No. 15-791

IN THE

Supreme Court of the United States

THE DOW CHEMICAL COMPANY AND ROCKWELL INTERNATIONAL CORPORATION,

Petitioners,

v.

MERILYN COOK, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICAN NUCLEAR INSURERS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae American Nuclear Insurers ("ANI") is a voluntary, non-profit unincorporated joint underwriting association of insurance companies that pool financial assets in order to provide insurance for public liability, as defined in the Price-Anderson Act ("PAA"),[2] 42 U.S.C. § 2014(w), relating to non-Governmental nuclear facilities. ANI insures all 100 currently operating commercial nuclear power reactors (which produce about 19% of the United States' electric energy supply[3]), and commercial nuclear fabricating facilities in the United States. It also insures universities and research facilities whose work involves radioactive substances, plus various suppliers, contractors, and transporters for nuclear facilities. Although this case concerns a Government facility, which ANI does not insure, the PAA liability and preemption provisions at issue here apply to

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given timely notice of American Nuclear Insurers' intent to file this brief. Petitioners' counsel has filed a letter granting blanket consent to *amicus* briefs, and an email from respondents' counsel consenting to the filing of this brief is filed herewith. Pursuant to Rule 37.6, ANI affirms that no counsel for a party authored this brief in whole or in part, and no person other than ANI and its counsel contributed any money to fund its preparation or submission.

[2] Pub. L. No. 85-256, 71 Stat. 576 (1957), codified as amended at 42 U.S.C. §§ 2012(i), 2014, 2210.

[3] U.S. Energy Information Administration, *Net Generation by Energy Source: Total (All Sectors), 2005-October 2015* (Dec. 24, 2015), http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_1_01.

every non-Governmental entity that ANI insures. ANI has defended many of these insureds in dozens of PAA cases.

When initially enacted in 1957, the main focus of the PAA was on "financial protection," *i.e.*, insurance to compensate victims, and to protect the nascent nuclear industry from the risk of insolvency due to unpredictable and potentially huge liabilities, in the event of a nuclear accident. Since 1957, Congress has mandated that every non-Governmental nuclear power plant licensee (and various other Atomic Energy Act licensees) maintain "primary financial protection" corresponding to "the amount of liability insurance available from private sources." 42 U.S.C. §§ 2210(a), (b)(1); *see also* § 2210(g) (instructing the Nuclear Regulatory Commission ("NRC"), in administering that mandate, to "use, to the maximum extent practicable, the facilities and services of private insurance organizations").

ANI and its predecessor, the Nuclear Energy Liability Insurance Association ("NELIA"), were created to meet those insurance needs. For almost sixty years, they have done so primarily through a Facility Form policy, covering both public liabilities and defense costs associated with public liability actions. Congress reviewed and approved that policy in 1957, *see* S. Rep. No. 85-296 (1957), *reprinted in* 1957 U.S.C.C.A.N 1803, 1803, 1811-13, and the NRC's regulations implementing the PAA incorporate it, *see* 10 C.F.R. § 140.91, app. A. Pursuant to that policy, ANI supplied a defense to all defendants in the public liability litigation that arose from the 1979 Three Mile Island accident ("TMI"), and has done so for all non-

Governmental public liability litigation involving its insureds since then. ANI testified before Congress in hearings about the TMI litigation that led to the passage of the 1988 amendments to the PAA which are the subject of the question presented in this case, and has since testified before Congress and filed *amicus* briefs in this and other courts regarding the PAA on multiple occasions. ANI filed *amicus* briefs in the Tenth Circuit in both *Cook v. Rockwell Int'l Corp.,* 618 F.3d 1127, Pet. App. 72a-119a (10th Cir. 2010) ("*Cook I*"), and *Cook v. Rockwell Int'l Corp*., 790 F.3d 1088, Pet. App. 1a-52a (10th Cir. 2015) ("*Cook II*").

In effect, Congress approved ANI's insurance pool and its Facility Form as the primary solution to the problem of how to insure the nuclear industry, defend it fairly and consistently in litigation, and provide compensation to victims injured by a nuclear accident. In 1988, informed by ANI's experience responding to TMI claims, Congress enacted the liability and preemption provisions at issue in this case. The decision below misreads and undermines those provisions. ANI therefore has both unique experience with the subject matter of this case and a strong interest in reversal of the decision below.

