No. _____

In the Supreme Court of the United States

TAMIA BANKS, RONNIE HOOKS, JOEL HOGAN, KENNETH NIEBLING, KENDALL LACY, TANJA LACEY, WILLIE CLAY, BOBBIE JEAN CLAY, ANGELA STATUM, AND MISSOURI RENTALS COMPANY, LLC, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

V.

COTTER CORPORATION, COMMONWEALTH EDISON COMPANY, DJR HOLDINGS, INC., AND ST. LOUIS AIRPORT AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

RYAN A. KEANE
Keane Law LLC
7711 Bonhomme Ave
Suite 600
St. Louis, MO 63105

BARRY COOPER
Counsel of Record
CELESTE BRUSTOWICZ
VICTOR COBB
Cooper Law Firm L.L.C.
1525 Religious Street
New Orleans, LA 70130
(504) 399-0009
bcooper@clfnola.com

KEVIN THOMPSON
Thompson Barney
2030 Kanawha Blvd
Charleston, WV 25311

ANTHONY D. GRAY
Johnson Gray, LLC
319 N. 4th St., Ste. 212
St. Louis, MO 63102

QUESTIONS PRESENTED

The Price Anderson Act, 42 U.S.C. § 2210 *et seq*., amended the Atomic Energy Act, 42 U.S.C. § 2011 *et seq*, to provide certain federal licensees with a system of private insurance, government indemnification, and limited liability for claims of "public liability" defined in pertinent part as "any legal liability arising out of or resulting from a nuclear incident". *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999) (citing 42 U.S.C. § 2014(w)). As Justice Gorsuch found: "[t]he presence of a nuclear incident is the hallmark of a public liability action." *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1140 (10th Cir. 2010).

The first question presented is whether there has been a "nuclear incident" such that the Price Anderson Act is applicable and provides original jurisdiction when the Congressional compensation mechanism provided by the Price Anderson Act is not implicated by the conduct giving rise to a Plaintiff's claims.

28 U.S.C. § 1291 provides United States Courts of Appeals with jurisdiction to hear appeals from all final decisions of the district courts of the United States.

The second question presented is whether an order by a federal district court severing a primary claim from a related contribution claim, remanding the primary claim to state court, and keeping federal jurisdiction over the contribution claim constitutes a "final decision" under 28 U.S.C. § 1291.

PARTIES TO THE PROCEEDING BELOW

Petitioners Tamia Banks, Ronnie Hooks, Joel Hogan, Kenneth Niebling, Kendall Lacy, Tanja Lacy, Willie Clay, Bobbie Jean Clay, Angela Statum, and Missouri Rentals Company, LLC were the plaintiffs before the District Court and plaintiffs-appellees in the Court of Appeals.

Respondents Cotter Corporation, Commonwealth Edison Company, DJR Holdings, Inc. and St. Louis Airport Authority were defendants before the District Court. Cotter Corporation was defendant-appellant in the Court of Appeals and Commonwealth Edison Company, DJR Holdings, Inc. and St. Louis Airport Authority were defendants in the Court of Appeals.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Missouri Rentals Company, LLC has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit: *In re: Cotter Corporation, (N.S.L.)*, No. 21-1160; *Banks v. Cotter Corporation*, No. 21-1165 (January 7, 2022)

U.S. District Court, Eastern District of Missouri: *Banks v. Cotter Corporation*, No. 4:20-cv-01227 (December 22, 2020)

U.S. District Court, Eastern District of Missouri: *Banks v. Cotter Corporation*, No. 4:18-cv-00624 (December 22, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Tamia Banks, Ronnie Hooks, Barbara Hooks, Joel Hogan, Kenneth Niebling, Kendall Lacy, Tanja Lacy, Willie Clay, Bobbie Jean Clay, Angela Statum, and Missouri Rentals Company, LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at *In re Cotter Corp., (N.S.L.)*, 22 F.4th 788 (8th Cir. 2022). The first and second district court remand opinions are not published. They are found at *Banks v. Cotter Corp.*, No. 4:18-CV-00624 JAR, 2019 WL 1426259 (E.D. Mo. Mar. 29, 2019) and *Banks v. Cotter Corp. (N.S.L.)*, No. 4:20-CV-01227-JAR, 2020 WL 7625088 (E.D. Mo. Dec. 22, 2020) respectively, and in the Appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) as the judgment of the court of appeals was entered on January 7, 2022, and denials of rehearing and rehearing en banc occurred on February 11, 2022.

STATUTORY PROVISIONS INVOLVED

The Price Anderson Act is comprised of 42 U.S.C. § 2210 with relevant definitions in 42 U.S.C. § 2014. Additionally, 28 U.S.C. § 1291 on what is a final judgment. Relevant provisions are found in the Appendix.

INTRODUCTION

This case raises two important questions of law: one substantive, one procedural. First, regards the scope of the Price Anderson Act ("PAA") and its jurisdictional provision in 42 U.S.C. § 2210(n)(2) which provides that "with respect to a public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place…shall have original jurisdiction."

The Eighth Circuit determined that the PAA is applicable to Petitioners' claims against Respondent Cotter Corporation even though Cotter was never a participant in the PAA's insurance and indemnification scheme and never conducted any activities related to a contract with the Atomic Energy Commission (now the Department of Energy).

In so concluding, the Eighth Circuit relied on the dictionary definition of the word "occurrence" and failed to consider the context in which the term "nuclear incident" is used, that is the PAA's insurance and indemnification scheme. The Eighth Circuit's refusal to look past the plain meaning is particularly perplexing considering Congress defined the term "occurrence" in a Senate Report that accompanied the PAA's enactment, which the Eighth Circuit decision fails to acknowledge or account for.

