No. 24-1001

IN THE

Supreme Court of the United States

COTTER CORPORATION; COMMONWEALTH EDISON COMPANY,

Petitioners,

v.

NIKKI STEINER MAZZOCCHIO; ANGELA STEINER KRAUS,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Price-Anderson Act creates a federal cause of action, dubbed a "public liability action," for, as relevant here, litigation over harms arising from radioactive material. 42 U.S.C. §§ 2014(ii), (q), (w). "[T]he substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [Section 2210]." 42 U.S.C. § 2014(ii).

The question presented is: Whether state tort law concerning the standard of care—if consistent with the provisions of 42 U.S.C. § 2210—applies to a public liability action under the Price-Anderson Act.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constiutitional Provisions

Statutes

Regulations

Legislative Materials

Other Authorities

INTRODUCTION

Respondents Nikki Steiner Mazzocchio and Angela Steiner Kraus are sisters who developed blood cancer as a result of their exposure to radioactive waste material mishandled by petitioners and other defendants. They filed suit, raising, as relevant here, a claim under the Price-Anderson Act (PAA), which creates a federal cause of action for litigation over harms arising from radioactive material. 42 U.S.C. §§ 2014(ii), (w). By default, the "substantive rules for decision" in a PAA case are "derived from the law of the State" where the injury occurred. *Id.* By this point in the litigation, petitioners appear to acknowledge that this default rule applies here: This case should be governed by the "substantive" law "of the State" (here, Missouri law). *See* Pet. 8.

Petitioners nonetheless ask this Court to grant review and hold that respondents must prove a violation of a *federal* regulation, not just of state law. Their logic? "[F]ederal law *is* the 'law of the State.'" Pet. 24.

This Court should deny the petition. No circuit has ever considered—let alone accepted—petitioners' up-is-down reading of the PAA. Indeed, petitioners' reading of the statute was not even raised in the court below, where petitioners floated an entirely different textual analysis.

A grant of certiorari would be particularly mistaken at this juncture. This case comes to the Court on the appeal of a question certified for interlocutory review. This Court does not need to consider weighing in on the question presented until the courts below have had the chance to assess

petitioners' reading. And this Court should not credit petitioners' alarmist claims that the opinion below threatens the entire nuclear industry in the meantime: Thanks to a federal indemnification and insurance scheme, the potential defendants Congress cared most about know they are not on the hook for any damages.

The petition should be denied.

STATEMENT OF THE CASE

A. Legal background

1. The Price-Anderson Act (PAA), codified at 42 U.S.C. § 2210, with relevant definitions in 42 U.S.C. § 2014, was enacted in 1957 with two goals. First, Congress sought to protect the public by ensuring adequate funds would be available to compensate victims in the event of a nuclear incident. Second, the PAA sought to encourage the development of the atomic energy industry. Pub. L. No. 85-256, § 1, 71 Stat. 576 (1957).

To accomplish those goals, Congress mandated that key players in the nuclear industry, such as nuclear power plant operators, be required to purchase financial protection in the form of the maximum available commercial liability insurance. *See* 42 U.S.C. §§ 2210(a), (b), 2014(k). In addition, the United States government would execute indemnity agreements with those players to ensure the companies wouldn't have to pay even if private insurance limits were exceeded. *See* 42 U.S.C. § 2210(c). Eventually, Congress also mandated that those players participate in a pooled insurance scheme, whereby liability above a threshold results in

an equal premium adjustment for all participants in the scheme. Pub. L. No. 94-197, §§ 2-3, 89 Stat. 1111, 1111-12 (1975) (codified as amended at 42 U.S.C. § 2014). Finally, the PAA capped the amount of liability for each nuclear incident. *See* 42 U.S.C. § 2210(e).

The end result is that today, through a combination of commercial insurance, pooled insurance, federal government indemnification, and a cap on the amount of liability, those key players in the nuclear industry will not pay a dime of damages.

2. In addition to ensuring the financial stability of the nuclear industry, the PAA creates a channeling provision allowing for the consolidation of litigation over nuclear incidents. Prior to 1988, liability for the vast majority of nuclear incidents (all but so-called "extraordinary nuclear occurrences") was governed entirely by state tort law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 254-56 (1984). Following the Three Mile Island accident, a slew of state tort cases was filed in both federal and state court. Congress wanted a mechanism to consolidate those claims in federal court. S. Rep. No. 100-218, at 13 (1987).