SUMMARY OF ARGUMENT

As the Tenth Circuit acknowledged, the decision below creates a clear circuit split on an important question of interpretation of the PAA. As this Court has explained, 42 U.S.C. § 2014(hh) expressly preempts, and replaces with a federal cause of action, any state law claim in a "public liability action." *El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 484 (1999). The question presented is the

scope of that express preemption. Everyone agrees that if plaintiffs plead (as the plaintiffs here did) and prove (as they did not) that they suffered bodily injury or property damage due to NRC-regulated radioactive materials, preemption applies. But the Tenth Circuit held that if plaintiffs do not prove bodily injury or property damage, they thereby avoid preemption.

The Tenth Circuit's ruling misreads both the plain language and the history and purposes of the PAA. Perversely, it confers litigation advantages on "economic stigma" claimants that are denied to cancer sufferers. Moreover, it threatens, at least in the Tenth Circuit, to resurrect both the uncertain and unlimited and potentially uninsured liabilities, and the forum shopping and litigation chaos, that the PAA was designed to prevent.

The uncertainty created by the decision below has potentially significant implications for the nuclear industry and for ANI, its insurer. The circuit split is clear and, as the approximately $1.3 billion at stake[4] – in what the Tenth Circuit referred to as a "small claims" case, *Cook II,* Pet. App. 12a, or "lesser nuclear occurrence" case, *Cook II,* Pet. App. 16a – illustrates, the stakes in PAA cases can be high. ANI, the nuclear industry, and its investors need to know what kinds of multi-million dollar liabilities are possible, on what bases, and in which courts. The Court should grant the petition and re-confirm the understanding on which plaintiffs, defendants, and insurers alike have proceeded since 1988: the PAA preemption provision

[4] *See Cook v. Rockwell Int'l Corp.,* D. Colo. No. 90-cv-181, Pltfs.' Corrected Mot. for Entry of Judgment, D.E. 2371-1, at 6-7 (filed Aug. 26, 2015).

means that claims for harms from NRC-regulated radioactive materials that fall short of bodily injury or property damage are not actionable at all.

ARGUMENT

I. THE TENTH CIRCUIT MISREAD THE STATUTORY TEXT, CREATING A CLEAR CIRCUIT SPLIT

Under 42 U.S.C. § 2014(hh), which Congress enacted in the 1988 amendments to the PAA,

> any suit asserting public liability . . . shall be deemed to be an action arising under [42 U.S.C. § 2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

As this Court has explained, much like a complete preemption statute, this

> unusual preemption provision . . . transforms into a federal action, "any public liability action arising out of or resulting from a nuclear accident," § 2210(n)(2). The Act not only gives a district court original jurisdiction over such a claim, see *ibid.*, but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court, see *ibid.* Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is

contested.

Neztsosie, 526 U.S. at 484-85.

By the express terms of § 2014(hh), for preemption to apply, a "suit" need only "assert[] public liability." Insofar as relevant, "public liability" is, in turn, defined as "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w).[5] And a "nuclear incident" is

> any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q). (As a shorthand, this brief refers to the specific harms enumerated in § 2014(q) as "bodily injury or property damage.")

The question presented is what happens when plaintiffs plead all the elements of public liability – including that they suffered damage due to a release of radioactive materials at or from a federally regulated facility – but fail to prove bodily injury or

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[5] Public liability can also arise from a precautionary evacuation ordered by government authorities, and there are certain exclusions from public liability. *Id.* The major exclusions are for the nuclear facility's on-site property and for workmen's compensation claims by facility employees. *Id.* Injuries to contractors or visitors at the facility are, however, included within public liability.

property damage, as those harms have been defined by the courts. That question should be answered simply by the text of § 2014(hh): the plaintiffs "assert[ed]" public liability by pleading its elements, so their entire "suit" is deemed a federal cause of action for public liability, thereby preempting any state law claims.

