No. 18-1160

In the Supreme Court of the United States

TECK METALS LTD., FORMERLY KNOWN AS TECK COMINCO METALS, LTD., PETITIONER

v.

THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, ET AL.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The National Mining Association ("NMA") is the national trade association of the mining industry. NMA's members include the producers of most of the Nation's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry.

Amici seek to highlight in this brief the importance of this case to the U.S. business community and the negative consequences that would flow from failing to review the Ninth Circuit's flawed and expansive interpretation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties were given timely notice and have consented to this filing.

There are thousands of CERCLA sites throughout the United States and their cleanup costs can exceed tens, if not hundreds, of millions of dollars. In light of CERCLA's strict-liability regime, clear and predictable rules are of critical importance to individuals and businesses potentially subject to liability under the statute. Given the potential for significant response costs associated with environmental contamination, and how frequently courts confront liability determinations under CERCLA, the scope of arranger liability is an important and recurring issue that warrants this Court's immediate review. *Amici* have a vital interest in promoting a predictable legal framework governing the scope of arranger liability—something that is seriously threatened by the Ninth Circuit's unprecedented expansion of CERCLA liability in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision conflicts with this Court's consistent and repeated instruction to construe CERCLA in accordance with "the statute's text and structure." *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 12 (2014); see also *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 135-137 (2007); *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). More specifically, in defining the scope of arranger liability—the type of liability at issue here—this Court has emphasized the importance of the statute's text. See *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 609-613 (2009). Adhering to CERCLA's text ensures that individuals and businesses receive adequate notice and guidance from "the provisions of our laws," rather than being subject to the policy

preferences of individual judges. See *Cooper Indus.*, 543 U.S. at 167 (citation and internal quotation marks omitted).

CERCLA imposes strict liability upon four broad categories of potentially responsible parties ("PRPs") for remedial actions and response costs associated with the release of hazardous substances. 42 U.S.C. § 9607(a). This case concerns CERCLA's "arranger" liability provision, which 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 * * * .

Id. § 9607(a)(3). As the First Circuit has explained, § 9607(a)(3)'s meaning is clear: "for arranger liability to attach, the disposal or treatment must be performed by another party or entity * * * ." *Am. Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 24 (1st Cir. 2004); see also *Chevron Mining Inc.* v. *United States*, 863 F.3d 1261, 1282 (10th Cir. 2017) (stating that § 9607(a)(3) "most naturally reads as the arrangement 'for disposal or treatment by any other party or entity'" (alteration omitted)).

In this case, the Ninth Circuit again went "far beyond the statutory language" to expand "the meaning of arranger liability beyond any cognizable limit * * * ." See *United States* v. *Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 954, 961 (9th Cir. 2008) (Bea, J.,

dissenting from denial of rehearing en banc in another case in which the Ninth Circuit misconstrued arranger liability). The Ninth Circuit, not content with the result dictated by the statute's plain language, rewrote § 9607(a)(3)—and acknowledged rewriting it—to achieve its desired policy outcome. The Ninth Circuit concluded that when Congress enacted CERCLA, what it really meant to say was that a party may be liable as an arranger if it arranged for disposal of hazardous substances "owned or possessed *by such person [or] by any other party or entity*." Pet. App. 87a (alteration and emphasis in original). This judicial amendment—inserting the word "or" and eliding an existing comma—allowed the Ninth Circuit to conclude that a party can arrange with itself to dispose of hazardous waste. That conclusion cannot be squared with CERCLA's text or common English. Moreover, it puts the Ninth Circuit in direct tension with the First Circuit's interpretation of § 9607(a)(3), see Pet. 34-36, although the scope of arranger liability is "an area of the law where uniformity among circuits is of paramount importance." *Burlington*, 520 F.3d at 952 (Bea, J., dissenting from denial of rehearing en banc).

To justify its decision to rewrite § 9607(a)(3), the Ninth Circuit noted that unless it stretched the meaning of "arranged for" to cover petitioner—*i.e.*, a foreign generator who did not arrange with another party to dispose of hazardous waste—there would be "a gaping and illogical hole in the statute's coverage." Pet. App. 89a. But as this Court has made clear time and again, statutory interpretation is not a "roving license" for courts "to disregard clear language simply on the view that * * * Congress 'must have intended' something

broader." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014).

