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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. In addition to the 300,000 members whose interests it represents directly, the Chamber also represents indirectly the interests of more than three million businesses of every size, in every industry sector, from every region of the country. One of the Chamber's important functions is to represent the interests of its members in matters before the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This is one of those cases. The question presented is a variant on a common question facing American businesses—whether a federal regulatory or remedial regime supplants, or merely supplements, state law. The decision below holds that the Price-Anderson Act, in which Congress sought to balance state and federal prerogatives, as well as the interests of nuclear-power providers and affected individuals—and which has been important to the development of the American nuclear-power industry for

[1] Pursuant to Rule 37.2, the *amicus* timely notified all parties of its intention to file this brief, and the parties' consent letters have been filed with the Clerk. Pursuant to Rule 37.6, the *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from the *amicus*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief.

almost 60 years now—merely supplements, and does not supplant, state-law remedies for individuals who claim to have been harmed by releases from nuclear facilities. That decision conflicts with decisions of other courts to consider the same question, and it also subjects nuclear-power providers to two different and overlapping remedial regimes, thereby undermining the Price-Anderson Act's protections and frustrating Congress' regulatory design.

The Chamber is well suited to address the preemption issues presented in this case, just as it has done in many of this Court's recent preemption cases. See, e.g., *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Kurns v. Railroad Friction Prods. Corp.*, 132 S. Ct. 1261 (2012); *National Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012). The Chamber's members do business in each of the 50 states and are subject to a wide range of federal and state regulations. The Chamber therefore has a strong interest in advocating clear rules of federal preemption, which ensure that the regulatory environment in which its members must operate is rational and consistent. Especially where, as here, Congress has made clear that a federal regulatory regime should supplant (rather than merely supplement) state regulation, the Chamber has a strong interest in ensuring that courts enforce "the supreme Law of the Land" through applicable preemption doctrines.

INTRODUCTION AND SUMMARY OF ARGUMENT

The notion of federal preemption embodied in the Tenth Circuit's decision is a curious one. In essence, that court has said to plaintiffs alleging injuries arising out of nuclear releases: "Your state-law claims are preempted by the federal Price-Anderson Act—unless you lose, in

which case they aren't preempted and you can just start over." That rule—which doesn't foreclose or displace much of anything—isn't really a rule of preemption at all. If left to stand, the Tenth Circuit's decision will not only negatively affect the nuclear sector, but also will encourage plaintiffs' lawyers to pursue duplicative legal theories in hopes of obtaining a second bite at the litigation apple.

* * *

Over the course of the last 60 years, "to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology," Congress has "relaxed [the federal] monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme" to regulate the nuclear-power industry and to compensate injured individuals. *Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 193 (1983). One important component of this "complex scheme" is the Price-Anderson Act (PAA).

As relevant here, the PAA provides that the federal district court in which a "nuclear incident" occurs shall have "original jurisdiction" over any "public liability action" arising out of the incident, "without regard to the citizenship of any party or the amount in controversy." 42 U.S.C. § 2210(n)(2). A "public liability action" is "any suit asserting public liability," *id.* § 2014(hh), which in turn is "any legal liability arising out of or resulting from a nuclear incident," *id.* § 2014(w). A "nuclear incident" is "any occurrence" that causes "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." *Id.* § 2014(q).

Pursuant to what this Court has called the PAA's "unusual preemption provision," *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999), any public liability action—again, any suit "asserting" liability arising out of a nuclear incident—"shall be deemed to be an action arising under [the PAA]." 42 U.S.C. § 2014(hh). "[T]he substantive rules for decision in [a PAA] 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 [the Act]." *Ibid.*

This much, therefore, is clear: The PAA (1) creates a federal cause of action for any liability arising out of a nuclear incident; (2) channels litigation of that cause of action into federal court; and (3) provides for resolution of the cause of action based on rules that are "derived from" state law insofar as state law is consistent with the PAA.

Before the decision below, it was also clear that a plaintiff pursuing a public liability action under the PAA could not also pursue a freestanding state-law tort claim to recover for the same alleged harm. Several federal circuits had agreed that the PAA supplanted ordinary state-law tort theories. That consensus view made good sense in light of the purpose of the PAA, which represents the culmination of decades of congressional efforts to construct a comprehensive, integrated remedial regime to regulate the nuclear-power industry and, where necessary, to compensate individuals allegedly harmed by nuclear releases.