The result was an amendment to the PAA in 1988 creating a "public liability action," a federal cause of action for injuries arising out of radioactive material. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988); 42 U.S.C. §§ 2014(ii), (q), (w). The "public liability action" retains state law as the governing substantive law: A "public liability action shall be deemed to be an action arising under [42 U.S.C. §] 2210," and "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved

occurs, unless such law is inconsistent with the provisions of such section." 42 U.S.C. § 2014(ii).[1] Section 2210, in turn, contains provisions that, for instance, limit punitive damages awards or require defendants to waive state-law defenses in some circumstances.

The amended PAA thus creates a scheme in which state torts, with state-law elements, are restyled as federal claims for purposes of Article III jurisdiction.

3. The PAA built on the Atomic Energy Act, which created an agency to govern civilian use of nuclear material. Known today as the Nuclear Regulatory Commission (NRC),[2] that agency issues licenses to entities that handle radioactive material. Some licenses authorize operating a nuclear power plant; others authorize taking title to or transporting radioactive material.

In addition, the NRC issues regulations governing the handling of radioactive material. As relevant here, some of those regulations set out dosage limits—levels of radiation to which workers and members of the public can be exposed. Those limits apply to "activities conducted under licenses issued by the [NRC]." 10 C.F.R. § 20.1001(a). The regulations provide that "nothing" in them "shall be construed as limiting actions that may be necessary to protect health and safety." 10 C.F.R. § 20.1001(b). In 1991, the NRC

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[1] At the time of the lower court decision in this case, this section was codified at 42 U.S.C. § 2014(hh). It has since been recodified as 42 U.S.C. § 2014(ii), but the text of the provision has not changed.

[2] Prior to 1974, this agency was known as the Atomic Energy Commission.

added mandatory language requiring that licensees must ensure that radiation emissions are "as low as reasonably achievable." 10 C.F.R. § 20.1101(b).

B. Factual background

Because this case comes to the Court at the pleading stage, all facts alleged in respondents' complaint are taken as true.

1. Between 1942 and 1957, uranium was processed in downtown St. Louis, Missouri, as part of the Manhattan Project. First Am. Comp. ¶ 34, ECF No. 44. Radioactive waste material from that processing was transported and stored at a site near the St. Louis Lambert International Airport. *Id.* ¶ 36. Defendant St. Louis Airport Authority later purchased that land. *Id.* ¶ 37. The St. Louis Airport Authority was never licensed by the NRC (or its predecessor) and is not a petitioner here.

In the late 1960s, private companies purchased the radioactive waste stored at the airport site. FAC ¶ 41. The waste was then transported to a site on Latty Avenue which abuts Coldwater Creek. *Id.* ¶ 42. In 1969, petitioner Cotter Corporation, the second defendant in this case, received a license from the Atomic Energy Commission (the NRC's predecessor) to purchase and assume responsibility for the radioactive waste material stockpiled at the Latty Avenue site. *Id.* ¶ 42. Cotter was not required to obtain financial protection or an indemnification agreement with the federal government and did not do so. *Id.* ¶ 46.

After purchasing the radioactive waste, Cotter began drying it (to make it lighter and easier to transport) and loading it on railcars next to Coldwater

Creek. FAC ¶ 47. From the start, Cotter failed to fulfill its licensee obligations. The Atomic Energy Commission cited Cotter for its "totally inadequate" sample surveys, which failed to "determine [the] concentrations of radioactive materials" the public was exposed to. *Id.* ¶ 48. The settling ponds and equipment used in Cotter's drying operation were in a state of disrepair. *Id.* The Atomic Energy Commission and the local health department also expressed concern about a "dust problem" and visible air contaminants. *Id.* In addition, health and environmental experts expressed concerns and noted violations of federal regulations. *Id.*

Eventually, Cotter's drying equipment entirely broke down, and Cotter appeared to abandon the site. FAC ¶ 49. Cotter eventually returned to dispose of the radioactive waste material that remained at the site by simply mixing it with soil and dumping it into a landfill in the St. Louis area. *Id.* ¶ 50.