Additionally, the Eighth Circuit also fails to acknowledge or account for the Nuclear Regulatory Commission's ("NRC") interpretation contained in a report submitted to Congress pursuant to the PAA which confirms that the PAA is not applicable to defendants such as Cotter. This interpretation should be given deference pursuant to *Chevron, U.S.A., Inc.*

v. NRDC, Inc., 467 U.S. 837, 844 (1984). Furthermore, the Eighth Circuit decision is contrary this Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) with respect to the applicability of the PAA.

The Eighth Circuit's failure to recognize that the term "nuclear incident" is a term of art used in the context of the PAA's insurance and indemnification scheme results in a decision that expands the scope of the PAA well beyond what Congress ever intended. Lower courts have struggled to apply this statute and each court of appeals to address the issue, including the Eighth Circuit, has held that the PAA is applicable and provides federal court jurisdiction even when the PAA's insurance and indemnification scheme is not implicated. It is necessary for this Court to correct the mistakes made by the Eighth Circuit with respect to the scope of the PAA by giving the terms of the PAA the meaning that Congress intended.

Second, this case raises an important procedural question regarding what constitutes a "final decision" under 28 U.S.C. § 1291. The Eighth Circuit ruled that the district court's severance and remand of the Plaintiffs' claims from the remaining third-party contribution claims "effectively put Cotter out of federal court for Plaintiffs' claims" thereby constituting a final judgment under § 1291.

This ruling puts the Eighth Circuit in direct conflict with the Fourth Circuit on the same issue. In a procedurally identical case, the Fourth Circuit held that when a district court retained jurisdiction over third-party contribution claims, that did not constitute a final decision as generally understood for the

purposes of § 1291. *Campbell-McCormick, Inc. v. Oliver*, 874 F.3d 390, 395 (4th Cir. 2017). This is directly contradictory to the Eighth Circuit's ruling. As such, it is necessary for this Court to clarify the application to circumstances such as these to prevent the Circuits from reaching polar opposite conclusions when the same set of facts are presented.

STATEMENT OF THE CASE

I. History and Framework of the Price Anderson Act

An analysis of the PAA's history is critical to understanding congressional intent with respect to what an "occurrence" is within the definition of a "nuclear incident". This is particularly true because the PAA is "complicated, interlocking, and use[s] words in unintuitive ways." *Est. of Ware v. Hosp. of the Univ. of Pennsylvania*, 871 F.3d 273, 279 (3d Cir. 2017). Specifically, it is important to recognize what Congress intended when it enacted the definition of "nuclear incident" in 1957 and precisely how Congress changed the scope of the PAA with the 1988 amendments.

A. PAA Enacted in 1957 – The Framework is Established, and "Nuclear Incident" is Defined.

The PAA was enacted in 1957 to protect the public by ensuring adequate funds for liability claims and to encourage the development of the atomic energy industry by providing government indemnification and a cap on liability for participating licensees and contractors. PL 85-256 (HR 7383), September 2, 1957, 71 Stat. 576.

For AEC (now NRC) licensees, the PAA required certain licensees to maintain "financial protection" to cover "public liability" claims. *Id*. (Codified as amended at 42 U.S.C. §§ 2210(a), (b)). In exchange the PAA required the licensee to execute and maintain an indemnity agreement with the AEC whereby, after financial protection is exhausted, the AEC provides indemnification up to $500,000,000 to cover "public liability arising out of or in connection with the licensed activity." Id. (Codified as amended at 42 U.S.C. § 2210(c)).

For AEC (now DOE) contractors, the PAA authorized the AEC to enter into agreements of indemnification with contractors for "activities under contracts for the benefit of the United States" providing $500,000,000 to cover "public liability arising out of or in connection with the contractual activity." Id. (Codified as amended at 42 U.S.C. § 2210(d)). Cotter has never conducted any activities related to a contract with the AEC.

To encourage the development of the atomic energy industry, the PAA capped aggregate liability for a single "nuclear incident" at the amount of financial protection required plus $500,000,000 in government indemnification. Id. (Codified as amended at 42 U.S.C. § 2210(e)).

The PAA defined "public liability" in relevant part as "any legal liability arising out of or resulting from a nuclear incident". Id. (Codified as amended at 42 U.S.C. § 2014(w)). "Nuclear incident" was defined as:

> Any occurrence within the United States causing bodily injury, sickness, disease, or death, or loss of or damage to property, or for loss of use of property, arising out of or resulting from the

> radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material.

Id. (Codified as amended at 42 U.S.C. § 2014(q).

The Senate Report that accompanied the PAA's enactment provided that:

> …the occurrence which is the subject of this definition is ***that event at the site of the licensed activity, or activity for which the commission has entered in to a contract***…That is why the definition of 'nuclear incident' has the phrase 'any occurrence causing bodily injury, sickness, disease, or death' and why the definition of 'public liability' is tied to any legal liability arising out of, or resulting from, a nuclear incident.

S. REP. 85-296, 1957 U.S.C.C.A.N. 1803, 1817-18 (emphasis added).

"Licensed activity" was defined as "an activity licensed pursuant to this Act and covered by the provisions of section [2210(a)]." PL 85-256 (HR 7383), September 2, 1957, 71 Stat. 576. (Codified at 42 U.S.C. § 2014(p)). This definition has remained unchanged. Cotter has never conducted "licensed activity" pursuant to the PAA because they have never maintained financial protection pursuant section 2210(a).

