circumstances of the case are uncommon,[20] but it surely indicates that it does not warrant review by this Court.

Teck argues that *Pakootas I* was undermined by this Court's analysis of arranger liability in *Burlington Northern*. In Teck's view, *Burlington Northern* "assumed" that arranger liability requires a third party. What Teck labels an assumption was merely the Court's framing of the question of whether the arranger—who in that case contracted to transport hazardous substances—could be held liable for accidental spills at issue in that case. *Burlington Northern,* 556 U.S. at 603-04, 612-13. Far from a holding or even a discussion of the need for a third

---

19. Any disagreement in dicta is not a basis for review. *See Bunting v. Mellen,* 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari) ("We sit, after all, not to correct errors in dicta; '[t]his Court reviews judgments, not statements in opinions") (quoting *California v. Rooney,* 483 U.S. 307, 311 (1987)) (alteration in original).

20. *See* Br. of United States 20.

party for arranger liability, the Court's comments were offered in context of analyzing the shipper's necessary level of intent to be liable for releases occurring in performance its agreement to ship hazardous material. *Id.* at 610-13.

Teck invokes the *Burlington Northern* Court's discussion of the meaning of "arrange" but close examination shows that it actually rebuts Teck's argument. The Court looked to the dictionary definitions of "arrange" to ascertain its meaning, which include "action directed to a specific purpose" and "to make preparations for; plan." *Id.* at 610-11. These definitions describe actions that do not require third party involvement.[21] Employing these definitions, the Court concluded that to satisfy the plain language of the statute, "an entity may qualify as an arranger under Section 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance." *Id.* at 611. That application of the statute easily fits Teck's conduct at issue here.

Ignoring the Court's commonsense understanding of the meaning of "arrange," Teck resists liability by digging deep into the clauses of the section searching for a loophole to avoid responsibility for its disposal practices. The opening words of Section 9607(a)(3) suggest otherwise as it begins with broad reach: "Any person who by contract, agreement, or otherwise arranged for disposal or treatment…." "Contract" or "agreement" could be

21. A person may take "action directed to a specific purpose"—like disposing of hazardous substances—individually without involving a third party. Likewise, a party may "make preparations for" and "plan" for the disposal of its hazardous substances without involving a third party.

read to require a third party, but "or otherwise" brings in other forms of arrangement. Amici invoke the *ejusdem generis* canon of construction to argue that "otherwise arranged" must be limited by the preceding specific listing of "contract" or "agreement," citing *United States v. Cello-Foil Products., Inc.,* 100 F.3d 1227, 1231 (6th Cir. 1996). This case is off point as it is concerned with requisite intent, as later addressed by *Burlington Northern. Cello-Foil Products,* 100 F.3d at 1231. The canon is not rigidly applied to require that multiple statutory terms be mere synonyms. *See Ali v. Federal Bureau of Prisons,* 552 U.S. 214, 227 (2008) ("[W]e do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase"). It is applied to prevent use of "catch all" provisions to expand the reach of a statute to conduct beyond the target of Congress' regulatory intent. *See, e.g., Yates v. United States,* __ U.S. __, 135 S. Ct. 1074, 1086-87 (2015) (rejecting argument that fish are "tangible objects" within the meaning of Sarbanes-Oxley Act's provision prohibiting destruction or falsification of records). Section 9607(a)(3) targets arrangements for disposal of waste, so the canon must be applied in the context of specifying how arrangement may occur. *Hughey v. United States,* 495 U.S. 411, 419 (1990) (examining context and intent of restitution statute to elucidate scope of catchall provision). Thus, "contract" and "agreement" are examples of forms of prohibited arrangement, but necessarily are not the exclusive forms. Had Congress intended such a restricted understanding, it did not need the language at issue here. These terms manifest Congress' intent to reach all the ways in which a polluter can accomplish disposal of its wastes. Employing the canon, amici purport to apply this Court's guidance on

forms of arrangement in *Burlington Northern*[22] but omit the Court's direction that "[i]n common parlance, the word 'arrange' implies action directed to a specific purpose."[23] Here, Teck's intentional steps to use the Columbia River to transport its wastes to its selected disposal facility—the Upper Columbia River and Lake Roosevelt—come within the meaning of "otherwise arrange."[24]

Rather than apply the broad introductory language prescribing liability for polluters who arrange for disposal of their wastes, Teck focused on a subsequent clause not obviously intended to limit arranger liability to bilateral agreements. The language in question follows the quotation above and states: "of hazardous substances owned or possessed by such person, by any other party or entity, at any facility…." 42 U.S.C. § 9607(a)(3). The court of appeals explained that there are two different conceivable interpretations of the meaning of this clause. Neither is grammatically correct as drafted, but this should not deter interpretation as the court of appeals and other courts have recognized that "neither a logician or a grammarian

---

22. Brief for the Chamber of Commerce of the United States and the National Mining Association (Br. of COC/NMA) 8.

23. *Burlington Northern,* 556 U.S. at 611. The Court also noted the dictionary definition of "arrange" as "to make preparations for," *id.*, and circuit authority stating that "words 'arranged for'…imply intentional action." *Id.* (quoting *Amcast Indus. Corp., v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993)).

