No. 26-130

In the Supreme Court of the United States

TECK METALS LTD.,
Petitioner,

v.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(4)(C), authorizes damages for feelings of cultural disconnection caused by injury to a natural resource.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. To those ends, WLF often appears as amicus curiae to advocate for predictable liability regimes. *Atl. Richfield Co. v. Christian*, 590 U.S. 1 (2020); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

INTRODUCTION AND SUMMARY OF ARGUMENT

"In deciding cases involving the American economy, courts should strive, where possible, for clarity and predictability." *Seven Cnty. Infrastructure Coal. v. Eagle County*, 605 U.S. 168, 192 (2025). The Ninth Circuit has broken from its sister circuits, Pet. 28–30, to read an opaque, uncertain, and novel natural-resources damages regime into CERCLA, one of the Nation's most important environmental statutes.

Spurred on by various atrocities caused by the release of dangerous toxins into the Nation's land, air, and water, Congress created a stringent, strict-liability regime based around a straightforward mission: ensuring both "timely cleanup of hazardous

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. Counsel for all parties received timely notice of WLF's intent to file this brief.

waste sites" and "that the costs of such cleanup efforts are borne by those responsible for the contamination." *Atl. Richfield*, 590 U.S. at 6 (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 4 (2014) (brackets omitted)). So came about the infamous "Superfund sites," which must be cleaned up by the government or a responsible party.

But CERCLA does one more thing. It also provides for "damages for injury to, destruction of, or loss of natural resources." 42 U.S.C. § 9607(a)(4)(C). Natural-resource damages claims can be brought against any potentially responsible party by federal, state, or tribal governments acting in trust for resources under their care. *Id*. § 9607(f)(1). As a rule, damages must be collected "for use only to restore, replace, or acquire the equivalent of such natural resources." *Id*. Losses that can't be restored, replaced, or functionally acquired fall out of the Act's ambit. Combined, that means CERCLA provides for damages directly keyed to a resource's economic value destroyed by the release of toxic pollution. That may include the value of lost use of the resource. And so the statute authorizes damages totaling above "the sums which can be used to restore or replace such resources." *Id*. But the law is pellucid: the direct, economic harms of lost use caused by the release are covered—nothing more. *Contra* BIO 22.

The Ninth Circuit, splitting decisively with its neighbor court of appeals in the Tenth, *New Mexico v. Gen'l Elec. Co.*, 467 F.3d 1223, 1245–47 (10th Cir. 2006), has announced a different rule. *See* Pet. 28–30 (discussing scope of circuit division). Loss can, in the Ninth Circuit, now mean *any* loss derived from the injury, including harms sourced to a community's disconnection from an injured resource of significant cultural weight—even though that kind of metaphysical loss is hardly susceptible to restoration or replacement. Pet. App. 18a.

That poses a practical problem for the Nation's industrial enterprises. Every firm that handles toxic substances makes business judgments knowing that it may accidentally acquire, contribute to, or wholly create a Superfund site. That's not a pretty fact; it's a fact of the Nation's economic life. Firms evaluate that risk just as car companies must estimate the possibility of punitive-damages awards or merging businesses must consider the risk of treble-damages antitrust suits. Businesses don't price out those risks because they're irresponsible, but because they very much are responsible—to a board, which will cashier mismanagement, and to shareholders, whose value they must maximize.

And so, when CERCLA works as Congress intended, covered enterprises factor in Superfund risk. If necessary, firms can hedge against that chance by imposing safety guardrails, ensuring compliance personnel are on the ball, or obtaining insurance. That's a virtuous circle. At its best, the Act undergirds a predictable environment where entrepreneurs can seek investment in new rare-earth prospecting or new methods of transporting and disposing toxic chemicals while still benefiting the public welfare. Safe, not stalled, development.

But metaphysical injury sourced to a subjective, cultural loss can't be predictably priced or insured against. And because such injury is inherently personal to a covered community, damages awards risk becoming functionally random. Spill next to people uniquely disposed to mental anguish or anxiety about pollution, and losses may (as here) be three times (or more) the actual cost of "accomplishing CERCLA's essential goals of restoration or replacement, while also allowing for damages due to interim loss of use." *New Mexico*, 467 F.3d at 1245. That seat at Damocles' banquet will unduly deter constructive economic activity. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business and investment decisions").