B. 1966 Amendments – "Extraordinary Nuclear Occurrence" is Defined and Incorporated into the Definition of "Nuclear Incident"

The PAA was amended in 1966 to add a "new concept to the statutory scheme that provided for a

waiver of traditional tort law defenses in the event of an accident determined to be an 'extraordinary nuclear occurrence' (ENO)." S. Rep. 100-70, 14, 1988 U.S.C.C.A.N. 1424, 1427. The definition of "nuclear incident" was amended by inserting "including an extraordinary nuclear occurrence." Pub. L. 89-645 (S 3820), October 13, 1966, 80 Stat. 891.

"Extraordinary nuclear occurrence" was defined as:

> any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Commission determines to be substantial…As used in this subsection, 'offsite' means away from 'the location" or 'the contract location" as defined in the applicable Commission indemnity agreement, entered into pursuant to section [2210].

Id. (Codified as amended at 42 U.S.C. § 2014(j)).

In addition, 42 U.S.C. § 2210(n)(2) was added allowing for removal of nuclear incident claims deemed substantial by the NRC, constituting an ENO. The 1966 amendments did not change 2210(a).

C. 1975 Amendments – Government Indemnification Phased Out for NRC Licensees

The 1975 Amendments phased out federal indemnity for certain NRC licensees and replaced it with a self-insurance pool-type arrangement including after-the-fact assessments for participating licensees. S. Rep. 100-70, 15, 1988 U.S.C.C.A.N. 1424, 1428. If damages from a nuclear incident were "likely to ex-

ceed the coverage available from [financial protection], each NRC reactor licensee would be assessed up to $5 million to pay a pro-rated share of the damages in excess." Id. This change occurred after Cotter's operations at issue were conducted and after its source material license was terminated. PL 94–197 (HR 8631), December 31, 1975, 89 Stat 1111.

D. 1988 Amendments – Response to Three Mile Island

In 1979, the Three Mile Island ("TMI") nuclear reactor located in Pennsylvania failed. This facility was licensed and indemnified pursuant to the PAA and maintained the required financial protection. *See* S. REP. 100-218, 3, 56, 1988 U.S.C.C.A.N. 1476, 1478 The NRC did not consider the accident to be substantial enough to constitute an ENO. Because the PAA only allowed a federal forum for nuclear incidents deemed "substantial" by the NRC, thousands of cases were filed in both state and federal courts. S. REP. 100-218, 13, 1988 U.S.C.C.A.N. 1476, 1488.

In response, Congress revised 42 U.S.C. § 2210(n)(2) substituting the previously defined term "nuclear incident" in the place of "Extraordinary Nuclear Occurrence" to allow for removal of claims against licensees that are not substantial enough to be an "ENO". PL 100–408 (HR 1414), August 20, 1988, 102 Stat 1066. Additionally, a federal cause of action called a "public liability action" for legal liability resulting from a "nuclear incident" was created. Id. Critically, the definitions of "nuclear incident", "licensed activity" and "public liability" were not changed. *Id*.

II. The Facts of This Case

From 1942 to 1957, Mallinckrodt processed uranium ore under a contract with the Manhattan Engineer District ("MED") (later the Atomic Energy Commission ("AEC")) at a site known as the St. Louis Downtown Site ("SLDS"). CA8 Joint Appendix ("JA") 528. The radioactive wastes produced by Mallinckrodt's processing were stored at a site near the Lambert Airport, known as the St. Louis Airport Site ("SLAPS"). *Id.*

In 1966, Continental Milling and Mining ("Continental") purchased these stockpiled wastes from the U.S. Government, assuming full responsibility for the care and custody of the wastes. JA 711. Continental moved them from SLAPS to a site on Latty Avenue located adjacent to Coldwater Creek. JA 783. When Continental went bankrupt in 1967, the radioactive wastes at the Latty site were acquired by Commercial Discount Corporation which dried some of the wastes and shipped it by railcars to Respondent Cotter Corporation's processing facility in Canon City, Colorado. *Id.*

In 1969, Cotter purchased the radioactive wastes remaining at the Latty site, agreeing to take all necessary precaution in the storage, handling, and shipping of the purchased wastes to prevent injury to adjoining property owners and prevent the wastes from encroaching on the property adjoining the Latty site. JA 763-764. Cotter also agreed to restore the Latty site. *Id.*

Between 1970 and 1973, Cotter dried the radioactive wastes at the Latty site and shipped them to its Canon City processing facility via railcars loaded on the banks of Coldwater Creek. JA 784. In 1973, Cot-

ter spread the remaining wastes over the Latty site and mixed it with contaminated topsoil before dumping it at the West Lake Landfill. JA 794. In 1974, Cotter certified to the AEC that the Latty site was decontaminated. JA 835. In August 1976, however, the NRC discovered radiation levels at the Latty site exceeded acceptable release limits and that soil samples contained uranium and thorium. JA 793-808.

Cotter was issued a source material license for its Latty operations, however, Cotter never maintained financial protection pursuant to § 2210(a) nor did it have an indemnification agreement with the AEC pursuant to § 2210(c) for its Latty operations. And Cotter's activities at Latty were not related to any AEC contract such that § 2210(d) would provide indemnification.

Cotter's Latty operations were sloppy and allowed toxic waste to migrate onto other properties including Coldwater Creek which has flooded many times since dispersing the waste well beyond the Latty site. Recognizing the dangers present, remediations have taken place at various locations along Coldwater Creek, including public parks and recreational sites. The same cannot be said for Petitioners' homes which remain contaminated with radioactive wastes.

Petitioners filed this suit on February 18, 2018, against Cotter and others in Missouri state court as a class action based entirely on Missouri tort law. The petition includes counts for trespass, nuisance, negligence, and strict liability.

