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 *AMICI CURIAE* OF LOUISIANA ENERGY SERVICES, LLC D/B/A URENCO USA AND WOLF CREEK NUCLEAR OPERATING CORPORATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Louisiana Energy Services, LLC d/b/a Urenco USA (UUSA) and Wolf Creek Nuclear Operating Corporation (Wolf Creek) respectfully submit this brief as *amici curiae*.[1]

[1] No counsel for any party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae's* intent to submit this brief at least ten days before it was due. All parties have

UUSA owns and operates a commercial uranium enrichment facility near Eunice, New Mexico. The UUSA facility is the only uranium enrichment plant operating in the United States today. It provides enriched uranium for use as fuel for the nation's nuclear power plants. Wolf Creek operates the Wolf Creek Generating Station, a nuclear power plant located in Kansas. Wolf Creek has been safely providing clean, reliable energy to the citizens of Kansas and Missouri since 1985. Both facilities are within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. Both facilities are also licensed by the Nuclear Regulatory Commission (NRC).

As nuclear facilities, UUSA and Wolf Creek are subject to nuclear liability laws similar to those that apply to the Petitioners and to other NRC-licensed facilities. Specifically, pursuant to the Atomic Energy Act of 1954 (AEA), as amended, UUSA and Wolf Creek must maintain nuclear liability coverage of a certain type and in an amount set by the NRC. 42 U.S.C. § 2243(d)(1), *id.* § 2210(a). UUSA is required, as a condition of its license and under NRC regulations, to maintain $300 million in nuclear liability insurance coverage. *See* 10 C.F.R. § 140.13b. Wolf Creek, also as a condition of its license and under NRC regulations, is required to maintain $375 million in primary nuclear liability insurance coverage, as well as to participate in the secondary industry retrospective premium system. 10 C.F.R. § 140.11. NRC regulations prescribe the required form of liability insurance policy, known as the "facility form policy." 10 C.F.R. § 140.91, App. A.

Amici have a substantial interest in this proceeding because the Tenth Circuit's decision threatens to undermine the federal nuclear liability regime and has implications for the

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consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

federally mandated system of nuclear liability coverage applicable to UUSA and Wolf Creek.

SUMMARY OF ARGUMENT

The Price-Anderson Act (PAA or Act), 42 U.S.C. § 2210 *et seq.*, creates exclusive liability for nuclear operators for injury arising from a "nuclear incident," and supplies a large pool of funds to ensure prompt and fair compensation for those physically or economically injured. The basis for the bargain is clear: to encourage the construction and operation of nuclear energy and related facilities in the United States, Congress sought to create a transparent, workable, and limited federal nuclear liability regime, protecting nuclear facility owners and operators from potentially crippling liabilities arising from ungovernable state tort actions.

Not any more. The Tenth Circuit below has now held that plaintiffs alleging injury from "*lesser nuclear occurrences*"—that is, injuries failing to meet the PAA's threshold of bodily injury or property damage—can recover damages under state tort law. Pet. App. 1a. The near-term result is an over $1 *billion* judgment for a group of plaintiffs whose only injury was fear of potential radioactive contamination from a nearby United States Department of Energy (DOE) facility. But as staggering as that number is, the long-term consequences of the *Cook* decision could be even more grave. The Tenth Circuit's decision provides the plaintiffs' bar with an end-run around the PAA's entire nuclear liability regime, and for the least deserving plaintiffs imaginable: those who cannot even establish that they or their property were at all physically harmed.

The Tenth Circuit thus has upended the PAA's carefully crafted balance of protecting the public from harm arising from the hazardous properties of radioactive material, and eroded the comprehensive and predictable nuclear liability regime for owners and operators of nuclear facilities. If allowed to stand, the Tenth Circuit's decision, which is contrary to the holdings of every other circuit to have

considered the issue, opens the door for nuclear market participants to potentially new and undefined liability. That uncertainty in turn has a cascading effect of negative consequences. It threatens to destabilize and weaken the value of the PAA's compensation system. It disrupts the settled expectations of participants and investors in the nuclear market. It discourages further participation and investment in nuclear energy within the United States. And it threatens to make the U.S. an outlier among countries with commercial nuclear power programs, many of which are governed by international nuclear liability conventions predicated on the principles inherent in the PAA. The petition should be granted.

