No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Price-Anderson Act, 42 U.S.C. § 2210 *et seq.*, preempts state-law claims by plaintiffs who assert a claim for injuries arising out of alleged radioactive releases and, if so, whether the decision below can stand.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner The Dow Chemical Company has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Rockwell International Corporation merged with Boeing NA, Inc., was renamed Boeing North American, Inc., and then merged into The Boeing Company ("Boeing"). Boeing has no parent corporation. State Street Bank and Trust Company owns 10% or more of Boeing's stock and is a wholly owned subsidiary of State Street Corporation, a publicly traded company.

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INTRODUCTION

This case involves the preemptive effect of the Price-Anderson Act (PAA), 42 U.S.C. § 2210 *et seq.*, which creates a federal cause of action for injuries arising out of alleged radioactive releases. As this Court has explained, that federal cause of action preempts and supplants state law: the PAA's "preemption provision ... transforms into a federal action" any lawsuit "asserting" a "nuclear incident" by "deeming" that lawsuit to be a federal action. *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999) (citing 42 U.S.C. § 2014(hh)). The federal PAA cause of action, in turn, is an unusual hybrid of federal and state law, arising under federal law but generally looking to state law for substantive rules of decision. The statute thus respects both the role of federal law in promoting nuclear energy and developing nuclear weapons and the role of state law in defining torts.

Until the decision below, every circuit to address the issue had concluded that this hybrid PAA cause of action provides the *exclusive* mechanism for plaintiffs to pursue claims for injuries arising out of alleged radioactive releases: such plaintiffs can recover under the PAA or not at all. *See, e.g.*, *Corcoran v. New York Power Auth.*, 202 F.3d 530, 537 (2d Cir. 1999); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *In re TMI Litig. Consol. II (TMI II)*, 940 F.2d 832, 855 (3d Cir. 1991). In particular, both the Fifth and Ninth Circuits have held that a plaintiff who asserts a PAA claim cannot pursue a freestanding state-law claim outside the PAA based

on the same alleged facts. *See Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186, 192 (5th Cir. 2011); *Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 570-71 (9th Cir. 2008); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2008); *Golden v. CH2M Hill Hanford Grp., Inc.*, 528 F.3d 681, 682-84 (9th Cir. 2008).

The Tenth Circuit, however, held below that a plaintiff who asserts a PAA claim *can* nonetheless pursue a freestanding state-law claim based on the same alleged facts. That holding not only creates a circuit conflict as stark as they come, but turns the PAA on its head. The statute was amended in 1988 to create an *exclusive* federal cause of action for injuries arising out of an asserted "nuclear incident," albeit a federal cause of action that generally incorporates underlying state tort law. Thus, a plaintiff cannot pursue both a PAA claim and a freestanding state-law claim based on the same alleged facts. And certainly nothing in the statute authorizes what happened here—"a little judicial jiu-jitsu," App. 5a, whereby a plaintiff who *attempts* but *fails* to prove a PAA claim can turn around and simply relabel that failed federal claim a freestanding state-law claim.

It is hard to overstate the legal and practical importance of this case. The PAA was amended in 1988, in the wake of the Three Mile Island accident, to create a rational and efficient regime to handle claims arising out of an alleged nuclear incident by, among other things, consolidating all such claims in federal court. To that end, Congress created a federal cause of action that supplants freestanding state-law claims. Allowing plaintiffs who assert a

PAA claim to pursue a state-law claim based on the same alleged facts would circumvent the PAA's comprehensive remedial scheme, and subject the nuclear energy industry, defense contractors, and the Federal Government to potentially boundless liability. The decision below creates intolerable uncertainty on the preemptive scope of the Act: litigants need to know what claims they may bring and in what court they may bring them. The answer to those questions should not turn on whether they sue in Denver, Houston, or Los Angeles. Because the decision below creates a clear circuit conflict on an important and recurring question of federal law, and potentially subjects the Federal Government—by virtue of its contractual indemnity obligations to petitioners—to a judgment of more than *$1 billion* in this case, this Court should grant the petition.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 790 F.3d 1088, and reprinted in the Appendix ("App.") at 1-52a. The Tenth Circuit's unreported order denying a petition for panel rehearing and rehearing *en banc* is reprinted at App. 53-54a. The district court's opinion is reported at 13 F. Supp. 3d 1153, and reprinted at App. 55-69a.

JURISDICTION

The Tenth Circuit issued its decision on June 23, 2015, and denied a timely petition for rehearing on July 20, 2015. App. 1a, 53-54a. On September 28, 2015, Justice Sotomayor extended the time within which to file a petition for certiorari to and including December 17, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Relevant statutory provisions are set forth in the Appendix, App. 294-331a.

STATEMENT OF THE CASE

A. Statutory Background

The PAA, first enacted in 1957, strikes a balance between protecting the public and fostering the development of nuclear energy and technology. *See* 42 U.S.C. §§ 2012(a), (i), App. 294-95a; *see also Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 64 (1978). To that end, the Act—among other things—establishes a mandatory framework for managing claims and funding liability arising from "nuclear incidents." *Id.* at 65. The PAA defines a "nuclear incident" as "any 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." 42 U.S.C. § 2014(q), App. 296a.

In 1988, Congress amended the PAA to federalize all claims for liability allegedly arising from a nuclear incident. As amended, the PAA establishes a new federal cause of action called a "public liability action." 42 U.S.C. § 2014(hh), App. 298a. The Act defines a "public liability action" as "any suit asserting public liability," *id.*, which the Act in turn defines as "any legal liability arising out of or resulting from a nuclear incident," *id.* § 2014(w), App. 297a. A "public liability action" "shall be deemed to be an action arising under [the PAA]." *Id.* § 2014(hh), App. 298a. Together, these provisions

establish that "any suit *asserting*" "*any* legal liability" resulting from "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property" caused by the radioactive effects of certain elements "shall be *deemed* to be" a federal suit under the PAA. 42 U.S.C. §§ 2014(q), 2014(w), 2014(hh), App. 296-98a (emphasis added). The 1988 amendments also provide that "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" Section 2210. *Id.* § 2014(hh), App. 298a.