What's more, the Ninth Circuit's reading expanded arranger liability in *two separate ways*, neither of which is grounded in the text and structure of the statute. First, the Ninth Circuit held that a party can be liable as an arranger "for arranging *with itself*." See Pet. 29-36. Second, and perhaps more importantly, by removing an arranger's ownership and possession requirement from § 9607(a)(3), the Ninth Circuit has expanded arranger liability to cover parties that "arranged for disposal of wastes owned 'by *any* other party or entity.'" Pet. App. 86a-87a (emphasis added). Under that standard, a nonowner who merely facilitates the disposal of hazardous waste—without ever owning, possessing, transporting, or even coming in contact with the waste—is potentially liable for the full cost of cleanup. Such a radical expansion of arranger liability has far-reaching consequences.

Upholding the Ninth Circuit's drastic expansion of arranger liability creates uncertainty about a statute that poses the risk of tens or hundreds of millions of dollars of liability on parties based on a strict-liability standard. This Court's review is warranted to provide clarity on this important and recurring issue.

ARGUMENT

"As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). To effectuate its remedial policy, CERCLA imposes strict liability upon four broad categories of PRPs, including those

who "arrange[] for" disposal of hazardous waste. 42 U.S.C. § 9607(a). "[A]ny party meeting one of the statutory definitions is *potentially* liable for the full cost of cleanup." *NCR Corp.* v. *George A. Whiting Paper Co.*, 768 F.3d 682, 689 (7th Cir. 2014). CERCLA also includes generous statutes of limitations. See 42 U.S.C. § 9613(g)(2)-(3). And there are more than 1,300 sites across the United States currently on the National Priorities List. National Priorities List Sites—by State, U.S. Envtl. Prot. Agency (last visited Mar. 27, 2019), https://bit.ly/2TDt4gL. Such sites generally have the highest "chances of costly activity and liability for potentially responsible parties." *Montrose Chem. Corp. of Cal.* v. *EPA*, 132 F.3d 90, 91 (D.C. Cir. 1998) (citation and internal quotation marks omitted). Given the statute's expansive reach and strict-liability regime, clear and predictable rules governing the scope of CERCLA liability are essential.

This Court has emphasized that the scope of arranger liability is defined by "the language of the statute." *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 609-612 (2009). Adhering to the statute's text provides regulated parties with fair notice and ensures that the parties actually responsible for environmental contamination are held accountable. By rewriting the language Congress enacted, the Ninth Circuit's decision here creates a legal regime in which regulated parties are subject to ambiguous and unpredictable rules, eliminating the regulatory certainty that is essential in this important and recurring area of the law. This Court's review is warranted.

A. CERCLA's Text Makes It Clear That Arranger Liability Attaches Only When A Person Arranges with Another Party to Dispose of Hazardous Waste

Any analysis of arranger liability must begin with "the language of the statute." *Burlington*, 556 U.S. at 609. CERCLA's text and structure highlight the Ninth Circuit's error in holding that a party can "arrange for" disposal of hazardous waste with itself.

CERCLA imposes strict liability for costs associated with environmental contamination upon

> 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). Congress did not define the phrase "arrange[] for," *Burlington*, 556 U.S. at 610 (alteration omitted), and "CERCLA, unfortunately, is not a model of legislative draftsmanship," *United States* v. *Bestfoods*, 524 U.S. 51, 56 (1998) (citation and internal quotation marks omitted). Despite its flaws, however, § 9607(a)(3)'s text is clear.

Under § 9607(a)(3), arranger liability attaches only when a person enters into a "contract" or "agreement" to dispose of hazardous substances, or "otherwise arrange[s]" for such disposal. Both "contract" and "agreement" require a transaction between two or more parties. See BLACK'S LAW DICTIONARY (10th ed.

2014) (defining "contract" as "[a]n agreement between two or more parties," and defining "agreement" as "[a] mutual understanding between two or more persons"); see also *Burlington*, 556 U.S. at 610-611 (undefined terms in CERCLA must be given their "ordinary meaning").

