No. 15-911

IN THE
Supreme Court of the United States

MERILYN COOK, *et al.*,
Cross-Petitioners,

v.

THE DOW CHEMICAL COMPANY AND
ROCKWELL INTERNATIONAL CORPORATION,
Cross-Respondents.

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

REPLY FOR CROSS-PETITIONERS

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REPLY FOR CROSS-PETITIONERS

Dow and Rockwell cannot seriously dispute that the questions presented by the cross-petition are closely related to, and would substantially inform resolution of, the question they ask the Court to address. Preemption is a matter of congressional intent. And the likelihood that Congress intended to preempt state law here varies dramatically depending on whether the result—in light of the Tenth Circuit's decision in *Cook I*—would be to wipe out *any remedy* for serious radioactive contamination that constitutes a nuisance under the longstanding laws of all 50 States.

Dow and Rockwell thus err by interpreting the cross-petition as a concession of weakness. Br. in Opp. 1. Make no mistake: Dow and Rockwell's petition should be denied. It suffers from a glaring procedural defect and fails to identify any meaningful circuit conflict. *If* the Court grants review nonetheless, it should not decide the preemption question in a vacuum. It makes no sense to consider the alleged preemptive force of a purported federal "physical injury" requirement where there are substantial doubts over whether that requirement exists in the first place.

Given the close relationship between the issues, the cross-petition questions are sufficiently important to warrant review if Dow and Rockwell's petition is granted. The Tenth Circuit's decision in *Cook I* conflicts with *Rainer* v. *Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), with respect to whether Price-Anderson imposes a federal threshold of harm. And it conflicts with *Pennsylvania* v. *General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983), with respect to whether radioactive contamination constitutes a "nuclear incident" absent some *further* physical harm. Dow and Rockwell's contrary arguments defy the express terms of those decisions.

There is simply no indication that Congress intended to deny property owners *any remedy* when their property suffers radioactive contamination so substantial that it constitutes a nuisance under state law. Because the questions presented in the cross-petition are crucial to determining whether Dow and Rockwell's preemption theory would have that effect, the Court should not grant their petition without granting this cross-petition as well.

I. THE QUESTIONS PRESENTED IN THE CROSS-PETITION ARE CRUCIAL TO THE PREEMPTION ISSUE DOW AND ROCKWELL PRESS

Dow and Rockwell insist that the issues in the cross-petition "ha[ve] no bearing on the preemption issue." Br. in Opp. 7. That is false. The cross-petition issues are crucial to assessing Congress's preemptive intent. And they are essential to application of the constitutional avoidance canon.

A. The Issues in the Cross-Petition Are Critical to Assessing Congress's Preemptive Intent

Preemption is a matter of congressional intent. See *Gobeille* v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016). And this Court's assessment of that intent necessarily depends on the *consequences* of preemption. As the cross-petition explained, "[t]his Court's analysis of Congress's preemptive intent could well depend on *how much*, if anything, Congress allegedly preempted." Cross-Pet. 17. Dow and Rockwell do not contend otherwise.

Dow and Rockwell posit that Price-Anderson preempts state remedies whenever a nuclear incident is alleged but not found. That is a far less plausible account of Congress's intent if the result is to eliminate *any remedy whatsoever* for radioactive plutonium contamination that constitutes a proven nuisance under state law. See *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2189 (2014) (presumption against preemption has "greatest force" when preemption would displace traditional state tort remedies). The scope of the federal remedy thus bears directly on the question Dow and Rockwell ask this Court to resolve.

Dow and Rockwell urge that their purported federal injury requirement is irrelevant because, under the Act's jurisdictional provision, "preemption is triggered when-

ever a plaintiff *asserts* a federal PAA claim." Br. in Opp. 6. That is a non sequitur. What matters in assessing Congress's preemptive intent is how broad a swath an interpretation would cut through traditional state law—a consideration wholly separate from the Act's *jurisdictional* provision. The Court cannot properly assess the preemption question without considering whether the Act imposes a federal threshold of harm, and if so, whether widespread radioactive contamination that constitutes a nuisance suffices. Those facts are crucial to deciding whether Congress intended the draconian results that Dow and Rockwell's preemption theory might entail. That is no less true merely because the Act provides that a plaintiff need only *assert* a nuclear incident, not *prove* the incident, to invoke federal jurisdiction.