B. Factual Background

The United States Government established the Rocky Flats facility in the early 1950s, at the height of the Cold War, to produce nuclear weapons. Trial Tr. (10/11/05), at 430-32, 480, 494, Tenth Circuit Appendix ("CA10 App.") Vol. IV. Rather than operate the facility itself, the Government turned to private contractors to handle the job. *Id.* Petitioner The Dow Chemical Company operated the facility from 1952 to 1975, and petitioner Rockwell International Corporation operated it from 1975 to 1989. *Id.* In return, the Government agreed to indemnify petitioners for certain claims related to their operation of Rocky Flats.

Beginning in the late 1960s and early 1970s, studies found plutonium above background levels on certain properties near the facility. Trial Tr. (10/27/05), at 3080-85 (Budnitz), CA10 App. Vol. IV. These studies were widely publicized, and led to both regulation and litigation. *See, e.g.*, *Good Fund Ltd.-1972 v. Church*, 540 F. Supp. 519 (D. Colo. 1982),

rev'd sub nom. McKay v. United States, 703 F.2d 464 (10th Cir. 1983). Virtually all of the properties at issue in this litigation were developed after this publicity, with the approval of state and local authorities. Exh. DX2292, CA10 App. Vol. VII.

With the end of the Cold War, the Federal Government shuttered the Rocky Flats facility in 1992. The plant site was extensively remediated, and is now a wildlife refuge. In 2005, following years of careful study, the federal Agency for Toxic Substances and Disease Registry determined that "the levels of off-site surface soil contamination [around Rocky Flats] are no apparent public health hazard for past, current and future exposures." Exh. DX454 at 76, CA10 App. Vol. VII; *see also id.* at 35-37, CA10 App. Vol. VII.

C. Proceedings Below

1. The Trial And First Appeal

Respondents filed this lawsuit in the U.S. District Court for the District of Colorado in January 1990, alleging that plutonium releases from Rocky Flats had exposed area residents, increased their cancer risks, contaminated their properties, and lowered property values. Compl., CA10 App. 194-218. The complaint expressly characterized the case as a "public liability action" under the PAA; indeed, the complaint tracked the PAA's definition of "nuclear incident" by asserting that respondents' claims "arise in whole or in part from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material which has been released or is threatened to be released into the environment from Rocky Flats." 2d Am. Compl. ¶ 96, CA10 App. 266; *see also id.* ¶¶ 1-3, 5, 20, 27-34,

53-59, CA10 App. 246-47, 249, 251-53, 257-58; *cf.* 42 U.S.C. § 2014(q), App. 296a. As relevant here, the complaint asserted trespass and nuisance claims under the PAA and Colorado law. 2d Am. Compl. ¶¶ 96, 111-21, CA10 App. 266, 268-70.

Much of the 1990s was taken up with fact discovery and summary judgment briefing. For present purposes, it suffices to say that the district court granted respondents' motion to certify a plaintiff class of all real property owners within a 30-square mile area surrounding the facility, and denied petitioners' motions for summary judgment. The case was eventually narrowed to the property-damage claims of the certified class—specifically, respondents' theories of trespass and nuisance based on Colorado law. Respondents did not purport to pursue any freestanding state-law claims outside the PAA; to the contrary, they acknowledged that "th[e] new cause of action" created by the 1988 PAA amendments had "*supplanted* claims that, prior to the Amendments, would have simply been brought in state court under state law." Pls.' Reply in Support of Mot. for Partial Summ. J. (8/4/97) [Dkt. 971], at 11 (emphasis added).

In July 2003, the district court (Kane, J.) issued a ruling distilling many of its previous rulings and "clarif[ying] the scope of trial." *Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d 1175, 1179 (D. Colo. 2003). That ruling observed that "[n]one dispute this is a 'public liability action' arising under the Price-Anderson Act ... because it is an action in which Plaintiffs seek to impose liability arising out of or resulting from a 'nuclear incident.'" *Id.* Analyzing respondents' claims under the Act, the court held

that state law invariably provides the relevant standard of care, and is not preempted by federal law even insofar as it would allow the imposition of liability for radioactive releases authorized by federal nuclear-safety standards. *See id*. at 1179-99.

In their final Statement of Claims, filed shortly before trial, respondents confirmed that their claims "arise under the [PAA], ... a federal statute providing for claims against the operating contractors of nuclear weapons facilities, ... in case of certain legal injuries, including property damages, caused by releases of radioactive substances from the facilities." Pls.' Statement of Claims (8/8/05) [Dkt. 1419], at 2. "Under the Act," respondents explained, "the legal rules governing plaintiffs' claims are derived from the law of the state where the incidents occurred." *Id.* (citing 42 U.S.C. § 2014(hh)). "Each plaintiff and class member asserts two claims *deriving from Colorado law*: trespass, and nuisance." *Id.* (emphasis added).

The trial began in October 2005. The jury ultimately found both petitioners liable under both the trespass and nuisance theories. 2/14/06 Jury Verdict Form, at 1-13, CA10 App. 375-87. As relief, the jury awarded the plaintiff class $176,850,340 in compensatory damages from both petitioners, $110,800,000 in punitive damages from petitioner Dow, and $89,400,000 in punitive damages from petitioner Rockwell. *Id.* at 15, 24, 26-27, CA10 App. 389, 398, 400-01. In their post-trial motion for judgment, respondents confirmed that "[t]he trespass and nuisance claims presented to the jury were brought pursuant to, and are governed by, the Price-Anderson Act." Pls.' Post-trial Mot. for Judgment

(5/4/06) [Dkt. 2170], at 27. After awarding prejudgment interest dating back to 1990, the district court entered a final judgment in favor of the plaintiff class in the amount of $926,104,087. *See Cook v. Rockwell Int'l Corp.*, 564 F. Supp. 2d 1189, 1197-1200, 1216-18 (D. Colo. 2008); Final Judgment (6/2/08) at 3-4, CA10 App. 621-22.

Petitioners appealed and, in its first encounter with this case, the Tenth Circuit reversed. *Cook v. Rockwell Int'l Corp.* (*Cook I*), App. 72-119a. The court noted that respondents "only presented their *PAA* trespass and nuisance claims to the jury." App. 84a n.8 (emphasis added). The court then proceeded to hold, like every other circuit to address the issue, that plaintiffs "must establish an injury sufficient to constitute a nuclear incident as a threshold, substantive element of any PAA claim." App. 90a. In other words, to prevail on a PAA claim, plaintiffs must not only *assert* the occurrence of a "nuclear incident," but *prove* that it caused them a compensable injury, *i.e.,* "'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.'" *Id.* at 88-91a (quoting 42 U.S.C. §§ 2014(q),(w),(hh), App. 296-98a).

