No. 26-130

In the Supreme Court of the United States

TECK METALS LTD.,

Petitioner,

v.

THE 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

REPLY BRIEF FOR PETITIONER

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The Ninth Circuit held that CERCLA does not "limit the types of recoverable natural resource damages" and thus authorizes the Tribes' "nonuse" damages claims. Pet. App. 13a-14a, 16a. Armed with that holding, the Tribes will put Teck on trial for more than half a billion dollars in subjective felt losses.

The Tribes seek to evade that clean question of statutory interpretation by rewriting both their claims and the decision below. They now claim to seek "interim lost use" damages with a "cultural component." That label is misleading. This case does not involve damages for objective lost uses that happen to be cultural—say, renting an alternative ceremonial site while a riverbank is restored. That could be an actual interim lost use because it is tied to the injured resource, bounded in time, and objectively measured. The question here, by contrast, is whether the Tribes can seek damages for *non*use values—the subjective felt loss from "disconnection" from or "apprehensions" about an injured resource. 4 S.E.R. 814-815. That was the only category of damages before the Ninth Circuit, which squarely deemed nonuse values an "authorized measure of damages under the statute." Pet. App. 14a, 16a-17a.

CERCLA's text is not so sweeping. Section 9607(a)(4)(C) imposes liability for "injury to, destruction of, or loss of natural resources." The Tribes quote that provision selectively, but the full list shows CERCLA's focus on harms to natural resources themselves. The Tribes also now dispute whether they are bound by Section 9607(f)(1), which limits trustees to damages "use[d]" to "restore, replace, or acquire the equivalent of" the resources. But Congress expressly extended that limit to tribes—as the Tribes told both courts below.

Meanwhile, the Tribes downplay the significance of the decision below. That is not what they told the Ninth Circuit. They correctly said there that whether CERCLA authorizes their claims is a question of nationwide importance for trustees and defendants. It is even more significant now that every other trustee—States, other tribes, and the United States—has a blueprint for massive but amorphous damages. A host of amici, domestic and foreign, warn of "company-ending" liability, Chamber Amici Br. 4, and "reciprocal litigation against American businesses," British Columbia

Amicus Br. 14. And this may be the Court's best opportunity to decide the question because no CERCLA natural-resource-damages case has been tried in 25 years.

If the Court does not grant certiorari outright, it should at least call for the views of the Solicitor General. The Tribes, like the panel below, lean heavily on an amicus brief filed in the waning days of the prior Administration. The current Administration indicated that it might weigh in at the rehearing stage, but its deadline lapsed. If the federal regulations are as important as the Tribes believe, the government should say what they mean and whether it stands by them.

I. THE DECISION BELOW IS WRONG.

The Tribes defend the Ninth Circuit's decision by changing the operative text, ignoring CERCLA's structure, and inverting its history and purpose.

A. CERCLA's Text Does Not Encompass Subjective Cultural Losses.

The key CERCLA provisions here are Sections 9607(a)(4)(C) and 9607(f)(1). The Tribes misconstrue the first, claim that the second does not apply, and turn to more far-flung provisions and ambiguous regulations instead.

1. CERCLA's operative provision imposes liability for "damages for injury to, destruction of, or loss of natural resources." 42 U.S.C. § 9607(a)(4)(C). The Tribes invoke (at 18) the "ordinary meaning" of "'damages for . . . loss of natural resources.'" But omitting "injury to" and "destruction of" matters. Those phrases illustrate that the entire list describes harms *to the resources themselves*. *Dubin* v. *United States*,

599 U.S. 110, 124-126 (2023) (a word "should be read in a similar manner to its companions"). As for the actual resources here, the Tribes mention (at 9) fly larvae and fish just once, when describing joint claims that are "not at issue."

Trying to squeeze into Section 9607(a)(4)(C)'s "loss of" language, the Tribes repeat the mantra that their claims are for "interim lost use." They are not. First, the $525 million claim for cultural disconnection is "dominated by" the "loss of *non*-use value." 4 E.R. 600 (emphasis added). Second, the Tribes' alternative $114 million claim for cultural buildings and language programs likewise includes a "substantial non-use component." 3 E.R. 324. The Tribes say (at 10) that the program "offset[s] ongoing harm"—but as they explained below, the relevant ongoing harm is "emotional distress," not inability to use fly larvae or fish. 1 S.E.R. 51; *see* 4 S.E.R. 887. Third, their $13 million claim for lost fishing trips reflects the "enhanced value" of fishing in the Tribes' culture. Pet. App. 13a, 31a. The whole point is a premium for felt loss.

