No. 21-1438

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. The PAA does not confer original jurisdiction over Petitioners' state law claims when the PAA's substantive provisions are inapplicable

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). In failing to consider the context in which "nuclear incident" is defined, the Eighth Circuit incorrectly determined that "the PAA applies broadly to any event causing bodily injury or property damage from nuclear materials." App. 11a. This decision raises serious issues under Article III of the U.S. Constitution, threatens the viability of the PAA compensation scheme, and must be corrected.

A. Respondent overreads *Ware*

Ignoring the Third Circuit's declaration that "we do not decide whether the possession of a license…might affect the Act's applicability to a particular case", Respondent maintains *Est. of Ware v. Hosp. of the Univ. of Pennsylvania*, 871 F.3d 273 (3d Cir. 2017) supports jurisdiction here. Unlike Respondent, the defendant in *Ware* was a nonprofit educational institution indemnified and exempted from maintaining financial protection pursuant to 42 U.S.C. § 2210(k). As stated in *Ware*: "Congress' choice to include a provision indemnifying licensed nonprofit educational institutions from public liability suggests strongly (perhaps overwhelmingly) that the Act applies to them." *Id.* at 282. Given the Third Circuit's recognition of "implicit limitations" to the PAA's scope, it is reasonable to

conclude it would have reached a different result here where Respondent is not exempted from financial protection or entitled to indemnification under the Act.

Petitioners acknowledge the circuit split is not obvious. However, that is not reason to deny this Petition as the Circuit Court decisions create two alternative implications of national importance. The first is that the PAA transforms Petitioners' state law claims into a federal "public liability action" arising under the PAA[1] despite the substantive provisions of the PAA being inapplicable. This is a clear violation of Article III of the Constitution because the PAA would be nothing more than a jurisdictional grant. Alternatively, the substantive provisions of the PAA are applicable resulting in a free government handout for anyone causing damage with nuclear material, thus eliminating the need for licensees to maintain financial protection, the foundation on which the PAA is built. Given these serious constitutional and viability issues, granting certiorari is more important than a circuit split.

B. In failing to consider context, an Article III violation arises

The Eighth Circuit did not follow this Court's precedent on basic statutory interpretation. The result is a clear violation of Article III.

The decision below failed to interpret the words consistently with their "ordinary meaning…at the time Congress enacted the statute." *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018). The decision's reliance on the 1986 dictionary definition of "occurrence", even though "nuclear

[1] *See* 42 U.S.C. § 2014(hh).

incident" was defined in 1957, displays a misunderstanding of the PAA's history resulting in a misinterpretation of how the 1988 amendments expanded the PAA's scope.

Incredibly, the decision is not based "upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis". *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). They only cited one subsection of one section in a statute with twenty sections. *See* 42 U.S.C. § 2210.

The Eighth Circuit's failure to recognize "nuclear incident" is a term of art utilized in the PAA's insurance and indemnification scheme results in a decision which transforms Petitioners' state law claims into a federal "public liability action" arising under the PAA, even though the substantive provisions of the PAA are inapplicable.

Pursuant to Article III, a case cannot be said to arise under a federal statute where that statute is nothing more than a jurisdictional grant. *Osborn v. Bank of U.S.*, 22 U.S. 738 (1824). Congress can only properly extend "arising under jurisdiction to any case in which a federal issue 'forms an ingredient to the original cause.'" *Id.* A statute that merely confers federal jurisdiction cannot constitute the federal law under which an action arises. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983).

In re TMI Litig. Cases Consol. II, 940 F.2d 832 (3d Cir. 1991) addressed this precise issue determining Article III was satisfied because the PAA formulates substantive federal provisions applicable to the action. *Id.* at 857 (3d Cir. 1991). The defendant in *TMI* maintained financial protection pursuant 42 U.S.C. §

2210(a) and was indemnified pursuant to 42 U.S.C. § 2210(c). While the substantive provisions of the PAA were applicable in *TMI*, they are not applicable here where Respondent is not a participant in the PAA compensation scheme.[2]

In failing to consider context, the decision below impermissibly recharacterizes Petitioners' state law claims into a "public liability action" that arises under the PAA. Since the substantive provisions are inapplicable to Petitioners' state law claims and the PAA does not form an ingredient to the original cause, this is a blatant violation of Article III because the PAA is nothing more than a jurisdictional grant.

