No. 24-1001

In the
Supreme Court of the United States

COTTER CORPORATION; COMMONWEALTH EDISON CORPORATION,
Petitioners,

v.

NIKKI STEINER MAZZOCCHIO; ANGELA STEINER KRAUS,
Respondents.

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

BRIEF FOR *AMICI CURIAE* NUCLEAR ENERGY INSTITUTE, INC., ENTERGY ARKANSAS, LLC, SYSTEM ENERGY RESOURCES, INC., ENTERGY LOUISIANA, LLC, ENTERGY OPERATIONS, INC., NEXTERA ENERGY DUANE ARNOLD, LLC, NORTHERN STATES POWER COMPANY-MINNESOTA, XCEL ENERGY INC., AND AMEREN MISSOURI IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Nuclear Energy Institute has no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

Entergy Arkansas, LLC is a Texas limited liability company with its principal place of business in Little Rock, Arkansas. All of its common membership interests are owned by Entergy Utility Holding Company, LLC, an intermediate holding company and Texas limited liability company, all of whose common membership interests are owned directly or indirectly by Entergy Corporation.

System Energy Resources, Inc. is an Arkansas corporation with its principal place of business in Jackson, Mississippi. Entergy Corporation owns all of the common stock of System Energy Resources, Inc.

Entergy Louisiana, LLC is a Texas limited liability company with its principal place of business in Jefferson, Louisiana. All of its common membership interests are owned by Entergy Utility Holding Company, LLC, an intermediate holding company and Texas limited liability company, all of whose common membership interests are owned directly or indirectly by Entergy Corporation.

Entergy Operations, Inc. is a Delaware corporation with its principal place of business in Jackson, Mississippi. Entergy Corporation owns all of the common stock of Entergy Operations, Inc.

Entergy Corporation is a Delaware corporation with its principal place of business in New Orleans, Louisiana. There is no publicly held corporation that owns 10% or more of Entergy Corporation's stock.

NextEra Energy Duane Arnold, LLC is a wholly owned direct subsidiary of ESI Energy, LLC, which in turn is a wholly owned direct subsidiary of NextEra Energy Resources, LLC. NextEra Energy Resources, LLC is a wholly owned direct subsidiary of NextEra Energy Capital Holdings, Inc., which in turn is a wholly owned direct subsidiary of NextEra Energy, Inc. The securities of NextEra Energy, Inc. are publicly traded. No publicly held company owns 10% or more of NextEra Energy, Inc. stock.

Northern States Power Company, a Minnesota corporation, is a wholly owned utility operating company subsidiary of Xcel Energy Inc. The securities of Xcel Energy Inc. are publicly traded. No publicly held company owns 10% or more of Xcel Energy Inc. stock.

Ameren Missouri is a wholly owned direct subsidiary of Ameren Corporation.

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STATEMENT OF INTEREST[1]

The Nuclear Energy Institute, Inc. (NEI) is the trade association for the commercial nuclear energy industry. NEI has more than 350 members involved in all aspects of the industry, including nuclear power plant licensees, reactor designers and advanced technology companies, architect and engineering firms, fuel suppliers and service companies, consulting services, and manufacturing companies. One of NEI's core functions is to represent its members' interests in litigation that raises issues of critical concern to the industry. This case fits that bill, as it threatens nuclear operators with significant tort liability for simply obeying federal law.

The remaining *amici* own and operate six of the seven active nuclear reactors within the jurisdiction of the Eighth Circuit, as well as reactors in other jurisdictions.

Entergy Arkansas, LLC (EAL) is the owner of Arkansas Nuclear One (ANO), a nuclear power plant in Russellville, Arkansas, within the jurisdiction of the Eighth Circuit. The two nuclear reactors at ANO generate enough power to meet approximately 56% of the total energy demand of EAL's 730,000 customers. EAL is concerned about the impact of the Eighth

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. In accordance with Supreme Court Rule 37.2, counsel of record for all parties received notice of *amici curiae*'s intention to file this brief at least 10 days prior to the due date.

