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

REPLY TO BRIEF IN OPPOSITION

KEVIN T. VAN WART, P.C.
BRADLEY WEIDENHAMMER
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

May 2, 2016

TABLE OF CONTENTS

Page

ARGUMENT 1

I. Plaintiffs' Efforts To Deny The Direct And Acknowledged Conflict Are Unavailing. 1

II. Plaintiffs' Efforts To Defend The Decision Below Are Unavailing. 4

III. Plaintiffs' Efforts To Establish A Vehicle Problem Are Unavailing. 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 11

Caterpillar Inc. v. Williams,
482 U.S. 386 (1987).....8

Cook v. Rockwell Int'l Corp.,
273 F. Supp. 2d 1175 (D. Colo. 2003).....11

Corcoran v. New York Power Auth.,
202 F.3d 530 (2d Cir. 1999).....6

Cotroneo v. Shaw Env't & Infrastructure, Inc.,
639 F.3d 186 (5th Cir. 2011) 1, 3

Dumontier v. Schlumberger Tech. Corp.,
543 F.3d 567 (9th Cir. 2008) 1, 4

El Paso Natural Gas Co. v. Neztsosie,
526 U.S. 473 (1999).....5, 7, 8

Golden v. CH2M Hill Hanford Grp., Inc.,
528 F.3d 681 (9th Cir. 2008) 1, 4

In re Hanford Nuclear Reservation Litig.,
534 F.3d 986 (9th Cir. 2008) 1, 4

In re TMI Litig. Cases Consol. II (TMI II),
940 F.2d 832 (3d Cir. 1991).....6

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007).....11

Nieman v. NLO, Inc.,
108 F.3d 1546 (6th Cir. 1997) 6, 9

O'Conner v. Commonwealth Edison Co.,
13 F.3d 1090 (7th Cir. 1994) 6

Pennsylvania v. General Public Utils. Corp.,
710 F.2d 117 (3d Cir. 1983) 4

Rainer v. Union Carbide Corp.,
402 F.3d 608 (6th Cir. 2005) 3

United States v. Williams,
504 U.S. 36 (1992) 8

Utility Air Regulatory Group v. EPA,
134 S. Ct. 2427 (2014) 11

Verizon Commc'ns, Inc. v. FCC,
535 U.S. 467 (2002).....8

Statutes

42 U.S.C. § 2014(hh) 5, 7, 8, 11

42 U.S.C. § 2014(q).....2, 6

Other Authorities

S. Rep. No. 89-1605 (1966).....7

Plaintiffs assert that this Court's review is unwarranted because (1) the decision below "creates no conflict of authority," (2) the decision below is "correct," and (3) "[t]his case ... is not an appropriate vehicle for review." Opp. 2. As explained below, each of these assertions is baseless. Accordingly, this Court should grant the petition or, at the very least, call for the views of the Solicitor General before leaving in place a circuit conflict on an important and recurring question of federal law that potentially subjects the Federal Government, by virtue of its indemnity obligations, to a judgment of more than *$1 billion* in this case.

ARGUMENT

I. Plaintiffs' Efforts To Deny The Direct And Acknowledged Conflict Are Unavailing.

According to plaintiffs, "[t]he decision below does not create a circuit conflict." Opp. 16; *see also id.* at 2, 21. That is a remarkable statement, given that the Tenth Circuit held below that the assertion of a PAA "public liability action" *does not* preempt freestanding state-law claims based on the same alleged facts, *see* Pet. App. 11-22a, while the Fifth and Ninth Circuits have held that the assertion of a PAA "public liability action" *does* preempt freestanding state-law claims based on the same alleged facts, *see*, *e.g.*, *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).

Plaintiffs deny the conflict on the ground that the asserted "nuclear incident" underlying their "public liability action" involves alleged *property* damage, while the asserted "nuclear incident" underlying the "public liability actions" in the Fifth and Ninth Circuit cases involved alleged *personal* injury. *See* Opp. 2, 16, 25-26. But that is the quintessential distinction without a difference. The legal issue in all of the cases involves the trigger for preemption of freestanding state-law claims: is it (1) the *assertion* of a PAA "public liability action" (as the Fifth and Ninth Circuits hold), or (2) *proof* of a PAA "public liability action" (as the Tenth Circuit held below)? In other words, does the PAA preempt freestanding state-law claims by plaintiffs who assert a "public liability action" but fail to prove an underlying "nuclear incident"? The basis for the alleged "nuclear incident" (whether personal injury or property damage) is legally and logically immaterial.