Reckonable remedies aren't just a nice-to-have. "Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). Reckonability goes by another name in our constitutional grammar: void-for-vagueness. "In our constitutional order, a vague law is no law at all." *United States v. Davis*, 588 U.S. 445, 447 (2019); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). That extends not just to ambiguous laws regulating conduct, but also to the harms imposed by shapeless remedies in a government-directed, strict-liability regime. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").

The Ninth Circuit's gloss on CERCLA offers all of the downsides of arbitrary-enforcement risk that this Court's vagueness doctrine abhors—and carries none of the mitigating factors (such as intent standards or a cognizable rubric that allows for error correction in excessive damages cases) that the Court requires to save damages regimes from "jar[ring] one's constitutional sensibilities." *Pac. Mut. Life. Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). The Court should grant the writ so it may affirm that the Constitution's insistence on definiteness applies to inchoate remedies statutes incapable of pre-enforcement "reckonability," and adopt Teck's narrower understanding of the statutory scheme.

ARGUMENT

I. BUSINESSES NEED RECKONABLE REMEDIES REGIMES.

It's not a pleasant fact, but every owner or operator of a facility or transit node supplying, carrying, or using CERCLA-covered hazardous substances must price the risk that it will create a Superfund site and incur additional liability for natural-resources damages. Likewise, firms looking to acquire other companies must diligently review the targeted company's holdings to avoid accidentally inheriting that same peril. That's not a bug. It's a feature of the Act.

After all, CERCLA doesn't ban the transportation or use of covered toxic pollutants. It simply puts the onus on responsible parties for their release. Congress didn't want to stop the shipping, use, transportation, or disposal of the relevant hazardous chemicals, byproducts, and other substances. If it did, it would have banned all those practices. Instead, it just wanted those economically beneficial activities to be carried out carefully.

In this way, CERCLA harnesses how markets price information. A mining company can estimate what the likely effect of accidental leakage into a river would do to the surrounding ecosystem—and roughly price out what cleanup would cost, how long repair might take, and look to prior enforcement actions and settlements to calculate the estimated cost for "restoring, replacing, or acquiring the equivalent of such natural resources." 42 U.S.C. § 9607(f)(1) (tense altered). This can be done in advance and inform business decisions. Impose additional safety measures. Scale back particularly aggressive plans. Obtain insurance against this "reckonable" risk.

This part of CERCLA works because it offers a priceable risk figure that ensures an element of regulatory certainty: here's the cost of the worst-case scenario. The economic value of a river's closure is something that can be reflected on a spreadsheet—jobs lost, power never generated by a hydroelectric dam, fishing permits never sold, and fish stocks never brought to market. Firms "crave certainty as much as almost anything: certainty is what allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018).

But strip away the ability to at least roughly price liability ex ante, and the virtuous circle breaks viciously. That puts firms in the unpleasant prospect of flying blind. The pipeline will never get funding. Disposal costs will become unsustainable. The transporter will balk. The mine won't open. That's what blessing inchoate, cultural-loss injury risks: the pausing or cancelation of otherwise economically useful actions.

Consider: different people experience (and will therefore price) "lost use [that] has a cultural dimension," Pet. App. 10a, differently than others. Judges and juries (who are, after all, people) won't be immune. Two identical records may garner wildly different awards based on subjective evaluation of the cultural harm at issue. Indeed, the type of harm experienced by an affected group may be so uniquely situated to members of an insular community that future plaintiffs might not even reasonably expect an outsider to ever understand—let alone be able to quantify it before opening a new facility or engaging in a contract to transport hazardous waste. The afflicted need not even reside in proximity to the release to claim injury. Faced with such a paradigm of uncertainty, rational firms will cease operations rather than court wholly unpredictable yet potentially catastrophic liability.

And this isn't just a predictability problem limited to the unique mores of those Americans represented by tribal trustees. Pet. 31. The trusteeship model extends to the States and the federal government. Left to stand, a State might seek relief for the cost of residents' pollution-linked mental distress after a toxic spill closes a bay. Or the United States could bring suit on behalf of those faithful citizens who take stewardship of the Earth as a divine command. Or vice versa. Or both. There's no shortage of potential felt loss our fellow Americans may experience when they discover toxic substances have been released into the atmosphere, land, or groundwater.