In April 2018, Respondents removed claiming federal question jurisdiction under the PAA which it said preempted all of Plaintiffs' state law causes of

action. Though knowing full well of Mallinckrodt's original processing of the waste in downtown St. Louis, Cotter did not make it or anyone else a third-party defendant when it removed.

III. The Proceedings Below

A. First Remand

The district court granted Plaintiffs' remand motion holding the PAA was inapplicable to Plaintiffs' state law claims as neither Cotter, nor any other defendant, possessed an applicable license or indemnity agreement required by the PAA. ("2019 Remand Order") App. 38a-60a.

Acknowledging that there are many conflicting opinions as to whether a license or indemnity agreement is required for federal subject matter jurisdiction pursuant to the PAA, the district court agreed with several courts, including one in the same district, holding the PAA is not applicable in the absence of an applicable license or indemnity covering the activities giving rise to liability. App. 52a-53a. (citing *Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325, 343 (D.N.J. 1998); *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 297 (D. Mass. 1999); *Joseph v. Sweet*, 125 F. Supp. 2d 573, 576 (D. Mass. 2000); *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1321–22 (N.D. Fla. 2001); *Irwin v. CSX Transp., Inc.*, No. 3:10-CV-300, 2011 WL 976376, at *2 (E.D. Tenn. Mar. 16, 2011); *Strong v. Republic Servs., Inc.*, 283 F. Supp. 3d 759 (E.D. Mo. 2017)

The district court judge concluded that without an applicable license or indemnity agreement, there can be no "occurrence," that is, no event at the site of licensed activity, that would constitute a "nuclear incident." *Id.* The district court notes the legislative

history which provides that the word "occurrence" as used in the definition of "nuclear incident" means "that event at the site of licensed activity, or activity for which the Commission has entered into a contract, which may cause damage." *Id*. at 53a, 55a. The district court's reasoning focused on the PAA's purpose, i.e., to protect the public and encourage development of the atomic energy industry by providing certain licensees with a system of private insurance, government indemnification, and limited liability for certain nuclear tort claims. *Id*. at 52a – 53a.

In light of the PAA's concerns related to liability limitation and indemnification, the district court was not convinced that the PAA's 1988 amendments were meant to extend the reach of the PAA to activities not covered by applicable licenses or indemnity agreements. *Id*. at 58a. Rejecting the contention that the PAA is now so broad as to cover any claim caused by certain nuclear materials, the district court held that whether as a matter of statutory construction or the structure and history of the PAA, a license or indemnity agreement is a prerequisite for federal subject matter jurisdiction and that Cotter's source material license was not a basis for federal subject matter jurisdiction. *Id*. at 54a and 59a.

B. State Court Proceedings

Back in state court, Cotter filed a Motion to Dismiss again arguing the PAA preempts Plaintiffs state law claims and provides the exclusive cause of action for claims arising from nuclear incidents or radiation injuries. Alternatively, Cotter argued that Plaintiffs failed to sufficiently allege their state law causes of action.

Plaintiffs filed a Second Amended Petition (JA 510) and Cotter refiled its Motion to Dismiss. Following a lengthy March 2020 hearing the state court judge granted in part and denied in part Cotter's motion and permitted Plaintiffs to proceed with discovery and file a Third Amended Complaint. (App. 34a-37a)

Before that discovery concluded, on June 30, 2020, Cotter filed a Third-Party Petition (JA 553) seeking state-based contribution from several third-party defendants, including Mallinckrodt. JA 553. Cotter's contribution claim came over two years after this suit was instituted and over one year after the first remand. Mallinckrodt then removed under 28 U.S.C. § 1442 *et seq*., which provides for federal jurisdiction over cases involving federal officers, as well as the PAA. (JA 264). No reason in law or fact prevented Cotter from naming Mallinckrodt at the outset.

C. Second Remand

Immediately after removal, Mallinckrodt filed for bankruptcy resulting in a stay pursuant to 11 U.S.C. § 362.[1] JA 572. Plaintiffs then filed a Motion to Sever and Remand All Non-Third-Party Claims. JA 575. After full briefing, the district court determined it would retain jurisdiction over the third-party demand against Mallinckrodt and severed and remanded all other claims. App. 16a-33a. The district court rightfully believed the sole question before it was whether supplemental jurisdiction over Plain-

[1] Mallinckrodt's bankruptcy intentions were reported in the press before it was added as a third-party defendant.

tiffs' state law claims should be exercised or not. *Id.* at 20a - 21a.

In severing and remanding, the judge considered these facts: the progress in state court since remand, the total lack of litigation progress in federal court, and Mallinckrodt's post-removal bankruptcy automatic stay. *Id.* at 19a. The court reasoned that the only claim with potential to give rise to federal question jurisdiction was Cotter's contribution claim against Mallinckrodt. *Id.* at 23a. Because the court found that Plaintiffs' state law claims substantially predominated over Mallinckrodt's federal defenses, the court considered and commented on each of the "Gibbs factors"." *Id.* at 23a-28a. (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)).

Citing "meaningful precedent" for severing contribution claims, the district court rejected Cotter's argument that Mallinckrodt was an indispensable party due to Cotter's great delay in naming Mallinckrodt:

> [S]everance is appropriate, this Court finds in its discretion that Mallinckrodt is not an indispensable party. The Court notes that over two years passed before Mallinckrodt was impleaded in state court and no Defendant appears to have filed a motion to dismiss in state court alleging failure to include a necessary party. Such inaction is inconsistent with Cotter's argument here that the case simply cannot proceed without Mallinckrodt's presence.

Id. at 31a.