The decision below spurns the consensus view, holding instead that a plaintiff asserting liability resulting from a nuclear incident can simultaneously pursue *both* a PAA claim *and* state-law tort claims—and if the PAA claim fails on the merits, simply start over under state

law. Under the decision below, the PAA is just an additional, alternative avenue for recovery. It supplements, but does not supplant, state-law tort theories. In the end, it preempts nothing.

This Court's review is warranted because the decision below (1) clearly conflicts with decisions from several other federal circuits, (2) neuters the PAA's express preemption provision, and (3) threatens to disrupt the complex interest-balancing that Congress has undertaken through decades of experience and experimentation with the PAA regime. An adverse judgment on a PAA claim should be the end of a plaintiff's attempt to establish a nuclear-power provider's liability, not an invitation to pursue the very same theories under different labels.

ARGUMENT

I. The Decision Below Squarely Conflicts With Decisions From Other Circuits And Misapplies Well-Settled Preemption Doctrine.

In the decision below, the Tenth Circuit held that respondents, who had asserted but failed to prove PAA liability, could nonetheless recover on a state-law nuisance claim. Applying the so-called "presumption against preemption," the court held that "nothing in [the] language, structure, or history" of the PAA indicated congressional intent to preempt state-law tort theories. Pet. App. 12a-13a. The PAA, the Tenth Circuit said, "merely affords a federal forum" for actions asserting liability arising out of nuclear incidents. Pet. App. 14a. If, as here, the plaintiff fails to prove the alleged nuclear incident, then the case ceases to be a PAA action and effectively reverts into an ordinary state-law tort suit. Pet. App. 14a-22a. In other words, the PAA is just a convenient alternative to state-law tort remedies. It has preemptive effect

only until the plaintiff loses—at which point preemption evaporates and the plaintiff gets a do-over under state law.

That ruling conflicts with the consensus view of several federal circuits and robs the PAA's express preemption provision of any real force.

A. Several circuits have held that the Price-Anderson Act preempts state-law tort claims arising out of nuclear incidents.

The decision below—holding that a plaintiff may seek to establish liability arising out of a nuclear incident *both* under the PAA and, if that fails, under state-law tort theories—squarely conflicts with decisions from a number of other circuits.

The petition explains the split in detail, and there is no need to retread that ground here. Suffice it to say that—

- The Fifth Circuit has held that plaintiffs who allege but fail to prove a PAA claim cannot pursue a state-law claim for "offensive contact" because doing so would amount to "an end-run around the entire PAA scheme." *Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186, 192-200 (5th Cir. 2011).
- The Ninth Circuit has held that plaintiffs cannot pursue state-law medical-monitoring claims arising out of nuclear incidents because "[t]he PAA is the exclusive means of compensating victims for any and all" such claims, and the PAA requires proof of physical injury. *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009-10 (9th Cir. 2008).

- The Third Circuit has explained that "no state cause of action based upon public liability exists," and that "[a] claim growing out of any nuclear incident is compensable under the terms of the [PAA] 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 Sixth Circuit has likewise held that a plaintiff asserting an injury arising out of a nuclear incident "can sue under the [PAA], as amended, or not at all." *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997).
- The Second Circuit has explained that the PAA "creat[ed] an *exclusive* federal cause of action for radiation injury." *Corcoran v. New York Power Auth.*, 202 F.3d 530, 537 (2d Cir. 1999).
- The Seventh Circuit has described the PAA cause of action as "supplant[ing] the prior state cause of action." *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994).

The circuit split—on an important issue of federal statutory interpretation that affects an increasingly significant industry—couldn't be any clearer.

B. The decision below misapplies well-settled preemption doctrine.

This Court should resolve the circuit split in favor of the consensus position, and against the Tenth Circuit's view, because the decision below deprives the PAA of the preemptive force that Congress intended.