Circuit's decision on its vendors and contractors, as well as the potential resulting impacts to its operations.

System Energy Resources, Inc. (SERI) is the 90%-owner of the Grand Gulf Nuclear Station in Port Gibson, Mississippi. Grand Gulf is the most affordable source of electricity in Mississippi today. Entergy Louisiana, LLC (ELL) is the owner of Waterford 3 Steam Electric Station and River Bend Station, nuclear power plants in Louisiana. As owners of nuclear power plants in the Fifth Circuit, SERI and ELL have an interest in consistency and predictability in the standard of care applicable to them and their plants.

Entergy Operations, Inc. (EOI) is the operator and U.S. Nuclear Regulatory Commission (NRC) licensee for ANO, Grand Gulf Nuclear Station, Waterford 3, and River Bend Station. EOI has an interest in a consistent standard of care applied in connection with each of the plants that it operates.

NextEra Energy Duane Arnold, LLC owns a 70% interest in and is the NRC licensee for the Duane Arnold Energy Center (DAEC) in Palo, Iowa, approximately nine miles northwest of Cedar Rapids and within the jurisdiction of the Eighth Circuit. DAEC is currently not in commercial operation, but given the current projected need for power, NextEra Energy Duane Arnold, LLC is evaluating restarting DAEC to provide safe, affordable, and reliable energy for Iowa. NextEra Energy Duane Arnold, LLC is concerned about the impact of the Eighth Circuit's decision on its potential restart of DAEC.

Northern States Power Company-Minnesota (NSPM)—a subsidiary of Xcel Energy Inc. (Xcel)—is the operator and NRC licensee for the Monticello Nuclear Plant in Monticello, Minnesota and the Prairie Island Nuclear Generating Station in Welch, Minnesota, both within the jurisdiction of the Eighth Circuit. NSPM nuclear operations support over 1,100 jobs at the plants and thousands more throughout Minnesota. NSPM and Xcel are concerned about the implications of the decision below for employees, vendors, and contractors at the Minnesota nuclear power plants and the potential resulting impacts to operations there.

Ameren Missouri (Ameren) is the operator of the Callaway Energy Center in Jefferson City, Missouri, within the jurisdiction of the Eighth Circuit. Operational since 1984, Callaway is Missouri's only nuclear power plant, and the electricity generated by the facility is enough to meet the needs of 780,000 average households every year. Ameren is concerned about the impact of the decision below on its operations.

SUMMARY OF THE ARGUMENT

The Eighth Circuit expressly departed from decisions issued by five other circuits and claimed the title as the only federal appellate court to allow state tort suits to override the federal standards of care that govern nuclear operators. That is more than enough reason to grant plenary review, but the consequences of that decision underscore the need for review and reversal. If allowed to remain standing, the decision below would wreak havoc on nuclear operators in the Eighth Circuit. It would destroy the regulatory

stability that the industry requires to make long-term capital investments and would risk imposing costly state-law tort liability on companies simply for obeying federal regulations that they have no choice but to follow. Indeed, it would mean that nuclear operators in the Eighth Circuit who follow expertly crafted federal nuclear-safety standards would nonetheless face the potential for crushing liability in state-law tort suits that impose inexpert safety standards crafted by lay juries. On top of that, nuclear operators in other circuits would face mounting uncertainty too, as they would have to contend with the risk that other courts might follow the Eighth Circuit's lead. The Court should grant the petition and correct the destabilizing and dangerous decision below.

Nuclear energy is a critical component of America's energy mix. The Nation's nearly 100 commercial nuclear reactors together provide almost 20% of the Nation's electrical supply. That percentage is projected to substantially increase in the coming decades, and the benefits of doing so are clear. Nuclear reactors reliably produce electricity around the clock and have maintained capacity factors above 90% for decades—meaning that they operate at full power generation over 90% of the time. At the same time, nuclear reactors are resilient in the face of increasingly severe weather and natural disasters, and they produce large amounts of power without generating any carbon emissions. Nuclear energy thus is critical not only to supplying residential and business consumers with electricity, but also as a component of any long-term goal to maintain energy

security and reduce carbon emissions as the country's overall energy consumption increases.

