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 NUCLEAR ENERGY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

In accordance with Supreme Court Rule 37, the Nuclear Energy Institute respectfully submits this brief in support of Petitioners, the Dow Chemical Company and Rockwell International Corporation.[1] The Nuclear Energy Institute, Inc. ("NEI") is responsible for establishing and advocating on policy matters affecting the nuclear energy industry. NEI represents the nuclear energy industry in litigation and on regulatory, technical, and legal issues. Its members include all companies licensed to operate commercial nuclear power plants in the United States, as well as nuclear plant designers, major architect/engineering firms, nuclear material licensees, and other entities involved in the nuclear energy industry.

NEI, through its members, has an unmistakable interest in this case. The comprehensive federal statutory and regulatory framework that Congress has established during the past sixty years undergirds the continued operation of nuclear facilities by NEI's members. This framework, which

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days before the due date of the *amicus curiae*'s intention to file this brief. Letters evidencing such consent have been or will be filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

includes the exclusive federal cause of action (the Public Liability Action) available to those who allege harm related to the hazardous properties of nuclear materials, is directly implicated by the Tenth Circuit's June 23, 2015, decision ("*Cook II*"). NEI submits this brief *amicus curiae* to provide the Court with its informed and unique perspective on the issues presented.

SUMMARY OF ARGUMENT

The Court should grant the Petition to review the Tenth Circuit's unprecedented decision. The Tenth Circuit found that plaintiffs alleging injury from releases of ionizing radiation may avoid the preemptive effect of the Price-Anderson Amendments Act of 1988, and recover hundreds of millions of dollars in damages, despite their failure to prove the predicate facts for a compensable injury under this Act. The Tenth Circuit stands alone in this decision, which conflicts with every other Circuit to have addressed the question. In reaching this conclusion, the Tenth Circuit disregarded the Act's purpose, the larger statutory framework within which it operates, and the regulatory system of which it is a part.

The Tenth Circuit's analysis should not be allowed to stand. NEI respectfully asks this Court to grant review to bring uniformity to this important area of law.

ARGUMENT

"A claim growing out of any nuclear incident is compensable under the terms of the [Price-Anderson] Amendments Act or *it is not compensable at all*." *In re TMI Litig. Cases Consol. II* (*TMI II*), 940 F.2d 832,

854 (3d Cir. 1991). The Tenth Circuit disagrees and has allowed state law claims to proceed independently of the Price-Anderson Amendments Act of 1988 ("Amendments Act"). This holding distorts the comprehensive statutory and regulatory system created by Congress and produces significant uncertainty for nuclear facility operators and litigants. Review should be granted.

I. Congress Has Established a Comprehensive and Exclusive Statutory System for Regulation of Commercial Nuclear Power and Protection of the Public

A. Congress Created a Comprehensive Regulatory Scheme to Support the Development of Nuclear Power

The background of the Amendments Act demonstrates why the Tenth Circuit's analysis cannot stand. Although possession and use of nuclear material originally was a government monopoly under the Atomic Energy Act of 1946, Congress subsequently concluded that "the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (citing H.R. Rep. No. 2181, 83d Cong., 2d Sess. 1-11 (1954)). Thus, the Atomic Energy Act of 1954 ("AEA") established the Atomic Energy Commission ("AEC") and provided for private sector involvement under a comprehensive regulatory system. *Roberts v. Florida Power & Light*

Co., 146 F.3d 1305, 1306 (11th Cir. 1998); *see* 42 U.S.C. §§ 2011 *et seq*.

The AEA provided for licensing of construction, ownership, and operation of commercial nuclear power reactors by private entities under supervision by the AEC, the predecessor of the Nuclear Regulatory Commission ("NRC"). *Pacific Gas & Elec.*, 461 U.S. at 207. The AEC "was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Id.* "Upon these subjects, no role was left for the states." *Id.*

Despite enactment of the AEA, private companies were reluctant to invest in nuclear facilities because of the uncertain scope of potential liabilities. *Roberts*, 146 F.3d at 1306. Thus, Congress enacted the Price-Anderson Act of 1957 "for the purpose of 'protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry.'" *TMI II*, 940 F.2d at 852 (quoting 42 U.S.C. § 2012). The Act limited the potential liability for activities involving the handling of nuclear materials, and established a system of private insurance and government indemnity to ensure predictability and a flourishing industry. *Id.* at 837 n.2.