Here, respondents were never required to satisfy that federal injury requirement at trial. Rather, the district court allowed them to try their claims on the theory that a mere *risk* of injury based on contamination of property by even a single atom of plutonium was enough. "The statute does not indicate that the mere presence of plutonium is per

se injurious to property. If mere contamination without actual damage were enough, Congress could have easily listed 'contamination' as an injury falling within 42 U.S.C. § 2014(q)'s definition of 'nuclear incident.' Instead, Congress required a showing of 'damage to property.'" App. 92a.

"Because the jury was not properly instructed on an essential element of [respondents'] PAA claims," the Tenth Circuit held, "the verdict must be set aside and the case remanded for further proceedings not inconsistent with this opinion." App. 95a. Nonetheless, the Tenth Circuit proceeded to address "questions of law raised in this appeal that are certain to arise again in the event of a re-trial in order to guide the district court on remand." App. 96a n.15.

The Tenth Circuit then held (among other things) that the district court erred by concluding that state tort law invariably provides the standard of care in a PAA claim, and consequently failing to analyze whether federal nuclear-safety standards conflict with state tort standards. App. 95-100a. Rather, the Tenth Circuit explained, general principles of conflict preemption apply in this context. *See id.* The court thus directed the district court on remand to evaluate petitioners' argument that federal nuclear-safety standards conflict with, and therefore preempt, state tort standards. App. 99-100a & n.18.

Respondents unsuccessfully petitioned for rehearing *en banc*, CA10 Supp. App. 320-24, and for a writ of certiorari from this Court, Cert. Pet., *Cook v. Rockwell Int'l Corp.*, No. 10-1377 (May 6, 2011). Respondents' certiorari petition argued that the Tenth Circuit had erred by holding that a PAA claim

includes a federal injury requirement, and, in any event, that radioactive contamination of real property in *any* amount invariably satisfies any such requirement. *Id.* at i.

This Court invited the Solicitor General to present the views of the United States. *See Cook v. Rockwell Int'l Corp.*, 132 S. Ct. 82 (2011). In response to that invitation, the Solicitor General urged the Court to deny the petition because, among other things, "the court of appeals … correctly determined that a 'nuclear incident' is a substantive element imposed by the Act, and correctly construed it pursuant to federal law." Br. for the United States at 8, No. 10-1377 (May 24, 2012), App. 278a. The Solicitor General explained that "the Act's independent limitation on actionable injuries furthers the express purpose of 'limit[ing] the liability of those persons liable for such losses' arising from nuclear incidents." App. 281a (citing 42 U.S.C. § 2012(i), App. 295a). Indeed, "it is implausible to believe that the government would have agreed to indemnify its contractors and licensees for liability for the presence of a single molecule of plutonium—no matter how harmless." App. 288a.

This Court denied the petition. *See* 133 S. Ct. 22 (2012).

2. Proceedings On Remand And The Second Appeal

Back in the district court, however, respondents made no effort to satisfy the PAA's injury requirement. Instead, they shifted legal theories entirely, and for the first time argued that *Cook I* had left undisturbed a freestanding state-law nuisance verdict in their favor. Joint Status Report

8/7/12 [Dkt. 2326], at 1-5, CA10 Supp. App. 401-05. Accordingly, they requested "the reinstatement of the jury's verdict and the Court's entry of judgment on Plaintiffs' nuisance claim under Colorado law and diversity jurisdiction" entirely *independent* of the PAA. *Id.* at 1, CA10 Supp. App. 401.

The district court rejected that request, holding that "a plaintiff who brings a PAA claim may not pursue a freestanding state-law claim based on the same facts." App. 57a. As the court explained, "every federal circuit … to consider whether the PAA preempts state causes of action for public liability arising out of or resulting from nuclear incidents has concluded that it has." App. 60-61a. In addition, the court explained, *this* Court has recognized that "the PAA completely preempts state-law in terms of the vehicle for bringing a claim" arising from an alleged "nuclear incident." App. 63a (citing *Neztsosie*, 526 U.S. at 485 n.6 (1999)).

The district court also rejected respondents' argument that, because they failed to prove a "nuclear incident," "the PAA does not apply at all." App. 63a. As the court noted, respondents "do not cite any authority holding that a plaintiff simultaneously may pursue a PAA claim and a state-law claim based on the same facts." App. 63 n.3. By the PAA's plain terms, after all, any suit "asserting" any legal liability arising from a nuclear incident is "deemed" to be an action arising under the PAA, *regardless* of whether plaintiffs ultimately prove that the asserted nuclear incident caused them any compensable injury. 42 U.S.C. § 2014(hh), App. 298a. Thus, respondents' argument foundered on "their own allegations" that "their lawsuit is a public

liability action arising from a nuclear incident." App. 63-64a (citing 2d Am. Compl. ¶¶ 1, 3, 5, 96, CA10 App. 246-47, 266).

Finally, the district court rejected respondents' suggestion that, in *Cook I,* petitioners had waived the argument that the PAA completely preempts and federalizes state-law claims alleging liability from a nuclear incident. To the contrary, the district court observed, petitioners had expressly "argued on appeal that '[t]he 1988 PAA amendments completely federalized this area of the law by making a "public liability action" under the PAA, 42 U.S.C. § 2014(w), "the *exclusive* means of compensating victims for any and all claims arising out of nuclear incidents."'" App. 67a (emphasis in original; quoting Petrs.' *Cook I* Br. 25, App. 88a (in turn quoting *Hanford*, 534 F.3d at 1009)). Indeed, the district court chastised respondents for "selectively quoting" the Tenth Circuit's *Cook I* opinion and "confus[ing]" the preemption issue presented here ("whether the PAA permits or preempts freestanding state-law claims based on the same facts as the PAA claim") with the preemption issue addressed by the Tenth Circuit in *Cook I* ("whether PAA § 2014(hh) preempts state tort law standards of care"). App. 67-68a.

Respondents thereafter stipulated to dismissal of the entire action with prejudice, and the district court entered final judgment in petitioners' favor. App. 70-71a. Respondents appealed.