But getting nuclear reactors up and running is a lengthy and capital-intensive process, and operating those reactors is extremely time- and resource-intensive. Accordingly, regulatory stability is critical both to those looking to enter the industry (whether as an investor or an operator) and to those already in it. All of those parties must have confidence that, after committing substantial capital on the front end, their investments will not face risks from the vagaries of inexpert jury decisions even after federal authorities have confirmed compliance with all applicable regulations and obligations.

The Eighth Circuit's decision below severely undermines that confidence and is remarkable for the scale of its potentially destabilizing effect. Although Congress enacted the Price-Anderson Act, Act of Sep. 2, 1957, Pub. L. No. 85-256, 71 Stat. 576, to encourage private nuclear development and to provide certainty for the industry by vesting exclusive control over nuclear safety rules in the federal government, the court below empowered state juries to impose their own set of ad hoc safety standards in individual tort suits involving nuclear-related incidents. Those individual standards will shift with each jury, and they will effectively override the nuanced and complex cost-benefit calculations that the federal government has conducted when promulgating its regulations in this sensitive area. The Eighth Circuit's approach destroys the balance of state and federal authority that Congress struck with the Atomic Energy Act, and it raises the risk that operators will have to make

decisions that expert federal regulators have deemed (or would deem) suboptimal.

This outcome has nothing to recommend it, and certainly nothing compelled the Eighth Circuit's unprecedented holding here. Quite the opposite. This Court's decisions in *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Commission* ("*PG&E*"), 461 U.S. 190 (1983), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), make the rule plain: The federal government has "occupied the entire field" of nuclear safety regulation. *Silkwood*, 464 U.S. at 249. While states retain authority to regulate the electrical-generation aspects of nuclear power facilities, they may not regulate the nuclear-safety aspects absent approval from the federal government. *See* 42 U.S.C. §2021(b). Without such approval, states have no authority to do anything more than make state tort suits available as a vehicle for the enforcement of the federal standards of care. *See Silkwood*, 464 U.S. at 251.

Simply put, this case involves a conceded circuit split on an exceedingly important issue and a decision below that is indefensible on the merits. The Court should grant review and reverse.

ARGUMENT

I. Nuclear Energy Is Integral To The Nation's Energy Supply And Infrastructure.

Nuclear power is an indispensable part of the Nation's energy supply. Today, 94 commercial nuclear power reactors in 28 states provide almost 20% of the country's electricity. *See* U.S. Energy Info. Admin., *Frequently Asked Questions (FAQ), How Many Nuclear Power Plants Are in the United States, and*

Where Are They Located?, https://perma.cc/UQW9-MDC6 (last updated May 8, 2024); U.S. Energy Info. Admin., *Frequently Asked Questions (FAQ), What Is U.S. Electricity Generation by Energy Source?*, https://perma.cc/KDC9-Z7EL (last updated Feb. 29, 2024). Seven of those reactors (six of which are owned and operated by *amici* here) are located in four different states within the Eighth Circuit. *See* U.S. Energy Info. Admin., *Nuclear Reactor, State, and Net Capacity* (Sept. 2023), https://perma.cc/834N-FA83; *see also* pp.1-3, *supra*. Those 94 reactors are responsible for half of the carbon-emissions-free electricity nationwide and annually contribute 800 billion megawatt-hours of generation—"the equivalent of removing 100 million cars off of the road." Office of Nuclear Energy, U.S. Dep't of Energy, *Advantages and Challenges of Nuclear Energy* (Jun. 11, 2024), https://perma.cc/K3HN-6ZCQ.