ARGUMENT

I. THE TENTH CIRCUIT'S INVENTION OF A NEW CONSTRUCT OF NUCLEAR LIABILITY UNDERMINES THE PAA.

A. In Crafting the PAA, Congress Thoughtfully Balanced Competing Societal Interests And Created a Comprehensive Scheme for Regulation of Nuclear Liability.

Recognizing that the United States should lead the world in the development of nuclear power, the Atomic Energy Act of 1946 established a Joint Committee on Atomic Energy dedicated to studying the development, use and control of atomic energy. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (stating that Congress determined that the "national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy"). Several years later, the Atomic Energy Act of 1954 established the Atomic Energy Commission and provided for private-sector involvement in the nuclear industry under a comprehensive regulatory scheme. 42 U.S.C. §§ 2011-2281.

The private nuclear power industry was slow to develop, however. Utilities and manufacturers harbored concerns about the potential for unchecked tort liability in the event of a nuclear accident. Indeed, the consensus in the 1950s was that there would be *no* market for private nuclear power without legislation limiting operators' liability. Joint Committee on Atomic Energy Hearing, 85th Cong., 1st Sess. 147, 156-157 (1957).

Congress responded with the PAA, 42 U.S.C. § 2210 *et seq*. The Act contains an exclusive liability regime and a comprehensive financial protection system serving the dual purpose of protecting the public and encouraging nuclear development. *See In re TMI Litig. Cases Consol. II (TMI II),* 940 F.2d 832, 852 (3d Cir. 1991). First, on liability: to facilitate prompt and equitable compensation in the event of a "nuclear incident," the PAA channels liability exclusively to the operator, *without* the need for claimants to prove fault on the part of the operator or other entities providing goods or services at the nuclear facility, 42 U.S.C. § 2210(a). The Act defines a "nuclear incident" broadly as "any occurrence * * * within the United States 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).

The *quid pro quo* for that exclusive liability regime is that the Act provides a system of "financial protection" for operators against nuclear liability. Federal licensees are required to carry private insurance against nuclear liability, and operators of federally owned facilities are indemnified by the government in the event of an accident triggering PAA liability. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 476 (1999). The aggregate liability of operators is limited to the amount of required financial protection. In the event a nuclear incident involves damages in excess of the

aggregate liability limit, the Act provides that "Congress will thoroughly review the particular incident" and "will take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude." 42 U.S.C. § 2210(e)(2).

Throughout the PAA's history, Congress has amended the Act when necessary to enhance the insurance requirements. *See, e.g.*, S. Rep. No. 109-99, at 4 (2005) (recounting prior extensions of the PAA). Congress also periodically reviews the PAA to ensure that its compensation system is fair and that the level of available compensation is adequate, taking into account the diverse views of a range of stakeholders, including plaintiffs' interests. *See, e.g., Hearings Before the Joint Committee on Atomic Energy on Proposed Amendments to the Price-Anderson Act Relating to Waiver of Defenses*, 89th Cong., 2d Sess. 105-07 (1966) (addressing plaintiffs' concerns with burden of proof and procedures for bringing suit); S. Rep. No. 109-99, at 4 (describing participants in Congressional hearings on the PAA, including public interest group). Congress has extended the PAA four times since its enactment in 1957, *see* S. Rep. No. 109-99, at 4, and in each extension, affirmatively decided to maintain the PAA's balance to ensure a system of prompt and efficient compensation. Most recently, in the Energy Policy Act of 2005, 42 U.S.C. § 13201 *et seq.* (2005), Congress extended the PAA through December 31, 2025, the longest extension in the Act's history. *See* S. Rep. No. 109-99, at 4.