In a case in which ANI supplied the defense for an insured defendant, the Fifth Circuit reached the correct conclusion:

> This suit is a "public liability action" as defined by the PAA, because the plaintiffs allege that they suffered injuries and illnesses due to their exposure to radiation, and because they assert that the defendants bear legal liability arising out of these incidents of exposure to radiation. Since it is a "public liability action," it is to be treated as arising under federal law.

Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186, 194 (5th Cir. 2011). Accordingly, it held that plaintiffs' failure to prove their bodily injury claims did not entitle them to do an end-run around the PAA and to proceed with no-injury "offensive contact" battery claims under Texas law. Instead, those claims must be dismissed with prejudice, since (as the court unanimously held), construed as state claims inconsistent with the PAA, they were preempted by § 2014(hh), *id.* at 193-95, and (as a majority held), construed as federal claims, they failed to meet the substantive federal liability requirement of bodily

injury or property damage, *id.* at 195-200.[6]

Two years earlier, the Ninth Circuit reached the same conclusion in a case involving "subcellular damage" due to radiation exposure which fell short of bodily injury:

Plaintiffs argue that if the harm they suffered

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[6] The courts have consistently held that to establish a federal claim under the PAA, a plaintiff must prove bodily injury or property damage (or a precautionary evacuation). Mere offensive contact or emotional distress, or a risk of future injury or a claim for medical monitoring, or a trespass or nuisance claim founded on a theory of economic stigma to property value, unsupported by property damage or loss of use of property, is insufficient. *See, e.g., Cotroneo,* 639 F.3d at 195-200 (offensive contact battery by radiation exposure); *June v. Union Carbide Corp.*, 577 F.3d 1234, 1248-52 (10th Cir. 2009) (exposure to radiation causing asymptomatic DNA damage and cell death, and medical monitoring); *Dumontier v. Schlumberger Tech. Corp.,* 543 F.3d 567, 570-571 (9th Cir. 2008) (exposure to radiation, "subcellular damage," emotional distress, and medical monitoring); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009-10 (9th Cir. 2008) (exposure to radiation and medical monitoring); *Golden v. CH2M Hill Hanford Group*, 528 F.3d 681, 683-84 (9th Cir. 2008) (exposure to radiation, emotional distress, and loss of consortium); *In re Berg Litig.*, 293 F.3d 1127, 1130-33 (9th Cir. 2002) (exposure to radiation, emotional distress, and medical monitoring). (Plaintiffs claim that *Rainer v. Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), creates a circuit split on this point. Conditional Cross-Pet. at 22. But because the plaintiffs in *Rainer* could not establish the elements of a claim derived from state law under § 2014(hh), the Sixth Circuit did not need to determine federal injury requirements.)

In the present case, the Tenth Circuit determined five years ago that plaintiffs had not established a federally cognizable injury at trial, *see Cook I,* Pet. App. 88a-95a, and on remand, plaintiffs "accept[ed] the premise that they couldn't" do so, and declined to seek retrial, *see Cook II,* Pet. App. 5a.

> isn't on the section 2014(q) list, the Act simply doesn't apply, and their state claims aren't preempted. But . . . *any* suit seeking compensation for a nuclear incident is preempted by the Act. Plaintiffs claim compensation for exposure to radioactive material, so they can only recover if they meet the requirements of the Act.

Dumontier, 543 F.3d at 571 (citations omitted).

Earlier decisions of the Second, Third, Sixth, Seventh and Ninth Circuits are to the same effect. *See Hanford*, 534 F.3d at 1009 ("The PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents," so plaintiffs who fail to demonstrate bodily injury or property damage are barred from any recovery); *Golden,* 528 F.3d at 683-684 (absent physical injury, PAA bars any "emotional distress claim for exposure to radioactive materials"); *Corcoran v. N.Y. Power Auth.,* 202 F.3d 530, 537 (2d Cir. 1999) (PAA created "exclusive federal cause of action for radiation injury"); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997) (PAA federalizes "any tort claim even remotely involving atomic energy production"); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) (PAA "preempts" state law trespass claims based on uranium leak; plaintiff "can sue under the [PAA] . . . or not at all"); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) (PAA preempts "[a]ny conceivable state tort action which might remain available to a plaintiff following the determination that his claim could not qualify as a public liability action"); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th

Cir. 1994) (same).