Nuclear energy is also extraordinarily reliable. Nuclear reactors operate at full capacity more than 90% of the time. *See* U.S. Dep't of Energy, Office of Nuclear Energy, *The Ultimate Fast Facts Guide to Nuclear Energy* 5, 7, https://perma.cc/GR4W-ZJGP (last visited Apr. 21, 2025). They are also designed to operate 24/7. *See id.* at 3. And they continue operating even amidst severe weather or natural disasters. *See* Matthew Fisher, *Resilience and Safety of Nuclear Power in the Face of Extreme Events*, Int'l Atomic Energy Ass'n (Sept. 2020), https://perma.cc/A396-QDJ9. As the federal government thus has recognized, "nuclear power is the most reliable energy source and it's not even close." Office of Nuclear Energy, U.S. Dep't of Energy, *Nuclear Power is the Most Reliable Energy Source and*

It's Not Even Close (Mar. 24, 2021), https://perma.cc/52R3-CSTN.

The benefits of nuclear energy are not, however, merely technical. Nuclear power is also a catalyst for economic growth. Every year, nuclear power contributes $60 billion of aggregate economic value to the American economy, employing roughly 70,000 Americans in high-quality long-term jobs. *See Advantages and Challenges*; NEI, *Jobs*, https://perma.cc/W7WE-QTXM (last visited Apr. 21, 2025). And those employees are paid "salaries that are 50% higher than those of other generation sources." *Advantages and Challenges*. Furthermore, nuclear power contributes to an additional 180,000 downstream jobs supporting the Nation's commercial nuclear reactors. *Jobs*. Unsurprisingly, then, the Nation is looking not just to maintain its nuclear-energy capacity, but to *triple* it over the coming decades. U.S. Dep't of Energy, *Pathways to Commercial Liftoff: Advanced Nuclear* 1 (Mar. 2023), https://perma.cc/K96B-4PW7.[2] In other words, the policy of the United States is to "unleash" nuclear

[2] That increase in power supply is necessary because demand for electricity has skyrocketed in recent years, due at least in part to the needs to charge emission-free battery electric vehicles and to supply power-hungry computing architecture, such as the large-scale data centers used to support cloud computing and artificial intelligence growth. *See* John D. Wilson & Zach Zimmerman, GridStrategies, *The Era of Flat Power Demand is Over* 3 (Dec. 2023), https://perma.cc/27QB-5FKU ("Over the past year, grid planners nearly doubled the 5-year load growth forecast," and "[t]he main drivers are investment in new manufacturing, industrial, and data center facilities"); *see also* Pet.21.

power development moving forward. *See, e.g.*, *Unleashing American Energy*, Exec. Order No. 14,154 (Jan. 20, 2025); *Protecting American Energy From State Overreach*, Exec. Order No. 14,260 (Apr. 8, 2025).

II. The Eighth Circuit's Unprecedented Ruling Is Exceptionally Destabilizing For The Nuclear Energy Industry.

The Eighth Circuit's decision below throws a sizeable wrench into the newly announced national policy to unleash nuclear power. Investors in the nuclear industry require regulatory stability to have the confidence necessary to provide large sums of capital to finance capital-intensive and long-term reactor projects. And current operators in the industry can ill-afford unexpected regulatory changes that dramatically increase costs. The decision below strikes at the heart of the regulatory stability that Congress deliberately created to ensure investment by enabling the industry to predict future costs over multiple license terms. Instead of having a single, predictable regulatory baseline for nuclear safety—*i.e.*, the federal baseline, which changes only on a prospective basis—the Eighth Circuit's decision requires nuclear operators to anticipate what a jury convened years or decades in the future might conclude is safest while examining the operators' conduct retrospectively, and they must then attempt to tailor their conduct accordingly to avoid a sizeable jury award. That is no way to run a railroad, much less a nuclear reactor.

Building and operating a nuclear plant is a difficult task and requires strict adherence to and

compliance with stringent safety and environmental regulations. "Nuclear power plants are more complex than other large-scale power generation plants, and so are more capital-intensive and may take longer to construct." World Nuclear Ass'n, *Economics of Nuclear Power* (Sept. 29, 2023), https://perma.cc/V75H-FWEY. It "takes thousands of workers, huge amounts of steel and concrete, thousands of components, and several systems to provide electricity, cooling, ventilation, information, control and communication." *Id.* And once the plant is constructed, still other costs await. To name a few, operating and generating costs—*e.g.*, costs related to licensing, security, maintenance, and nuclear fuel—collectively measure in the tens of billions of dollars annually for the Nation's nuclear power plants. *See* NEI, *Nuclear Costs in Context* 6-7 (Feb. 2025), https://perma.cc/E4X5-9TWF.