A new panel of the Tenth Circuit reversed. App. 1-52a. The court began by identifying the core legal question: whether PAA plaintiffs who "assert but fail to prove a nuclear incident" may nonetheless pursue a freestanding state-law claim based on the same

alleged facts. App. 9a. Before addressing that question, however, the panel majority asserted that petitioners had "forfeited" this issue in the first appeal by allegedly failing to raise a "field preemption defense" at that time. App. 9-11a. The majority based that assertion entirely on a footnote in *Cook I* stating that "Defendants … never develop the issue" of field preemption. App. 9-10a (citing *Cook I,* App. 97a n.16). The majority acknowledged the district court's conclusion that this footnote addressed an entirely different preemption issue regarding "state tort law standards of care," and "admit[ted] this may not be a frivolous reading of the prior panel's opinion." App. 11a. The majority ultimately disagreed, however, based on its own conclusion that the standard-of-care issue in *Cook I* presented "at most a conflict preemption question" and that the prior panel therefore would have had no reason to mention field preemption in addressing that issue. *Id.* The majority did not address *Cook I*'s explanation for its reference to field preemption: that "at least five other circuits" had analyzed the standard-of-care issue under that rubric. App. 100a n.19. Judge Moritz specifically disagreed with the panel majority on the forfeiture point. App. 37a, 51a.

Notwithstanding its discussion of forfeiture, the Tenth Circuit then proceeded to address the preemption issue on the merits. App. 12-23a. The court began with the PAA's text, which "applies to 'any suit asserting public liability.'" App. 13a (quoting 42 U.S.C. § 2014(hh)). The court discerned in that text "[n]othing [that] speaks to what happens when a nuclear incident is alleged but unproven," and concluded that Congress therefore did not intend to bar freestanding state-law tort claims in those

circumstances. App. 15a. The court also cited the PAA's "larger statutory structure" and "history," and found both consistent with the notion that Congress was concerned about "[l]arger occurrences that qualify as nuclear incidents" but left liability for "smaller occurrences" completely unregulated. App. 16-17a. The court also discounted petitioners' reliance on this Court's decision in *Neztsosie* and decisions from other circuits. App. 18-22a.

The remainder of the Tenth Circuit's opinion addressed the distinct issue whether respondents could pursue "reinstatement" of the original jury verdict that the prior panel had "set aside," *Cook I*, App. 95a. Remarkably, the panel majority concluded that they could. App. 23-34a. Judge Moritz also disagreed with the majority on this score. App. 37-52a.

Petitioners unsuccessfully sought rehearing from the Tenth Circuit. App. 53-54a. This petition follows.

REASON FOR GRANTING THE WRIT

The PAA Preempts State-Law Claims By Plaintiffs Who Assert A Claim For Injuries Arising Out Of Alleged Radioactive Releases, And The Decision Below Cannot Stand.

The PAA federalizes any and all claims asserting liability for injuries arising out of an alleged "nuclear incident." In particular, the statute expressly preempts all such claims and transforms them into a federal PAA claim. The decision below turns that regime upside down by holding that plaintiffs who assert a PAA claim may nonetheless pursue a freestanding state-law claim based on the same

alleged facts. Because that decision is not only wrong, but creates a direct and acknowledged circuit conflict on an important and recurring issue of federal law and opens the door to potential reinstatement of a *$1 billion* judgment for which the Federal Government is responsible, this Court's review is warranted.

A. The Tenth Circuit's Decision Creates A Direct And Acknowledged Circuit Conflict.

Until the decision below, the federal courts of appeals were unanimous in holding that the PAA provides the *exclusive* means for plaintiffs to pursue claims for injuries arising out of an alleged "nuclear incident": such plaintiffs can recover under the PAA "or not at all." *Nieman*, 108 F.3d at 1553; *see also Corcoran*, 202 F.3d at 537 (the PAA "creat[es] an *exclusive* federal cause of action for radiation injury") (emphasis added); *O'Conner*, 13 F.3d at 1099-1100 (under the PAA, "a state cause of action is not merely transferred to federal court; instead, a new federal cause of action supplants the prior state cause of action."); *TMI II*, 940 F.2d at 855 ("[T]here can be no action for injuries caused by the release of radiation from federally licensed nuclear power plants separate and apart from the federal public liability action created by the [PAA]."). Indeed, both the Ninth and Fifth Circuits have relied on that proposition to hold that plaintiffs who attempt, but fail, to prove a PAA claim are precluded from pursuing a freestanding state-law claim based on the same alleged facts.

Thus, in *Hanford*, the Ninth Circuit considered whether plaintiffs could pursue state-law medical-

monitoring claims based on alleged exposure to radiation. *See* 534 F.3d at 1009-10. The court had previously held that such claims are not compensable under the PAA. *See Berg v. E.I. Dupont de Nemours & Co.*, 293 F.3d 1127, 1131-33 (9th Cir. 2002). The plaintiffs thereafter moved for a remand to state court, arguing that the failure of their PAA claims left them free to pursue state-law claims based on the same alleged radioactive releases as their failed PAA claims. The district court rejected that argument, and the Ninth Circuit affirmed. *See Hanford*, 534 F.3d at 1009-10. As the appellate court explained, "[t]he PAA is the *exclusive* means of compensating victims for *any and all* claims arising out of nuclear incidents." *Id.* (emphasis added; citing *Berg*, 293 F.3d at 1132, *TMI II*, 940 F.2d at 854, and 42 U.S.C. §§ 2014(hh),(w)). Because the plaintiffs' "medical monitoring claims were not compensable under the PAA absent physical injury," they were not compensable *at all*, and the district court correctly dismissed the entire case with prejudice. *Hanford*, 534 F.3d at 1009.