1. The Tenth Circuit correctly recognized that "[p]reemption can come about in various ways." Pet. App. 8a. But the court erred by conflating the "various"—but

discrete—preemption categories: although it initially acknowledged petitioners' position "that the [PAA] *expressly* preempts and precludes" state-law claims arising out of nuclear incidents, Pet. App. 9a (emphasis added), the court then referred throughout the balance of its opinion to "*field* preemption," see, e.g., *id.* at 9a, 11a, 12a, 14a (emphasis added). Although the various preemption categories may not be "rigidly distinct," *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990), this Court has been careful to address them separately, as independent grounds for determining whether Congress has indicated its intent to displace state law.

2. Congress may preempt state law expressly or impliedly, "through a statute's express language or through its structure and purpose." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). Whether preemption is express or implied, "[t]he question, at bottom, is one of statutory intent, and [this Court] accordingly begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quotations omitted).

Express preemption. "Pre-emption of state law is sometimes required by the terms of a federal statute." *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 540 (1979) (plurality op.). "Congress can define explicitly the extent to which its enactments pre-empt state law," *English*, 496 U.S. at 78, and so a court in an express-preemption case must "focus on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent," *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

Implied preemption. Separately, Congress may also preempt state law by implication—"through 'field' or 'conflict' pre-emption." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015).

Field preemption occurs where Congress "intended to foreclose any state regulation in the *area*, irrespective of whether state law is consistent or inconsistent with federal standards." *Ibid.* (quotations omitted). In that situation, "even complementary state regulation is impermissible," because the area of regulation is "an area the Federal Government has reserved for itself." *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). Congress may reserve an entire area for exclusively Federal regulation either by creating a "scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or by legislating in "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English*, 496 U.S. at 79 (quotations omitted).

In areas where Congress has not "occupied the field," federal law still may impliedly preempt state law that "conflicts" with federal law on the same subject. That may happen in two different situations: (1) "where compliance with both state and federal law is impossible," and (2) "where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc.*, 135 S. Ct. at 1595 (quotations omitted).

3. Although the PAA entails both field-preemption aspects—given the extent to which Congress has legislated in the nuclear-power area—and conflict-preemption aspects—given the care with which Congress has bal-

anced competing objectives—this is an *express* preemption case that turns on the meaning of the PAA's *express* preemption provision, Section 2014(hh).

In pertinent part, Section 2014(hh) states as follows: "[A]ny suit asserting public liability"—statutorily defined to mean "any legal liability arising out of or resulting from a nuclear incident"—"shall be deemed to be an action arising under section 2210 of this title," *i.e.*, under the PAA's operative remedial provision. See *Neztsosie*, 526 U.S. at 484 (referring to Section 2014(hh) as the PAA's "preemption provision").

The key terms for present purposes are "assert[]" and "deem[]." In the context here, "assert" means to "invoke or enforce a legal right." *Black's Law Dictionary* 139 (10th ed. 2014); see also *Black's Law Dictionary* 116 (6th ed. 1990) ("[t]o state as true; declare; maintain"). "Deem" means "[t]o treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have." *Black's Law Dictionary* 504 (10th ed. 2014); see also *Black's Law Dictionary* 415 (6th ed. 1990) (to "consider" or "treat as if").

Thus, Section 2014(hh) means that any suit *invoking or seeking to enforce a right to relief* arising out of a nuclear incident must be *treated as if it were a federal cause of action* under the PAA. Accordingly, under the provision's plain language, even a complaint that asserts *only* state-law causes of action, without ever mentioning federal law, must be treated as if it were a complaint seeking relief solely under the PAA; in that instance, Section 2014(hh) "forms the state-based cause of action into the federal mold." *O'Conner*, 13 F.3d at 1096. But this case is even more straightforward. As the petition explains, respondents here didn't plead just state-law claims; rather, they expressly invoked the PAA and "assert[ed]" PAA

claims (by name) in their original complaint. See Pet. 6-7, 23-24. Because respondents indisputably "assert[ed]" liability arising out of a nuclear incident, their "suit"—the whole thing—is "deemed" to be one arising under the PAA. Respondents must succeed, or fail, exclusively under federal law.[2]