While acknowledging the direct conflict with *Cotroneo*, *Dumontier*, *Hanford,* and *Golden*, *see Cook II,* Pet. App. 21a-22a, the Tenth Circuit disagreed, because it perceived in the PAA no language "preempt[ing] and preclud[ing] all state law tort recoveries for plaintiffs who plead but do not prove nuclear incidents," *Cook II,* Pet. App. 14a. But 42 U.S.C. § 2014(hh) does just that. It deems the entire "suit" brought by one who "assert[s] public liability" to be federal, thereby extinguishing state law claims arising out of the same radiation hazard.

The Tenth Circuit itself conceded that § 2014(hh) is preemptive: "no one disputes" that "'[t]he PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents.'" *Cook II,* Pet. App. 21a (quoting *Hanford*, 534 F.3d at 1009). But it carved out from § 2014(hh)'s undisputed express preemption an exception for a "lesser occurrence," applicable in this $1.3 billion case because plaintiffs failed to prove bodily injury or property damage. *See id.*

There is no basis in the PAA for that exception. The Tenth Circuit argued that "[n]othing in [the text of the PAA] speaks to what happens when a nuclear incident is alleged but unproven." *Cook II,* Pet App. 15a. But § 2014(hh) says that preemption occurs when public liability (which entails a nuclear incident, § 2014(w)) is "assert[ed]" – *i.e.,* alleged; whether it is proven is beside the point.

Given that clear statutory language, the Tenth Circuit erred in invoking a presumption in favor of the retention of "traditional state law remedies," *Cook II*,

Pet. App. 15a; *see also id.* at 12a-13a, and in creating a "lesser occurrences" exception with no textual basis. The PAA's plain language should determine the outcome of this case: "When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Chamber of Commerce v. Whiting,* 563 U.S. 582, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

II. THE TENTH CIRCUIT'S "LESSER OCCURRENCES" THEORY INVITES AN END-RUN AROUND THE PAA THAT COULD UNDERMINE CONGRESS'S OBJECTIVES AND LEAD TO PERVERSE RESULTS

A. The Structure, Context, and History of the PAA Demonstrate that Preemption of State Causes of Action Under § 2014(hh) Is Essential to the PAA Scheme

Like any provision in a complex regulatory statute, § 2014(hh)'s preemption provision must be viewed "'in [its] context and with a view to [its] place in the overall statutory scheme.'" *King v. Burwell,* 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000)). A review of the structure, context, and history of the PAA also illuminates Congress's major goals for the Act.

1. The AEA and the pre-1988 PAA

The backdrop to the PAA is the 1954 Atomic

Energy Act ("AEA")[7]. In the AEA, Congress determined that it would be in the national interest to open up what had previously been a Federal Government monopoly and encourage the development of a private nuclear industry, *see* 42 U.S.C. §§ 2011, 2012, 2013(d), subject to comprehensive federal regulation to protect "the health and safety of the public," § 2012(d)-(f). In doing so, Congress recognized that in the public mind, "atomic energy [had been] popularly associated only with the atom bomb." S. Rep. No. 83-1699 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3456, 3457. However, rather than allowing the nuclear industry to be stymied by unfounded fears and state-level regulation, Congress created a comprehensive regulatory regime, retaining for the Federal Government "complete control of the safety and 'nuclear' aspects of energy generation." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 212 (1983).

That initiative, complemented by subsequent amendments including the PAA, has ultimately resulted in the world's largest commercial nuclear industry, producing about 19% of the United States' electricity, subject to the most intensive federal regulation of any U.S. industry, and with an exemplary safety record. But it got off to a rocky start.

In 1957, Congress found that private nuclear development was stalled, in large part because investors feared uncertain, potentially huge, and

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[7] Pub. L. No. 83-703, 68 Stat. 619 (1954), codified as amended at 42 U.S.C. §§ 2011-2297h-13.

uninsurable liabilities: "the problem of possible liability in connection with the operation of reactors is a major deterrent to further industrial participation in the program." S. Rep. No. 85-296, *reprinted in* 1957 U.S.C.C.A.N at 1803.