The Ninth Circuit built on *Hanford* in *Golden*, which, as relevant here, involved a state-law emotional-distress claim removed from state court. *See* 528 F.3d at 683-84.[1] Insofar as that claim was based on alleged radiation exposure, the *Golden* court held, it was not compensable. Plaintiffs' sole

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[1] Although *Hanford* was decided before *Golden*, and originally reported at 521 F.3d 1028 (9th Cir. 2008), the Ninth Circuit subsequently amended the *Hanford* opinion on issues not material here, and the final *Hanford* opinion is thus published in a later volume of the Federal Reporter.

remedy for such alleged exposure was a PAA claim, and alleged emotional distress does not satisfy the PAA's injury requirement. *See id.* "Here, [the plaintiff] can't show that the exposure caused his physical injuries and without physical injury, he can't recover for psychic harm arising from exposure to radioactive materials." *Id.* at 683. Thus, the Ninth Circuit concluded that "summary judgment was proper as to [the plaintiff's] emotional distress claim for exposure to radioactive materials," *id.* at 684, and did not allow him to pursue a state-law emotional-distress claim for such exposure.[2]

The Ninth Circuit's subsequent decision in *Dumontier* applied the same rule. The plaintiffs there sought to pursue state-law claims for emotional distress, medical monitoring, and "actual malice." 543 F.3d at 569. The district court concluded that the PAA supplanted and preempted those claims, and then granted the defendant summary judgment under the PAA because the plaintiffs could not satisfy the Act's federal injury requirement. *See id.* The Ninth Circuit affirmed, once again holding that "[e]xposure to radioactive materials is compensable *only* if it causes one of the harms" listed in the PAA's

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[2] The Ninth Circuit did, however, allow the plaintiff to pursue a state-law emotional-distress claim for exposure to *non*-radioactive materials, which are beyond the PAA's preemptive scope. *See Golden*, 528 F.3d at 684. Here, in sharp contrast, respondents' putative state-law nuisance claim is based on alleged contamination of their properties by plutonium, a radioactive element expressly covered by the PAA. *See* 42 U.S.C. § 2014(aa), App. 298a (including plutonium in the PAA's definition of "special nuclear material").

definition of a "nuclear incident," and rejecting the possibility of freestanding state-law claims based on the same alleged facts as the failed PAA claim. *Id.* (emphasis added); *see also id.* at 571 ("[W]e held in [*Hanford*] that any suit *seeking* compensation for a nuclear incident is preempted by the [PAA].") (emphasis modified); *id.* ("Plaintiffs claim compensation for exposure to radioactive material, so they can *only* recover if they meet the requirements of the [PAA].") (emphasis added).

In holding below that an unsuccessful PAA plaintiff remains free to pursue a freestanding state-law claim based on the same alleged facts as the failed PAA claim, the Tenth Circuit gave these Ninth Circuit decisions short shrift. Remarkably, the court asserted that those cases "just don't address the question before us." App. 21a. While acknowledging *Hanford*'s holding that "'[t]he PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents,'" the Tenth Circuit declared that "precisely no one disputes this beside-the-point point." *Id.* (quoting *Hanford*, 534 F.3d at 1009). Rather, the court insisted, "[t]he issue before us isn't what happens in the event of a nuclear incident, but ... what happens in the face of a lesser occurrence." *Id.*

But that was precisely the issue presented in *Hanford*, *Golden*, and *Dumontier*. In each of those cases, as noted above, plaintiffs who *asserted*, but failed to *prove*, liability arising from a nuclear incident then sought to pursue a freestanding state-law claim; in each of those cases, the Ninth Circuit held that the PAA preempted such freestanding state-law claims. *See Hanford*, 534 F.3d at 1009-10;

Golden, 528 F.3d at 683-84; *Dumontier*, 543 F.3d at 569-71. The Tenth Circuit essentially conceded this point with respect to *Golden* and *Dumontier*, but dismissed those cases on the ground that "by way of support ... they cite only *Hanford*'s holding that the Act is the exclusive means of compensating victims of nuclear incidents, offering nothing to explain how or why the Act might preclude relief in cases involving lesser occurrences." App. 21a. But those cases *do* explain just that: "[S]ection 2014(hh)'s preemption clause"—which provides that "*any* suit *asserting* public liability ... shall be *deemed* to be an action arising under Section 2210 of this title," 42 U.S.C. § 2014(hh) (emphasis added)—"would lose much of its force" if plaintiffs who asserted but failed to prove a PAA claim were free to pursue a freestanding state-law claim based on the same alleged facts as their failed PAA claim. *Dumontier*, 543 F.3d at 570.

And the Fifth Circuit has reached the same conclusion. In *Cotroneo*, as relevant here, the plaintiffs brought a claim for "offensive contact," a Texas tort that does not require a showing of physical injury, based on alleged exposure to radioactive releases. *See* 639 F.3d at 190. The district court recognized that such a claim does not satisfy the PAA's injury requirement, but dismissed the claim *without* prejudice to allow plaintiffs to pursue it in state court. *See id.* at 191.

The Fifth Circuit reversed. The panel unanimously held that "the district court erred by holding that the plaintiffs' 'offensive contact' claims did not arise under federal law." *Id.* at 194. That is because "a plaintiff who *asserts* any claim arising out of a 'nuclear incident' as defined in the PAA 'can sue

under the PAA or not at all.'" *Id.* at 192 (emphasis added; quoting *Nieman*, 108 F.3d at 1553); *see also id.* at 193-95. And because plaintiffs cannot recover under the PAA without proving that the asserted nuclear incident caused them a compensable injury, it follows that the district court was required to dismiss plaintiffs' "offensive contact" claim *with* prejudice. *See id.* at 195-200.[3]

The Tenth Circuit below conceded that *Cotroneo* holds that the PAA preempts freestanding state-law claims arising from alleged exposure to radiation, but accused the Fifth Circuit of "fail[ing] to identify any provision of the Act that expressly preempts and precludes state law claims in the absence of a nuclear incident." App. 22a. Ignoring the Fifth Circuit's extensive discussion of the PAA's text, *see* 639 F.3d at 194-98, the Tenth Circuit asserted that *Cotroneo* simply "reasoned more generally that to allow parties to recover under state law for lesser

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[3] Although Judge Dennis agreed with the panel majority that the PAA preempts a freestanding state-law "offensive contact" claim (and indeed authored the majority opinion on this point), he would have held that the PAA does not impose a federal injury requirement at all. In his view, the PAA converts any suit *asserting* a "nuclear incident" into a PAA suit, but does not then require plaintiffs to *prove* that the asserted "nuclear incident" caused them a compensable injury. *See* 639 F.3d at 205. The *Cotroneo* panel majority expressly rejected that theory. "[I]f the plaintiff cannot show that a nuclear incident occurred, there can be no public liability, and hence no recovery on his public liability action. ... This result is perfectly logical: the success or failure of a plaintiff's public liability action depends upon whether the plaintiff can prove what he asserts—public liability." *Id.* at 196.

occurrences [than a "nuclear incident"] would 'circumvent the entire scheme governing public liability actions.'" App. 22a (quoting 639 F.3d at 197).