2. Section 9607(f)(1) removes any ambiguity in Section 9607(a)(4)(C) for suits by government trustees. Damages in such suits shall be "available for use only to restore, replace, or acquire the equivalent of such natural resources." 42 U.S.C. § 9607(f)(1). The Tribes' claims plainly exceed those limits: there is "no mathematical link between measured contamination and this [damages] package," and the damages "would remain the same" even if the "contamination is not there." 4 S.E.R. 884, 887.

So the Tribes say (at 34), for the first time in this litigation, that they are not bound by Section 9607(f)(1) at all. That argument fails twice over. First, the Tribes affirmatively waived it. They told the Ninth Circuit that they "will be bound to use any recovery as required by law," citing "9607(f)(1)." C.A. Reply Br. 23 (Dkt. 54). Even if they meant to be cagey, Br. in Opp. 23 n.3, they assured the district court that they "fully intend to comply" with the "statutory requirement" in "9607(f)" about how trustees may "use recovery" of damages. 1 S.E.R. 47.

Second, the argument is wrong anyway. Section 9607(f)(1) originally restricted, in one sentence, the use of sums recovered by "the Federal Government or the State Government." Pub. L. No. 96-510, § 107 (1980). In 1986, Congress made two simultaneous amendments. It added "or the Indian tribe," Pub. L. No. 99-499, § 207(c)(2)(D) (1986), and it rewrote the sentence, *id.* § 107(d)(2). The Tribes say that the second change negated the first. But the only reading that gives effect to both amendments is that the restriction on recoveries applies to Indian tribes. Plus, the Tribes' reading proves too much: tribes are not mentioned in the previous sentence about who may "act on behalf of the public as trustee." So either they are bound by Section 9607(f)(1)'s limits, or they should not be here.

Alternatively, the Tribes downplay Section 9607(f)(1)'s limitations. They point (at 18) to the next sentence, which says that the "measure of damages . . . shall not be limited by the sums which can be used to restore or replace such resources." 42 U.S.C. § 9607(f)(1). But that sentence does not license subjective, perception-based damages either. It just means that "funds in excess of restoration costs" must be used "for the third purpose spelled out" in the statute: "acquir[ing] the equivalent of the damaged resource." *New Mexico* v. *Gen. Elec. Co.*, 467 F.3d 1223, 1245 (10th

Cir. 2006) (quoting H.R. Rep. No. 99-253(IV), at 50 (1985)); *accord Ohio* v. *Dep't of Interior*, 880 F.2d 432, 444 n.8 (D.C. Cir. 1989).

3. Moving further from the operative text, the Tribes, like the panel below, invoke (at 19) the miscellaneous provision's mention of "use value." 42 U.S.C. § 9651(c)(2). The Tribes claim (at 26) that nonuses "*are* uses." So in their view, they can recover for "admir[ing]" a resource's beauty (at 26) as readily as for replacing ceremonial plants (at 24-25). But that erases the well-known pre-CERCLA distinction between "use value" and "nonuse value." Pet. 20-21 & n.2. Congress's enumeration of "use value"—alongside other objective measures like "replacement value" and "ability of the ecosystem or resource to recover"—makes its omission of nonuse value intentional. 42 U.S.C. § 9651(c)(2); *see Esteras* v. *United States*, 606 U.S. 185, 195 (2025).

4. The Tribes fall back on Department of Interior regulations that mention "nonuse values such as existence and bequest values." 43 C.F.R. § 11.83(c)(1). Those regulations cannot displace the statutory text. *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 412-413 (2024). And they warrant no particular respect because they reflect longstanding equivocation. When Interior first promulgated the regulations, the Reagan Administration correctly recognized that "CERCLA mentions only use values." 51 Fed. Reg. 27,674, 27,719 (Aug. 1, 1986). Interior nevertheless held open the possibility of nonuse values in "extraordinary circumstances," *ibid.*, but disavowed "[i]ntangible injuries" as "impossible to measure accurately," *id.* at 27,706. In 1989, the D.C. Circuit wrongly ordered Interior to redo its regulations, *Ohio*, 880 F.2d 432, and Interior then

added "existence and bequest values" to the definition of compensable value. 59 Fed. Reg. 14,262, 14,286 (Mar. 25, 1994). And in 2008, the Bush Administration—still bound by *Ohio*—maintained that definition while cautioning that estimating nonuse value "remains controversial." 73 Fed. Reg. 57,259, 57,261 (Oct. 2, 2008). A dicey, atextual regulation is *more* reason for review, not less.