To address that problem, Congress commissioned a scientific study, supervised by the Atomic Energy Commission ("AEC"), "of the possible consequences in terms of injury to persons and damage to property if certain hypothetical accidents should occur in a typical large nuclear power reactor." *Id.* at 1807. This resulted in the Brookhaven Report, AEC, *Theoretical Possibilities and Consequences of Major Accidents in Large Nuclear Power Plants,* WASH-740 (1957), *available at* http://www.dissident-media.org/infonucleaire/wash740.pdf. Congress and the AEC used that study to "determine the amount of financial protection . . . the license[e] for reactors must have to protect the public against nuclear incidents." S. Rep. No. 85-296, *reprinted in* 1957 U.S.C.C.A.N at 1810.

Congress and the AEC also consulted insurance companies to determine how much financial protection could be provided, on what terms, by private insurers. That led to the creation of ANI's predecessor insurance pool, NELIA, which shared proposed policy terms, limits and rates with the AEC and Congress. Congress took testimony from participating insurers and reviewed those terms, including the scope of coverage, in the Senate Report on what became the PAA. *See id.* at 1808-09, 1811-13. The relevant scope of coverage terms reviewed by Congress and the AEC in 1957 – providing coverage

for public liability as defined in the PAA, and for the defense costs associated with a public liability action – remain essentially unchanged in the Facility Form policy used by ANI today, which was approved by the NRC and is appended to its PAA-implementing regulations, 10 C.F.R. § 140.91, app. A.

The PAA embodies both Congress's solution to the problem of potential uninsurable liabilities that stalled commercial nuclear development in the 1950s, *see Duke Power Co. v. Carolina Envtl. Study Grp., Inc.,* 438 U.S. 59, 83 (1978), and Congress's commitment to secure compensation for those injured by nuclear incidents, 42 U.S.C. § 2012(i). The 1957 Act defined "public liability" and "nuclear incident" essentially as they are now defined in 42 U.S.C. § 2014(w) and (q) – "public liability" is liability arising from a "nuclear incident," and a "nuclear incident" is an occurrence "causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." It (i) instructed the AEC (now succeeded by the NRC) to ensure that commercial nuclear facilities have adequate financial protection "to cover public liability claims," 42 U.S.C. § 2210(a) & (b); (ii) mandated the use of private insurance pools (now administered by ANI) to furnish that protection, § 2210(g); (iii) provided a federal indemnity for "public liability" in excess of the required financial protection, § 2210(c); and (iv) imposed a limit on "the aggregate liability for a single nuclear incident," § 2210(e). In defining "nuclear incident," Congress intentionally mirrored the insurance pools' policy language

regarding the types of injury covered. *See* S. Rep. No. 85-296, *reprinted in* 1957 U.S.C.C.A.N at 1818. In doing so, the Senate Report specifies that Congress did not intend to include in property damage "the diminution in value or other similar causes of action which may occur, namely, from the location of an atomic energy activity at a particular site." *Id.*

Certain PAA provisions, including its authorization for federal indemnification of liabilities in excess of ANI's policy limits, are subject to regular renewal (next due in 2025), and Congress has used renewals and other occasions to review, update, and amend the PAA. In 1966, for example, Congress amended the PAA to strengthen federal control over cases arising from a catastrophic event. It provided that in the event of an "extraordinary nuclear occurrence" ("ENO"), defined as an occurrence that the Government determines causes "substantial" increases in radiation offsite resulting or likely to result in "substantial damages to persons offsite or property offsite," 42 U.S.C. § 2014(j), certain state law defenses would be unavailable, and the defendant could remove public liability claims to federal court.