B. The Cross-Petition Issues Are Critical to Constitutional Avoidance

The petitions are also intertwined for another reason: This Court cannot properly apply a critical tool of statutory construction—the constitutional avoidance canon—without having both issues before it. In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), this Court upheld the prior version of Price-Anderson against a due process challenge only after expressly leaving open whether a "legislatively enacted compensation scheme" must "provide a *reasonable substitute remedy* * * * for the * * * state tort law remedies it replaces." *Id.* at 88 (emphasis added). Under the Tenth Circuit's decision in *Cook I*, Dow and Rockwell's preemption claim raises grave constitutional doubts by wiping out a broad swath of traditional state nuisance law without affording any substitute remedy.

Dow and Rockwell contend that the constitutional problem arises only from the questions in the cross-

petition, not from the question in Dow and Rockwell's petition. Br. in Opp. 9-10. Not so. Whether a federal statute "provide[s] a reasonable substitute remedy * * * for the * * * state tort law remedies it replaces," *Duke Power*, 438 U.S. at 88, depends both on the scope of preemption and on what the "substitute remedy" is. This Court cannot meaningfully evaluate the constitutional implications of Dow and Rockwell's preemption theory—and consider those implications in applying the constitutional avoidance canon—without knowing whether the theory would eliminate *any remedy* for nuisances traditionally redressable under state law.

Dow and Rockwell deny any "'grave and doubtful'" constitutional issue. Br. in Opp. 10. But the Tenth Circuit disagreed, deeming the constitutional claim "no trivial argument." Pet. App. 22a-23a n.3. This Court found the claim sufficiently serious to mention in *Duke Power*, 438 U.S. at 88. Other authorities concur. Cross-Pet. 20. Dow and Rockwell acknowledge that "the whole point of the PAA is to strike a balance" between protecting the public and promoting industry. Br. in Opp. 10. But a regime in which nuclear operators can strew radioactive plutonium across neighboring properties with impunity so long as they do not physically deform the landscape would be about as lopsided a "balance" as one can imagine.

Finally, Dow and Rockwell contend that this case is a poor vehicle for addressing the constitutional question because, on remand from the first appeal, the property owners did not try to prove "damage to property" under the Tenth Circuit's newly minted standard. Br. in Opp. 11 n.1. But the property owners declined to do so only because the Tenth Circuit's "physical injury" standard is impossible to meet in this or virtually any other case. Nuclear accidents—even serious ones—do not typically

damage property by physically deforming it. They damage property by causing radioactive contamination that poses a health hazard. Given the Tenth Circuit's holding that federal law excludes that paradigmatic harm, the property owners reasonably pursued their state remedies instead—claims that have been part of this case from the outset. See C.A. App. 268-269 ¶¶111-115. Far from undermining the importance of the issues, the Tenth Circuit's impossibly demanding federal standard only underscores why the Court should not decide preemption without addressing the Tenth Circuit's earlier decision as well.

II. The Questions In The Cross-Petition Warrant This Court's Review

Given the close relationship between the issues in the two petitions, the Court should not grant Dow and Rockwell's petition without also granting the cross-petition.

A. The Court's Denial of the Property Owners' Prior Petition Is Irrelevant

Dow and Rockwell urge that this Court's prior denial of review in *Cook I* supports the same result here. Br. in Opp. 12-13. But that argument ignores obvious procedural differences.

Whether the issues in *Cook I* would warrant review standing alone is far different from whether they warrant review in the event the Court grants Dow and Rockwell's petition. Even on a conditional cross-petition, this Court has broad discretion. See S. Shapiro, *et al.*, *Supreme Court Practice* 493 (10th ed. 2013); *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975). But the factors motivating the exercise of that discretion are significantly different. Any incremental burdens of considering other, closely related issues in a case already before the

Court are much reduced. And review of the issues would inform this Court's consideration of the case.

As the government explained back in 2012, moreover, the Tenth Circuit's decision in *Cook I* was interlocutory: It anticipated further proceedings on remand to address various federal and state-law issues, potentially rendering the questions presented irrelevant. Pet. App. 290a-293a. Here, by contrast, Dow and Rockwell do not contend that *Cook II* is interlocutory in any relevant sense. For that reason too, this Court's earlier denial of review in no way counsels denial of this cross-petition.