The Tenth Circuit characterized that as an "implied" preemption argument (even though the Fifth Circuit had treated it as an *express* preemption argument), and asserted that "we have as much difficulty with this argument as Judge Dennis did in dissent, for we fail to discern how our reading of the Act 'circumvents' anything." App. 22a (citing 639 F.3d at 200-02 (Dennis, J., concurring in part and dissenting in part)). As noted above, however, Judge Dennis did not dissent on this score at all, but rather agreed with his colleagues that the PAA preempts freestanding state-law claims in cases asserting a nuclear incident; his disagreement with the *Cotroneo* panel majority was limited to the *elements* of the federal PAA cause of action. *See* 639 F.3d at 193-95; *id.* at 204 (Dennis, J., concurring in part and dissenting in part) (acknowledging that the PAA "replace[s] the plaintiffs' state-law claims with federal claims derived from state law").

There is, in short, no way to reconcile the Tenth Circuit's decision below with the Fifth and Ninth Circuit decisions described above. This direct and acknowledged conflict on an important and recurring issue of federal law warrants this Court's review. *See* S. Ct. R. 10(a).

B. The Tenth Circuit's Decision Is Manifestly Incorrect.

The Tenth Circuit not only created a direct and acknowledged circuit conflict on an important and recurring issue of federal law, but placed itself on the

wrong side of that issue. Its decision reflects a manifest misunderstanding of the PAA's text, structure, and purpose.

Although the Tenth Circuit was quick to accuse other courts of paying insufficient attention to the statutory text, *see* App. 21-22a, the Tenth Circuit itself failed meaningfully to analyze the relevant statutory provisions. As the Tenth Circuit recognized, "[t]he [PAA] applies to 'any suit *asserting* public liability,'" and such a suit is "'*deemed* to be an action arising under federal law.'" App. 13-14a (quoting 42 U.S.C. § 2014(hh)) (emphasis added). Those are the critical textual provisions that, as other courts have explained, transform certain state-law tort claims into federal PAA claims. Once the state-law suit is "deemed" to be a federal suit at the outset of the litigation, no more state-law claims remain; they are expressly preempted and supplanted by federal claims. *See, e.g.*, *Cotroneo*, 639 F.3d at 192, 194-95; *id.* at 204 (Dennis, J., concurring in part and dissenting in part).

That straightforward point resolves this case. Respondents unquestionably *asserted* liability arising from a "nuclear incident"; indeed, they specifically styled this case as a public liability action, and parroted the PAA's definition of "nuclear incident" in their complaint. 2d Am. Compl. ¶ 96, CA10 App. 266; *see also id.* ¶¶ 1-3, 5, 20, 27-34, 53-59, CA10 App. 246-47, 249, 251-53, 257-58. And respondents not only "asserted" PAA claims in their pleadings, but affirmatively litigated those claims for almost *twenty years*. Accordingly, this action is "deemed" to arise under the PAA, 42 U.S.C.

§ 2014(hh), and respondents may recover, if at all, only under the PAA.

Rather than engaging that textual argument, the Tenth Circuit responded with a rhetorical question: "Where does any of this language—expressly—preempt and preclude all state law tort recoveries for plaintiffs who plead but do not prove nuclear incidents?" App. 14a. And the court then gave a summary answer: "We just don't see it." *Id.* According to the court, "[n]othing in th[e] language [of the PAA] speaks to what happens when a nuclear incident is alleged but unproven." App. 15a.

As noted above, however, the statute specifies that a suit "asserting" a nuclear incident is "deemed" to be a PAA suit. 42 U.S.C. § 2014(hh), App. 298a. The *assertion* of a nuclear incident, not *proof* of a nuclear incident, is what triggers preemption. Where, as here, plaintiffs fail to prove that the asserted "nuclear incident" caused them a compensable injury, they meet the same fate as any other plaintiff who fails to prove an asserted federal claim: the court must enter judgment for the defendant on that claim. *See, e.g.*, *Cotroneo*, 639 F.3d at 195-200. Because such a plaintiff *has* no more state-law claim (it having been "deemed" a PAA claim), there is no reason for the statute to further specify "what happens when a nuclear incident is alleged but unproven." App. 15a. The Tenth Circuit did not explain how a state-law tort suit, having been transformed into a federal action, could—like Cinderella at midnight—magically revert back to a state-law tort suit if and when the plaintiffs fail to prove their federal claims at trial (or a PAA judgment in their favor is reversed on appeal).

Nothing in the statute contemplates or provides for any such reversion.

Indeed, any doubt on this score should have been erased by this Court's decision in *Neztsosie*. The plaintiffs there, members of the Navajo Nation, alleged that the defendants had exposed them to radioactive materials as a result of uranium mining on the Reservation. *See* 526 U.S. at 477-78. The plaintiffs filed suit in tribal court under tribal tort law. *See id.* The defendants filed suit in federal court to enjoin the claims, arguing that they were necessarily deemed federal PAA claims that should be adjudicated in federal court. *See id.* at 478-79.

This Court agreed that the dispute belonged in federal court. As the Court explained, "the [PAA] transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident.'" *Id.* at 484 (quoting 42 U.S.C. § 2210(n)(2), App. 324a). By the statute's plain terms, any state-law claim asserting a nuclear incident is "deemed to" arise under federal law. 42 U.S.C. § 2014(hh), App. 298a. "This structure, in which a public liability action becomes a federal action ... resembles what we have spoken of as '"complete pre-emption" doctrine,' ... under which 'the pre-emptive force of a statute is so "extraordinary" that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Neztsosie*, 526 U.S. at 484 n.6 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)). Because the PAA expressly provides for the "conversion of state claims to federal ones," it is one of the "rare" statutes that allows a defendant to remove a case to federal court even when the

plaintiff purports not to bring a federal claim. *Id.* at 485 n.7.