There's no need to uncap the statute this way. CERCLA focuses on the restorable economic value of a "loss of natural resources," 42 U.S.C. § 9607(a)(4)(C), not fixing for loss associated with sincerely held feelings of cultural disconnection. (And in a world of scarce resources, authorizing the latter will inevitably mean fewer funds available for the former.) The Court should grant review so it can restore CERCLA's "valuable" reckonability to "corporations making business and investment decisions." *Hertz*, 559 U.S. at 94.

II. THE NINTH CIRCUIT'S INTERPRETATION UNDERMINES DUE PROCESS.

If CERCLA provides for cultural-loss injury, it strikes against the same "[e]lementary notions of fairness enshrined in our constitutional jurisprudence [which] dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574; *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417–18 (2003); Pet. 23 ("[T]he freewheeling, open-ended valuation of harm contemplated by the Ninth Circuit provides no meaningful notice") (internal quotation marks and citation omitted).

True, this Court has allowed more room for ambiguity in civil, economic regulation than in the criminal law. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982). That's due, in part, to the Court's understanding of how going concerns operate. *Id.* at 498. As the *Hoffman* Court pointed out, "businesses . . . face economic demands to plan behavior carefully" and "can be expected to consult relevant legislation in advance of action." *Id.* That's precisely right, *supra* at 5–8, and this fact can satisfy fair notice—just as universally condemned, reprehensible conduct carries with it the explicit ex ante understanding that sanctions will be harsh. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) ("TXO acted with malice"); *id.* at 465–66 (Stevens, J., plurality) ("[T]he notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct").

But the *Hoffman* excuse for sloppy legislative drafting falls apart when a company can't price out its litigation risk under a joint-and-several, strict-liability statute like CERCLA. Where "objective criteria" for liability exist, *Pac. Mut. Life.*, 499 U.S. at 23, that inoculates even "extreme" damages awards from otherwise "jar[ring] one's constitutional sensibilities." *Id.* at 18. But subjective criteria, such as losses attributable to "'cultural disconnection,'" Pet. App. 31a, provide no such safeguard for on-the-hook defendants. Cultural-loss injury offers no reference point for any reasonable judge to determine whether a damages award was clearly excessive. And no reviewing court can genuinely compare the ratio of a "damages award . . . to the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580.

The Court has never considered a hopelessly vague remedies-regime like the one the Ninth Circuit created. And it's certainly never blessed such vagueness in the context of a statute that puts sovereigns, vested with enforcement discretion and unlimited capacity to assert felt-loss injury, in the plaintiff's seat. So the ruling below poses the very enforcement-discretion problem this Court's vagueness caselaw rightly condemns. *Davis*, 588 U.S. at 447; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids") (cleaned up, citation omitted).

That's not to say that Congress can't use the make-whole language of common-law tort or vest discretion with judges or juries "to consider the need for retribution and deterrence, in addition to restitution." *Tull v. United States*, 481 U.S. 412, 422 (1987). Nobody's saying that the vagueness doctrine should forever swallow, say, punitive damages. *See, e.g.*, *TXO*, 509 U.S. at 465–66 (Stevens, J., plurality). But Congress can't create a regime like the one the Ninth Circuit says it must have designed. From the perspective of a defendant making an expected-value calculation (especially when navigating a strict-liability regime like CERCLA) knowing the band of potential damages is just as vital as understanding what conduct is acceptable and which is barred.

In short, just as inchoate laws must be set aside, or (when possible) narrowly construed "to avoid the shoals of vagueness," *Buckley v. Valeo*, 424 U.S. 1, 77–78 (1976) (per curiam), so must ambiguous remedies regimes incapable of pre-enforcement "reckonability." Teck's reading of CERCLA avoids this problem, and the Court should grant the writ so it may adopt it.

CONCLUSION

The lower court's blessing of felt loss natural-resources injury can't be squared with the text or function of the Act. Worse still, it would create a serious due process question. The Court should grant the writ to set things right.

Respectfully submitted,

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