The PAA, after all, groups together various types of harm ("bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property") in the statutory definition of "nuclear incident." 42 U.S.C. § 2014(q), Pet. App. 296a. It makes absolutely no difference which of these various harms is asserted. Indeed, these various harms overlap; as the Tenth Circuit noted, plaintiffs' claims here could be viewed either as asserting "loss of or damage to property" or "loss of use of property." Pet. App. 90a. Plaintiffs identify no case in which the specific *type* of harm asserted had any bearing on the preemption issue.

The Tenth Circuit certainly did not think that the specific type of harm asserted had any bearing on

that issue. To the contrary, the court essentially conceded that its decision conflicts with the Fifth Circuit's decision in *Cotroneo*, and declared that "we have as much difficulty with [that decision] as Judge Dennis did in dissent," Pet. App. 22a—even though Judge Dennis did *not* dissent on the question whether an asserted PAA claim preempts freestanding state-law claims, *see Cotroneo*, 639 F.3d at 192; *see also id.* at 204 (Dennis, J., concurring in part and dissenting in part). Similarly, the Tenth Circuit did not invoke the type of harm asserted to distinguish the Ninth Circuit decisions cited above, but simply stated—erroneously—that those decisions "offer[ed] nothing to explain how or why the Act might preclude relief in cases involving lesser occurrences [than a 'nuclear incident']." Pet. App. 21a. Plaintiffs suggest no reason why the type of harm alleged as the basis for an asserted "nuclear incident" should have any bearing on the preemption issue. (Indeed, in their conditional cross-petition, plaintiffs themselves allege a "conflict" between the Tenth Circuit's first decision in this case and the Sixth Circuit's decision in *Rainer v. Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), even though this case involves alleged property damage and *Rainer* involved alleged personal injury. *See* Pls.' Cond. Cross-Pet. 22.)

Contrary to plaintiffs' argument, the circuit conflict presented here is not "a shallow and ill-defined division over *reasoning*, not *outcomes*." Opp. 26 (emphasis in original). The Fifth and Ninth Circuits directed the dismissal with prejudice of freestanding state-law claims brought by plaintiffs who asserted, but failed to prove, a PAA "public liability action." *See Cotroneo*, 639 F.3d at 192-200;

Dumontier, 543 F.3d at 570-71; *Hanford*, 534 F.3d at 1009; *Golden*, 528 F.3d at 682-84. Here, in sharp contrast, the Tenth Circuit allowed plaintiffs to pursue a freestanding state-law claim even though they concededly asserted, but failed to prove, a PAA "public liability action." *See* Pet. App. 11-22a.[1] It is hard to imagine a circuit conflict more stark than this, with consequences (as petitioners' various *amici* underscore) more unsettling for the future of nuclear technology in this country. At the very least, the Court should call for the views of the Solicitor General on this important and recurring issue of federal law.

II. Plaintiffs' Efforts To Defend The Decision Below Are Unavailing.

Plaintiffs also contend that this Court should deny the petition because the decision below is "correct." Opp. 2, 16, 26. In their view, "[n]o express language in Price-Anderson bars state-law tort remedies where a plaintiff pleads but does not prove a nuclear incident." *Id.* at 26; *see also id.* at 27 ("Dow and Rockwell cite no language in Price-Anderson expressly preempting state-law remedies where a nuclear incident is alleged but not found."). But, as

---

[1] Plaintiffs' reliance on the Third Circuit's decision in *Pennsylvania v. General Public Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983) (*GPUC*), is perplexing. As defendants point out in opposition to plaintiffs' conditional cross-petition, that case predates the 1988 amendments that created the federal PAA claim. *See* Defs.' Cond. Cross-Pet. Opp. 26-27. Accordingly, the claims in *GPUC* arose under state law, *see* 710 F.2d at 121-22, and the question whether the assertion of a federal PAA claim preempts freestanding state-law claims was not presented.

defendants explain in their petition, the PAA expressly "'deem[s]'" any suit "'asserting'" public liability to be a federal PAA suit. Defs.' Pet. 23 (quoting 42 U.S.C. § 2014(hh)). As this Court has recognized, that "preemption provision" "transforms" state-law claims into federal claims. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999).

Plaintiffs' opposition brief never addresses the PAA's "deeming" language. Instead, plaintiffs insist that "Congress clearly knew how to preempt state law when it wanted to," by preempting state law "'inconsistent with the provisions of [Section 2210].'" Opp. 28 (quoting 42 U.S.C. § 2014(hh)) (emphasis omitted). But that statutory language addresses an entirely different preemption issue: the extent to which the PAA preempts the state law that provides "the substantive rules for decision" in a federal PAA claim. 42 U.S.C. § 2014(hh), Pet. App. 298a. The preemption issue here, in contrast, is whether the PAA preempts freestanding state-law claims independent of a federal PAA claim. As noted above, it does, by "deem[ing]" such claims to arise under the PAA. *Id.*

Plaintiffs never explain how a claim asserting liability from a nuclear incident could be "deemed" a federal PAA claim at the outset of litigation yet magically revert to a state-law claim if and when they fail to prove (or abandon) a federal PAA claim. As the Third Circuit has explained:

> *At the threshold* of every action *asserting* liability growing out of a nuclear incident, then, there is a federal definitional matter to be resolved: Is this a public liability

> action? If the answer to that question is "yes," the provisions of the Price-Anderson Act apply; *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*.