Section 9607(a)(3) does not define all the ways in which a party can "arrange for" disposal, but under well-settled principles of statutory interpretation, the term "otherwise arranged"—a catch-all provision following two specific terms—must "embrace[] the concepts similar to those of 'contract' and 'agreement.'" *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) (citations omitted). Indeed, the ordinary meaning of "arrange" includes "to bring about an agreement or understanding concerning[.]" *Burlington*, 556 U.S. at 611 (quoting WEBSTER'S COLLEGIATE DICTIONARY 64 (10th ed. 1993)). Taking this generally accepted meaning, in combination with the interpretive requirement that "arrange for" must be defined by reference to "contract" and "agreement," makes clear that an arrangement under § 9607(a)(3) also requires at least two parties. This conclusion is further strengthened by the statute's "by any *other* party or entity" language, 42 U.S.C. § 9607(a)(3) (emphasis added), which unambiguously requires more than one party's involvement. Thus, as the district court recognized below, "[t]he 'plain language' of § 9607(a)(3) would appear to require another party, other than just the defendant, be involved in the disposal of the hazardous substances." Pet. App. 201a.

Reading "arrange" in § 9607(a)(3) to require a transaction involving two or more parties is consistent with Congress's use of the words "arrange" and

"arrangement" in other sections of CERCLA. Section 9604, for example, authorizes the President "to *remove or arrange for* the removal of" hazardous substances, 42 U.S.C. § 9604(a)(1) (emphasis added), plainly drawing a distinction between the President removing hazardous waste himself and "arrang[ing] for" another party to do so on his behalf. See *Ohio* v. *EPA*, 838 F.2d 1325, 1327 (D.C. Cir. 1988) (stating that § 9604(a) gives the President the option "to act or finance action" to address hazardous waste). That provision further provides that the President may "*contract[] with or arrange[] for* a qualified person to assist the President in overseeing and reviewing the conduct" of a remedial investigation or feasibility study. 42 U.S.C. § 9604(a)(1) (emphasis added). Similar examples of Congress using "arrange" to mean a transaction involving multiple parties can be found throughout CERCLA.[2]

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[2] See, *e.g.*, 42 U.S.C. § 9620(d)(2)(B) ("It shall be an appropriate factor to be taken into consideration * * * that *the head of the department, agency, or instrumentality* that owns or operates a facility *has arranged with the Administrator or appropriate State authorities* to respond appropriately * * * to a release or threatened release of a hazardous substance." (emphases added)); *id.* § 9627(c) ("Transactions involving scrap paper, scrap plastic, scrap glass, scrap textiles, or scrap rubber (other than whole tires) shall be deemed *to be arranging for recycling if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material)* can demonstrate by a preponderance of the evidence that all of the following criteria were met at the time of the transaction[.]" (emphasis added)); *id.* § 9661(d) ("*The Administrator shall enter into a cooperative agreement* with an appropriate public agency or authority of the State of New York under which the Administrator shall *maintain or arrange* for the maintenance of all properties within the Emergency Declaration Area that have been acquired

This understanding also comports with CERCLA's remedial objective. Courts have long understood arranger liability as Congress's way to ensure that PRPs do not "evade liability by 'contracting away' responsibility." *United States* v. *Gen. Elec. Co.*, 670 F.3d 377, 382 (1st Cir. 2012). Section 9607(a)(3) thus prevents a PRP from freeing itself from liability "by selling or otherwise transferring a hazardous substance to another party for the purpose of disposal." *Team Enters., LLC* v. *W. Inv. Real Estate Tr.*, 647 F.3d 901, 907 (9th Cir. 2011); see also *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 678 (3d Cir. 2003) (arranger liability ensures that defendants cannot "simply close their eyes to the method of disposal of their hazardous substances" (citation and internal quotation marks omitted)). Given that legislative purpose, it is no surprise that courts generally have "assumed that arranger liability requires another party." See Pet. 32-33, 35-36 (discussing, *inter alia*, *Burlington*, 556 U.S. at 609-612); see also, *e.g.*, *Consolidation Coal Co.* v. *Ga. Power Co.*, 781 F.3d 129, 148 (4th Cir. 2015); *NCR Corp.*, 768 F.3d at 704-705.