The district court concluded:

> The Plaintiffs in this case are Missouri citizens and property owners who seek damages and injunctive relief under Missouri law based on events which took place entirely in Missouri. (Doc. 1-6). After an earlier remand, Cotter's Third-Party Petition seeking contribution against Mallinckrodt, who has a potential federal defense under the PAA and 28 U.S.C. § 1442, provides the only potential avenue for federal jurisdiction in this case. Mallinckrodt' s federal defense is only relevant, however, in the event that Plaintiffs succeed in their claims against Cotter. While the claim against Mallinckrodt stems, from a common nucleus of operative fact as Plaintiffs' state law claims, the state law claims substantially predominate, and the Gibbs factors favor severance and remand. Mallinckrodt is not an indispensable party to the litigation, and its presence as Third-Party Defendant does not change this Court's prior determination that there is no federal jurisdiction under the PAA. *Id.* at 32a-33a.

D. Eighth Circuit Reverses

Cotter appealed and also sought a supervisory writ; plaintiffs opposed also filing a motion to dismiss for lack of jurisdiction.

The Court of Appeals for the Eighth Circuit reversed. App. 1a-15a. Before determining the merits of the appeal, the Eighth Circuit considered the question of whether the court had jurisdiction to hear the appeal. *Id.* at 4a. Cotter asserted jurisdiction under 28 U.S.C. § 1291, 1367, and 1442. Plaintiffs argued that:

- 28 U.S.C. § 1291 prohibited appeal because the December 2020 remand was not final and did not meet the stringent requirements of the collateral order doctrine.
- 28 U.S.C. § 1367 did not allow for a right of appeal because appeals can only lie when the judgement is final, or the collateral order doctrine applies.
- 28 U.S.C. § 1442 did not allow a right of appeal because the December 2020 remand did not consider whether the removing third-party defendant was or was not a government contractor and the district court retained jurisdiction over the removing third-party defendant thus not activating the § 1447 exception.
- 28 U.S.C. § 1447 prohibited appeal of the March 2019 remand because it was based on subject matter jurisdiction and no exception applied.
- 28 U.S.C. § 1441 did not allow a third-party defendant to remove.
- 28 U.S.C. § 1292 did not permit removal because Defendants did not request nor did the district court certify the decision for interlocutory appeal.

Without providing any rationale, the Eighth Circuit determined that "the remand order is a reviewable final judgment under § 1291 because it effectively put Cotter out of federal court for Plaintiffs' claims." App. 4a.

Having found jurisdiction to hear the appeal existed, the court then held that contrary to the district court's ruling, the PAA's jurisdictional grant, 42 U.S.C. § 2210(n)(2), provides federal question jurisdiction over all "nuclear incidents," regardless of

whether a defendant had an applicable license or indemnity agreement. *Id*. at 14a.

Applying the plain meaning of the word "occurrence", the court determined that a "nuclear incident" under the PAA means "something that takes place" within the United States, causing bodily injury or property damage, and arising out of the properties of source, special nuclear, or byproduct material. *Id*. at 9a - 10a. The court said this definition encompasses even those nuclear disasters where a defendant lacks an applicable indemnity agreement. *Id*.

The Eighth Circuit held that because the PAA provides federal question jurisdiction over the claims against Cotter and a "district court has no discretion to remand a claim that states a federal question," the district court abused its discretion. *Id*. at 14a-15a. (citing *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 542 (8th Cir. 1996)).

The court of appeals denied panel rehearing and rehearing en banc. App.61a.

REASONS FOR GRANTING THIS WRIT

It is respectfully submitted that because Cotter's § 2210 status is uncontested, this Court can and should answer the questions: Does federal question jurisdiction exist under the PAA when its substantive commands are unfulfilled? And is a judgment final under § 1291 when the district court retains jurisdiction over the third-party contribution claims?

I. Interpretation of the Price Anderson Act's Scope is of National Importance and Lower Court Decisions Are Not Consistent

A. The Eighth Circuit Decision Undermines the Foundation on Which the PAA is Built Creating an Issue of National Importance

There is no doubt as to the national importance of the Price Anderson Act which was enacted as an amendment to the Atomic Energy Act to ensure adequate funds would be available to satisfy liability claims and to remove the deterrent of uninsurable liability associated with catastrophic losses emanating from nuclear power plants. *Pac. Gas & Elec. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). The Eighth Circuit's determination that the PAA is applicable and provides original jurisdiction regardless of whether a defendant has an applicable license or indemnity agreement pursuant to the PAA undermines the entire compensation mechanism created by the PAA.

The financial protection requirement found in 42 U.S.C. § 2210(a) is the foundation of the PAA's indemnification scheme. In exchange for maintaining financial protection[2], the government provides indemnification up to $500 million pursuant to 42 U.S.C. § 2210(c) which covers "public liability arising out of or in connection with the licensed activity". Despite the fact that Cotter never maintained financial protection under § 2210(a) or had an indemnification agreement with the government pursuant to §

[2] Financial protection can be compared to primary insurance coverage, which is to be exhausted before government indemnification kicks in.

2210(c), the Eighth Circuit nonetheless determined that the PAA is applicable to them.[3]

The implications of this decision threaten the entire viability of the PAA. The first implication is that the PAA provides jurisdiction even though there is no source of PAA funds. This would be a violation of Article III of the United States Constitution because the PAA would be nothing more than a jurisdictional grant. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 849 (3d Cir. 1991) (citing *Osborn v. Bank of the United States*, 22 U.S. 738 (1824)). Alternatively, the second implication is that the PAA's substantive provisions are applicable, and the government pays anyway resulting in an epic windfall for Cotter for its negligent operations. Why maintain financial protection if the government pays? Neither of these results was the intention of Congress and each raises serious questions as to the PAA's constitutionality and viability.