In re TMI Litig. Cases Consol. II (TMI II), 940 F.2d 832, 855 (3d Cir. 1991) (emphasis added); *see also Corcoran v. New York Power Auth.*, 202 F.3d 530, 537 (2d Cir. 1999) (1988 PAA amendments "creat[ed] an *exclusive* federal cause of action for radiation injury") (emphasis in original); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("[T]he [PAA] preempts [plaintiff's] state law claims; the state law claims cannot stand as separate causes of action."); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099-1100 (7th Cir. 1994) ("[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.").

Undeterred, plaintiffs parrot the Tenth Circuit's theory that the PAA "distinguishes a 'nuclear incident' from an 'occurrence,'" and allows plaintiffs who assert but fail to prove a "nuclear incident" to recover under state law for a lesser "occurrence." Opp. 28 (citing 42 U.S.C. § 2014(q)). That theory is baseless. The PAA defines "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." 42 U.S.C. § 2014(q). An "occurrence" in other words, is a prerequisite for a "nuclear incident," not a distinct event that allows

for the reversion of unsuccessful PAA claims into state-law claims. As noted above, the PAA expressly provides that "any suit *asserting* public liability"—*i.e.*, liability based on an underlying "nuclear incident"—"shall be *deemed* to be" a federal PAA action, *id.* § 2014(hh) (emphasis added), without carving out an exception for plaintiffs who assert but fail to prove a PAA claim.

Plaintiffs are thus reduced to arguing, in general terms, that "Dow and Rockwell's position ... defies Price-Anderson's history," because "'one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with state law.'" Opp. 29 (quoting S. Rep. No. 89-1605, at 6 (1966)). Plaintiffs, however, rely on history predating the 1988 amendments that created the *federal* PAA cause of action at issue here. As a result of those amendments, this Court has explained, the PAA "transforms" state-law claims asserting "public liability" (*i.e.*, an underlying "nuclear incident") into federal claims, *Neztsosie*, 526 U.S. at 484, but then generally looks to state law to provide the "substantive rules for decision" in those federal claims, 42 U.S.C. § 2014(hh). That system preserves a "significant role for state law," Opp. 31, while protecting the compelling federal interest in the civilian and military use of nuclear technology.

Plaintiffs' efforts to distinguish this Court's decision in *Neztsosie* can most charitably be described as contrived. In their view, this Court misspoke when analogizing the PAA to complete-preemption statutes, "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."'" *Neztsosie*, 526 U.S. at 484 n.6 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)). In plaintiffs' view, the PAA is "wholly unlike the statutes this Court has cited as examples of complete preemption," because the PAA "preserv[es] state law as the 'substantive rules for decision'" in a federal PAA claim. Opp. 31 (citing 42 U.S.C. § 2014(hh)). But *Neztsosie* recognized that the PAA "resembles" complete preemption precisely because it transforms state-law claims into federal claims, albeit federal claims "decided under substantive state law rules that do not conflict with the [PAA]." 526 U.S. at 484 n.6. While plaintiffs insist that "Congress would not have left that significant role for state law if it sought to preempt all state remedies," Opp. 31, that point cuts the other way: Congress would not have bothered to incorporate state law into the PAA's federal cause of action if plaintiffs could simply bring freestanding state-law claims independent of the PAA.

III. Plaintiffs' Efforts To Establish A Vehicle Problem Are Unavailing.

Finally, plaintiffs contend that "[t]his case ... is not an appropriate vehicle for review" because "the court of appeals properly held [that] Dow and Rockwell forfeited their preemption argument by not timely raising it." Opp. 2; *see also id.* at 15-21. Plaintiffs do not dispute that the Tenth Circuit "'passed upon'" the preemption issue on the merits, so that the issue is squarely presented for this Court's review. *See, e.g.*, *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). Instead, they argue that the forfeiture issue is "complex," and would require this

Court "to wade into [a] morass," thereby creating "a monumental vehicle defect." Opp. 2, 18.