B. Congress Transformed the Nuclear Liability Landscape with the 1988 Price-Anderson Amendments Act

Congress dramatically transformed the Price-Anderson landscape by passing the Amendments Act in 1988. *Id.* at 857. Before the Amendments Act, persons claiming radiation injuries could allege state law causes of action in state or federal court, and

could recover under any theory of liability available in a state. *In re TMI* (*TMI III*), 67 F.3d 1103, 1105 (3d Cir. 1995). The Amendments Act altered this by preempting and extinguishing all such state law causes of action; it (1) expressly created a new and exclusive federal cause of action, the Public Liability Action (PLA), and (2) required that all rules of decision to be applied in a PLA be consistent with the comprehensive federal framework governing nuclear energy. *Roberts*, 146 F.3d at 1308; *TMI II*, 940 F.2d at 857.

The Amendments Act defines a PLA as "any suit asserting public liability," 42 U.S.C. § 2014(hh), which the Amendments Act defines as "any legal liability arising out of or resulting from a nuclear incident," 42 U.S.C. § 2014(w). A PLA "shall be deemed to be an action arising under [the Price-Anderson Act]." 42 U.S.C. § 2014(hh). 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 Price-Anderson Act. 42 U.S.C. §§ 2014(q), 2014(w), 2014 (hh) (emphasis added). The Amendments Act also provides 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. 42 U.S.C. § 2014(hh).

In the Amendments Act, "Congress sought to effect uniformity, equity, and efficiency in the disposition of public liability claims." *TMI II*, 940

F.2d at 857. "After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*." *Id.* at 854; *see also Roberts*, 146 F.3d at 1306 (PLA is "an exclusive federal cause of action for radiation injury"); *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090, 1099-1100 (7th Cir. 1994) ("a new federal cause of action supplants the prior state cause of action"); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("[S]tate law claims cannot stand as separate causes of action.").

Consistent with Congress' goals of "uniformity, equity, and efficiency," *TMI II*, 940 F.2d at 857, the NRC's permissible dose limits establish the sole tort duty of care for NRC licensees both as to nuclear workers and members of the public. *See TMI III*, 67 F.3d at 1113; *Roberts*, 146 F.3d at 1308. Pursuant to its statutory authority, the NRC established the permissible dose limits based on the vast body of accumulated scientific knowledge about the effects of radiation exposure. *See* 10 C.F.R. Part 20.

C. The Price-Anderson Amendments Act Precludes States from Regulating Nuclear Safety Through Tort Standards That Are Inconsistent with the Federal Duty of Care

In addition to preempting all state law causes of action, Congress also preempted state law rules of decision that are "inconsistent" with Price-Anderson. 42 U.S.C. § 2014(hh). "Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any

cause of action grounded in state law." *O'Conner*, 13 F.3d at 1100. Under this framework, Congress has preempted states from regulating the safety aspects of nuclear energy. *See Pacific Gas & Elec. Co*, 461 U.S. at 208 ("the safety of nuclear technology [is] the exclusive business of the federal government"). The "Price-Anderson system, by design, alters state tort law to forward the goals of that act." *O'Conner*, 13 F.3d at 1100.

The Supreme Court has confirmed that the Amendments Act "transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident,'" *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999), explaining that:

> This structure, in which a public liability action becomes a federal action, but one decided under substantive state-law rules of decision that do not conflict with the Price-Anderson Act, *see* 42 U.S.C. § 2014(hh), 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[.]'"

Id. at 484 n.6 (internal citations omitted).