B. CERCLA's Structure, History, And Purpose Confirm Its Plain Text.

1. The Tribes dismiss CERCLA's structure as irrelevant. They call (at 29) its combination of sweeping strict liability and cabined remedies a "policy argument for Congress." But drawing inferences from statutory structure is a well-established interpretive tool. Antonin Scalia & Bryan Garner, Reading Law 167 (2012). That is why this Court has narrowly "constru[ed]" strict-liability regimes not to reach "purely psychic" injuries. *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 551-552 (1991). So too when construing sovereign liability. *FAA* v. *Cooper*, 566 U.S. 284, 304 (2012). Plus, there are serious due-process concerns inherent in subjecting defendants to "nearly infinite and unpredictable liability" based on "intangible harms." *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 546, 552 (1994); *see* Washington Legal Foundation Amicus Br. 8-10.

2. History also supports Teck's reading, not the Tribes'. The Tribes observe (at 29) that a rejected version of CERCLA in 1979 included a remedy for property damage and medical expenses. That is exactly right. A Congress unwilling to compensate even objective personal harms did not silently empower trustees

to collect hundreds of millions of dollars for individuals' subjective feelings of disconnection. Pet. 26. By contrast, a 1995 hearing statement and a 1997 unenacted amendment (at 29-30) reflect "[p]ost-enactment legislative history" that is "not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011).

3. The Tribes, like the Ninth Circuit, distort CERCLA's purposes. They insist (at 28) that their claims are consistent with "traditional" make-whole tort principles. *See* Pet. App. 15a-16a ("full recovery" for "persons harmed"). But CERCLA is not a tort regime and "does not provide a general cause of action for all harm caused by toxic contaminants." *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 18 (2014).

II. THE DECISION BELOW WARRANTS REVIEW.

The Tribes offer no good reason to leave the Ninth Circuit's rule undisturbed. The circuits are divided and the stakes are enormous.

A. The Courts Of Appeals Are Divided Three Ways.

The Tribes deny a conflict by rewriting the question. They say (at 14, 18-19) that every court of appeals permits "interim lost use" damages. True, but irrelevant. Objective interim lost uses—cultural or otherwise—are not in dispute. Pet. 10, 17; pp. 1-2, *supra*. The three-circuit conflict, and the Tribes' claims, concern subjective, *non*use values.

1. The Tenth Circuit "restrict[s]" the "measure and use of damages . . . to accomplishing CERCLA's essential goals of restoration or replacement." *General Elec.*, 467 F.3d at 1245. It thus excludes damages that

are not "tailored to redress specific injury to the State's role as trustee," such as "personal or economic injury." *Id.* at 1246 n.34, 1250 n.39.

The Tribes try to avoid the clash with the Tenth Circuit in two ways. First, they respond (at 16) that the Tenth Circuit addressed a preemption question. That is irrelevant. The court had to construe what CERCLA authorizes to hold that CERCLA preempted state-law remedies. *General Elec.*, 467 F.3d at 1245-1248. Second, they observe (at 17) that they are not bringing a private suit for private resources. That misses the point. The Tenth Circuit's limit turns on whose injury is redressed, not who owns the resources. The groundwater in *General Electric* was public, yet the damages still had to be "tailored to" the trustee's role, not individuals' injuries. 467 F.3d at 1250 n.39.

2. The D.C. Circuit is more permissive. It treated "passive" use as compensable because it reflects "utility derived by humans from a resource." *Ohio*, 880 F.2d at 464, 476 n.77. That conclusion was wrong. *See* pp. 3-8, *supra*. Still, even the D.C. Circuit has guardrails. The court recognized that Congress excluded recovery for private harms, *Ohio*, 880 F.2d at 460-461, and later foreclosed recovery for "'purely private' interests," *National Ass'n of Mfrs.* v. *Dep't of Interior*, 134 F.3d 1095, 1113 (D.C. Cir. 1998). The Tribes read (at 16-17) "purely private" to mean privately owned. But *Ohio*'s discussion addressed the kinds of injuries—personal and private economic harms—that Congress excluded from trustee recoveries. So the Tribes "would not have succeeded" even under *Ohio*'s "relaxed standards." Pacific Legal Foundation Amicus Br. 17.