Given those considerable costs, nuclear development is highly sensitive to regulatory uncertainty. *See* World Nuclear Ass'n, *Nuclear Power Economics and Project Structuring* 29 (2017 ed.), https://perma.cc/HJ8H-G6GD ("The prospects for nuclear power are greatly affected by the type of market regulation encountered."). Historically, however, the nuclear industry has enjoyed stability in the field of nuclear safety regulation. Indeed, before the Eighth Circuit's decision below, all five circuits to weigh in on the subject had held that nuclear operators could rely on safety regulations promulgated by the Nuclear Regulatory Commission (NRC). Those courts uniformly held that, when the NRC issues a regulation establishing a standard of care to govern a specific aspect of nuclear safety, that

standard becomes the *exclusive* standard of care, eliminating any concern that state juries might impose different and higher standards of their own. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 858 (3d Cir. 1991). And while NRC regulations have changed over the years, those changes take effect *prospectively* and are accompanied by regimented procedures that provide nuclear operators with advance notice and an opportunity to comment, as well as the prospect of robust judicial review. *See* 5 U.S.C. §551 *et seq*.

Unfortunately, because of the Eighth Circuit's decision here, nuclear operators now find themselves in a new era of uncertainty. According to the decision below, nuclear operators—including *amici* here—can pass federal nuclear-safety standards with flying colors, but doing so will afford them no protection at all when a plaintiff files a state-law tort suit related to a nuclear incident (including when, as here, the incident is decades old), as juries now are free to concoct their own ad hoc regulatory standards when sitting in judgment of the nuclear operator's past safety record. *See, e.g.*, Restatement (Second) of Torts §288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."). Indeed, juries could even decide to impose strict liability. *See, e.g.*, *id.* §519 (1977) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."); *see also In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 1004-06 (9th Cir. 2008); *Pennsylvania v. Gen. Pub. Utils. Corp.*,

710 F.2d 117, 120-21 (3d Cir. 1983). The upshot is that nuclear operators in the Eighth Circuit are now in a perpetual state of uncertainty, forced to guess whether juries will impose debilitating tort liability on them just for adhering to NRC "[r]equirements" that are "binding on all persons and organizations who receive a license from NRC to use nuclear materials or operate nuclear facilities." U.S. Nuclear Regul. Comm'n, *NRC Regulations Title 10, Code of Federal Regulations* (last updated Mar. 19, 2025), https://perma.cc/GY9K-LHJ7. And nuclear operators in other circuits face added risk too unless and until the decision below is repudiated and uniformity is restored, as they must now contend with the prospect that courts in *their* jurisdiction might follow the Eighth Circuit's lead. Precisely because the Eighth Circuit's rule creates uncertainty surrounding the costs of operating in the nuclear industry, it drives down expectations surrounding the profitability of the industry, thereby decreasing the overall economic attractiveness of nuclear development at a time when the Nation is aiming to expand nuclear-energy production.

All that is bad enough, but there is more. Because juries might find liability even where a nuclear operator has satisfied the mandatory federal standard of care, adherence to whatever standard that state tort law supplies runs the risk of forcing nuclear operators to engage in conduct that expert federal regulators have deemed suboptimal. As petitioners correctly observe, for example, jurors might "conclude that nuclear handlers should remove or relocate stored or deposited material, even where the safest solution for the public is to leave the material in place." Pet.18. Other potential examples abound.