2. TMI and the 1988 PAA Amendments

In 1979, the worst nuclear occurrence in U.S. history occurred at Three Mile Island, Pennsylvania, leading to the first major mass litigation test of the PAA scheme. TMI involved major damage to the Three Mile Island generating station itself, uncontrolled releases of radioactive materials, a precautionary evacuation, and serious public concerns. However, subsequent studies have concluded that the amount of radiation released

beyond the facility boundaries was very small – resulting in doses to the public substantially below both NRC safety thresholds and normal background radiation levels. TMI was not declared an ENO – there has never been one – and the studies concluded that it caused "negligible effects on the physical health of individuals or the environment." *See* NRC, *Backgrounder on the Three Mile Island Accident* (last updated Dec. 12, 2014), *available at* http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html. Given that, it is doubtful whether TMI caused the bodily injury or property damage necessary to amount to a "nuclear incident" under 42 U.S.C. § 2014(q).

Nonetheless, TMI gave rise to an extraordinary volume of litigation. As Congress recounted in the Senate Report that led to the 1988 PAA amendments, TMI spawned "over 150 separate cases against TMI defendants, with over 3,000 claimants, in various state and Federal courts." S. Rep. No. 100-218 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488. Since the 1966 provision for removal and consolidation of ENO cases to federal court did not apply, plaintiffs were free to forum-shop in state or (given diversity) federal courts in multiple states. *See Stibitz v. Gen. Pub. Util. Corp.*, 746 F.2d 993 (3d Cir. 1984). The result was, as the Tenth Circuit aptly described it, "litigation chaos." *Cook II,* Pet. App. 18a. For example, forty-two plaintiffs filed suit in state court in Mississippi, 1,000 miles away from TMI's Pennsylvania location. *See In re TMI,* 89 F.3d 1106, 1109 (3d Cir. 1996). Litigation costs and legal uncertainties played a significant role in causing ANI to pay out over $41 million in settlements, "[d]espite the lack of detectable off-site

health effects or property contamination." *See* GAO, *Nuclear Regulation: A Perspective on Liability Protection for a Nuclear Plant Accident*, Report No. GAO/RCED-87-124, at 27 (1987). Still, eight years after the incident, 2,000 personal injury claims were pending. *See id.*

The 1988 amendments to the PAA were Congress's response to that "chaos." As the Tenth Circuit has noted, the centerpiece of that response was a decision "to expand federal control over safety and liability issues involving the nuclear industry, particularly with respect to the role of federal courts in resolving liability." *Farley,* 115 F.3d at 1504. To prevent defendants from being subjected to a "multitude of separate cases" in state and federal courts, *Neztsosie*, 526 U.S. at 486, pursuant to unregulated state law causes of action, and to "avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation," S. Rep. No. 100-218, *reprinted in* 1988 U.S.C.C.A.N. at 1488, Congress enacted § 2014(hh), creating the new "public liability action," arising under federal law but deriving the content of substantive rules of decision from state law insofar as not inconsistent with federal law. That provision enables either plaintiffs or defendants to insist that litigation be conducted in federal court, without regard to diversity, whereupon § 2210(n)(2) consolidates all cases in a single court – the federal district court for the district in which the incident occurs. 42 U.S.C. § 2014(hh). Congress also imposed new limitations on nuclear tort liability: a bar on liability for precautionary evacuation costs "unless

such costs constitute a public liability," 42 U.S.C. § 2210(q); limitations on liability of nuclear facility lessors, § 2210(r); and limitations on punitive damages, § 2210(s).

3. The Crucial Role of § 2014(hh) in Congress's Design

Three key congressional objectives emerge as consistent themes from this history. First, the *raison d'être* of the PAA is to encourage investment and participation in the commercial nuclear industry by vanquishing the specter of unpredictable, potentially huge, and potentially uninsured liabilities. Second, in the event of a nuclear incident, Congress chose to devote the limited financial protection available, including federal indemnities, to compensating victims who suffer tangible injuries – bodily injury or property damage – not to claimants who assert distress or economic stigma based on the same exaggerated fears of nuclear risks that Congress rejected in deciding to promote the industry. Third, conscious that litigation costs and delays burden the industry and victims alike, Congress sought to simplify nuclear tort litigation.