Under this complete preemption doctrine, the PLA does not incorporate state law tort duties that are inconsistent with the sole duty to comply with NRC permissible limits on radiation dose. Although

variously describing the type of preemption at issue, every Circuit Court of Appeals that has addressed this issue has interpreted section 2014(hh) to preclude application of state tort law standards that are inconsistent with the PLA duty, including the Third Circuit (*TMI II*, 940 F.2d at 859), Sixth Circuit (*Nieman*, 108 F.3d at 1553), Seventh Circuit (*O'Conner*, 13 F.3d at 1105), Ninth Circuit (*Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 570-71 (9th Cir. 2008)), and Eleventh Circuit (*Roberts*, 146 F.3d at 1308). These decisions recognize that to impose liability based on state law tort theories, even though the defendant complied with the NRC permissible limits, would be contrary both to the preemption of state regulation of nuclear safety (*see Pacific Gas & Elec. Co*, 461 U.S. at 208), and Congress' purpose in creating the PLA. Therefore, applying a state tort law standard of care in a PLA would impermissibly permit state regulation of the safety of nuclear power. *See TMI II*, 940 F.2d at 859 ("Permitting the states to apply their own nuclear regulatory standards, in the form of the duty owed by nuclear defendants in tort, would, however, 'frustrate the objectives of the federal law.'").

II. The Tenth Circuit Decision Undermines the Price-Anderson Amendments Act and the Regulatory Scheme Created by Congress

A. The Tenth Circuit's Conclusion That Plaintiffs May Allege State Law Claims for "Lesser Occurrences" Has No Basis in the Law

Although the *Cook II* panel does not conclude that the decisions of sister Circuits in *TMI II*, *TMI III*,

Roberts, *Nieman*, and *O'Conner,* were wrongly decided, *Cook II* suggests that the contrary sister-Circuit authority is inapplicable given the record below and that the plaintiffs in this case were unable to prove that a nuclear incident occurred. Therefore, the panel suggests, plaintiffs' claims are based on what it calls a "lesser occurrence," meaning something "less" than a "nuclear incident." Pet. App. 21a. Yet absolutely no authority supports the notion that Price-Anderson leaves intact state law claims based on "lesser occurrences." The Tenth Circuit's conclusion in this regard is contrary to the entire statutory and regulatory system that governs claims based on radiation injury.

Cook II leaps to this conclusion by assuming that Congress carved out an exception to the preemptive effect of the Amendments Act for an entire class of state law claims (*i.e.*, "lesser occurrences"), without ever saying it was doing so. The panel could not and did not cite to statutory language delineating this exception. Under the panel's reasoning, any claim based on a "lesser occurrence" is spared the preemptive effect of the Act, even though the term "lesser occurrence" is nowhere mentioned or defined in the Act or anywhere in Price-Anderson jurisprudence.

Because the concept of tort liability for "lesser occurrences" does not exist under Price-Anderson law, it is not surprising that other Circuit Courts have not adopted this concept. Other courts *have* made clear, however, that state law claims based on injuries that do not rise to the level of those articulated by section 2014(q) ("bodily injury, sickness, disease, or death, or loss of or damage to

property, or loss of use of property") are preempted. As the Ninth Circuit stated in *Dumontier*, the Amendments Act "prohibits recovery when plaintiffs haven't suffered 'bodily injury, sickness, disease or death'—even when the state cause of action doesn't have that limitation." 543 F.3d at 570 (citing *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2008)). Permitting recovery for injuries not articulated in section 2014(q) would allow an "end run" around the statute's preemption clause. *Dumontier*, 543 F.3d at 570; *see also In re Berg Litig.*, 293 F.3d 1127, 1131 (9th Cir. 2002) (rejecting state law emotional distress claim). As the Third Circuit has said, "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 by the Amendments Act." *TMI II*, 940 F.2d at 855. Given the breadth of this definition [of a PLA], the consequence of a determination that a particular plaintiff has failed to state a public liability claim potentially compensable under the Price–Anderson Act is that he has no such claim at all." *Id.* at 854. The Tenth Circuit's decision is directly at odds with this established authority.