24. Teck arranged to dispose of its wastes in the UCR by purposefully designing its waste disposal operations to accomplish that result. Applying CERCLA to Teck is vastly different from applying a record destruction statute to fish. *See Yates,* __ U.S. __, 135 S. Ct. at 1086-87.

will find comfort in the world of CERCLA." Pet. App. 86a. If Teck is right that the clause requires involvement of another party or entity, the commas surrounding "by any other party" must go, but if the court of appeals and Respondents are right that arranger liability extends to disposal of hazardous substances owned by another, an "or" should be inferred.

Faced with an ambiguity that required textual modification either way, the court adopted the interpretation that squared with the intent of CERCLA.[25] Pet. App. 86a-89a; *Exxon Corp. v. Hunt*, 475 U.S. 355, 371 (1986) ("[The overall purpose of a statute is a useful referent when trying to decipher ambiguous statutory language"). Recognizing CERCLA's "overwhelmingly remedial statutory scheme," the court reasoned that Teck's argument would "create a gap in the CERCLA liability regime" by allowing a polluter to avoid liability by disposing of wastes without involving a transporter as an intermediary, so it must be rejected. Pet. App. 88a-89a. Amici urge that the remedial purpose of CERCLA is no guide here, Br. of COC/NMA at 11, citing cases in which the meaning of the clause was clear and well-grounded in the statute's text and structure. *E.g. CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (CERCLA did not preempt state law statute of repose). That is not the case here as Respondents' interpretation squares with this Court's understanding of the meaning of "arrange" and is

25. Teck's convoluted attempt to "clarify" the statutory provision—separating out the who, what, when, and how—masks its own textual alteration. *See* Pet. 32. Breaking apart the provision into four sentences conceals Teck's deletion of two commas in the statutory text—precisely what the court of appeals grappled with and rejected. The statute is ambiguous because there are two differing, reasonable interpretations.

consistent with comprehensive liability for polluters who "arrange" to dispose of their wastes.

Teck disagrees with this conclusion, but no court has sided with it and disagreed with the court of appeals' holding. In search of a circuit split, Teck invokes cases discussing whether an arranger must own the wastes in question. *E.g. Chevron Mining Co., v. United States,* 863 F.3d 1261, 1281 (10th Cir. 2017) ("Arranger liability under CERCLA applies only to a person who arranges for disposal 'of hazardous substances *owned or possessed by such person.*'") (quoting 42 U.S.C. 9607(a)(3)) (emphasis in original). These cases do not decide the question presented here (whether a third party must be involved) and do not mention the decision in *Pakootas I*.[26] Given their focus on necessary ownership of waste, the cases Teck cites do not address the relationship of the ownership clause to

26. None of the cases cited by Teck have exculpated a defendant that generated and directly disposed of its waste. *See* Pet. 35-36; *Cello-Foil Prods.,* 100 F.3d at 1230-31 (analyzing liability of companies that entered into arrangement whereby they shipped used drums to a facility where they were emptied and reconditioned, and such activities resulted in releases of hazardous substances); *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.,* 343 F.3d 669, 678 (3d Cir. 2003) (analyzing liability of company that shipped material to a separate company for processing into usable form for releases from second company's processing); *United States v. Vertac Corp.,* 46 F.3d 803, 810 (8th Cir. 1995) (analyzing liability of United States for waste released by a company with which it contracted); *Chevron Mining,* 863 F.3d 1261 (holding United States liable as owner of property where it permitted company to dispose mining tailings, but refusing to also find United States liable as arranger where, aside from selling property to the mining company for use as a tailings disposal site and issuing permits for pipelines to carry tailings over government property, government had no role in tailings disposal).

the earlier framing of arranger liability, or the intention of the statute as applied to an arranger that did not involve others in its disposal practices. Thus, there is no conflicting analysis to address and no basis for this Court's review.

Finally, amici the United States Chamber of Commerce and the National Mining Association are concerned that *Pakootas I* undermines decisions rejecting liability for parties who lack control over the wastes at issue. *E.g. Concrete Sales & Servs., Inc. v. Blue Bird Body Co.,* 211 F.3d 1333 (11th Cir. 2000); *Vertac Chem. Corp.,* 46 F.3d 803. This concern is misplaced because these cases address the requisite intent for arranger liability and do not discuss the interpretation of the language at issue here. *Concrete Sales & Servs.,* 211 F.3d at 1337; *Vertac Chem. Corp.,* 46 F.3d at 810-11. It is noteworthy that the intent requirement imposed in these cases and by *Burlington Northern* protects against amici's fear of liability based on "tangential involve[ment]" in disposal of wastes. Br. of COC/NMA, 13.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

PAUL J. DAYTON
Counsel of Record
BRIAN S. EPLEY
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, WA 98164
(206) 447-7000
pdayton@omwlaw.com

Counsel for Respondent the Confederated Tribes of the Colville Reservation