The Tenth Circuit acknowledged petitioners' express preemption argument but dismissed it without meaningful analysis. The court said it "just [didn't] see" any express preemption provision in the PAA. Pet. App. 14a. What the Tenth Circuit saw in Section 2014(hh), instead, was a garden-variety jurisdictional provision that "merely affords a federal forum" when a plaintiff asserts an injury arising from a nuclear incident. *Ibid.*

The Tenth Circuit's inability to "see" any express preemption in Section 2014(hh) is more than a mere taxonomical error about preemption doctrines; instead, it appears to be rooted in a fundamental misunderstanding of the statute caused, at least in part, by the court's incomplete quotation of the provision's text. The Tenth Circuit said that under Section 2014(hh) a plaintiff's "suit is 'deemed to be an action arising under' *federal law*." Pet. App. 14a (emphasis added). The court's "arising under federal law" paraphrase evokes a certain jurisdictional feel, suggestive of Article III, § 2 of the Constitution and 28 U.S.C. § 1331.

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[2] To be clear, in providing that the "rules of decision" for a PAA public liability action would be "derived from" state law, Congress did not indicate any intent to preserve separate state-law causes of action. Rather, "Congress expressed its intention that state law provides the content of and *operates as federal law*." *TMI II*, 940 F.2d at 855 (emphasis added).

But Section 2014(hh) doesn't say what the Tenth Circuit said it says. The statute actually says that any suit that asserts an injury resulting from a nuclear incident is "deemed to be an action arising," not just under federal law generally, but "*under section 2210 of this title*" specifically—*i.e.*, under the PAA's operative remedial provision, with all of its attendant rules, restrictions, and limitations. Accordingly, it's not just that the state-law cause of action can find its way into federal court; it's that any state-law claim, as such, ceases to be and is displaced by the PAA's complex remedial regime. It is "deemed"—treated as if it were, in all respects—a PAA claim.

The Tenth Circuit's inability to see the preemptive scope of Section 2014(hh) is particularly surprising given this Court's unanimous decision in *Neztsosie*. There, several members of the Navajo Nation sued in tribal court for damages allegedly resulting from uranium mining on the Navajo Nation Reservation. 526 U.S. at 477-78. The defendants asked a federal district court to enjoin the tribal-court litigation, but the court refused. The Ninth Circuit affirmed, holding (1) that state-law claims could be resolved in the tribal court, (2) that even though PAA claims should be litigated in federal court, it was for the tribal court to decide in the first instance whether the PAA applied, and (3) that if the tribal court determined that the PAA applied, it could proceed to resolve any PAA claim. See *id.* at 478-79.

This Court vacated the Ninth Circuit's decision, holding that Congress had "expressed an unmistakable preference for a federal forum, at the behest of the defending party, * * * for litigating a [PAA] claim on the merits," *id.* at 484-85, and, accordingly, that it was for the federal court, not the tribal court, to determine the applicability of the PAA, see *id.* at 487-88. In the course of its opinion,

this Court made some important observations about Section 2014(hh)—the same provision at issue here. First, the Court expressly referred to Section 2014(hh) as the PAA's "preemption provision." *Id.* at 484. Second, the Court emphasized that that Section 2014(hh)'s preemption provision is "unusual" in that it "*transforms* into a federal action 'any public liability action arising out of or resulting from a nuclear incident'"—such that any such suit actually "*becomes* a federal action." *Id.* at 484 & n.6 (emphasis added). Put another way, the Court said, Section 2014(hh) accomplishes the "*conversion* of state claims to federal ones." *Id.* at 485 n.7 (emphasis added).

Indeed, the *Neztsosie* Court went further, and described the operation of Section 2014(hh) as "resembl[ing] * * * complete pre-emption." *Id.* at 484 n.6 (quotations omitted). Under the complete-preemption doctrine, a defendant may remove a civil action from state court to federal court, even though the complaint asserts only state-law claims, because "the pre-emptive force of [the relevant federal] 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." *Ibid.* (quotations omitted). This Court's analogy to complete preemption is significant here because it confirms that Section 2014(hh) accomplishes the "extraordinary" feat of actually "convert[ing]" a state-law cause of action into a PAA cause of action.