The First Circuit, addressing the very question at issue in this case, reached a conclusion that is diametrically opposed to the Ninth Circuit's decision here, recognizing that "[t]he sentence structure of § 9607(a)(3) makes it clear that * * * for arranger liability to attach, the disposal or treatment must be performed by another party or entity * * * ." *Am. Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 23-24 (1st Cir. 2004). The Tenth Circuit similarly has explained that "the

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by any public agency or authority of the State." (emphases added)).

statute's plain language" demonstrates that "the clause 'by any other party or entity' does not apply to ownership of the hazardous substances but, as most courts have held, refers back to the previous clause, 'for disposal or treatment * * * .'" See *Chevron Mining Inc.* v. *United States*, 863 F.3d 1261, 1281-1283 (10th Cir. 2017).

CERCLA's text and structure demonstrate that a party cannot arrange with itself to dispose of hazardous waste. Far from creating "a gaping and illogical hole in the statute's coverage," Pet. App. 89a, interpreting § 9607(a)(3) to apply only to transactions between two or more parties is consistent with "the plain language of the statute" and "makes sure that the party getting paid for disposal or treatment * * * is liable while not insulating from liability the previous owner who arranged for the disposal or treatment." See *Chevron Mining*, 863 F.3d at 1281-1282.

B. The Ninth Circuit's Rewriting of § 9607(a)(3) Drastically Expands Arranger Liability and Is Significant

The Ninth Circuit, citing "CERCLA's overwhelmingly remedial" character, Pet. App. 89a (citation and internal quotation marks omitted), felt justified in rewriting the statutory language to ensure that petitioner would be held liable. But CERCLA's remedial purpose is not "a substitute for a conclusion grounded in the statute's text and structure." *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 12 (2014); accord *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) ("Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all."). Compounding the problem, the

Ninth Circuit stretched the meaning of § 9607(a)(3) to create two novel and expansive forms of arranger liability.

As explained, the Ninth Circuit held that a waste generator need not arrange with another party to dispose of the generator's hazardous substances to be liable as an arranger. See Pet. 29-36; Pet. App. 86a-87a, 91a-92a. To reach that conclusion, the Ninth Circuit had to change the language of § 9607(a)(3) to read:

> any person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed *by such person [or] by any other party or entity* . . . .

Pet. App. 87a (alterations and emphasis in original).

Doing so had two implications. First, as applied to petitioner, which "owned or possessed" certain wastes, the Ninth Circuit concluded that petitioner could have "arranged" with itself to dispose of its own hazardous waste—the statute imposes no requirement that it arrange with "any other party." To avoid reading that language out of the statute entirely, the Ninth Circuit had to give it some meaning, giving rise to the second expansion in liability: As the Ninth Circuit acknowledged, its insertion of the word "or" into § 9607(a)(3) means that "a party need not own [or possess] the waste to be liable as an arranger."[3] Pet. App. 87a.

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[3] This interpretation cannot be squared with the statute's text. See, *e.g.*, *Chevron Mining*, 863 F.3d at 1281 ("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))); *Team Enters.*, 647 F.3d at 913 (St. Eve, J., concurring) ("The plain language of the statute

Thus, under the Ninth Circuit's version of § 9607(a)(3), "parties can be liable * * * if they arranged for disposal of wastes owned [or possessed] 'by *any* other party or entity.'" Pet. App. 86a-87a (emphasis added). By eliminating the ownership/possession element, the Ninth Circuit extended arranger liability to cover parties who never own, possess, transport, or even come in contact with hazardous waste.

The reach of this new form of arranger liability is significant. It simply reads out of the statute a predicate requirement of arranger liability—once having "owned or possessed" the waste, see *supra* n.3—opening up liability to any number of third parties who may have been tangentially involved in causing wastes to be disposed of, if they were somehow involved in making arrangements. It also compounds the tension between the Ninth Circuit and other circuits. See, *e.g.*, *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333, 1338-1339 (11th Cir. 2000) (per curiam) (holding that manufacturer that facilitated the generator's purchase of hazardous substances was not an arranger because it did not "control or direct [the generator's] operation or disposal practices"); *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 811 (8th Cir. 1995) (concluding that the United States was not an arranger, even though it facilitated the disposal of hazardous waste, because it was not "actively involved" in the process); *Gen. Elec. Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281, 287 (2d Cir. 1992) (per curiam) (holding that oil companies were not arrangers because they did not "exercise control over * * * either

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indicates that a liable 'arranger' must own or possess the hazardous substance.").

the generation of or the disposal of waste oil"). The Ninth Circuit's approach "stretches the meaning of arranger liability beyond any cognizable limit."[4] See *United States* v. *Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 961 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc).