In 1974, Cotter certified that there was no longer any radioactive contamination at the Latty Avenue site, despite knowing of radiation surveys that indicated otherwise. FAC ¶¶ 13, 57, 58. Based on Cotter's representations, the Atomic Energy Commission agreed to terminate its license. *Id.* ¶ 59. Around that time, Cotter was purchased by petitioner Commonwealth Edison, the third defendant in this case. *Id.* ¶¶ 13, 55. Commonwealth Edison was never licensed by the Atomic Energy Commission or the NRC. *Id.* ¶ 89.

Two years later, surveys conducted by the NRC revealed persistent radioactive contamination at the Latty Avenue site. FAC ¶ 61. The NRC informed Cotter that the survey "raised a serious question" as to

the accuracy of Cotter's statements made in support of its application for termination of its license. *Id.*

In 1978, the fourth defendant, DJR Holdings, purchased the Latty Avenue site. DJR was never licensed by the NRC or its predecessor and is not a petitioner here. DJR conducted decontamination operations on the site, moving radioactive material from the soil closest to Coldwater Creek to another part of the property. FAC ¶¶ 65, 70-71.

By the 1980s, because of defendants' actions, the radioactive waste material left over from the Manhattan Project had contaminated both Coldwater Creek and the Latty Avenue site. Both contained high levels of radioactive isotopes, some of "the most toxic materials known to man." FAC ¶¶ 24-25. When radioactive isotopes pass through human cells, they can cause genetic mutations leading to cancer. *Id.* ¶ 27.

2. From 1984 to 2014, respondent Nikki Steiner Mazzocchio lived in an apartment building abutting Coldwater Creek near the Latty Avenue site. FAC ¶ 10. Respondent Angela Steiner Kraus, Ms. Mazzocchio's sister, lived in the same apartment building from 1998 to 2002. *Id.* ¶ 11. Both plaintiffs' apartments flooded multiple times with waters from the creek. *Id.* ¶ 10-11. Ms. Kraus regularly spent time in and around Coldwater Creek, gardening, trail running, and splashing her face with the creek water. *Id.* ¶ 11. And both sisters consumed produce grown in Ms. Kraus's garden, right by Coldwater Creek. *Id.*

As a result of their exposure to radioactive isotopes, both Ms. Mazzocchio and Ms. Kraus—like many other people living in the vicinity of the creek—developed cancer. Within weeks of each other, Ms.

Mazzocchio and Ms. Kraus, who have no family history of cancer, were diagnosed with an incurable blood cancer called multiple myeloma. FAC ¶¶ 10-11, 81-82.

C. Procedural background

1. Ms. Mazzocchio and Ms. Kraus initially filed a complaint against defendants in Missouri state court. After removal and several years of litigation, respondents filed their first amended complaint.

The operative complaint raises Price-Anderson Act claims against four defendants: The St. Louis Airport Authority, Cotter Corporation, Commonwealth Edison, and DJR Holdings.

Petitioners' question presented centers on just one of the claims raised by Ms. Mazzocchio and Ms. Kraus—their common-law negligence claim. But respondents in fact raised four sets of claims:

- Negligence per se: Respondents allege that defendants violated the Missouri Clean Water Law and that this violation constituted negligence per se. Respondents also allege that defendants violated various federal regulations, including radiation dosage limits and rules about sampling and testing.
- Civil conspiracy: Respondents allege that defendants conspired to wrongfully release radioactive waste material and to obtain termination of Cotter's license based on inaccurate information.
- Strict liability: Respondents allege that because radioactive waste material is ultrahazardous,

defendants are liable for any harms resulting from that material.

- Common-law negligence: Respondents allege that defendants were negligent when they mishandled radioactive waste material. They also alleged that defendants negligently failed to warn the public of the risks of radiation at the Latty Avenue site.

2. Defendants moved to dismiss. They argued that the standard of care element of plaintiffs' common-law negligence claim must be based on federal dosage regulations, not state law. The district court denied the motion. First, it pointed out that the standard of care argument could not be dispositive as to "the other three Defendants" or as to "some claims" against Cotter. Pet. App. 22a. Second, even as to the common-law negligence claim against Cotter, the district court found that federal dose regulations did not "provide the exclusive standard of care." *Id.* 21a. Cotter's argument to the contrary was "not based on any provisions in the PAA" and "conflicts with the plain language of the PAA, Atomic Energy Act, and federal regulations and causes consequences seemingly contrary to Congressional intent." *Id.*

The district court noted that defendants only "allude[d] to" and "never develop[ed]" the issues of field and conflict preemption. Pet. App. 44a. n.29. Accordingly, the court held that defendants had not established a "per se rule" that federal regulations governed their claim. *Id.* 45a. Instead, it determined that "the applicable standard of care depends on the facts of each case and the claims against each defendant." *Id.* 45a.