The result of this "extraordinary" preemption is that "the law governing the complaint is *exclusively federal*." *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009) (emphasis added); see also *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (LMRA "displace[s] entirely any state cause of action" to enforce a collective bargaining agreement) (quotations omitted); *Metropolitan Life Ins. Co. v. Taylor*,

481 U.S. 58, 67 (1987) (ERISA completely preempts state-law claims and makes them "necessarily federal in character"). If *Neztsosie*'s core holding left any doubt, the Court's analogy to complete preemption removes it: Section 2014(hh) does not create some federal fraternal twin of the state-law cause of action, but instead "transforms" and "converts" the state-law cause of action into a PAA cause of action.

Neztsosie hardly stands alone in recognizing the PAA's "transform[ative]" force. This Court has long emphasized that the PAA does more than merely express a preference for a federal forum, as the Tenth Circuit here seemed to believe. Indeed, in 1978—even before Congress amended the PAA to add a distinct federal cause of action—this Court explained that the statute "provide[s] a reasonably just *substitute* for the common-law or state tort law remedies it *replaces*." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 (1978) (emphases added). As the Court explained there, before the PAA was enacted, private parties had a right "to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources." *Id.* at 88 n.33. But "[a]fter the Act was passed, that right at least with regard to nuclear accidents was *replaced* by the compensation mechanism of the statute." *Ibid.* (emphasis added).[3]

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[3] This Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), does not compel a different conclusion. The Court there acknowledged that "states are precluded from regulating the safety aspects of nuclear energy," *id.* at 240-41, but held that state-law punitive damages were nevertheless available for radiation injuries, see *id.* at 251-56. *Silkwood* involved preemption under the Atomic Energy Act of 1954, not the PAA, and its description of the PAA preceded the 1988 amendments that created the federal cause of action at issue here.

The Tenth Circuit's decision is incompatible with *Neztsosie*. Rather than "transforming" or "converting" respondents' state-law nuisance claim into a federal claim—thereby consolidating and streamlining PAA litigation—that decision preserves the state-law claim as an alternative basis for establishing liability.

In sum, Section 2014(hh) expresses Congress' intent to displace state law with respect to actions seeking to establish liability arising out of nuclear incidents. Congress has made clear its preference that all such actions should be federal actions, governed by federal law (derived from not-inconsistent state law). Congress did not intend to allow do-overs under state tort law, separate and apart from the PAA.

4. In refusing to give Section 2014(hh) any preemptive effect, the decision below invoked the so-called "presumption against preemption." Pet. App. 12a-13a. From time to time—albeit inconsistently—this Court has employed such a presumption where Congress has legislated "in a field which the States have traditionally occupied." *Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230 (1947); see, e.g., *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013); *Altria Group*, 555 U.S. at 77; *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

This "presumption against preemption" is not well grounded and should be abandoned. Preemption is simply the name given to the ordinary operation of the Supremacy Clause, and this Court's early cases did not hesitate to enforce that clear constitutional rule. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) (if state law "come[s] into collision with an act of Congress," state law must yield whether or not it was enacted "in virtue of a power to regulate [the State's] domestic trade and po-

lice"); see also Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C.L. Rev. 967, 974-77 (2002) (explaining that this Court's decisions in the early 20th century can be read to embody "a presumption in favor of preemption").

Indeed, the *non obstante* provision in the Supremacy Clause—"any [state] law to the contrary notwithstanding"—effectively reversed the presumption against implied repeals of contrary state law, demonstrating the Framers' purpose not to avoid preemption but to authorize it. See *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2580 (2011) (plurality op.) ("The *non obstante* provision in the Supremacy Clause * * * suggests that federal law should be understood to impliedly repeal conflicting state law."). Thus, "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law" but should simply determine the "ordinary meanin[g]" of federal law. *Ibid.* (quotations omitted); see also *Altria Group*, 555 U.S. at 101-02 (Thomas, J., dissenting).

Applying a "presumption against preemption" is especially inappropriate in an *express preemption* case like this one, because "[p]re-emption fundamentally is a question of congressional intent," *English*, 496 U.S. at 78-79, and the plain language of the statute—free of the distorting influence of an ill-defined presumption—is the "best evidence" of congressional intent to preempt state law, *Sprietsma*, 537 U.S. at 63. Indeed, under cardinal rules of statutory interpretation, "[i]f the intent of Congress is clear"—here, to preempt—"that is the end of the matter." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (quotations omitted).