Consider radiation-exposure limits for nuclear-facility employees. That is precisely the kind of issue that is ordinarily understood to call for *ex ante* regulation by expert government agencies, *see* Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 Vand. L. Rev. 1281, 1309 (1980), which are well-positioned to "consider[] the full range of risks and technologically feasible safety precautions" and thus "adopt[] a regulatory safety standard that [they] believe[] would optimally solve the safety problem," Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 Iowa L. Rev. 957, 997-98 (2014). The NRC did just that when it promulgated regulations detailing the maximum "occupational dose limits" for radiation, 10 C.F.R. §20.1201, as it balanced a complex set of competing and incommensurate values, such as economic costs, technological feasibility, and the need to minimize radiation doses, *see, e.g.*, 25 Fed. Reg. 4402, 4402-03 (May 18, 1960) (detailing "benefits" and "hazards of ionizing radiation" alongside "[b]asic biological assumptions" before weighing the three to provide "[r]ecommendations" regarding exposure to ionizing radiation); *see also* 51 Fed. Reg. 1092 (proposed Jan. 9, 1986) (comparing, among other things, "risks from exposures" and technological constraints to determine "acceptability of risk" and "standards for occupational exposures" to radiation (capitalization altered)). Under the Eighth Circuit's approach, however, non-expert jurors now have the final word on radiation-exposure limits at nuclear facilities, and they could very well conclude that the "reasonable" amount of radiation exposure is an amount that would make the

continued operation of the nuclear facility well-nigh impossible.

Nor are federal safety standards of this sort uncommon. The NRC has promulgated dozens of safety regulations that cover every aspect of the operation of a nuclear facility. It regulates "access to high radiation areas." 10 C.F.R. §20.1601. It sets rules for "[d]isposal [of waste] into sanitary sewerage," *id.* §20.2003, or "by incineration," *id.* §20.2004. It governs the posting of signs and labeling of containers at nuclear facilities, *see id.* §20.1901-04, and it has determined when a facility should receive exemptions from those rules, *see id.* §20.2301. It regulates when it is appropriate to "backfit" or modify commercial power reactors. *See id.* §50.109. And the list goes on. For each of those rules, the NRC has considered the competing interests in public health, the public's need for energy, economic and technological feasibility, and more. A jury cannot consider those competing concerns to the same degree, and it certainly cannot bring to bear the expert judgment needed to accommodate each of them.[3] More troubling still, after one jury decides that a particular standard is the correct one, a different jury may very well disagree and adopt a different one. The jury verdicts are not

[3] Indeed, allowing state tort law to supply standards of care would mean that a jury could find a nuclear operator liable for violating a safety rule even after the NRC had determined that it should enjoy an *exemption* from that rule. *See* 10 C.F.R. §20.2301. That absurdity only further reinforces that the Eighth Circuit's theory cannot stand without doing considerable violence to the statutory and regulatory design.

only less informed than the federal regulatory standards, but less predictable and less reliable.

Those examples illustrate the dual risks stemming from state-tort-law regulation of nuclear safety. On the one hand, as petitioners' waste-storage example reveals, juries may reject nuclear-safety rules that they perceive as counterintuitive, even if those rules are actually the best practices within the regulated community and based on scientific consensus. And on the other hand, as the maximum-radiation-dose example above reveals, juries with a single plaintiff before them are ill-positioned to consider the many competing values that expert regulators must balance when addressing the complex issues that nuclear-energy regulation necessarily entails. Either way, interjecting state juries as an additional regulatory authority—after Congress has firmly vested exclusive regulatory authority for nuclear safety in the federal government—creates serious problems for the operation of nuclear facilities and risks imposing significant liability on nuclear operators simply for following mandatory federal standards. That is plainly inconsistent with the announced national objective of achieving a "long-awaited American nuclear renaissance." U.S. Dep't of Energy, *Secretary Wright Acts to "Unleash Golden Era of American Energy Dominance"* (Feb. 5, 2025), https://perma.cc/YCS8-YMFC.