The district court certified the following question for interlocutory appeal: "Whether federal dosage

regulations should be exclusively utilized as the standard of care in a Price-Anderson Act public liability action." Pet. App. 18a.

3. The appeal turned on the construction of 42 U.S.C. § 2014(ii). That section provides that "[a] public liability action shall be deemed to be an action arising under section 2210 of this title." 42 U.S.C. § 2014(ii). It then declares that "the substantive rules for decision in such action shall be derived from the law of the State . . . unless such law is inconsistent with the provisions of such section." *Id.*

The defendants argued that the phrase "such section" incorporated the whole federal scheme of nuclear safety regulation. Pet. App. 9a. Ms. Mazzocchio and Ms. Kraus responded that the phrase "such section" referred solely to Section 2210, and that Missouri substantive law governing standards of care was in no way "inconsistent" with Section 2210, which contains rules about, for instance, punitive damages, indemnification, and liability caps. *Id.*

The Eighth Circuit agreed with Ms. Mazzocchio and Ms. Kraus and rejected defendants' argument. The Eighth Circuit held that "such section" in the public liability action provision refers only to Section 2210. Pet. App. 9a. Because nothing in Section 2210 mentioned dosage requirements, much less indicated that such dosage requirements would trump Missouri's standard of care, the Eighth Circuit held that Missouri state law should govern. *Id.*

The Eighth Circuit explained that this Court has "spoke[n] about the role of state tort law in broad terms" and "was clear that state law standards of negligence and strict liability would continue to play a role in compensating those injured in a nuclear

accident." Pet. App. 8a. And while "evidence of compliance with federal safety standards" might be "relevant to a negligence claim," it was not "dispositive." *Id.* 10a n.2 (citations omitted). Moreover, the Eighth Circuit explained that in the 1988 PAA amendments, "Congress did not repudiate the Court's understanding of the role that state tort law plays in a public liability action" but in fact "approved it." *Id.* 8a.

3. Two of the four defendants—Cotter and Commonwealth Edison—have petitioned for certiorari. Petitioners no longer argue that "such section" in 42 U.S.C. § 2014(ii) refers to the whole federal regulatory code. Pet. 8. Petitioners thus appear to agree that the "substantive rules for decision" in this case must be derived from the "law of the State." Petitioners instead now argue that the "law of the State" in this case is actually federal law. *Id.* 24.

REASONS FOR DENYING THE WRIT

I. This case is a poor vehicle for addressing the question presented.

This case's "interlocutory posture is a factor counseling against this Court's review at this time." *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (mem.) (2020) (Kavanaugh, J., statement respecting denial of certiorari). The case comes to this Court on an appeal of a certified question, after the courts below denied defendants' motion to dismiss. This Court should wait for the case to play out before considering whether to intervene.

1. First, petitioners are asking this Court to consider an argument they never made below. As the

Court has instructed time and again, this Court is "a court of final review and not first view." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (citation omitted). It should wait for the courts below to pass upon petitioners' new legal theory before considering wading into this case.

Petitioners argued in the district court that Respondents "can only have a federal claim" because 42 U.S.C. § 2014(ii) states that "[a] public liability action *shall be deemed to be an action arising under* section 2210 of this title." D. Mot. to Dismiss Reply Br. 2, ECF No. 59 (quoting 42 U.S.C. § 2014(ii)). Per the district court, petitioners only "allude[d]" to field preemption and "never develop[ed] the issue." Pet. App. 44a.

In the Eighth Circuit, petitioners tried a different approach, arguing that the phrase "such section" "refer[s] to the whole Act," not just to 42 U.S.C. § 2210. Petr. C.A. Reply Br. 11. They argued that Missouri standards of care were inconsistent with the "whole Act." *Id.* 12.