B. The Circuits Are Divided over Whether Price-Anderson Imposes a Federal Standard of Harm

1. Dow and Rockwell's efforts to downplay the issues fail in any event. In *Rainer* v. *Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), the Sixth Circuit held that the standard for compensable harm under Price-Anderson's "nuclear incident" definition is governed by state, not federal, law. The "key question," the court ruled, was "whether *Kentucky caselaw* equates 'subcellular damage' with 'bodily injury'" (the component of the "nuclear incident" definition at issue there). *Id.* at 618 (emphasis added). That was so because "[c]ourts are required to look to state law for the substantive rules to apply in deciding [Price-Anderson] claims." *Ibid.* By contrast, the Tenth Circuit construed the "nuclear incident" definition to impose a *federal* standard here. Pet. App. 86a-95a.

Dow and Rockwell seek to avoid the Sixth Circuit's holding by rewriting it. They admit that the holding "blends" what they contend are separate "state and federal law elements of a PAA claim," and that it would have been "more precise" for the court to have framed its holding in terms they prefer. Br. in Opp. 24. Subsequent cases, they add, have "improved" upon the Sixth Circuit's

interpretation, which they dismiss as "'an evolutionary stepping-stone.'" *Ibid.* Those are all just fancy ways of saying that the Sixth Circuit interpreted the statute differently from other courts, and that the only way to harmonize the decision is to rewrite it.

For that reason, when the Ninth Circuit confronted the issue in *Dumontier* v. *Schlumberger Technology Corp.*, 543 F.3d 567 (9th Cir. 2008), it recognized that the Sixth Circuit had construed the "nuclear incident" definition differently. *Id.* at 570. "Unlike the Sixth Circuit," it held, "we have never relied on state law to interpret bodily injury." *Ibid.* Dow and Rockwell's efforts to rewrite the Sixth Circuit's decision cannot avoid the fact that the *circuits themselves* acknowledge the conflict.

2. Nor do Dow and Rockwell offer any persuasive defense on the merits. They insist that Congress created a "*hybrid* federal cause of action" with both state and federal elements. Br. in Opp. 16-17. But the statute says no such thing. Price-Anderson does not define "nuclear incident" in order to establish federal elements a plaintiff must prove to establish compensable harm. It defines the term to identify the categories of cases that can be litigated in federal court under the Act's *jurisdictional* provision. 42 U.S.C. §§2014(q), (w), (hh), 2210(n)(2). The section defining the cause of action, by contrast, unambiguously incorporates *state* law: "[T]he substantive rules for decision * * * *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) (emphasis added). Dow and Rockwell can find no such inconsistency here.

Dow and Rockwell's contrary interpretation ignores Congress's intent to accord primacy to state law—an intent Congress made clear when enacting Price-Ander-

son in 1957 and repeatedly reaffirmed when amending the statute over the years since. Cross-Pet. 25-26. The implausibility of Dow and Rockwell's interpretation is clear from the fact that they never raised the argument for the first two decades they litigated this case. Pet. App. 86a-87a.[1]

C. The Circuits Are Divided over Whether Radioactive Contamination Constituting a Nuisance Is a "Nuclear Incident"

1. Even if Price-Anderson's "nuclear incident" definition imposed a federal standard of harm, the circuits would still be divided over that standard's content—specifically, whether an owner must show some "physical injury" to property beyond the contamination itself. In *Pennsylvania* v. *General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983), the Third Circuit allowed a suit even though "[t]he complaints d[id] not contain any claim of damages for direct physical damage to any of plaintiffs' property." *Id.* at 122. The claims satisfied the "statutory definition" of "nuclear incident," it held, because they alleged "'damage to property' as a result of the intrusion of radioactive materials upon plaintiffs' properties through the ambient air, *irrespective of any causally-related permanent physical harm to property*." *Id.* at 123 (emphasis added). That holding cannot be reconciled with the "physical injury" rule adopted here. Pet. App. 90a-93a.

Dow and Rockwell insist there is no conflict because *Pennsylvania* predated the 1988 amendments. Br. in

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[1] Dow and Rockwell assert in passing that the property owners forfeited their argument that Price-Anderson's "nuclear incident" definition should be interpreted by reference to state law. Br. in Opp. 16. That is wrong. See C.A. Supp. Reply in No. 08-1224, at 8 (arguing that definition would be "governed by the substantive law of the state where the nuclear incident occurred").