B. The Decision Permits States To Regulate the Safety of Commercial Nuclear Power Through Tort Law, Contrary to Congressional Intent and Decades of Developed Case Law

The primary contribution of the Amendments Act was to prohibit state regulation of commercial nuclear power operations by preempting and extinguishing state law causes of action that are

inconsistent with the interlocking definitions of 42 U.S.C. §§ 2014(q), 2014(w) and 2014(hh), and that impose duties of care on operators that are inconsistent with the duty of care for a PLA. *See Roberts*, 146 F.3d at 1308; *TMI II*, 940 F.2d at 854 ("After the Amendments Act, no state cause of action based upon public liability exists."). Accordingly, "states are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law." *Id.* at 859-60 (citing *Pacific Gas & Elec. Co.*, 461 U.S. at 204).

The decision below reverses course and suggests that plaintiffs may pursue state law causes of action based on alleged radiation injuries even if such plaintiffs cannot satisfy the bodily injury and property damage claim requirements. This framework would permit these "lesser" claims to be brought under state tort law causes of action excluded by the Price-Anderson Act.

Congress has expressly pre-empted state standards of care "inconsistent with" the Act. 42 U.S.C. § 2014(hh). Even in the absence of Price-Anderson preemption, the Atomic Energy Act would independently pre-empt any state standards of care that conflict with regulatory limits (and any contrary reading of *Cook II* is erroneous). The Tenth Circuit's decision, however, invites unwarranted litigation and uncertainty as to whether state rules of decision that are pre-empted in a PLA nonetheless survive as to non-PLA plaintiffs alleging "lesser occurrences." Plaintiffs may attempt to establish separate standards of care that govern claims for "lesser

occurrences," such as "reasonable safety precautions" or the "as low as reasonably achievable" ("ALARA") standard, even though these types of standards have been consistently rejected by courts as inconsistent with the sole duty of care under the Amendments Act. *See, e.g.*, *Adkins v. Chevron Corp.*, 960 F. Supp. 2d 761, 772-73 (E.D. Tenn. 2012) (holding that allegations of "numerous stack violations," non-compliance with various license provisions, were insufficient to state a claim for relief absent evidence that releases had exceeded permissible dose limits); *Finestone v. Fla. Power & Light Co.*, 319 F. Supp. 2d 1347, 1349 (S.D. Fla. 2004) (citing cases); *McLandrich v. S. Cal. Edison Co.*, 942 F. Supp. 457, 467 (S.D. Cal. 1996) (holding that "the numerical dose limits, rather than the ALARA standards, will be applicable to the case at bar").

If courts were to apply certain state rules of decisions to the claims of non-PLA plaintiffs alleging "lesser occurrences," the result would be state regulation of nuclear safety. These state tort standards divorced from the elements of a PLA would impose significant new burdens on nuclear power plant licensees, which could lose the assurance intended by Congress that compliance with the permissible dose limits is their sole duty of care for purposes of tort liability.

C. The Decision Creates Exceptional Burdens and Uncertainty for Commercial Nuclear Power Licensees

The Amendments Act was designed to provide operational certainty for commercial nuclear power licensees. *Roberts*, 146 F.3d at 1306. In an industry involving the application of complex principles of

science and engineering, *see In re TMI Litig.*, 193 F.3d 613, 629-55 (3d Cir. 1999), licensees rely on the standard of care established by the Amendments Act to confirm that they are operating within permissible limits. That standard is federal and certain.

As a result and as discussed above, the Circuit Courts that have considered this issue before *Cook II* are in agreement that plaintiffs who are unable to state a PLA for their alleged radiation injuries are left with no alternative state law remedy. The Amendments Act therefore provides commercial nuclear power licensees with the assurance that the scope of *any* potential liability stemming from claims for radiation injuries is defined by the Amendments Act. The Amendments Act was designed to provide operational certainty for commercial nuclear power licensees, by limiting their potential liability to compensable injuries.

Cook II promotes uncertainty because plaintiffs will claim that it leaves the door open for them to argue for the application of state tort law to impose liability on commercial nuclear power plant operators for "lesser occurrences" that were never contemplated by Congress when it designed the Amendments Act's liability, insurance, and indemnification system. A plaintiff bringing such an action would claim that even though the nuclear power plant operator complied at all times with the federal regulatory standards, it still may be found liable for an alleged "lesser occurrence." Although such a claim would not have merit, and has been consistently rejected by the Circuit Courts of Appeal, the fact that the defendant in this situation might have to defend a standalone state law claim divorced

from the Price-Anderson liability system demonstrates why this Court should confirm the prevailing law.