In the twenty-seven years since Congress replaced state law causes of action with the federal public liability action in § 2014(hh), the PAA scheme has worked well to fulfill all those purposes. Every circuit court to address the issue, including the Tenth Circuit in *Cook I*, has held that, while it incorporates some state law elements, the federal cause of action for public liability requires a plaintiff to demonstrate one of the injuries enumerated in § 2014(q) – the same injuries that are enumerated, and for which liability

is covered, in ANI's Facility Form policy. As a result, the industry is protected from uninsured liabilities, and Congress's goal of assuring compensation for victims with real, tangible injuries is met. Meanwhile, the ability to remove cases to the federal district court for the district in which the incident occurs, which ANI and its insureds exercise routinely, means that the age of "litigation chaos" and lawsuits in Mississippi regarding incidents in Pennsylvania is over. In each of these respects, Congress's decision in 1988 to make the federal public liability action the exclusive means for seeking compensation for nuclear torts has been critical.

B. The Tenth Circuit's "Lesser Occurrences" Exception Threatens to Undermine the PAA Scheme and Yield Perverse Results

The Tenth Circuit acknowledges that "no one disputes" the application of § 2014(hh) preemption, as described above, when a plaintiff has suffered bodily injury or property damage. *Cook II,* Pet. App. 21a. But it treats cases in which plaintiffs do not prove such injuries as "lesser occurrences" to which § 2014(hh), and the entire PAA scheme, have no application. *See id*.

In such cases, under the Tenth Circuit's theory, state law applies as if the PAA was never enacted.[8] States may impose liability for various kinds of intangible harm – such as "offensive contact" in

[8] The safety regulatory scheme of the AEA, as opposed to the PAA, would, however, still have preemptive effect insofar as state tort law conflicts with federal safety regulations. *See, e.g., O'Conner,* 13 F.3d at 1104-05; *TMI,* 940 F.2d at 858-59.

Cotroneo or nuisance by imperceptible "contamination" that poses no health threat but "disturbs the plaintiff's comfort and convenience, including his peace of mind," the apparent basis for the billion dollar award the Tenth Circuit would sanction in this case, *see Cook II,* Pet. App. 47a (Moritz, J., concurring in judgment). These are claims for which, given the terms of ANI's Facility Form policy (providing coverage for liabilities for "bodily injury or property damage caused by the nuclear energy hazard," 10 C.F.R. § 140.91, app. A.I(1)), defendants may have no insurance coverage. And, while it did not occur in this case, the Tenth Circuit's premise that § 2014(hh) does not apply to plaintiffs who do not establish a tangible injury would mean that such plaintiffs still live in the pre-1988 world of *Stibitz,* in which suits about a nuclear occurrence at a federally regulated facility in Pennsylvania can be pursued in a Mississippi state court.

For several reasons, the Tenth Circuit's theory threatens to undermine the PAA. First, although styled as an exception for "lesser occurrences," it is not confined to small and insignificant cases.[9] The $1.3 billion plaintiffs claim based on the Tenth Circuit's decision would be by far the largest award in any nuclear tort case in U.S. history. While it would not "shutter the nuclear industry," *Cook II,* Pet. App. 17a,

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[9] The PAA does distinguish larger and smaller events, but in a different way: by defining catastrophic nuclear occurrences as ENOs, to which special rules apply. *See* 42 U.S.C. § 2014(j). As of 1966, the PAA provided for federal jurisdiction and removal of large cases (ENOs), but not smaller cases, but the 1988 amendments united them in federal court.

the specter of a $1.3 billion award in a case involving no tangible injury, based on theories of liability that likely fall outside the scope of insurance and other financial protection, *see Cook II,* Pet. App. 4a, is apt to frustrate Congress's efforts to "encourage the development" of the nuclear industry, *see* 42 U.S.C. § 2012(i), at least in the Tenth Circuit.