3. The Ninth Circuit has now embraced the broadest theory yet. In its view, Congress "did not limit the types of recoverable natural resource damages." Pet. App. 14a. The Ninth Circuit thus allows a CERCLA trustee to seek "full recovery of *any* damages to *those persons harmed* by the loss of natural resources." Pet. App. 15a-16a (emphases added).

B. The Question Presented Is Important.

The Tribes contest (at 30) whether the question presented is "sufficiently important" to warrant review. They told the Ninth Circuit otherwise, stressing this "importan[t]" question's "implications . . . throughout the country." Tribes Pet. 14, 16, No. 24-4442 (9th Cir. 2024). They were right then, and wrong now.

To start, the threat of copycat claims is real. The Tribes contend (at 30) that "[c]ultural considerations" in natural-resource-damages claims have existed for decades. Again, though, actual cultural uses may have been recoverable; the Ninth Circuit's embrace of perception-based theories of subjective harm is a dramatic new move. It introduces "wholly unpredictable yet potentially catastrophic liability" for businesses. Washington Legal Foundation Amicus Br. 7. And it provides a nationwide blueprint. The Tribes do not deny that the Ninth Circuit's logic extends to "federal, state, and tribal trustees alike" because "every human community" can assert a felt loss. Chamber Amici Br. 7-8. "[T]ens of thousands" of responsible parties are thus retroactively exposed to liability "they could have never anticipated." Pacific Legal Foundation Amicus Br. 13-14.

The fallout crosses borders. By exposing foreign companies to massive liability with no "meaningful way to assess their risk," the decision below "threatens to disrupt international stability." Mining Ass'n of Canada Amici Br. 9-10, 14-16. As British Columbia warns, perception-based damages "invite[] reciprocal litigation against American businesses." British Columbia Amicus Br. 3-4, 13-15.

The Tribes respond (at 31) that the question should be left to "ventilate." But the Ninth Circuit contains the most federal land and tribal reservations in the country, so its rule will do substantial damage before anybody else weighs in. And CERCLA natural-resource-damages claims often do not get very far because of extreme settlement pressure, which the decision below ratchets up. Pet. 35. This Court should not wait for another petition that might never arrive.

III. THIS CASE IS AN EXCELLENT VEHICLE.

The Tribes raise three vehicle objections: Teck's question presented is not the real issue, this case is interlocutory, and their statutory arguments impede review. None is substantial.

First, this case cleanly presents the question whether a trustee can recover for the felt loss of a cultural connection to natural resources. The Tribes contend (at 2, 24) that the panel did not endorse damages for felt losses and merely rejected a "categorical[] bar" to damages for cultural uses. The decision was not that modest. It held that Congress "did not limit the types of recoverable natural resource damages"; deemed "passive uses" (*i.e.*, nonuse values) an "authorized measure of damages under the statute"; and concluded that "the Tribes' damages claims are authorized under CERCLA." Pet. App. 14a, 16a-17a.

This case is a particularly good vehicle because it highlights—and isolates—the disputed category of subjective damages. The Tribes already seek $177 million in joint claims with Washington, purportedly to compensate for objective harms like diminished fishing. Pet. 10. The Tribes' solo claims for up to $538 million necessarily seek something beyond that—subjective, nonuse damages. And the Tribes' quiet retreat to a $165 million "lower bound" (at 28) underscores the subjectivity here.

Second, the Tribes emphasize (at 31-33) that this case is interlocutory. Of course, the case is here only because the Tribes argued that the question was too critical to await a post-trial appeal. And the Tribes' suggestion (at 26-28, 33) that they might yet recover for traditional lost uses is illusory. The Tribes' experts outlined subjective, felt-loss harms, and the Ninth Circuit held that such "passive uses" are "authorized." Pet. App. 16a. Meanwhile, any objective lost uses are already covered by the joint claims with Washington, Pet. 10, so the Tribes would run into CERCLA's prohibition on "double recovery." 42 U.S.C. § 9607(f)(1). The threshold statutory question is thus squarely presented. The Tribes' retort (at 33) that Teck "may well prevail at trial" is true of every certified interlocutory appeal where the court of appeals reverses and this Court grants review. *E.g.*, *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14 (2004); *Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199 (1996).

Third, the Tribes reprise (at 34) their argument that they are exempt from Section 9607(f)(1)'s limitations. *See* pp. 4-5, *supra*. The Tribes cannot manufacture a vehicle problem by raising a non-jurisdictional merits argument that they disclaimed in the courts below and that no court has ever accepted. At best, they can make the point in their merits brief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 9, 2026