III. Nothing In The Price-Anderson Act Or This Court's Precedents Supports The Decision Below.

In some cases, negative practical consequences are the unavoidable result of the statute that Congress

chose to enact. *See BP P.L.C. v. Mayor & City Council of Balt.*, 593 U.S. 230, 245-46 (2021). This is not one of them. The uncertainty created by the decision below is a problem solely of the Eighth Circuit's making, as neither Congress nor this Court's cases ever meant to put nuclear operators in the impossible position of facing substantial state-law tort liability simply for complying with safety regulations promulgated by the Nation's expert nuclear agency.

Since the beginning, the federal government has exercised near-total control over nuclear energy in this country. During World War II, as part of the Manhattan Project, the federal government supervised the very first artificial nuclear reactor in history. *See* Richard Rhodes, *The Making of the Atomic Bomb* 431-40 (1986). Nuclear technology remained within the exclusive control of the federal government until the end of the war. And at the war's end, Congress "nationalized all aspects of atomic-energy development" through the Atomic Energy Act of 1946. Richard Rhodes, *Dark Sun: The Making of the Hydrogen Bomb* 279 (1995); *see also Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 63 (1978) (the Atomic Energy Act "contemplated that the development of nuclear power would be a Government monopoly"). The federal government began to gradually loosen its monopoly on nuclear energy only in the Atomic Energy Act of 1954. *See PG&E*, 461 U.S. at 206-07. But even then, it retained almost-exclusive control over the private nuclear industry. *See* 42 U.S.C. §2021(c).

Given that history, as well as the federal government's comprehensive regulation of nuclear

safety, this Court has long held that "states are precluded from regulating the safety aspects of nuclear energy." *Silkwood*, 464 U.S. at 240-41. That is, while states may regulate "the generation of electricity itself," such as "economic question[s]" like "whether a particular plant should be built," "no role was left for the states" to regulate safety aspects of nuclear power, such as "the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." *PG&E*, 461 U.S. at 207 (citing 42 U.S.C. §§2014(e), (z), (aa), 2061-64, 2971-78, 2091-99, 2111-14); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 82 (1990). The dividing line when it comes to states' authority thus is hard to miss: States may regulate the *power-generation* aspects of nuclear power plants, but not the *nuclear-safety* aspects of nuclear power plants. *See PG&E*, 461 U.S. at 207; *see also Silkwood*, 464 U.S. at 240-41.

Splitting from five other circuits, the Eighth Circuit rejected that clear distinction in the decision below. *Compare* App.3-11, *with TMI*, 940 F.2d 832; *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994); *Nieman v. NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997); *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305 (11th Cir. 1998), and *Hanford*, 534 F.3d 986. While it conceded that "states cannot enact … 'before-the-fact nuclear safety' statutes or regulations," it nonetheless concluded that "rules of state tort law" *may* "regulate in this field." App.7.

That conclusion is incoherent. When Congress "occupied the entire field of nuclear safety concerns," it precluded state regulation of nuclear safety regardless whether that regulation comes about

through the *ex ante* promulgation of written law or *ex post* tort judgments. *Silkwood*, 464 U.S. at 249. After all, state tort-law duties of care regulate industry no less than statutes or written regulations. *See, e.g.*, *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 774 (2019); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996). Thus, as the Third Circuit correctly concluded in *TMI*, states may not "impos[e] a non-federal duty in tort, because any state duty would infringe upon pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law." *TMI*, 940 F.2d at 859-60 (citing *PG&E*, 461 U.S. at 204).

The Eighth Circuit concluded otherwise based on a clear misreading of *Silkwood*. In *Silkwood*, this Court acknowledged that, although "the federal government has occupied the entire field of nuclear safety concerns," Congress had nonetheless permitted "state tort law [to] apply" in certain circumstances when nuclear-plant operators injured individuals. *Silkwood*, 464 U.S. at 249, 252. Congress thus permitted states to award punitive damages against reactor operators when their conduct fell below the standard of care embodied in federal regulations. *See id*. at 258.