Indeed, the Tenth Circuit's notion that cases where the plaintiff(s) do not prove bodily injury or property damage are necessarily "lesser occurrences" from an economic standpoint cannot withstand scrutiny. A "nuclear incident" case – one in which the Tenth Circuit would concede that the PAA applies – may be a relatively small case from an economic perspective. For example, a significant number of the cases ANI has defended involved bodily injury claims by individual contract workers allegedly exposed to radiation while working at nuclear power facilities. While expensive to defend, those cases did not involve enormous potential liability, since each case involved only one or a handful of plaintiffs. On the other hand, if it is not preempted, a "lesser occurrence" case involving allegations of economic stigma attributed to low levels of radiation in a broad radius around a facility is apt to involve multiple plaintiffs, complex, extremely expensive proceedings, and a potential for huge aggregate damage awards or settlements, as this case and the history of TMI illustrate.[10]

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[10] For this and other reasons, plaintiffs' analogy to the Class Action Fairness Act ("CAFA"), which the Tenth Circuit noted approvingly, *Cook II,* Pet. App. 12a, is inapt. CAFA provides for federal jurisdiction over cases that are large in terms of number of plaintiffs – class actions – and in terms of amount in

Second, if the Tenth Circuit's "lesser occurrences" exception is admitted, it has the potential to be invoked in a large proportion of nuclear tort cases. Because the nuclear industry is, in fact, very safe, ANI's experience is that in the vast majority of nuclear tort cases (including this case and TMI), plaintiffs cannot prove a tangible injury – bodily injury or property damage – caused by the nuclear energy hazard. That is to say, the vast majority of litigated PAA cases might be deemed "lesser occurrences" under the Tenth Circuit's theory.

Third, the Tenth Circuit's theory is apt to create perverse incentives and confusion, complicating, delaying and increasing the expense of the process of litigating and resolving nuclear tort claims. Throughout the first two decades of the *Cook* litigation, proceeding under the PAA, the plaintiffs tried to prove what plaintiffs in nuclear tort litigation, and tort plaintiffs in general, normally try to prove: that the defendants had caused them to suffer substantial, tangible injuries. Conversely, the defendants sought to show that they had not.

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controversy – a minimum of $5 million, *see* 28 U.S.C. § 1332(d), and it requires courts to make that size-based jurisdictional determination at the pleading stage. In contrast, the "nuclear incident"/"lesser occurrence" jurisdictional divide suggested by the Tenth Circuit offers no assurance that the "lesser occurrence" cases the Tenth Circuit would assign to state courts have fewer parties or less money at stake than the "nuclear incident" cases it concedes belong in federal court. The Tenth Circuit also suggests that jurisdiction is to be determined based on what is proven, rather than on what is pled – an unworkable approach that would have suddenly deprived the federal courts of jurisdiction two decades into this case but for the fortuity of diversity jurisdiction, *see Cook II,* Pet. App. 6a-7a, n.2.

However, if allowed to stand, the *Cook II* decision could suggest very different and perverse approaches to the litigation. Under *Cook II*, it could potentially be advantageous for plaintiffs to deny any tangible injuries, since, on the Tenth Circuit's theory, they may then be able to proceed under a state law without the PAA injury requirements, without its limitations on damages, and without its anti-forum-shopping provision. Conversely, in *dicta* apt to create conflicts between insurers/indemnitors and insureds/indemnitees, the Tenth Circuit suggested that a defendant might be better off conceding injuries that it did not cause, in an effort to access financial protection. *See Cook II,* Pet. App. 4a, 6a. The potential for such perverse incentives could only complicate and impair the litigation process, and it provides a strong signal that the Tenth Circuit's statutory interpretation is misguided.

III. THE STAKES ARE SUBSTANTIAL, AND THE LEGAL UNCERTAINTY CREATED BY THE TENTH CIRCUIT'S DECISION NEEDS TO BE RESOLVED

In this case, over $1 billion is at stake, and the litigation has already lasted 26 years. While this case is an outlier, PAA litigation is generally complex and expensive.

Moreover, the PAA context is one in which legal uncertainties are harmful. As explained above, the Tenth Circuit's decision creates risks of litigation chaos and potentially uninsured liabilities – the same kinds of risks that deterred investment and participation in the nuclear industry in the 1950s and created the need for the PAA.

In this context, with the circuit split on the question presented already clear, there is no cause to defer its resolution pending further percolation in the lower courts. The Court should act now, reverse the Tenth Circuit's decision, and re-affirm the common-sense, plain-language understanding of PAA preemption that ANI, the nuclear industry, plaintiffs and the courts have heretofore shared.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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