B. The Eighth Circuit Decision is Contrary to Congressional Intent and Ignores the Context, History, Structure and Purpose of the Act

In determining that Plaintiffs claims constitute a "nuclear incident" and arise under the PAA even though Cotter has never been a participant in the PAA system, the Eighth Circuit fails to consider the context in which the term "nuclear incident" was de-

[3] Petitioners note that following the 1975 amendments, which phased out government indemnification for certain licensees, there may be circumstances where the PAA is applicable in the absence of an indemnity agreement. However, this cannot be the case for Cotter whose license was terminated in 1974, before the 1975 amendments were enacted.

fined, i.e., the financial protection and government indemnification compensation mechanism established by the PAA to ensure adequate funds in case of a "nuclear incident". In other words, the Eight Circuit reviewed the relevant terms in a vacuum without reference to statutory context, structure, history, and purpose.

As this Court has previously stated, "[t]he definition of words in isolation…is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting and precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006).

When a statutory term is undefined or is ambiguous, reference to Congressional intent may be had. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). See also *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61–62, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) (considering legislative history to interpret Clean Water Act); *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (considering legislative history to interpret Indian Gaming Regulatory Act). "Analysis of legislative history is, of course, a traditional tool of statutory construction. There is no reason we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evi-

dence of congressional intent with respect to the precise point at issue." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 127 S. Ct. 1534, 167 L. Ed. 2d 449 (2007) (Stevens concurring). Especially if "the legislative history is pellucidly clear." *Id.*

"The presence of a nuclear incident is the hallmark of a public liability action." *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1140 (10th Cir. 2010). Broken down, a nuclear incident requires three elements: 1) an occurrence, or extraordinary nuclear occurrence, 2) causing bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, and 3) arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. 42 U.S.C. § 2014(q).

The Eighth Circuit relies solely on the plain meaning of the word "occurrence" and ignores the legislative history where Congress precisely defined the word "occurrence" as used in the definition of "nuclear incident":

> the occurrence which is the subject of this definition is ***that event at the site of the licensed activity, or activity for which the commission has entered in to a contract***…That is why the definition of 'nuclear incident' has the phrase 'any occurrence causing bodily injury, sickness, disease, or death' and why the definition of 'public liability' is tied to any legal liability arising out of, or resulting from, a nuclear incident.

S. REP. 85-296, 1957 U.S.C.C.A.N. 1803, 1817-18 (emphasis added). Moreover, an interpretation of the Price-Anderson Act promulgated by the AEC's Gen-

eral Counsel in the Code of Federal Regulations, later expressly relied on this definition of "occurrence", noting in particular that, "[t]his definition of 'occurrence'…is crucial to the Act's placing of venue under section [2210(n)(2)]." 10 C.F.R. § 8.2(c) (1998).

From the legislative history, it is clear the only events Congress intended to constitute a "nuclear incident," were an "event at the site of licensed activity, or activity for which the commission has entered into a contract." Congress was also clear when it defined "licensed activity" as "an activity licensed pursuant to the [Atomic Energy Act] and covered by the provisions of 2210(a)." 42 U.S.C. § 2014(p).

In failing to consider the legislative history, the Eighth Circuit interprets the term "nuclear incident" as to expand the scope of the PAA to cases where the PAA's insurance and indemnification scheme is not implicated. In doing so, the Eighth Circuit impermissibly determined that Plaintiffs claims against Cotter "arise under" the PAA when there is no source of PAA funds to provide compensation for Cotter's activities. This is contrary to one of the main functions of the PAA, to ensure adequate public compensation in the event of a catastrophic nuclear accident. *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 83 (1978).

The Eighth Circuit's reliance on the 1988 amendments to the PAA is misplaced. The decision, along with other courts of appeal to consider the issue, make a common misconception about the 1988 amendments. The Eighth Circuit cites the 1986 dictionary definition of the word "occurrence" suggesting the Eighth Circuit considered the term "nuclear incident" as one enacted with the 1988 amendments.

This is clearly wrong as the definition of "nuclear incident", and its use of the word "occurrence", was enacted in 1957.

Critically, nothing about the 1988 amendments changed the definition of "nuclear incident" or "licensed activity". In failing to consider the legislative history from when the definition of "nuclear incident" was enacted, the panel misinterprets how Congress expanded the scope of the PAA. The 1988 amendments only expanded the scope by including less sever accidents not deemed "substantial", but they did not extend the PAA to all entities any time a claim is based on radioactive materials. Simply put, the 1988 amendments did nothing to extend the PAA to NRC licensees such as Cotter who do not maintain financial protection. The district court got it right here:

> [I]n light of the PAA's concerns related to liability limitation and indemnification, the Court is not convinced that the 1988 amendments were meant to extend the reach of the PAA to activities not covered by applicable licenses or indemnity agreements. Defendants' construction overlooks the original purposes and framework of the AEA and the PAA - to require those involved in the nuclear industry to obtain licenses and maintain financial protections.

App. 60a.

C. The Eighth Circuit's Holding Conflicts with *Silkwood*

While this Court has never fully considered the

applicability of the PAA[4], this Court's decision in *Silkwood*, 464 U.S. 238 is most on point. The Eighth Circuit decision brushes this Court's decision in *Silkwood* aside as not applicable because it was entered before the 1988 amendments. App. 13a - 14a. However, nothing about the 1988 amendments affects the relevant portions of *Silkwood*. Specifically, the amendments do not change this Court's decision that the "Price-Anderson Act does not apply" where an NRC licensee does not maintain financial protection under 42 U.S.C. § 2210(a). *Silkwood*, 464 U.S. at 251–251. Nor do the amendments affect the decision that the Atomic Energy Act has no preemptive effect of its own. *Id.* at 238, 251.