C. The PAA's substantive provisions are not applicable to Petitioners' claims – No PAA funds to cover Respondent's liability

Ignoring the implications, Respondent maintains the PAA applies to Petitioners' state law claims.

Respondent first asserts its source material license creates original jurisdiction under the PAA, despite never participating in the PAA compensation scheme. Respondent never maintained financial protection pursuant to 42 U.S.C. § 2210(a) and is not entitled to indemnification pursuant to 42 U.S.C. § 2210(c). Simply put, "licensed activity" under the PAA is limited to NRC licensees "covered by the provisions of section 42 U.S.C. § 2210(a)." 42 U.S.C. § 2014(p). As such, Respondent's source material license standing alone does not implicate substantive provisions of the

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[2] Petitioners note their interpretation has no effect on the jurisdiction of federal courts where there is a properly indemnified party under the PAA as in *TMI*.

PAA. Respondent was not a participant in the PAA compensation scheme and there is no source of PAA funds for Respondent's liability.

While not addressed in the decision below, Respondent argues they are indemnified pursuant to Mallinckrodt's contract with the US Government. But the actual contract terms clearly provide that the AEC will indemnify Mallinckrodt, and other persons indemnified, against public liability which "***arises out of or in connection with [Mallinckrodt's] contractual activity***". CA8 Joint Appendix ("JA") 505 ¶¶ 3a. and 3b. (emphasis added). Moreover, the PAA limits indemnification to "persons indemnified in connection with the contract". 42 U.S.C. § 2210(d)(2)(B).

Respondent never conducted operations even remotely connected to Mallinckrodt's contractual activity. Mallinckrodt's relationship to the waste ceased in 1966 when the US government sold it to a third party, Continental Milling and Mining ("Continental"), which assumed responsibility. JA 711 ¶ 10. Continental moved the wastes to Latty Avenue, a site wholly unrelated to Mallinckrodt's contractual activity. JA 783. After Continental went bankrupt, Commercial Discount Corporation acquired the wastes. *Id*.

Respondent's first involvement was in 1969 when it purchased the Latty Avenue wastes from Commercial Discount Corporation. JA 763-764. From 1970 to 1973, Respondent dried and loaded the wastes onto railcars at the Latty site next to Coldwater Creek before shipping them to Colorado. JA 784. Respondent was negligent in this process allowing contamination of the adjacent land and Coldwater Creek and this forms the basis of Petitioners' claims. Simply put,

Respondent is not a "person indemnified" entitled to indemnification pursuant to Mallinckrodt's contract because its Latty operations were not related to the contractual activity.

Respondent's assertion that the PAA prohibits punitive damage and medical monitoring claims against them is misplaced. The PAA's prohibition on punitive damages is clearly inapplicable to Respondent because they are not a person on behalf of whom the United States is obligated to make payments. See 42 U.S.C. § 2210(s). With respect to medical monitoring, the case law supports Petitioners position that federal courts lack jurisdiction. *June v. Union Carbide Corp.*, 577 F.3d 1234, 1248 (10th Cir. 2009) (affirming district court decision that it lacked jurisdiction over medical monitoring claims); *In re Berg Litig.*, 293 F.3d 1127, 1133 (9th Cir. 2002) (medical monitoring claims fail to meet the jurisdictional requirements of the PAA).

The PAA's substantive provisions are inapplicable because Respondent never conducted "licensed activity" such that 42 U.S.C. § 2210(a)-(c) apply and it never conducted activity related to a government contract such that 42 U.S.C. § 2210(d) applies. To determine otherwise would result in a free government handout to Respondent for its negligence threatening the PAA's viability by eliminating the need for licensees to maintain financial protection, the primary source of PAA funds.

D. 1957 Senate Report is relevant and the best indication of congressional intent

Respondent claims the 1957 Senate Report in which Congress defined the word "occurrence" as used in the definition of "nuclear incident" predated the

1988 amendments by more than 30 years and is not relevant. "Nuclear incident" was defined when the PAA was initially enacted in 1957. The 1988 Amendments did not redefine the term making the Senate Report relevant.