As a further example of the potential anomalous and incorrect results from misapplication of the law based on the *Cook II* holding, a release of radiation might constitute a "nuclear incident" as to some plaintiffs, but only a "lesser occurrence" as to others who cannot prove a compensable injury under section 2014(q). Thus, a plaintiff with a serious alleged injury (*e.g.*, lung cancer) would be limited to alleging a PLA because the release may qualify as a "nuclear incident," while a person claiming only "emotional distress" from the same release might potentially recover damages under state law.[2] Similarly, a plaintiff alleging "damage to property" might have no or limited recovery in a PLA, while a neighbor who has only background levels of radiation on his or her property (*see In Re TMI*, 193 F.3d at

[2] The Tenth Circuit states that "it's hard to conjure a reason why Congress would allow plaintiffs to recover for a full panoply of injuries in the event of a large nuclear incident but insist they get nothing for a lesser nuclear occurrence." *Cook II*, Pet. App. 15a-16a. This misstates the issue. It is not the *size of the occurrence* that triggers the right to recovery, but rather the *extent and type of the harm*. *See* 42 U.S.C. § 2014(q) (listing compensable types of harm). Congress allowed recovery only for the harm compensable in a PLA, and not under "some other species of tort[.]" *TMI II*, 940 F.2d at 854-55. The Tenth Circuit does and cannot "conjure a reason" why Congress would design a system to allow those supposedly injured by a "lesser nuclear occurrence" (which is a term Congress did not create or use) to pursue state law claims that those allegedly injured by a nuclear incident cannot pursue.

644 ("[R]adiation is a 'constituent element' of our environment, and mankind has been exposed to it since our first appearance on this planet.")) might recover based on a state tort law cause of action.

These anomalous results that radiation injury plaintiffs would argue are permissible under the *Cook II* decision illustrate the industry-wide financial and operational uncertainties created by the decision. Not only is *Cook II* in conflict with the binding law in other Circuits, the uncertainty it creates undermines the goals of the Amendments Act to encourage private investment in atomic energy.

The uncertainties promoted by the *Cook II* decision also could create the very real possibility that a nuclear power plant licensee could elect not to operate its facility, because it would be unable to determine the controlling standard that would confirm that it is without fault. This creation of disincentives for the construction and operation of nuclear power plants in the United States undermines not only Congress' goals in passing the Price-Anderson Act and the Amendments Act, it also would undermine the stated goal of the present Administration to "continue to promote the safe and secure use of nuclear power worldwide[.]" EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN at 19 (June 2013), https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf. These efforts are part of the Administration's strategy for reducing carbon emissions from energy production, *id.* at 18, which is an objective to which the United States committed itself in the recent Paris Agreement on climate change. *See* U.N. Framework

Convention on Climate Change, Nov. 30-Dec. 11, 2015, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev. 1 (Dec. 12, 2015), *available at* http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf.

D. As Recognized by the Tenth Circuit Itself, the Decision Effectively Would Contort the Incentives of Parties in Price-Anderson Litigation

The Tenth Circuit's entirely unsupported interpretation of Price-Anderson flips the interests of the parties under the adversarial system of civil justice, and it has no basis in the statute or in the decades of case law since its enactment. *Cook II* purports to establish a liability system in which the question of whether the defendants are liable may depend on whether the injuries resulting from an alleged release rise to the level of a "nuclear incident" or if they are a "lesser occurrence." As described above, this liability scheme would require plaintiffs bringing a claim under the Amendments Act to meet a higher evidentiary standard—demonstrating that a "nuclear incident" occurred—whereas plaintiffs bringing a claim for a "lesser occurrence" would claim they need only meet a lower evidentiary standard under state tort law, even though under Price-Anderson such state tort standards are preempted. *See supra*, Section I.B.