The fact that the 1988 amendments were enacted after the *Silkwood* decision is not determinative. While the 1988 amendments did respond to Silkwood by adding 42 U.S.C. § 2210(s) to clarify that punitive damages are not permitted when the United States would be obligated to make payments under an indemnification agreement, none of the 1988 amendments changed the requirement of financial protection under § 2210(a).

D. The Eighth Circuit Ignores the NRC Which Should Be Given Deference

---

[4] In *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), this Court determined that a United States District Court, not a tribal court, makes the decision of whether the PAA is applicable. This decision does not however consider whether an applicable license or indemnity agreement are perquisites for the PAA to apply. Here, the district court did decide whether the PAA applied remanding the case to state court twice.

Ten years after the 1988 amendments, as required by section 2210(p) of the PAA, the NRC submitted a report to Congress providing "an overview of the Price-Anderson Act and its amendments through the 1988 extension and an update on legal issues pertaining to nuclear insurance and indemnity." NUREG/CR-6617, The Price-Anderson Act–Crossing the Bridge to the Next Century: A Report to Congress (1998) at xi, available at https://www.nrc.gov/docs/ML1217/ML12170A857.pdf

This report unequivocally provides that not all NRC licensees are covered by the PAA. "The [PAA] requires licensees to provide financial protection." *Id*. at xii. "Key parameters of Price-Anderson include: which licensees…are covered." *Id*. at xiii. "Covered licensees include production and utilization facilities, with commercial nuclear power being the main concern of Price-Anderson." Id. The "NRC decided that no apparent need existed to extend Price-Anderson to other classes of materials licensees." *Id*. at 4-5.

As this Court has previously stated, "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, U.S.A., Inc.*, 467 U.S. at 844. Moreover, "[b]ecause this case involves that kind of express delegation, the [executive agency's] views merit the greatest deference." *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317, 324, 114 S. Ct. 835, 127 L. Ed. 2d 152 (1994). Here, the NRC's interpretation is consistent with congressional intent and the PAA's structure and purpose and should be given deference.

Despite these "well-settled principles" the Eighth Circuit decision does not acknowledge or account for the NRC's interpretation provided in a report that was required pursuant to Section 2210(p) of the PAA. This is contrary to precedent established by this Court and the result is an interpretation that is contrary to congressional intent and forces Plaintiffs into a federal forum when their claims are not covered by the PAA and based entirely on state law. Simply put, the NRC's interpretation confirms that Plaintiffs' claims against Cotter do not arise under the PAA because Cotter is not covered by the PAA. The district court did not abuse its discretion in severing and remanding Plaintiffs' claims against Cotter over which it has no original jurisdiction.

E. Interpretation of the PAA's Scope Is Inconsistent Among Lower Courts

Is there a Circuit Split? Maybe. The Eighth Circuit determined that all Circuits to address this issue have reached the same conclusion. However, the Eighth Circuit overreads the decision in *Estate of Ware*, 871 F.3d 273. In *Estate of Ware,* the Third Circuit acknowledges that there are "implicit limitations on the Price-Anderson Act's scope" and states that "[n]one of this is to say that the Act applies to all harm occurring from nuclear material in any situation whatsoever." *Id.* at 284 – 285. Noting that 42 U.S.C. § 2210(k) exempts nonprofit education institutions from the PAA's financial protection requirements, the Third Circuit determined that the PAA applied to the claims asserted by the estate of a neuroscientist harmed while working at a nonprofit university. *Id.* at 282. There is no such exemption for licensees such as Cotter.

As the district court noted here, there are numerous conflicting opinions as to whether the PAA applies in the absence of an applicable license or indemnity agreement. App. 52a-53a. (citing *Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325, 343 (D.N.J. 1998); *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 297 (D. Mass. 1999); *Joseph v. Sweet*, 125 F. Supp. 2d 573, 576 (D. Mass. 2000); *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1321–22 (N.D. Fla. 2001); *Irwin v. CSX Transp., Inc.*, No. 3:10-CV-300, 2011 WL 976376, at *2 (E.D. Tenn. Mar. 16, 2011); *Strong v. Republic Servs., Inc.*, 283 F. Supp. 3d 759 (E.D. Mo. 2017).

A review of the decisions that reach a different conclusion than the Eighth Circuit demonstrates that these cases rely on the definition of "occurrence" from the legislative history or rely on cases that cite to the definition. One decision rejected the argument adopted by the Eighth Circuit here, even calling it "[h]ogwash!" and "frivolous". *Samples*, 165 F. Supp. 2d at 1321. On the other hand, the cases relied on by the Eighth Circuit do not even consider the definition provided by Congress.

For over four years, the parties in the instant case have ping-ponged between state and federal courts filling these dockets with PAA, removal, and remand related briefs all the while largely prevented from conducting discovery (class-related or on the merits) necessary to bring this matter to an end. The lack of legal certainty on PAA jurisdiction and application is a primary reason this case has not proceeded as it should. This, coupled with the now conflicting decisions on what constitutes a final judgment under § 1291 discussed below, has the real effect of making

the judicial system a contributor to the wasting of resources, money, and time for the parties now before this Court and the state and federal courts below. The time to clarify this legal uncertainty is now, and that job falls to this Court.

II. The Eighth Circuit's Holding That the District Court's Order Was a "Final Decision" Under 28 U.S.C. § 1291 Creates a Circuit Split Between the Eighth and Fourth Circuits.