The scope of arranger liability under CERCLA is an important and recurring issue. There are thousands of CERCLA sites throughout the United States. See National Priorities List Sites—by State, U.S. Envtl. Prot. Agency (last visited Mar. 27, 2019), https://bit.ly/2TDt4gL. And those sites generate a significant amount of litigation. In Fiscal Year 2017 alone, the EPA initiated more than 1,900 civil judicial and administrative cases,[5] and between 1994 and 2007, approximately 81 CERCLA cases were filed each year in federal court by private plaintiffs.[6] The cleanup costs associated with CERCLA sites can

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[4] For example, a passive broker who is only tangentially involved in facilitating waste disposal is materially different from the arranger in *American Cyanamid*, who contracted directly with the transporters of the waste and "selected, secured, and directed the waste to the * * * site." See 381 F.3d at 9-10, 25 (holding that "a broker can be liable as an arranger if the broker controls the disposal of the waste"). Without control over the disposal process, a party cannot be "responsible for the * * * release of hazardous wastes." See *Morton Int'l*, 343 F.3d at 679; see also *Amcast Indus. Corp.* v. *Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993).

[5] Fiscal Year 2017 EPA Enforcement and Compliance Annual Results, U.S. Envtl. Protection Agency (Feb. 8, 2018), https://bit.ly/2CSsvd4.

[6] U.S. Gov't Accountability Office, GAO-09-656, *Superfund Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements* 39 (July 2009), https://bit.ly/2FWYsTC.

exceed tens, if not hundreds, of millions of dollars,[7] and liability under § 9607(a) is "strict, joint, and several." *Morrison Enters.* v. *McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002) (citation omitted); see also *Long Beach Unified Sch. Dist.* v. *Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994) (describing CERCLA liability as "a black hole that indiscriminately devours all who come near it" (citation and internal quotation marks omitted)). An arranger is therefore "jointly and severally liable for the *entire* harm to the Site * * * unless it can affirmatively establish some basis for dividing the harm." *Chem-Nuclear Sys., Inc.* v. *Bush*, 292 F.3d 254, 259 (D.C. Cir. 2002) (citations omitted); see also *Morrison Enters.*, 302 F.3d at 1133. Moreover, there are "many permutations of 'arrangements'" that § 9607(a) potentially encompasses. *Burlington*, 556 U.S. at 610; *see also NCR Corp.*, 768 F.3d at 704 ("What qualifies as 'arranging for disposal' * * * is clear at the margins but murky in the middle.").

C. The Ninth Circuit's Approach Ran Afoul of This Court's Well-Accepted Canons of Statutory Interpretation

This Court has emphasized that the scope of CERCLA must be construed in accordance with "the language of the statute." *Burlington*, 556 U.S. at 609-610;

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[7] See, *e.g.*, *Asarco LLC* v. *Atl. Richfield Co.*, 866 F.3d 1108, 1127-1128 (9th Cir. 2017) ($99.294 million for various response actions); *Lockheed Martin Corp.* v. *United States*, 833 F.3d 225, 230 (D.C. Cir. 2016) ($287 million in response costs, plus an additional $124 million to complete the cleanup); *New York State Elec. & Gas Corp.* v. *FirstEnergy Corp.*, 766 F.3d 212, 239 (2d Cir. 2014) ($94 million in cleanup costs, plus an additional $114 million in future cleanup costs).

see also *CTS Corp.*, 573 U.S. at 12; *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 134-136 (2007); *Cooper Indus.*, 543 U.S. at 167. To justify its departure from the statute's text, the Ninth Circuit pointed to CERCLA's somewhat confusing language. Pet. App. 86a. But the mere fact that a statute is "awkward, and even ungrammatical," does not render it ambiguous. *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004).