Cook II accordingly encourages plaintiffs to characterize their claims as "lesser occurrences" rather than attempting to prove a nuclear incident occurred. The decision further proclaims that—because "a number of special rules kick in" when a jury finds that a plaintiff's injuries arise from a

"nuclear incident," including such "generous financial protections"[3] as "rules limiting the liability of certain defendants and requiring the government to pay any damages not covered by insurance"—"defendants often have as much incentive as plaintiffs to accept that any harm they caused stemmed from a nuclear incident." *Cook II*, Pet. App. 4a (citing 42 U.S.C. § 2210(c)–(e)).

This perverse incentive for defendants to accept that plaintiffs' alleged injuries arise from nuclear incidents, in order to be covered by the Amendment Act's "generous financial protections," would only arise because of the Tenth Circuit's interpretation that defendants are liable under state tort law for "lesser occurrences" that are not covered by the Act's financial protections. No such incentive is present under the prevailing circuit view that defendants are not liable for radiation injuries that do not arise from a "nuclear incident."

The Tenth Circuit's interpretation also is contrary to the decades of published opinions documenting defendants vigorously contesting plaintiffs' claims

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[3] Nuclear power plant licensees bear the costs of the Price-Anderson financial protection system. Under the Price-Anderson Act, "owners of nuclear power plants pay an annual premium for $375 million in private insurance for offsite liability coverage for each reactor site (not per reactor)." U.S. NUCLEAR REGULATORY COMMISSION, NUCLEAR INSURANCE: PRICE-ANDERSON ACT (June 2014), http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.pdf. "In the event a nuclear accident causes damages in excess of $375 million, each licensee would be assessed a prorated share of the excess, up to $121.255 million per reactor." *Id.*

that their alleged injury stems from a nuclear incident. *See, e.g.*, *Dumontier*, 543 F.3d at 571 (affirming grant of defendant's motion for summary judgment on the basis that where "Plaintiffs claim compensation for exposure to radioactive material, . . . they can only recover if they meet the requirements of the Act"); *In re Berg Litig.*, 293 F.3d at 1131 (accepting "defendants' position that emotional distress was not a 'bodily injury' covered by the Act"); *O'Conner*, 13 F.3d at 1094 (noting defendants moved for summary judgment on the grounds that there was no evidence that plaintiff received a radiation dose in excess of the federal permissible limits); *Roberts*, 146 F.3d at 1308 (affirming grant of defendant's motion to dismiss on the basis that plaintiffs had failed to allege receipt of doses exceeding federal permissible limits).[4]

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[4] *See also McMunn v. Babcock & Wilcox Power Generation Grp., Inc.*, --- F. Supp. 3d ----, 2015 WL 5472936, at *12 (W.D. Pa. Sept. 15, 2015) (granting defendants' summary judgment motion for plaintiffs' failure to demonstrate "breach of duty because they have not proffered evidence that the average annual federal permissible release limits for uranium were ever exceeded"); *Smith v. Carbide & Chems. Corp.*, No. 5:97-CV-3-M, 2009 WL 3007127, at *1 (W.D. Ky. Sept. 16, 2009) (defendants raised defense that "Plaintiffs must prove that the Defendants released contaminants in excess of federal nuclear safety standards in order to prevail on each of their state-law-based tort claims brought under the [Amendments] Act"); *Lokos v. Detroit Edison*, 67 F. Supp. 2d 740, 741 (E.D. Mich. 1999) (defendant moved for summary judgment "for the reason that plaintiffs have failed to establish . . . a dose in excess of the federal permissible dose limits"); *Coley v. Commonwealth Edison Co.*, 768 F. Supp. 625, 627 (N.D. Ill. 1991) (defendant moved for summary judgment on basis that "its compliance with the NRC regulations conclusively proves that it was not

Notably, the Tenth Circuit does not claim that its decision in any way alters the liability scheme applicable to plaintiffs bringing claims based on radiation injury (a claim with which *amicus* does not concur). Instead, the decision suggests that these inverted incentives have always been present and that it is the defendants in this case who have "made a curious tactical decision" by arguing that no "nuclear incident" has occurred. *Cook II*, Pet. App. 4a. The fact that defendants in decades of PLA litigation have based their defense on the lack of a "nuclear incident" suggests that it is the Tenth Circuit that is incorrect, and not that PLA defendants consistently have acted irrationally.