Although *Neztsosie* thus details the mechanism by which the PAA preempts state-law claims, the Tenth Circuit brushed aside that decision. According to the Tenth Circuit, the PAA is "quite unlike ... true complete preemption statutes" because it "does much to preserve state rules of decision." App. 19a. But that is a *non sequitur*. *Neztsosie* teaches that, like a complete preemption statute, the PAA transforms a state cause of action into a federal one. To be sure, that federal action generally incorporates state substantive law, *see* 42 U.S.C. § 2014(hh), App. 298a, but any freestanding state-law tort claims are nonetheless preempted and "deemed" to be federal claims. Indeed, *Neztsosie* referred to Section 2014(hh) as the PAA's "preemption provision," 526 U.S. at 484—a reference that would be inexplicable if, as the Tenth Circuit held below, that provision does *not* preempt state-law suits within its scope.

Just as the Tenth Circuit erred by attempting to distinguish *Neztsosie*, the court erred by relying on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), for the proposition that "'Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies.'" App. 20-21a (quoting 464 U.S. at 251-52). *Silkwood* predated the 1988 PAA amendments that created the federal "public liability action" and added the statute's "preemption provision." *Neztsosie*, 526 U.S. at 484. Needless to say, *Silkwood* thus sheds no light on the PAA's preemptive scope after the 1988 amendments.

Rather than analyzing the PAA's text as it exists today, the Tenth Circuit analogized the PAA to the

Class Action Fairness Act: "the [PAA] embodies an arrangement much like that found in the Class Action Fairness Act and similar statutes, one in which Congress hasn't preempted an entire field but provided a federal forum and certain specific rules for larger cases while allowing smaller cases more or less to go their own way." App. 12a. In the Tenth Circuit's view, it would be anomalous for the PAA to "preclude small claims even as ... it ... guarantees recovery for larger ones." *Id.*

That analogy, and the asserted distinction between "large" and "small" claims, has no basis in the PAA's text, structure, or purpose. To the contrary, as noted above, the PAA takes *all* suits asserting a "nuclear incident" and "deem[s]" them to be federal suits. 42 U.S.C. § 2014(hh), App. 298a; *see also Neztsosie*, 526 U.S. at 478-79. The fact that the PAA then provides relief only for plaintiffs who prove that the asserted "nuclear incident" caused them a compensable injury simply reflects Congress' considered decision about how best to allocate limited resources. That decision makes sense: as noted above, the PAA seeks to strike a balance between "protect[ing] the public" and "encourag[ing] the development of the atomic energy industry," 42 U.S.C. § 2012(i), App. 295a, and thus does not authorize compensation for plaintiffs who assert a "nuclear incident" but cannot prove that they have suffered any of the statutorily enumerated injuries.

If anything, this case proves the point. Having failed to prove at trial that the asserted "nuclear incident" caused them any compensable injury, respondents simply relabeled their failed PAA claim a freestanding state-law claim. The Tenth Circuit

below accepted that relabeling, and gave them a green light to try to reinstate the original judgment of a *billion* dollars in their favor, for which the Federal Government has assumed contractual indemnification liability. App. 23-36a; *see also* App. 112a n.22 ("There is no dispute that Defendants have entered into indemnification agreements with the government."). Under these circumstances, the Tenth Circuit's characterization of the claims at issue here as "small," App. 12a, is perplexing. If any case highlights the potential for crippling liability resulting from the aggregated claims of plaintiffs who have not been required to prove any compensable injury under the PAA, it is this one.

At bottom, the decision below would "permit an end-run around the entire PAA scheme." *Cotroneo*, 639 F.3d at 196. There would have been no reason for Congress to have "deemed" freestanding state-law claims asserting a "nuclear incident" to be federal claims if plaintiffs were free to pursue freestanding state-law claims outside the PAA. The decision below thus not only violates the PAA's plain text, but frustrates the entire statutory scheme, which "provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages" while also protecting "private sector participation in the beneficial uses of nuclear materials." *TMI II*, 940 F.2d at 853 (internal quotation omitted); *see also Duke Power*, 438 U.S. at 93 (noting "the important congressional purpose of encouraging private participation in the exploitation of nuclear energy"). By consolidating all claims asserting injury arising from alleged radioactive releases under the public-liability umbrella, the PAA also avoids piecemeal litigation and furthers "the

congressional aims of speed and efficiency." *Neztsosie*, 526 U.S. at 486.

C. The Tenth Circuit's Alternative Forfeiture Ruling Is Wrong.

As noted above, the Tenth Circuit acknowledged that its decision creates a circuit conflict on the PAA's preemptive scope. *See* App. 21-23a. The panel majority ruled in the alternative, however, that petitioners forfeited their preemption argument in their first (successful) appeal in this case. *See* App. 9-11a. That alternative ruling, which Judge Moritz rejected, *see* App. 37a, 51a, is manifestly incorrect.

As a threshold matter, the forfeiture issue is a red herring. The Tenth Circuit proceeded below to resolve the preemption question on the merits by rendering a far-reaching substantive ruling that concededly created a circuit conflict. *See* App. 12-23a. Under Tenth Circuit law, that ruling created binding circuit precedent, and is "not dicta" notwithstanding the alternative forfeiture ruling. *United States v. Rohde*, 159 F.3d 1298, 1302 & n.5 (10th Cir. 1998); *see also Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008) (when court renders alternative holdings neither is dicta and both are binding). Because the Tenth Circuit unquestionably "'passed upon'" the important preemption issue presented here, this case provides an appropriate vehicle for this Court to review the lower court's resolution of that issue. *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)).

In any event, the panel majority's alternative forfeiture ruling is flatly refuted by the record. Even

a cursory glance at the briefing in the original Tenth Circuit appeal shows that petitioners, in describing the operation of the PAA, made the very point they are making here: that the PAA provides "the *exclusive* means for seeking redress for a nuclear-related injury; a plaintiff seeking such redress 'can sue under the [PAA] ... or not at all.'" Petrs.' *Cook I* Br. 39 (emphasis in original; quoting *Nieman*, 108 F.3d at 1553), App. 147a; *see also id.* at 25, App. 136a ("The 1988 PAA amendments completely federalized this area of the law by making a 'public liability action' under the PAA, 42 U.S.C. § 2014(w), 'the *exclusive* means of compensating victims for any and all claims arising out of nuclear incidents.'") (emphasis in original, quoting *Hanford*, 534 F.3d at 1009). That point alone—which the *Cook II* majority never addressed—is enough to dispose of the forfeiture argument.