As explained, § 9607(a)(3)'s meaning is clear. See *supra* Section A. In fact, both the Ninth Circuit and the district court recognized here that the plain language of § 9607(a)(3) counsels that a third-party transaction is a prerequisite to liability. See Pet. App. 87a-88a, 201a; accord, *e.g.*, *Kaiser Aluminum & Chem. Corp.* v. *Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992) (holding that a party who "disposed of the [waste] itself" was not liable as an arranger).[8] The

[8] The Ninth Circuit rejected "the statement in *Kaiser Aluminum*" as ambiguous and dicta, Pet. App. 90a-91a, relying instead on *Cadillac Fairview/California, Inc.* v. *United States*, 41 F.3d 562 (9th Cir. 1994) (per curiam). Notably, *Cadillac Fairview* involved a "prearranged process" between the arrangers and a third party. See *id.* at 564-566; see also Pet. App. 82a (noting that the arrangers in *Cadillac Fairview* "sold a product to another party"). The arrangers in *Cadillac Fairview* pumped waste back to the plant operated by the third party, which then stored the waste "in pits near the * * * plant." 41 F.3d at 564. The arrangers thus generated the waste *and* delivered it "to another party" for disposal. See *id.* at 565-566. In any event, as the Tenth Circuit has explained, *Cadillac Fairview*'s conclusion that arranger liability attaches "not only to hazardous substances owned or possessed by the alleged-arranger but also to such substances owned or possessed 'by any other party or entity' * * * is untethered from CERCLA's text." See *Chevron Mining*, 863 F.3d at 1282-1283 (citing *Cadillac Fairview*, 41 F.3d at 565).

Ninth Circuit's justifications came down to punctuation and policy, neither of which is a basis for a court to override clear statutory language.

The Ninth Circuit first cast doubt on § 9607(a)(3)'s third-party transaction requirement because of the commas offsetting the phrase "by any other party or entity." Pet. App. 88a. *Amici* disagree with the Ninth Circuit's apparent assumption that setting off with commas the language "by any other party or entity" somehow undercuts the conclusion that arranger liability requires the presence of another party.

By using the phrase "such person" in connection with the "hazardous substances owned or possessed by" language, the sentence structure of § 9607(a)(3) unambiguously identifies the "person who * * * arrange[s] for disposal"—the only person mentioned in this provision—as the person who owns or possesses the hazardous substances. See *Chevron Mining*, 863 F.3d at 1281-1282. The comma before the phrase "by any other party or entity" draws a clear distinction between the "person" who owns the waste (and thus does the arranging) and the "other party or entity" disposing of it. And the comma following the phrase "by any other party or entity" highlights the distinction between an owner-arranger and an owner.[9] This reading of § 9607(a)(3) ensures that each phrase is given a "distinct meaning." Cf. *id.* at 1282-1283 & n.15

[9] Section 9607(a) imposes liability on both an owner who disposes of waste "at any facility * * * owned or operated by *another party or entity*," 42 U.S.C. § 9607(a)(3) (emphasis added), and an owner who disposes of waste at its own facility, see *id.* § 9607(a)(1); see also *Bestfoods*, 524 U.S. at 68 (explaining that a PRP's status depends on the relationship between the party and the facility).

(reading the ownership or possession requirement to apply to "*any* party's or entity's ownership or possession of the substances" would "render the 'owned or possessed' language entirely superfluous"). It also advances CERCLA's remedial purpose by imposing liability on both "the party getting paid for disposal or treatment" *and* "the previous owner who arranged for the disposal or treatment." *Id.* at 1282.

But even assuming the commas were misplaced, the Ninth Circuit would still be in error because "[t]he importance of statutory language depends not on its punctuation, but on its meaning." *Chickasaw Nation* v. *United States*, 534 U.S. 84, 98 (2001) (O'Connor, J., dissenting) (citing *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993)). When, as in this case, the statute's intent is clear, courts may "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute." *U.S. Nat'l Bank*, 508 U.S. at 462 (quoting *Hammock* v. *Farmers' Loan & Trust Co.*, 105 U.S. 77, 84-85 (1881)). And considering how the insertion of the word "or" into § 9607(a)(3) significantly expands the scope of arranger liability, a misplaced comma is the "more plausible" conclusion to be drawn for the provision's awkward structure. See *Crandon* v. *United States*, 494 U.S. 152, 170 (1990) (Scalia, J., concurring in the judgment) ("[A] misplaced comma is more plausible than a gross grammatical error * * * .").