Respondent incorrectly claims the excerpt cited by Petitioners simply elaborates on the venue provision of the Act.[3] The excerpt Petitioners cite comes from the "Section by Section Analysis" where Congress describes each section of the Act and related definitions. In describing the definition of "nuclear incident," Congress plainly states "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 into a contract, which may cause damage, rather than the site where the damage may perhaps be caused." 1957 U.S.C.C.A.N. 1803, 1817. This declaration has nothing to do with jurisdiction or venue and simply means the occurrence which establishes a nuclear incident is an event at the site of licensed activity, or activity for which the commissions has entered into a contract, which may cause damage. This analysis provided by Congress is the best indication of Congressional intent with respect to the meaning of "nuclear incident".

While the provisions cited by Petitioners are relevant, those cited by Respondent are not. Respondent points to a portion of the Senate Report describing the definition of "person indemnified". What Respondent

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[3] Petitioners are unsure what venue provision Respondent is referring to as the PAA's jurisdiction and venue provision, 42 U.S.C. § 2210(n)(2), was not enacted until 1966. Pub. L. 89-645 (1966).

fails to realize is the PAA must first be triggered for this provision to be applicable. As stated by the NRC, "[u]nder any reasonable definition" the term person indemnified "does not embrace contexts in which no one has an indemnification agreement with the government. The term itself, and its use elsewhere in the Act, presuppose the existence of some relevant person appropriately identified as 'the person with whom an indemnity agreement is executed.'" Br. for the United States, Neztsosie, No. 98-6, 1998 WL 858533, at *30 (Dec. 8, 1998) (citing 42 U.S.C. § 2014(t); see, e.g., 42 U.S.C. § 2210(c). Here, there is no such person with respect to Respondent's liability.

E. Respondent overreads *El Paso Nat. Gas Co. v. Neztsosie*

Respondent relies on *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), claiming the PAA provides original jurisdiction over Petitioners' state law claims. In *Neztsosie*, this Court held the district court, not tribal court, determines if the PAA applies. Here, the district court did just that, concluding the PAA did not provide original jurisdiction.[4] The question is not whether the PAA provides for jurisdiction and removal. Rather, it is whether the PAA applies in the first place. *Neztsosie* does not reach this issue.

This Court did address the Act's applicability in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) determining it does not apply to licensees like

[4] 28 U.S.C. § 1447(d) prohibits review of this decision "on appeal or otherwise." Appellate courts must take this jurisdictional prescription seriously, however pressing the merits of the appeal might seem. *Powerex Corp. v. Reliant Energy Services, Inc.* 551 U.S. 224, 238-239 (2007).

Respondent. "Under the Act, the NRC is given discretion whether to require plants licensed under § 2073 to maintain financial protection. 42 U.S.C. § 2210(a). Government indemnification is available only to those required to maintain financial protection, *id.,* § 2210(c), and the liability limitation applies only to those who are indemnified. *Id.,* § 2210(e)." *Silkwood*, 464 U.S. at 252. Because the defendant did not maintain financial protection, this Court determined "the Price-Anderson Act does not apply to the present situation." *Id.* at 251. This Court held that the PAA is inapplicable to licensees such as Respondent[5] and it remains relevant to the question presented even after the 1988 amendments because those amendments do not change the substantive provisions of the PAA related to financial protection and indemnification.

II. Petitioners do not assert any federal causes of action, just like *Campbell*

Respondent ignores this litigation's history in presenting the Court with a narrative of federal claims only; blanketing their Opposition's narrative as "the same circumstances" presented to *every single circuit* on the present jurisdictional issue. Resp't's Br. in Opp'n, 28. Respondent missed the mark. *Campbell* and this case are virtually identical: no federal claims were asserted by Petitioners, and the third-party defendant claims involving federal issues were severed and left in federal court.