"Under the Supremacy Clause * * * [the Court's] job is to interpret Congress's decrees of pre-emption neither

narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). To apply a presumption against preemption is to "slant[] the inquiry" into congressional intent, increasing the risk of an incorrect assessment. *Bates*, 544 U.S. at 457 (Thomas, J., concurring in the judgment in part and dissenting in part). The decision below gave Section 2014(hh) an unnatural, crabbed interpretation because of the "presumption against preemption," and the result is inconsistent with the clear purpose of the PAA as expressed in the statute and described by this Court.

II. The Decision Below Undermines The Complex Balance Of Interests That Congress Deliberately Struck In The Price-Anderson Act.

The decision below not only fundamentally misunderstands the PAA's express preemption provision, but also threatens to undermine the careful balance of interests that Congress struck in the PAA. The complex statutory scheme seeks to balance nuclear-power providers' interest in limiting potential liability—and thus the public's interest in encouraging the nuclear-power industry's growth—with the interest in providing adequate resources to compensate injured persons. At the same time, the PAA balances the interest of the federal government in effecting a rational, uniform regulatory program to promote development of nuclear power with the states' interest in enforcing ordinary tort duties. The decision below scuttles Congress' balancing act.

A. The decision below upsets the balance between providing adequate compensation to injured individuals and limiting unpredictable liability.

From its enactment in 1957, and through amendments in 1966 and 1988, the history of the PAA demonstrates a congressional commitment to balance the interests of licensed nuclear-power providers with the interests of the public, and especially persons who might be harmed by nuclear accidents.

As this Court explained in *Pacific Gas*, federal nuclear policy under the PAA is a "complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology." 461 U.S. at 194. To "promote the civilian development of nuclear energy," Congress has attempted to reduce the cost of doing business in this dangerous industry by providing an aggregate limitation of liability. To "safeguard the public" from "unpredictable risks," Congress has required licensees to obtain the maximum amount of insurance available and provided an additional pool of resources to compensate injured persons. And to promote uniformity and efficiency in the operation of this complex remedial scheme, Congress has required licensees to waive certain defenses in some cases (including fault-related defenses, statutes of limitations, and government-contractor defenses), provided for consolidation of claims in a single federal court, and finally, created a federal cause of action for liability arising out of a nuclear incident.

The decision below threatens to undermine the complex balance between provider and individual interests that Congress has struck in the PAA. To ensure fair compensation and enhance predictability, Congress provided for a single, uniform federal cause of action. That cause

of action is generous to would-be plaintiffs in that it limits certain common-law defenses and is backed by billions of dollars' worth of financial protection. But the cause of action also gives providers necessary predictability and finality, in that it eliminates the risk of duplicative and copycat litigation arising out of a single incident. If a plaintiff fails to prove any element of her PAA claim, then her suit fails and the defendant is not liable. Under the decision below, however, the provider, having prevailed against the plaintiffs' PAA claim, may yet be liable—to exactly the same extent—under a parallel state-law cause of action. In that circumstance, the PAA provides no protection for the licensee; it is just an alternative avenue for relief.

This Court rejected a similar attempt to disturb a comprehensive remedial scheme in *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011), which involved the National Childhood Vaccine Injury Act (NCVIA). As this Court explained, a "massive increase in vaccine-related tort litigation" in the 1970s and early 1980s "destabilized the * * * vaccine market, causing two of the three domestic manufacturers [of the DTP vaccine] to withdraw" from the market and causing a shortage of the DTP vaccine when the sole remaining manufacturer experienced production problems. 562 U.S. at 227. Congress enacted the NCVIA "[t]o stabilize the vaccine market and facilitate compensation" to persons injured by vaccines. *Id.* at 228. The NCVIA (1) "established a no-fault compensation program [that was] designed to work faster and with greater ease than the civil tort system" and (2) provided "significant tort-liability protections for vaccine manufacturers." *Id.* at 228-29 (quotations omitted). Among other things, the NCVIA "expressly eliminate[d] liability for a vaccine's unavoidable, adverse side effects." *Id.* at 230.