Opp. 26-27. But those amendments did not change the statute in any respect relevant to this issue. They provided that suits arising out of nuclear incidents would be deemed to arise under federal law. 42 U.S.C. § 2014(hh). But they did not redefine *what a "nuclear incident" is*. The only change they made to *that* definition was to replace "Commission" with "Nuclear Regulatory Commission" and "subsection" with "section." Pub. L. No. 100-408, § 16(a)(1), (d)(1), 102 Stat. 1066, 1079-1080 (1988).

Dow and Rockwell also assert there is no conflict because *Pennsylvania* was decided on motions to dismiss or for summary judgment, while this case was tried to a jury. Br. in Opp. 27-28. But regardless of the posture, the *legal* question is the same: Does radioactive contamination, without further "physical harm," qualify as "damage to property"? The Third Circuit said "yes." 710 F.2d at 123. The Tenth Circuit held the opposite.

2. The Tenth Circuit's decision in *Cook I* also squarely conflicts with the construction the federal government placed on Price-Anderson at the time it was enacted. In 1960, the Atomic Energy Commission issued a form insurance policy, modeled on policies already used in the industry, designed to satisfy the Act's insurance requirements. See *Financial Protection Requirements and Indemnity Agreements*, 25 Fed. Reg. 2948 (Apr. 7, 1960). That policy explicitly defined "property damage" to include "physical injury to or destruction *or radioactive contamination* of property." *Id.* at 2949 (emphasis added). The policy thus clearly reflected the agency's (and the industry's) understanding that radioactive contamination and physical injury are *two types* of property damage. That policy—a formal regulation issued after notice and comment—warrants substantial deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230-231 (2001).

Dow and Rockwell bury that regulation in a footnote, asserting that it warrants no deference because it "do[es] not reflect any federal agency's interpretation of the PAA." Br. in Opp. 29 n.2. But the *whole point* of the regulation was to prescribe a model insurance policy consistent with the Act's insurance requirements. And regardless, the policy is compelling evidence of what both the industry and the government understood "damage to property" to mean.

3. Finally, Dow and Rockwell caricature this case as seeking recovery for mere "exposure" to "a single atom of plutonium." Br. in Opp. 4, 17-20. That is incorrect. Dow and Rockwell did not just "expose" property to radiation. They *contaminated the property* with substantial amounts of radioactive plutonium that constituted a health hazard and a nuisance under state law. See Cross-Pet. 8-10 (citing testimony establishing, among other things, radiation levels up to "'100 to 1,000 times what the normal background should be'" that caused "a 29% increase in lung cancer"). Far from allowing recovery for "a single atom of plutonium," the jury instructions required an increased risk of health problems or a demonstrable risk of future harm that was both "substantial" and "unreasonable." Cross-Pet. App. 88a, 92a-98a. The Tenth Circuit expressly rejected Dow and Rockwell's mischaracterizations below, finding it "impossible to understand [the jury instructions] as authorizing" liability in the manner that Dow and Rockwell contend. Pet. App. 24a-26a.

Dow and Rockwell's attempts to relitigate the case they lost at trial cannot alter the draconian consequences of the legal rule that *Cook I* adopted. Under its holding, radioactive contamination—no matter how substantial, and no matter what the health consequences—does not constitute "damage to property" absent some further

"physical injury" to the property. See Pet. App. 90a-93a & n.12. Dow and Rockwell assert that the court required only a "'*detectable level* of actual damage'" to the property. Br. in Opp. 20 (emphasis altered). But the problem with the court's holding is not that it required a large blast crater rather than a small one. The problem is that nuclear accidents do not normally damage property by deforming the landscape—"detectabl[y]" or otherwise. They damage property by *contaminating* it with radioactive carcinogens that pose a health hazard, causing substantial and unreasonable interference with the owner's use and enjoyment of the property. An interpretation of Price-Anderson that denies *any recovery* for that paradigmatic injury is not a plausible account of congressional intent.

CONCLUSION

If the Court grants the petition in No. 15-791, it should grant this conditional cross-petition as well.

Respectfully submitted.

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