The PAA's comprehensive system also has been amended—and strengthened—in response to specific events. The Three Mile Island accident in 1979 spawned a multitude of state and federal court litigation. After Three Mile Island, Congress acted to strengthen and maintain the PAA liability regime. Specifically, in the Price-Anderson Amendments

Act of 1988, P. Law 100-408, Congress created a new federal cause of action, known as a "public liability action," as the exclusive means for members of the public to seek compensation in the event of a nuclear incident. As this Court has noted, the PAA public liability action resembles the "complete preemption" doctrine, under which " 'the pre-emptive force of a statute is so extraordinary' " that normal state law claims are converted into federal claims in order to ensure the efficient and equitable resolution of claims. *Neztsosie*, 526 U.S. at 485 n.6 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987)). After the 1988 Amendments to the PAA, claims based on alleged radiological contamination may only be brought in federal court as PAA claims.

Congress thus has sought to ensure the availability of prompt and equitable compensation, while protecting owners and operators from a multitude of litigation with possibly conflicting claims to available funds. As this Court put it in *Neztsosie*, the PAA "provides clear indications of the congressional aim of speed and efficiency" in the system for "distributing limited compensatory funds" in the event of a nuclear incident. 526 U.S. at 477. Congress understood the value of the compensation scheme it created under the PAA, and it repeatedly has acted to confirm and ensure the continued vitality of this system.

B. The Tenth Circuit Improperly Substituted Its Views for the Judgment of Congress.

The PAA is a "classic example" of a legislative economic scheme, in which Congress has sought "to structure and accommodate the burdens and benefits of economic life." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978) (citation and internal quotation omitted). And to maintain that careful balance, Congress created the "public liability action" in the 1988 Amendments as the exclusive means to seek redress for a nuclear incident.

As the Court recognized in *Neztsosie*, the PAA is akin in its preemptive force to other federal legislative systems under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, and the Labor Management Relations Act, 29 U.S.C. §§ 151-169. 526 U.S. at 485, n. 6.[2] The Court observed that the creation of an exclusive federal cause of action can provide benefits, such as avoiding a proliferation of suits and conserving limited compensatory funds. 526 U.S. at 477. The Court further observed that the 1988 Amendments provide "clear indications of the congressional aims of speed and efficiency" in the resolution of claims. 526 U.S. at 486.

Federal legislative systems that create exclusive federal causes of action, such as ERISA and the PAA, are more appropriate analogues than the Class Action Fairness Act, which the Tenth Circuit cited by analogy. For as Petitioners explain, that analogy—which the Tenth Circuit uses to read a distinction between "large" and "small" claims into the PAA—has "no basis in the PAA's text, structure, or purpose." Pet. 26-27. There is simply no indication in the PAA that Congress created a distinction between "nuclear incidents" and what the Tenth Circuit called "lesser nuclear

[2] Amici agree with Petitioners, *see* Pet. 26, that the Tenth Circuit inexplicably contradicted this Court's decision in *Neztsosie* when it stated that the PAA is "quite unlike * * * true complete preemption statutes" because it "preserve[s] state rules of decision." App. 19a. It is true that Congress did not wish to *create a stand-alone federal tort* as the basis for a public liability action, and thus provided that the "substantive rules for decision in such action shall be derived" from state law, which might encompass substantive issues such as the requisite duty of care and the burden of proof for causation. 42 U.S.C. § 2014(hh). But there is a difference between preserving state substantive law as the law of decision and permitting state law *claims*. The PAA's preemption leaves room for the former, but not the latter.

occurrences." The Tenth Circuit created this new construct out of whole cloth.[3]

The Tenth Circuit's decision creates a wholly new construct of nuclear liability. It thus renders the PAA's protections largely meaningless. By allowing a free-standing state nuisance claim where the plaintiffs failed to prove bodily injury or property damage to sustain a PAA public liability action, the Tenth Circuit's decision completely undermines the PAA system and the balance achieved by Congress.

The Tenth Circuit's decision opens the door to plaintiffs bringing a multitude of suits that are prohibited under the PAA, which requires proof of actual bodily injury or property damage from a release of radiation in excess of permissible federal limits. For instance, a plaintiff might seek to bring a state law claim based on no more than the fear of the effects of radiation or emotional distress caused by the release of radiation. Other potential claims might include those asserted by businesses claiming loss of trade based on a nuclear release. These were precisely the types of state tort actions that arose after the Three Mile Island accident, *see, e.g., TMI II*, 940 F.2d at 836, and which created the need for the 1988 Amendments.