When plaintiffs sued a vaccine manufacturer on state-law strict liability and negligence theories, alleging that the vaccine was defectively designed, this Court held that "[s]tate-law design-defect claims [were] * * * preempted." *Id.* at 232. That conclusion, which followed from the NCVIA's plain language, was confirmed by the Act's "structural *quid pro quo*"—manufacturers were required to finance the compensation regime in exchange for certain limitations of liability. *Id.* at 240. "Taxing vaccine manufacturers' product to fund the compensation program, while leaving their liability for design defect virtually unaltered, would hardly coax manufacturers back into the market"—one of the primary purposes of the NCVIA. *Ibid.*

So too here, requiring nuclear-power providers to obtain the maximum insurance available and then to make additional contributions to the compensation pool, while leaving them exposed to unpredictable state-law tort liability, would undermine the basic purpose of the PAA regime—"to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power," *Duke Power*, 438 U.S. at 83.

B. The decision below upsets the balance between the federal government and the states.

The decision below also upsets the balance that Congress struck between the interests of the federal government and the states. As this Court has recognized, "[t]he interrelationship of the federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership." *Pacific Gas*, 461 U.S. at 194. Indeed, Congress has considered principles of federalism in crafting this regulatory and remedial scheme, and its decision to create an *exclusive* federal cause of action is

entitled to respect. "Federalism," after all, is not just "states' rights" by another name. It is not one end of the federal-state spectrum, but the spectrum itself. It is affirmed as much by effectuating congressional intent to preempt state law as it is by preserving the operation of state law absent such intent.

"[O]ptimiz[ing] the partnership" between the federal government and the states has meant, among other things, preserving a role for state law, subject to overriding federal objectives. In its original form, the PAA did not create a federal cause of action or otherwise affect state tort law. By 1966, however, Congress became concerned that traditional state tort law might be inadequate to ensure compensation to victims of nuclear incidents. So Congress amended the PAA to require licensees, in cases involving "extraordinary nuclear occurrences," to waive certain defenses that might cut off liability under state law.

By 1988, Congress identified another problem with reliance on state tort law: A multiplicity of claims brought in state courts, under state law, could not be consolidated to promote efficient compensation. Thus, in the 1988 amendments to the PAA, Congress created a federal cause of action, providing that any similar state-law cause of action "shall be deemed" a federal cause of action, and specifically authorized removal of state-court lawsuits to federal court. Although the "rules for decision" in a PAA action would be "derived from" state law, that did not mean that state law would continue to operate independently; rather, state law "operates as federal law," *TMI II*, 940 F.2d at 855, and only to the extent that it promotes the objectives of the PAA regime.

That federal-state balance is threatened by the decision below. Congress has carefully drawn and amended

the PAA to provide a complex, comprehensive, *federal* compensation regime that balances private and public interests. Indeed, the PAA regime has become more and more "federal" with each revision. The decision below ignores that fact and treats the PAA as a convenient *alternative* to a state-law nuisance action—a "bonus" claim of sorts—respected only as long as it promises to afford relief to the plaintiff. Once it becomes clear that the plaintiff cannot prevail under the PAA, the plaintiff may declare that she no longer seeks recovery under the federal regime, and a court must revert to state-law tort theories as if the PAA did not exist. There is no balance in that approach, certainly not the balance that Congress struck.

When Congress has not expressed any intention to displace state law, a court must not do so. "Our Federalism" requires federal courts to recognize and respect the independent importance of state law. But when Congress, acting within constitutional bounds, has expressed its intent to preempt state law, the Supremacy Clause requires a court to respect Congress' choice. Federalism is a two-way street, and here Congress has determined that a federal cause of action (informed by state law) should be the only cause of action available to persons who might be harmed by nuclear accidents.

* * *

The decision below stands in stark conflict with clear holdings of several other circuits—a conflict resulting from misapplication of this Court's preemption doctrine. This Court should grant the petition to resolve the conflict among the circuits and to reaffirm that when Congress expressly provides a federal cause of action that displaces similar state-law causes of action, a court must enforce the congressional mandate.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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