The Tenth Circuit's inversion of incentives is contrary to the intended purpose of the Amendments Act's provisions because—according to the Tenth Circuit's own reasoning—it would encourage a defendant in Price-Anderson litigation to admit that a nuclear incident occurred when in fact, the plaintiff may not be able to meet his or her burden of proof on this issue, in order for the defendant to assure it will receive the "generous financial protections" afforded by the statute. There is no evidence to suggest that Congress would create a statutory scheme that would incentivize such behavior by litigants.

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negligent in the amount of radiation to which it allowed its male employees to be exposed").

E. The Jurisdictional Structure of the Price-Anderson Amendments Act Confirms the Tenth Circuit's Error

Cook II's reasoning conflicts not only with the liability system and policies codified by Congress. It conflicts with the jurisdictional structure of the Act.

The Act provides a federal forum for the resolution of claims "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), 2210(n)(2). It allows not just a defendant to remove, but the Commission and Secretary as well. 42 U.S.C. § 2210(n)(2). The Act states that jurisdiction "*shall*" exist "without regard to the citizenship of any party or the amount in controversy," *id.* (emphasis added), making these federal claims, based on federal law, to be resolved in federal court.

The *Cook II* decision ignores the import of this jurisdictional structure. Although the Court acknowledges, implicitly, that Congress intended that claims covered by the Act be resolved in federal court, it suggests that purpose was served in *Cook II* because "the complaint alleged that the parties were completely diverse and asked for damages in excess of the statutory minimum." *See Cook II*, Pet. App. 7a, n.2. This is reasoning that Congress sought to avoid, because it would limit federal jurisdiction based on the happenstance of diversity, contrary to the intent to create federal claims that would be resolved in federal court.

Cook II sets up a situation in which a nuclear licensee, serving the goals of the broader national

economy, would be deprived of the federal forum that the structure of the Act was intended to create.

The Fifth Circuit's analysis in *Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186 (5th Cir. 2011), illustrates *Cook II*'s error. In *Cotroneo*, a suit brought by workers who were employed in cleaning up radioactive materials, the Fifth Circuit explained that the "PAA, in section 2014(hh), provides that *the entire suit*, not just particular claims that are part of the suit, 'shall be deemed to be an action arising under section 2210.'" *Id.* at 194 (emphasis added). Therefore, the Fifth Circuit reversed the district court's holding that "offensive contact" claims alleged by the plaintiffs "did not arise under federal law." *Id.* The jurisdictional structure of the Amendments Act, in other words, dictates that when a claim implicates that which it governs, any and all claims asserted by the plaintiff are governed by federal law and a federal standard.

F. Review Is Necessary To Eliminate the Uncertainties and Circuit Conflicts Created by the Tenth Circuit Decision

This case presents a clear and profound conflict in circuit authority on the preemptive effect of the Amendments Act. The Tenth Circuit's opinion ignores the comprehensive and exclusive statutory system created by Congress for the regulation of commercial nuclear power by permitting plaintiffs to bring state tort law causes of action for "lesser occurrences." As discussed above, this new liability scheme undermines the statutory system enacted by Congress and creates significant uncertainty for operators of commercial nuclear power facilities.

If this conflict is left unresolved, courts will lack clear direction as to the preemptive effect of the Amendments Act and, as a result, operators will face significant uncertainty, and litigants may have different remedies for alleged radiation injuries not rising to the level of a "nuclear incident" based on the judicial district in which their claims arise. The Court needs to act to provide clarity on the preemptive effect of the Amendments Act on *any* claim arising out of alleged releases of radiation from nuclear facilities, including those not rising to the level of a "nuclear incident" under the Act.

CONCLUSION

For the foregoing reasons, *amicus* respectfully asks this Court to grant the Writ of Certiorari.

Respectfully Submitted,

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