Before this Court, petitioners shift gears yet again. They now abandon any argument that "such section" is broader than 42 U.S.C. § 2210, that the Missouri standards of care are "inconsistent with" that section, or that the "law of the State" does not govern this case. Pet. 8, 24. Instead, they argue for the first time in this litigation that the PAA preempts the entire field here—that "federal law *is* the 'law of the State," because federal regulations preempt any state standards of care. Pet. 24. That reading of the statute bears no resemblance to what petitioners urged below, and this Court should wait for a lower court to consider the reading before it considers weighing in.

2. Second, this Court should not grant certiorari in this interlocutory posture because an opinion from this Court may wind up being largely advisory. The courts below rejected only a "per se rule that federal regulations preempt state law standards of care in every public liability action." Pet. App. 45a. They left open the possibility that petitioners might be able to invoke "specific statutory provisions that conflict with state standards of care." *Id.* 9a. But at this point, petitioners had invoked at most only "some brooding federal interest." *Id.* (citation omitted). The courts below simply thought that making such a "fact-intensive" determination at the pleading stage would be "premature." *Id.* 45a. This Court should not consider granting certiorari before the district court has examined those "specific statutory provisions." *Id.* 9a.

Indeed, this Court's opinion might be largely advisory even if, after examining those "specific statutory provisions," the district court concludes that state law governs. The Eighth Circuit has now emphasized that "evidence of compliance with federal safety standards" can be "relevant" to state standards of care. *Id.* 10a n.2 (citations omitted).

3. Finally, this Court should not grant certiorari in this interlocutory posture because the answer to the question presented is not determinative for the outcome of this litigation and may turn out not to matter much at all. Recall that respondents have brought suit against four different defendants on four different theories of liability. This Court's intervention not only will not end the litigation; it will not even affect the majority of claims and defendants, and it certainly will not affect the damages at stake. At most,

if this Court were to grant certiorari and reverse, the decision would affect how plaintiffs prove *one* theory of liability against *one* defendant.

a. The petition does not dispute that, at the very least, state standards of care will govern claims against two of the four defendants—St. Louis Airport Authority and DJR Holdings. The federal regulations petitioners cite apply, by their terms, *only* to "persons licensed by the Commission." 10 C.F.R. § 20.1002; *see also* 10 C.F.R. §§ 20.105, 20.106(a) (1970). These two defendants were never licensed by the NRC to handle the radioactive waste material at issue. Thus, the provision that petitioners claim supplies the standard of care does not apply to those defendants.

As the district court explained, there can be no doubt that state law supplies the standard of care against those defendants. "Surely," the district court explained, it would be absurd to "hold that non-licensees owe a duty of care that is solely imposed on NRC licensees." Pet. App. 40a. It would be equally absurd to hold that they "owe no duty of care and thus, escape liability completely." *Id.*

The petition raises no argument to the contrary. Indeed, the non-licensee defendants do not bother to join the petition.

b. That leaves defendant Cotter Corporation.[3] Cotter was licensed by the NRC between 1969 and 1974. FAC ¶¶ 45, 57. Even as to Cotter, there can be no doubt that three of the four claims—negligence per

[3] The fourth defendant, Commonwealth Edison, was not licensed by the NRC but is Cotter's parent company.

se, civil conspiracy, and strict liability—do not require proof that a federal regulation was violated.

Start with respondents' negligence per se claim (where statutes, rather than common law, determine the standard of care). The negligence per se claim alleges that petitioners violated the Missouri Clean Water Law. FAC ¶ 117. Petitioners argue only that "nuclear safety statutes" are preempted. Pet. 3. They do not dispute that respondents can raise a negligence per se claim under a statute like the Missouri Clean Water Law, which is not a "nuclear safety statute." *Id.* Respondents thus can proceed on their negligence per se claim without proving a violation of federal regulations.

Similarly, the petition does not dispute that respondents can establish civil conspiracy without reference to federal regulations. Civil conspiracy is an intentional tort, and petitioners do not contest that "federal safety standards have no bearing on a defendant's liability for its intentional acts." *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 221 (D. Me. 1996). Here, respondents allege that Cotter and ComEd knew that the Latty Avenue site was contaminated and "jointly conspired to perpetrate the fraud that there was no radioactive contamination remaining with respect to Cotter's abandoned operations." FAC ¶ 14.