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[5] This is consistent with the NRC's interpretation of the PAA's scope. See NUREG/CR-6617, The Price-Anderson Act – Crossing the Bridge to the Next Century: A Report to Congress (1998), available at https://www.nrc.gov/docs/ML1217/ ML12170A857.pdf

As set forth in the Petition for Writ of Certiorari (pp. 28-31), Petitioners filed suit alleging state law claims. Third-party defendant Mallinckrodt removed the case from state court citing (in part) § 1442(a) and asserting a federal contractor defense. Now, the question is not whether "the Eighth Circuit properly reviewed the remand of federal claims", as Respondent claims, but whether the Eighth Circuit had jurisdiction to review the order remanding the state law claims and severing this federal third-party contribution claim in the first place. Extensive interpretation and application of § 1291 by federal appellate courts around the country and this Court demonstrates the Eighth Circuit did not have jurisdiction to review the decision of the District Court.

Petitioners are not ignoring precedent. Contrary to Respondent's position, *Quackenbush, Moses H. Cone*, *Baker,* etc., do not support the Eighth Circuit's opinion: they do not provide a carte-blanche holding that any remand order is reviewable under § 1291. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Baker v. Kingsley*, 387 F.3d 649 (7th Cir. 2004); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996). The Eighth Circuit's holding just opened the floodgates for additional circuit split on this issue.

Again, the present litigation is a state-law suit where a third-party defendant asserted a federal contractor defense. It is a bold misrepresentation of the Eighth Circuit's order when Respondent states the decision "concluded that the remand order at issue was final… because it effectively put Cotter out of federal court on the *federal claims brought against*

Cotter." Br. in Opp'n, 28. The Eighth Circuit stated the remand order was "a reviewable final judgment… because it effectively put Cotter out of federal court for *Plaintiff's claims*." Pet. App., 4a. There are no federal claims asserted against Cotter; to state otherwise is untrue.[6]

Respondent's third-party federal issues against Mallinckrodt remain and were severed, while "all other claims in this case" were remanded. Pet. App., 33a. The decision to remand and sever by the District Court did not put Cotter and Mallinckrodt "effectively out of court" on the federal defense nor was its effect to "surrender jurisdiction of a federal suit to a state court," *Quackenbush*, 517 U.S. at 714. Yet these are the only alternative avenues by which a remand order such as this may be reviewable under § 1291. *Id.* Moreover, the Eighth Circuit previously recognized that "a Rule 21 severance order merely severs separate claims which are *independently capable* of *final and appealable judgments*." *Strandlund v. Hawley*, 532 F.3d 741, 744 (8th Cir. 2008) (emphasis added); *see* Pet. App., 28a-31a. Respondent's argument has no teeth, as the District Court's severance does not mean Mallinckrodt's federal defense was surrendered to a state court.

The Eighth Circuit's decision to grant jurisdiction over a decision that was not final, with no applicable exceptions, flies in the face of precedent. *See Quackenbush, supra.* This inconsistent application of

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[6] Defendant also states there was "no question that the Eighth Circuit properly reviewed the remand of *federal* claims…" when no federal claims were remanded. They were severed. *See* Br. in Opp'n, 29; Pet. App., 28a-31a.

§ 1291 splits the Eighth Circuit from all other circuits and this Court on this jurisdictional issue, and most notably the Fourth Circuit (per *Campbell-McCormick, Inc. v. Oliver*, 874 F.3d 390 (4th Cir. 2017)). Even though the current circumstances are virtually identical to *Campbell*, Petitioners do not solely rely on the *Campbell* decision—there are a multitude of other cases cited. *See* Pet. for Writ, 31. For jurisdictional reasons as well, then, the presented issues clearly warrant review by this Court

III. Conclusion

Because of the constitutional and viability implications created, Certiorari is necessary to correct the Eighth Circuit's decision. Petitioners do not bring a "public liability action" arising under the PAA, but rather, they bring state law causes of action. The PAA does not form an ingredient to the original cause and the substantive provisions are inapplicable. If the decision stands a violation of Article III now exists as the PAA is nothing more than a jurisdictional grant. Alternatively, the substantive provisions of the PAA do apply and the entire viability of the PAA is brought into question. Finally, Certiorari is necessary to correct the Eighth Circuit's misapplication of § 1291 and its implications.

Respectfully submitted,

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