In fashioning the PAA, Congress made the determination that only specified injuries arising from nuclear incidents—*i.e.*, those that result in actual injury to persons or property—were compensable, and that claims for such injuries must be

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[3] *See Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 56, 64-65 (1987) (discussing the exclusive federal cause of action under ERISA for qualified plan participants to bring claims for disability and other benefits, and stating that "the federal scheme would be completely undermined" if claimants "were free to obtain remedies under state law that Congress rejected"); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (discussing the Labor Management Relations Act and bar on bringing state law breach of contract claims against employers for matters within the scope of a collective bargaining agreement).

brought in federal court as public liability actions. The Tenth Circuit's decision undermines this Congressional mandate by allowing plaintiffs to bring state law claims that do not require any showing of actual harm to persons or property, and may instead be based simply on "fear" of the perceived harms that *could* be caused by radiation. Allowing such claims brings us back to the situation that prompted the passage of the PAA in the first place: concerns about the potential for unchecked tort liability stifle the development of private nuclear energy facilities. Congress has already answered these concerns through the development of the comprehensive nuclear liability regime enshrined in the PAA, and therefore this Court must ensure that Congress' work is not undone by the Tenth Circuit's errant decision.

II. THE TENTH CIRCUIT'S NOVEL INTERPRETATION OF THE PAA IS NOT SUPPORTED BY THE TEXT OF THE ACT OR ITS LEGISLATIVE HISTORY.

As this Court recognized in *Neztsosie*, 526 U.S. at 476, the PAA provides a scheme "of private insurance, Government indemnification and limited liability for claims of 'public liability'" which arise from a "nuclear incident." As discussed above, the scope of compensable claims under the PAA is circumscribed by the Act's definition of "nuclear incident" – *i.e.,* "any occurrence * * * within the United States 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). As a matter of law, this definition of "nuclear incident" establishes the threshold for asserting a compensable injury from a release of radiation. A plaintiff who cannot demonstrate bodily injury or property damage as defined by the PAA cannot meet the prerequisites for a public liability action, and

thus cannot maintain any action for a radiation-related claim. *See* 42 U.S.C. § 2014(q).

As Petitioners correctly point out, the Tenth Circuit glosses over the text of the PAA. Pet. 23-24. The text of the PAA contains no suggestion that it contemplates state claims founded on some "lesser nuclear occurrence." To begin with, the PAA does not define any such "lesser nuclear occurrence," and Congress defined "nuclear incident" in such a way as to delineate the harms from the release of radiation that it believed should be compensable, *i.e.*, personal injury or property damage. *See also* 10 C.F.R. Part 140, App. A (NRC-prescribed facility form policy covers "all" liability caused by the "nuclear energy hazard").

Congress made its intent to make the PAA the sole source of nuclear liability known in other ways as well. For instance, the 1988 Amendments prohibit an award of punitive damages in certain circumstances. 42 U.S.C. § 2210(s). Nor does the PAA allow recovery for claims such as psychiatric damages or emotional distress not connected to physical bodily injury. *See Golden*, 528 F.3d at 682-683. As this Court explained in another context, "the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined" if plaintiffs remained "free to obtain remedies under state law that Congress rejected." *Metropolitan Life*, 481 U.S. at 64-65. The same principle holds here: Congress specifically delineated the claims that plaintiffs may bring related to nuclear harm under the PAA. Permitting plaintiffs to make an overt end-run around the federal nuclear liability system to bring alternative claims under state law would undermine the entire federal scheme.[4]

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[4] It should be noted that Congress in the PAA balanced a key area of nuclear liability, but did not try to cover every type of radiation injury claim. The PAA is concerned with "public liability"—*i.e.,* harm to the offsite public from a release of radiation in excess of federal limits. Injuries to onsite employees of licensees are covered by federal or state