Finally, it's not even clear that petitioners intend to argue that respondents cannot raise a strict liability claim. The petition's question presented is limited to the correct "standard of care"—an element of a negligence claim, but not of a strict liability claim. Pet. i. In a "negligence case," "[t]ort law imposes 'a duty to exercise reasonable care" on those whose conduct

presents a risk of harm to others. *Air & Liquid Sys. Corp. v. DeVries,* 586 U.S. 446, 452 (2019) (quoting Restatement (Third) of Torts: Phys. and Emot. Harm § 7 (2005)). By contrast, an argument that a defendant should be strictly liable "begin[s] with the premise that the accident has happened even though the defendant has fully exercised reasonable care while engaging in the activity." Restatement (Third) of Torts: Phys. & Emot. Harm § 20. Because "strict liability signifies liability without fault, or at least without any proof of fault," strict liability claims contain no standard of care element. *Id.* ch. 4 Scope Note.

Nor do petitioners make any argument that clarifies their position on strict liability. They do not address, for instance, the strong evidence that Congress intended to preserve strict liability claims. *See, e.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 244-45, 258 (1984) (allowing state-law strict liability claim); S. Rep. 89-1605, at 12 (explaining that claimants will have the "benefit of a rule of strict liability if applicable State law so provides").

Petitioners have good reason to remain ambiguous about their position regarding strict liability. After all, if petitioners argued that personal injury torts with no standard-of-care element are abrogated altogether, they would have to concede that other claims with no standard-of-care element are similarly abrogated, including property claims like trespass and nuisance. That petitioners' question presented is unclear regarding whether petitioners intend to challenge respondents' strict liability claim is another reason to deny certiorari.

c. What is left is respondents' common-law negligence claim against Cotter. But it's not even clear that the question presented makes a difference as to *that* claim. The factual record on which federal regulations apply is as yet undeveloped. The district court "doubt[ed] whether the specific [] regulation Defendants seeks to require here" was "even applicable (even as to Defendant Cotter)." Pet. App. 40a n.25. And to the extent that Cotter's negligence lay in its failing to warn the public about excessive radiation, that breach took place *after* its NRC license was terminated—that is, after NRC regulations no longer applied. FAC ¶ 105. At that point, Cotter was in the same position as the other unlicensed defendants. For the reasons explained *supra*, at 14, a state-law standard of care thus must govern respondents' duty-to-warn claim.

d. Finally, assume for a moment petitioners turn out to be right, and there's at least one theory of common-law negligence respondents can't pursue without proving a violation of a federal regulation. Certiorari *still* wouldn't be warranted, because that theory of liability will go forward even under petitioners' theory. Respondents have at this stage sufficiently alleged a violation of federal regulations.

First, respondents pleaded a violation of the federal dosage limits. Respondents alleged that "Cotter released radiation into unrestricted areas in the environment in excess of the levels permitted by federal regulations in effect at the time" and cited surveys showing radiation levels that could support their claim. FAC ¶¶ 52, 71. At the pleading stage, that's more than enough.

Petitioners argue that respondents "do not allege that federal regulators ever *cited* Cotter for violating the applicable radiation limits." Pet. 10 (emphasis added). But of course, there is no rule saying that a defendant is immune from liability just because the federal government did not catch them violating federal regulations at the time. The NRC itself acknowledges that it does not issue citations for many violations of federal regulations. NRC, Enforcement Process Diagram (July 7, 2020), https://perma.cc/NDA5-XCJY.

Moreover, recall that Cotter *was* cited for "totally inadequate" surveys to test for radiation. FAC ¶ 48. It is hard to see how the Government could cite Cotter for exceeding radiation limits when Cotter refused to collect the very data that would show that it was exceeding those limits.

Second, the dosage limits are not the only federal regulations at issue. The district court was "not convinced" that the dosage regulations petitioners cite "would provide the exclusive standard of care against Defendant Cotter based on Plaintiffs' allegations." Pet. App. 45a n.30. The district court pointed out that "there are other possible sources of federal law." *Id.* For example, respondents alleged violations of a regulation governing testing and sampling. *See* 10 C.F.R. § 20.201(b) (1970) (now codified at 10 C.F.R. § 20.1501); FAC ¶ 48.

e. Not only would any of these theories of liability render the question presented immaterial as to Cotter's liability, but the amount of damages Cotter is on the hook for will not change either, regardless of the answer to the question presented. Cotter has conceded that Missouri law determines its share of damages.