The Eighth Circuit acknowledged that "*Silkwood* wrestled with whether a plaintiff was entitled to a particular remedy under state law and *not* with whether state standards of care apply." App.8 (emphasis added). But it reasoned that "the Court spoke about the role of state tort law in broad terms" in *Silkwood* and thus interpreted that decision as

holding "that state-law standards of negligence and strict liability would continue to play a role" in regulating nuclear safety. *Id.* That is wrong. Taken together, *PG&E* and *Silkwood* establish a straightforward rule: While the federal government has "occupied the entire field of nuclear safety concerns"—and thus sets the exclusive standard of care in nuclear-accident tort suits—states may nonetheless allow tort suits to serve as vehicles for the enforcement of that federal standard of care and may preserve state-law remedies like punitive damages when those federal standards are violated. *PG&E*, 461 U.S. at 212; *Silkwood*, 464 U.S. at 251 ("There is, however, ample evidence that Congress had no intention of forbidding the states from providing such remedies.").

Nor does §2014(ii) of the Price-Anderson Act save the Eighth Circuit's decision. *Contra* App.8-10. That subsection provides that, in a public-liability action, "the substantive rules for decision … shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with [§2010]" of the statute. 42 U.S.C. §2014(*ii*). But that provision, in the context of the Atomic Energy Act's comprehensive regulation of nuclear-safety standards of care, does *not* give authority to the states to develop their own standards of care. Instead, it serves as a federalized choice-of-law rule, specifying that tort-law principles "of the State in which the nuclear incident involved occurs" govern the suit, *id.*, rather than authorizing the creation of a federal common law of tort to supply rules to govern questions such as how to prove causation, how to apportion proportional liability, or how to assess the role of contributory

negligence. *See, e.g.*, *Nieman*, 108 F.3d at 1559-60; *cf.* 42 U.S.C. §1988(a) (adopting state-law tort rules to govern suits under §1983). But the fact that Congress co-opted state tort-law principles to govern those aspects of Price-Anderson Act suits in no way suggests that it similarly allowed state tort law to supply the relevant standard of care, allowing state regulation of nuclear safety in through the back door. *Cf. Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) ("State tort law that requires a manufacturer's [product] to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect.").

In all events, to whatever extent that the Eighth Circuit understood *Silkwood* to permit state tort-law standards of care to operate in Price-Anderson Act suits, Congress displaced *Silkwood* through its subsequent enactment of the Price-Anderson Act Amendments in 1988. *See* Pub. L. No. 100-408, 102 Stat. 1066 (1988). Indeed, Congress expressly used the 1988 amendments to disapprove of the holding in *Silkwood* and to further federalize the field of nuclear-safety regulation. *See* 42 U.S.C. §2210(s) (limiting recovery of punitive damages); App.7-9. Thus, even accepting the erroneous premise that Eighth Circuit correctly determined that *Silkwood* had impliedly overruled *PG&E* and thereby allowed state-law standards of care to govern nuclear-safety suits, that holding is no longer relevant in light of Congress' action in the 1988 amendments.

In short, the rule from *PG&E* in 1983 remains the same one today: "[T]he federal government has occupied the entire field of nuclear safety concerns."

461 U.S. at 212. And while *Silkwood* clarified that, just as in other preemption contexts, state tort law may supply a vehicle for enforcement of federal nuclear-safety standards, *see Silkwood*, 464 U.S. at 251, it did *not* give states license to do through tort law what they could not do through written law.

In fact, to the extent that the Eighth Circuit's tort/non-tort distinction makes any difference, it cuts *against* respondents' position here. That is because "[a] state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the" federal government. *Riegel*, 552 U.S. at 325. By contrast, juries "see[] only the cost" and are "not concerned with [the] benefits" of the federal safety rule. *Id.* Thus, "one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation" than written regulations. *Id.* Here, however, the Eighth Circuit *privileged* jury verdicts over written regulations, allowing state regulation of nuclear safety through the former but not the latter.

As all of this underscores, the Eighth Circuit's decision below is not just wrong, but dangerously so, as it empowers juries to announce nuclear-safety standards based on incomplete information. Worse still, the decision below threatens an industry that is expected to serve as an anchor in the Nation's long-term energy strategy. Certiorari is amply warranted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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