The Ninth Circuit concluded that it was free to disregard the statute's language because, in its view, reading § 9607(a)(3) as imposing liability only when a party arranges with another party to dispose of hazardous waste "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-89a. To remedy this purported problem, and to achieve what it viewed to be a more just outcome, the Ninth Circuit literally rewrote the language Congress enacted.

By "read[ing] an absent word into the statute," the Ninth Circuit did not interpret the statute; the Ninth Circuit amended it. *Lamie*, 540 U.S. at 538. That the plain language of § 9607(a)(3) may leave a gap in the statute's coverage is not a problem within the power of a court to fix.[10] Even if it thinks "Congress could or should have done more," a court may not "revise [a] legislative choice," *Cyan, Inc.* v. *Beaver Cty. Emps. Retirement Fund*, 138 S. Ct. 1061, 1073 (2018), or "repair * * * a congressional oversight or mistake," *Logan* v. *United States*, 552 U.S. 23, 35 (2007). "[A] reviewing court's task is to apply the text of the statute, not to improve upon it." *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489, 508-509 (2014) (citation, internal quotation marks, and alteration omitted).

Rewriting § 9607(a)(3) to include the word "or" drastically expanded the scope of arranger liability under CERCLA beyond what Congress intended. If the plain language of § 9607(a)(3) creates a gap in CERCLA's arranger liability scheme, Congress, and not the

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[10] The Ninth Circuit theorized that unless it inserted the word "or" into § 9607(a)(3), a generator who disposed of waste "on the property of another" may not be liable under CERCLA. Pet. App. 88a-89a. That is not the case. See *Bestfoods*, 524 U.S. at 65 (stating that "a saboteur who sneaks into the facility at night to discharge its poisons out of malice" is "directly liable for the costs of cleaning up the pollution" (citing 42 U.S.C. § 9607(a)(2)).

courts, has the authority to fix it. See *Concrete Sales*, 211 F.3d at 1339.

* * * *

Given CERCLA's strict-liability regime and the potentially expansive nature of arranger liability, clearly defined and easily applied rules are essential. This Court has emphasized that "the plain language of the statute" provides these rules. See *Burlington*, 556 U.S. at 609-612; see also *Cooper Indus.*, 543 U.S. at 167. Defining the scope of arranger liability by reference to the statute's text creates a regulatory environment in which all parties know the rules of the game ahead of time—*before* they are inadvertently swept into CERCLA's strict-liability regime. Adhering to the statute also advances Congress's goal of ensuring that "'those actually responsible'" for environmental contamination are held accountable, while preventing the sweep of arranger liability from extending "beyond the bounds of fairness." See *Morton Int'l*, 343 F.3d at 678 (quoting *Bestfoods*, 524 U.S. at 55-56). In short, a legal framework rooted in the statute's language to define the scope of arranger liability serves two important purposes: providing regulated parties with fair notice and effectuating Congress's intent.

By untethering the scope of arranger liability from the statute's text, the Ninth Circuit has created a legal framework subject to ambiguous and potentially inconsistent rules. Without clear guidance grounded in the statute's text and its ordinary meaning, individuals and businesses are left to guess whether they fall within the scope of arranger liability—a particularly undesirable position given CERCLA's "'pay-first, split-the-bill later' regime." *NCR Corp.*, 768 F.3d at 686.

Interpreting § 9607(a)(3) to impose dramatically expanded liability is inconsistent with Congress's objective of ensuring that those parties "actually responsible" for environmental contamination bear the costs of cleanup. *Bestfoods*, 524 U.S. at 55-56. The Ninth Circuit's decision, if allowed to stand, would introduce destabilizing uncertainty into this important area of the law. This Court's prompt review is warranted.

CONCLUSION

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

Respectfully submitted,

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