Cotter Corp.'s Third-Party Comp. Cross-cls., ¶ 71. Missouri law allows joint and several liability and contribution. Mo. Rev. Stat. § 537.067 (2005). So under Missouri law, the question is not which counts respondents prove against Cotter, but instead what percentage of the damage is Cotter's fault. *Id.*

And of course, if the question presented turns out to be outcome-determinative in spite of all that, this Court will have another chance to address it at the case's conclusion.

II. Petitioners' novel reading of the statute is incorrect.

1. Start with the text of the statute. A "public liability action" is a suit "resulting from a nuclear incident." 42 U.S.C. §§ 2014(ii), (w). Under the Price-Anderson Act, a "public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." 42 U.S.C. § 2014(ii). Because the standard of care for a negligence claim is a "substantive rule[] for decision" and is not "inconsistent with the provisions" of Section 2210, it must be "derived from the law of the State." *Id.*

No one disputes that the standard of care is a "substantive rule[] for decision." A substantive rule of decision is a "legal rule[]" that "determine[s] the outcome of a litigation," not just its procedural "manner and [] means." *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). The standard of care is the classic "substantive rule for decision." Think *Erie*

itself: The Erie Railroad's standard of care was determined "under the law of Pennsylvania" because it was substantive and not procedural. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 70 (1938).

Nor do petitioners contend any longer that the state-law standards of care respondents cite are "inconsistent with the provisions of such section." As the Eighth Circuit recognized—and petitioners, at this point, do not dispute—"such section" "quite clearly refer[s] to § 2210." Pet. App. 9a. Section 2210 says nothing about the standard of care, and it certainly does not mention federal dosage regulations. Therefore, they cannot conflict.

Contrast that with substantive state laws that may well be "inconsistent with" provisions of Section 2210. For instance, a state law about punitive damages could be inconsistent with Section 2210(s), which forecloses punitive damages against parties on whose behalf the United States is obliged to make payments pursuant to a contract. State law tort defenses might be inconsistent with Section 2210(n)(1), which allows an indemnification agreement to foreclose defenses in the case of certain extraordinary nuclear occurrences. 42 U.S.C. §§ 2210(s), (n)(1).

As such, the standard of care in a public liability action for negligence must be "derived from the law of the State in which the nuclear incident involved occur[ed]"—in this case, the laws of Missouri. *See* 42 U.S.C. § 2014(ii).

2. Petitioners appear to agree that the standard of care in this case must be "derived from the law of the State." Pet. 24. But rather than give this phrase its

natural meaning, they argue that "federal law *is* 'the law of the State.'" Pet. 24.

Petitioners' explanation appears to go as follows: All state common law that relates to radioactive waste material is automatically preempted by federal law. Therefore, there is no "law of the State" to supply a standard of care. So the only "law of the State" left to apply is *federal* law.

But *Congress* certainly thought there was a "law of the State"—it wrote that mandate into the statute. Requiring the substantive law of the State to govern public liability actions would be a passing strange way to express petitioners' rule: That public liability actions be litigated according to federal law, with state law only used to "fill gaps" (Pet. 25).

Moreover, on petitioners' reading, the final clause of the public liability action provision would be entirely superfluous. That final clause states that the "law of the State" does not apply if it "is inconsistent with the provisions of" Section 2210. 42 U.S.C. § 2014(ii). If petitioners are right that the whole field of state tort law is field preempted, there would be no need for that clause, which provides only what then-Judge Gorsuch described as a "modest form of conflict preemption." *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1095 (10th Cir. 2015) (Gorsuch, J.).