Nothing could be further from the truth. The forfeiture issue here is straightforward: the Tenth Circuit panel majority asserted that defendants had forfeited in the first appeal the argument that the PAA preempts freestanding state-law claims. *See* Pet. App. 9-11a. But, as defendants note in their petition, even cursory review of the first appeal refutes that assertion: the preemption issue disputed there was whether federal nuclear safety standards preempt the state-law standards of care that provide the substantive rules for decision in a *federal* PAA claim. *See* Defs.' Pet. 30-31. Preemption of freestanding state-law claims was not at issue in the first appeal (and thus could not have been forfeited) because plaintiffs did not purport to be pursuing such claims. In particular, defendants noted in their opening brief in the first appeal that the PAA preempts freestanding state-law claims by plaintiffs who assert a federal PAA claim, and plaintiffs not only failed to dispute that point, *see id.* (citing, *inter alia*, Pet. App. 136a, 147a), but affirmatively *conceded* at oral argument that "we concede and ... 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," *see id.* at 30 (citing Pet. App. 267a).

Indeed, plaintiffs do not even defend the Tenth Circuit's reasoning on forfeiture, which is based entirely on footnote 16 of the Tenth Circuit's decision in the first appeal. *See* Pet. App. 9-10a (citing Pet. App. 97a n.16). In that footnote, which involved defendants' "challenge [to] the district court's ruling

that federal nuclear safety standards do not preempt state tort standards of care under the PAA," Pet. App. 95-96a, the Tenth Circuit observed that "[d]efendants … never develop the issue" of field preemption, Pet. App. 97a n.16; *see also id.* at 100a n.19. But the preemption issue presented in the first appeal (whether the PAA preempts the state standards of care incorporated into a federal PAA claim) is entirely distinct from the preemption issue presented in the second appeal and here (whether the PAA preempts freestanding state-law claims by plaintiffs who assert a federal PAA claim).

While plaintiffs do not defend the Tenth Circuit's interpretation of footnote 16, they try to blur the distinction between these two different preemption issues. Thus, they assert that "the court of appeals ruled in the first appeal [that] Price-Anderson 'does not expressly preempt state tort law.'" Opp. 20 (quoting Pet. App. 97a). But, as noted above, the preemption issue there involved defendants' "challenge to the district court's ruling that federal nuclear safety standards do not preempt state tort standards of care under the Act," Br. of U.S. (No. 10-1377), at 19, Defs.' Pet. App. 290-91a, and had nothing to do with the different question whether the assertion of a federal PAA claim preempts freestanding state-law claims.

Indeed, as plaintiffs themselves acknowledge even now, preemption of freestanding state-law claims was not in dispute in the first appeal because:

> All parties, including Dow and Rockwell, accepted that the property owners were asserting *Price-Anderson claims based on Colorado law*. *See* C.A. App. in No. 08-

> 1224, at 498-499 ("None dispute this is a 'public liability action' arising under the Price-Anderson Act …. Defendants admit [§ 2014(hh)] permits Plaintiffs to assert claims based on Colorado tort law in this action …."); Dist. Ct. Dkt. 1419 at 2 (Aug. 8, 2005) (reciting that claims "arise under the Price-Anderson Act" and "deriv[e] from Colorado law").

Pls.' Cond. Cross-Pet. 7 & n.3 (emphasis added). Both district court and plaintiffs confirmed that point before and after trial. *See Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d 1175, 1179 (D. Colo. 2003) ("None dispute this is a 'public liability action' arising under the [PAA]."); Order (5/20/08) [Dkt. 2261], at 57 n.24 ("[T]he trespass and nuisance claims decided by the jury were brought pursuant to the [PAA]."); Plfs.' Mot. for J. (5/4/06) [Dkt. 2170], at 27 ("The trespass and nuisance claims presented to the jury were brought pursuant to, and are governed by, the [PAA]."). And the Tenth Circuit recognized in the first appeal that plaintiffs "only presented their *PAA* trespass and nuisance claims to the jury." Pet. App. 84a n.8 (emphasis added).

Because the first appeal plainly involved a different preemption issue than the second appeal, this Court can readily resolve the forfeiture issue without much ado, as it often does. *See, e.g.*, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1266-68 (2015); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2439 n.4 (2014); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). The alternative would be to allow lower courts or litigants effectively to insulate important

rulings from this Court's review by simply asserting forfeiture, no matter how baseless the assertion.

Because the forfeiture issue here is a bogeyman, it provides no basis to deny review of the decision below. Again, at the very least, before leaving in place a circuit conflict on an important and recurring question of federal law, this Court should call for the views of the Solicitor General.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant review.

Respectfully submitted,

KEVIN T. VAN WART, P.C.
BRADLEY WEIDENHAMMER
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com