Indeed, in *Cook I*, respondents themselves *conceded* that their state-law claims had been supplanted by PAA claims, and never suggested that the judgment in their favor could be affirmed on freestanding state-law grounds. *See* Resps.' *Cook I* Br. 30-55, 69, App. 208-33a, 246a. Thus, at oral argument in *Cook I*, respondents' counsel agreed with the Sixth Circuit in *Nieman* that a plaintiff who asserts a nuclear incident can recover either under the PAA or not at all: "*Nieman* ... holds, as we concede and as everyone agrees, that after the 1988 Amendments these claims are brought as federal causes of action under Price Anderson, a point on which there is no dispute." *Cook I* Oral Arg. 1:21:52-1:22:07, App. 267a; *see also* Resps.' *Cook I* Br. 41-42, App. 219a (noting, without disagreement, that "[i]n *Nieman* ..., the court ... simply stated that after the

1988 Amendments, state law claims no longer 'stand as separate causes of action.'") (quoting 108 F.3d at 1553).

In other words, no one disputed in *Cook I* that the PAA preempted respondents' state-law claims and transformed them into PAA claims. Rather, the preemption dispute in *Cook I* involved the entirely different issue whether state tort law invariably provides the standard of care in a PAA claim, even when it conflicts with on-point federal nuclear-safety standards. The district court held that state law was not preempted, *see* 273 F. Supp. 2d at 1179-99; petitioners challenged that holding on appeal, *see* Petrs.' *Cook I* Br. 15, 22-38, App. 129a, 134-46a; *Cook I* Oral Arg. 1:37-9:22, App. 261-66a; and respondents defended it, *see* Resps.' *Cook I* Br. 24-25, 30-52, App. 202-04a, 208-31a; *Cook I* Oral Arg. 1:19:51-1:22:07, App. 266-67a. The Tenth Circuit in *Cook I* agreed with petitioners that federal nuclear-safety standards may conflict with, and therefore preempt, state tort standards, and accordingly directed the district court to analyze that issue on remand. *See* App. 95-100a & nn.15-19. As the *Cook I* court noted, petitioners argued this standard-of-care preemption point in terms of *conflict* preemption, not *field* preemption: insofar as there are *no* on-point federal nuclear-safety standards, then state law provides the standard of care for a PAA claim. *See* App. 97a n.16, 100a n.19; *Cook I* Arg. 1:37-9:22, App. 261-66a.

The *Cook II* panel majority based its forfeiture ruling entirely on a footnote in *Cook I* stating "that though [petitioners] had 'alluded to field preemption in their brief' in the first appeal, they 'never developed the issue.'" App. 9-10a (quoting *Cook I*,

App. 97a n.16). According to the *Cook II* majority, "under law of the case doctrine what governs is the first panel's holding that [petitioners] failed to develop the [field preemption] argument." App. 10a. As a result, the *Cook II* majority concluded, *Cook I* establishes that petitioners forfeited the argument that the PAA preempts a freestanding state-law claim based on an alleged "nuclear incident," even though (as noted above) petitioners expressly made that point in their *Cook I* brief, respondents never disputed it, and the *Cook I* court never addressed it.

Indeed, the preemption dispute presented here does not focus on *field* preemption, but rather on *express* preemption. Field preemption is a form of *implied* preemption, where preemption "may be inferred from a 'scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). No such inference is required here because the PAA by its plain terms "deem[s]" actions "asserting" a "nuclear incident" to be federal PAA actions. 42 U.S.C. § 2014(hh), App. 298a. The *Cook II* majority's ruling that petitioners forfeited a "field" preemption argument in *Cook I* thus provides no basis to conclude that petitioners forfeited an *express* preemption argument. *See, e.g., English*, 496 U.S. at 78-79 (distinguishing express preemption from field preemption); *Choate v. Champion Home*

Builders Co., 222 F.3d 788, 792-96 (10th Cir. 2000) (same).

Not surprisingly, thus, when respondents first raised a waiver argument on remand from *Cook I,* the district court readily rejected it. App. 67-68a. The court quoted petitioners' *Cook I* briefs, where they explained that the PAA preempts freestanding state-law claims based on an alleged "nuclear incident." *Id.* And the court chastised respondents for "selectively quoting" *Cook I* by arguing that petitioners "did not advance a field preemption argument" in that appeal. App. 68a (internal quotation omitted). As the court explained, respondents' forfeiture argument "confus[es] two distinct preemption issues." *Id.* "In the footnotes [respondents] cite, the Tenth Circuit was ... referring to preemption of state tort law duty of care by federal safety standards, whereas the question here is whether the PAA completely preempts state claims arising out of nuclear incidents." *Id.*

The *Cook II* panel majority admitted—with considerable understatement—that "this may not be a frivolous reading of the prior panel's opinion." App. 11a. But the majority asserted that "it is surely an odd one," on the theory that preemption of a state-law standard of care by federal nuclear-safety standards involves conflict preemption, not field preemption. *Id.* As a result, the majority declared that the prior panel would not have mentioned field preemption in addressing that issue. *See id.* ("[W]e are unwilling to give such an uncharitable gloss to our colleagues' handiwork.").

But there was no need for the *Cook II* panel majority to speculate on this score: the *Cook I* court

explained why it was mentioning field preemption in addressing preemption of the state-law standard of care. As *Cook I* noted, "at least five other circuits" had analyzed that issue under the rubric of "field preemption." *Cook I*, App. 100a n.19. That point—*which the Cook II majority simply ignored*—explains why *Cook I* mentioned field preemption in addressing what the *Cook II* majority characterized as "at most a conflict preemption question." App. 11a. The *Cook II* majority, in short, "confuse[d]" the preemption question here with the "entirely different" preemption question addressed in *Cook I,* App. 68a, and thereby ruled that petitioners forfeited in *Cook I* an issue that was neither disputed nor decided in *Cook I.*

This Court should not allow a manifestly erroneous forfeiture ruling to insulate from review a lower-court decision creating a circuit conflict on an important and recurring issue of federal law. This Court can and should readily dispose of that ruling and resolve the conflict. *See, e.g.*, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1266-68 (2015) (reviewing record to reject asserted forfeiture); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2439 n.4 (2014) (same); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (same).

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

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