The legislative history of both the PAA and its 1988 Amendments confirms that Congress intended the public liability action to be the *exclusive* means for resolution of radiation claims in order to avoid the numerous state and federal court actions that could result in the event of a nuclear incident. *See Neztsosie*, 526 U.S. at 486 ("The terms of the Act are underscored by its legislative history, which expressly refers to the multitude of separate cases brought 'in various state and Federal courts' in the aftermath of the Three Mile Island accident.") (citing and quoting S. Rep. No. 100-218, at 13). The litigation stemming from the Three Mile Island accident involved state court actions where plaintiffs asserted, among other things, "claims based on fear of the effects of radiation." *TMI II*, 940 F.2d at 836. When Congress enacted the 1988 Amendments, to federalize all claims arising from nuclear incidents, it meant to preclude precisely the type of claim asserted by the plaintiffs in *Cook*: "The Price-Anderson system, including the waiver of defenses provisions, the omnibus coverage, and the predetermined sources of funding, provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures and standards for recovery that might otherwise be applicable under State tort law." S. Rep. No. 100-218 at 4.

The Tenth Circuit's decision runs completely contrary to this express Congressional purpose. It would allow funds to be inappropriately diverted to those who have suffered *no* cognizable injury under the PAA, effectively nullifying one

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workers' compensation laws, and damage to onsite property is covered by other insurance. *See* 42 U.S.C. § 2014(w). In addition, the PAA covers public liability arising from use of nuclear materials within the authority of the NRC and DOE, namely, "source, special nuclear, or byproduct material" as defined in the Act. *See* 42 U.S.C. § 2014(q). Liability related to naturally occurring radiation levels outside the jurisdiction of DOE and the NRC, such as radon in homes and businesses or exposures of persons during medical diagnosis or treatment, are generally outside the PAA system.

of the most important provisions of the Act: the limitation on aggregate public liability of nuclear operators. The non-injured plaintiffs in this case were awarded over $900 million plus interest—for a total award upwards of $1 billion. Allowing non-PAA state law claims for such so-called "lesser" occurrences renders the Act's limitation on aggregate liability meaningless.

III. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF EVERY OTHER CIRCUIT THAT HAS CONSIDERED THE PREEMPTIVE EFFECT OF THE PAA PUBLIC LIABILITY ACTION.

At least six other circuits have addressed the scope of the PAA and independent state tort law claims. Each has found that the PAA is the exclusive means of seeking redress for a nuclear injury. *See Nieman v. NLO, Inc.,* 108 F.3d 1546, 1553 (6th Cir. 1997) (stating that a plaintiff seeking redress for a PAA claim can sue under the statute or not at all); *see also see also Cotroneo v. Shaw Env't & Infrastructure, Inc.,* 639 F.3d 186, 193-200 (5th Cir. 2011); *Dumontier v. Schlumberger Tech. Corp.,* 543 F.3d 567, 569-571 (9th Cir. 2008); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009-10 (9th Cir. 2008); *Golden v. CH2M Hill Hanford Grp., Inc.*, 528 F.3d 681, 682-684 (9th Cir. 2008); *TMI II,* 940 F.2d at 855; *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1306 (11th Cir. 1998).

As the Third Circuit put it: "there 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 under the [PAA] Amendments Act." 940 F.2d at 855. The Fifth Circuit, for its part, has explained: "[R]ecovery on a state law cause of action without a showing that a nuclear incident has occurred would circumvent the entire scheme governing public liability actions, which is clearly inconsistent with [the

PAA]." 639 F.3d at 197. And the Ninth Circuit has held that "[t]he PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents," such that plaintiffs who fail to demonstrate bodily injury or property damage within the statutory definition of a "nuclear incident" are barred from any recovery. *Hanford*, 534 F.3d at 1009.

The Tenth Circuit parted ways with all these decisions, creating a six-to-one split, when it concluded that the PAA is *not* the exclusive means of seeking redress for nuclear-related injuries, such that a plaintiff may seek redress for nuclear-related harm under state law. As Petitioners correctly explain, the Tenth Circuit acknowledged the conflicting decisions of the other circuits, but remarkably dismissed them nearly out of hand. *See* Pet. 19-22. The Tenth Circuit's intentional disregard of the other circuits' decisions demonstrates that its decision is irreconcilable. That split will create tremendous uncertainty in the application of the PAA—particularly because a number of nuclear participants are located within the Tenth Circuit, including the *amici curiae*, as well as DOE's Waste Isolation Pilot Plant facility (the nation's only disposal facility for high-level nuclear waste), and the Sandia National Laboratory and the Los Alamos National Laboratory, both of which are important national security facilities. Simply by virtue of their physical location, nuclear facilities in the Tenth Circuit now face uncertainty about their potential liability exposure even if a nuclear incident never occurs at their facilities.