This case involves the question of whether severance and remand of a primary claim from a contribution claim constitutes a "final decision" under 28 U.S.C. § 1291. The Fourth Circuit has concluded that it does not, while the Eighth Circuit in this case has concluded that it does.

A. The Fourth Circuit Concludes That Severance and Remand of State Law Claims From Third-Party Contribution Claims Does Not Constitute a Final Decision Under 28 U.S.C. § 1291

In *Campbell-McCormick, Inc.*, 874 F.3d 390, the Fourth Circuit was presented with an appeal stemming from a remand order at the district court level. *Id.* at 393. The plaintiff originally filed his state law claims against several defendants, one of whom then filed a third-party complaint for contribution against twelve other third-party defendants. *Id.* One of the third-party defendants then removed the case to federal district court pursuant to 28 U.S.C. § 1442(a) asserting the federal contractor defense. *Id*. The plaintiff then filed a motion to sever and remand his state law claims. *Id.* Specifically, he requested the district court decline to exercise supplemental juris-

diction over his state law claims pursuant to § 1367(c).

The district court granted the plaintiff's request and declined supplemental jurisdiction over the plaintiff's state law claims, remanding those claims back to state court while retaining jurisdiction over the third-party contribution claims. *Id.* The defendant and third-party plaintiff appealed the remand decision, asserting the Fourth Circuit possessed jurisdiction over the appeal under § 1291. *Id.* However, the Fourth Circuit questioned that presumption and recognized that the district court's decision did not constitute a final order under § 1291 because it did not fully extinguish the claims from federal court:

> [I]f the [district court's] Order had dismissed CMC's third-party claims in conjunction with remanding Oliver's claims, the Order would constitute a final decision because there would be no claims left to pursue in federal court. Instead, however, the district court retained jurisdiction over and stayed the third-party claims, leaving those claims to be resolved at a later time. Accordingly, the Order does not constitute a final decision as generally understood for purposes of § 1291.

Id. at 395. Consequently, the Fourth Circuit dismissed the appeal, finding that it lacked jurisdiction to hear the case.[5] *Id.* at 398.

B. The Eighth Circuit Concludes That Severance and Remand of State Law Claims

---

[5] The Fourth Circuit also examined whether the collateral order doctrine provided an alternate means of jurisdiction for the Court and found it did not apply. *Id.* at 398.

From Third-Party Contribution Claims Does Constitute a Final Decision Under § 1291

Given the exact same circumstances, and even when presented with the Fourth Circuit's decision in *McCormick*, the Eighth Circuit utilized a completely inconsistent application of § 1291. The facts of the instant case are the same as those in *McCormick*. Here, Plaintiffs filed suit against a number of defendants, alleging state law claims. App. 18a. One of those defendants, Cotter, filed a third-party petition against a number of third-party defendants, including Mallinckrodt LLC. App. 19a. Mallinckrodt removed the case from state court citing, among other provisions, § 1442(a), asserting a federal contractor defense. App. 19a. Plaintiffs then filed a motion to sever and remand, asking the district court to sever Plaintiffs' state law claims from the third-party contribution claim, and decline to exercise supplemental jurisdiction over the state law claims and remand those to state court. App. 20a-21a. The district court granted Plaintiffs' motion, severing a remanding their state law claims while retaining jurisdiction over the third-party contribution claim. App. 34a.

Cotter appealed the remand decision while filing a petition for writ of mandamus at the same time. App. 15a. Plaintiffs filed a motion to dismiss the appeal for lack of jurisdiction. App. 4a. In that motion, Plaintiffs raised the issue that the district court's order did not constitute a "final decision" under § 1291. Plaintiffs directed the Eighth Circuit to the *McCormick* decision of the Fourth Circuit as support for the position. Despite this, the Eighth Circuit denied Plaintiffs' motion to dismiss, and found it had jurisdiction to hear the appeal under § 1291. App. 4a. The

Eighth Circuit's opinion makes no mention of whether it considered the Fourth Circuit's ruling when coming to its decision.

C. The Eighth Circuit's Decision is Incorrect.

The extensive interpretation and application of § 1291 by federal appellate courts around the country, as well as this Court, demonstrates that the Eighth Circuit's ruling subverts the intent of the statute. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) ("A 'final decisio[n]' is typically one 'by which a district court disassociates itself from a case.'"); *State St. Bank & Tr. Co. v. Brockrim, Inc.*, 87 F.3d 1487, 1490 (1st Cir. 1996) ("A final decision under § 1291 is one that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'"); *United States v. Mellon Bank, N. A.*, 545 F.2d 869, 871 (3d Cir. 1976) ("[T]his Court established three requisites for a 'final order': (1) It must be a final rather than a provisional disposition of the issue; (2) it must not be merely a step toward final disposition of the merits; (3) and the rights asserted must be threatened with irretrievable loss if review is postponed."). Quite simply, when a third-party contribution claim remains in federal court, as was the case here, the federal court litigation continues. The court file remained open after the remand, no finality existed for the entirely of the claim, only a portion. Consequently, the Eighth Circuit's ruling – as opposed to the Fourth Circuit – was an incorrect application of § 1291.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RYAN A. KEANE
Keane Law LLC
7711 Bonhomme Ave
Suite 600
St. Louis, MO 63105

BARRY COOPER
Counsel of Record
CELESTE BRUSTOWICZ
VICTOR COBB
Cooper Law Firm L.L.C.
1525 Religious Street
New Orleans, LA 70130
(504) 399-0009
bcooper@clfnola.com

KEVIN THOMPSON
Thompson Barney
2030 Kanawha Blvd
Charleston, WV 25311

ANTHONY D. GRAY
Johnson Gray, LLC
319 N. 4th St., Ste. 212
St. Louis, MO 63102