IV. IF NOT CORRECTED, THE TENTH CIRCUIT'S DECISION WILL HAVE SIGNIFICANT ADVERSE EFFECTS.

Nuclear energy companies invested in this industry in reliance on the PAA's thorough nuclear liability regime. The Tenth Circuit's decision fundamentally changes the risks those companies face. For there now exists a real likelihood that nuclear owners and operators could be unexpectedly

saddled with very significant judgments—perhaps upwards of billions of dollars—in favor of plaintiffs who may not have suffered harms that Congress deemed significant enough to warrant compensation under the PAA. Even if such plaintiffs were ultimately unsuccessful, moreover, without the framework of the PAA, such cases may sit in court for years in protracted, complex, and expensive litigation.

If the Tenth Circuit's decision stands, companies already invested in the nuclear market can do little to mitigate this new risk. And for companies not yet invested in the U.S. nuclear market, the Tenth Circuit's decision could discourage participation and investment or further expansion in this vital industry—a result precisely contrary to Congressional and executive branch policy and intent.

From a broader perspective, moreover, the Tenth Circuit's decision threatens to destabilize the *global* market for nuclear energy, which (then and now) is an important component of the U.S. energy mix, particularly in light of climate change concerns.[5] Not only does the decision below threaten further investment in U.S. nuclear facilities, it also runs counter to internationally accepted nuclear liability standards.[6]

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[5] *See, e.g.,* White House, *Fact Sheet: Obama Administration Announces Actions to Ensure that Nuclear Energy Remains a Vibrant Component of the United States' Clean Energy Strategy available at* https://www.whitehouse.gov/the-press-office/2015/11/06/fact-sheet-obama-administration-announces-actions-ensure-nuclear-energy.

[6] Most countries with established nuclear programs have nuclear liability regimes based on compliance with one of two international conventions on nuclear liability: the Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention) and the Vienna Convention on Civil Liability for Nuclear Damage (Vienna Convention). *See* Nuclear Energy Agency-OECD, Paris Convention on Nuclear Third Party Liability (2014) *available at* https://www.oecd-nea.org/law/paris-convention.html; International Atomic Energy Agency, Vienna Convention on Civil Liability for Nuclear Damage *available at* https://www.iaea.org/publications/documents/conventions/vienna-

Companies often are unwilling to participate in the nuclear market in countries in which operator liability and minimum claim requirements are not absolute. For example, India has not entirely followed the international nuclear liability standards because its nuclear liability law provides, among other things, that operators may have a right of recourse against *suppliers* for nuclear damages. *See* Institute for Defense Studies and Analyses, Resolving India's Nuclear Liability Impasse (2014) *available at* http://www.idsa.in/issuebrief/ResolvingIndiasNuclearLiabilityImpasse_kumarpatil_061214. This provision conflicts with the international norm of channeling all nuclear liability to the operator. And not surprisingly, the potential for nuclear supplier liability in India has had the effect of discouraging many nuclear suppliers from engaging in the Indian nuclear market, inhibiting that market's growth. *See* World Nuclear Association, Nuclear Power in India (2015) *available at* http://www.world-nuclear.org/info/Country-Profiles/Countries-G-N/India/.

The Tenth Circuit's decision to permit certain state-law tort claims for "lesser nuclear occurrences" could well introduce the same market-dampening effect into the United States that India has experienced. It un-tethers potentially significant and uncertain liability from the federal statute designed to curb it, discouraging domestic and foreign actors from participating in the market.

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convention-on-civil-liability-for-nuclear-damage. The Paris and Vienna Conventions share many common principles, including the exclusive liability of the nuclear operator and mandatory financial coverage of the operator's liability.

CONCLUSION

For all of the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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January 15, 2016