Even if the statute were "susceptible to more than one reading," this Court would "have the duty to accept the reading that disfavors pre-emption." *Id.* (Gorsuch, J.). And of course, nothing in the text of the PAA renders it susceptible to petitioners' reading, "let alone favors it so clearly that we might overcome the presumption against preemption." *Id.* What's more, "[t]he case for federal pre-emption is particularly weak

where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

3. Petitioners' novel argument is also inconsistent with this Court's precedent. Petitioners cite *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), for the premise that "the federal government has occupied the entire field of nuclear safety concerns." *Id.* at 212; *see* Pet. 22. But as then-Judge Gorsuch explained, *Pacific Gas* was about preemption of "before-the-fact nuclear safety regulations." *Cook*, 790 F.3d at 1098. It did not affect "traditional after-the-fact tort remedies." *Id.*

Were there any doubt, this Court's opinion the very next year in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), made clear that federal regulation does not preempt those after-the-fact tort remedies. In *Silkwood*, this Court held that "persons injured by nuclear accidents were free to utilize existing state tort law remedies." *Id.* at 252. This Court allowed that "the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards." *Id.* But "that regulatory consequence was something that Congress was quite willing to accept." *Id.*

Even the dissenting justices in *Silkwood*, who objected to the award of punitive damages in nuclear incident cases, recognized that Congress intended such cases to be governed by state tort law, including

a "jury-imposed negligence standard." *See id.* at 268 (Blackmun, J., dissenting). As this Court later wrote, *Silkwood* made clear that state tort law "fell beyond any fair understanding of the NRC's reach." *Virginia Uranium, Inc., v. Warren*, 587 U.S. 761, 773-74 (2019).

In 1988, Congress partially abrogated *Silkwood*'s holding that state punitive damages rules govern nuclear incident cases, forbidding punitive damages against parties on whose behalf the United States must make payments pursuant to an indemnification agreement. 42 U.S.C. § 2210(s). But it did not suggest any disagreement with the other portion of *Silkwood*, explaining that state tort law elements govern underlying liability. To the contrary: The 1988 amendments to the PAA codified that piece of *Silkwood*, making clear that the "law of the State" would supply any "substantive rules for decision." *See* 42 U.S.C. § 2014(ii).

4. Legislative history confirms that, from the start, the PAA evinced a "policy of only interfering with state tort law to the minimum extent necessary." H.R. Rep. No. 100-104, pt. 1, at 20 (1987); *see also* S. Rep. No. 85-296, at 9 (1957) (emphasizing that bill will result in "no interference with the State law"); S. Rep. No. 89-1605, at 12 (1966) ("[A] claimant would have exactly the same rights . . . under [then-]existing law—including, perhaps, benefit of a rule of strict liability if applicable State law so provides.").

And the relevant expert agencies have agreed that the PAA does not preempt the field of state tort law. The U.S. Department of Energy acknowledges that the PAA preserves "the existing tort law of the State." U.S. Dep't of Energy, *Price-Anderson Act: Report to Congress* 5 (2023), https://perma.cc/JCS5-8U5X. The

NRC's regulations explain that they should not be "construed as limiting actions that may be necessary to protect health and safety." 10 C.F.R. § 20.1001(b). In addition, the NRC rejected an argument "that full compliance with the Commission's regulations . . . is evidence acceptable in a court of law that the licensee was not negligent." *In the Matter of A.N. Tschaede*, 23 N.R.C. 461, 461 (1986). The NRC explained that it "did not intend the standards to establish absolute safe levels of exposure below which no injury could occur." *Id.* at 464.

Text, structure, precedent, and other interpretive tools thus all line up against petitioners' argument.

III. There is no split worthy of this Court's attention.

No circuit has considered petitioners' novel reading of the text of the PAA, that "federal law *is* 'the law of the State.'" Indeed, no circuit before the Eighth seems to have considered the statute's text much at all.

In any case, petitioners vastly overstate any division among the circuits as to whether federal regulations provide the exclusive standard of care: Most of the language they cite is dicta, and it's not clear this case would turn out differently even in the one circuit (the Eleventh) where it's not.

1. Per petitioners, the rule that "states are preempted from imposing a non-federal duty in tort" stems from a 1991 Third Circuit case. Petitioners cite *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 859 (3d Cir. 1991), for the proposition that "the plaintiffs'

rights will necessarily be determined . . . by reference to federal law." Pet. 13.[4]

But that case was not about the standard of care at all. Recall that the PAA transforms state causes of action into federal claims. The question in the Third Circuit case was whether the PAA's unique structure—in which the claim is modeled on state substantive law—nevertheless grants courts federal question jurisdiction for Article III purposes. *TMI II*, 940 F.2d at 835-36, 854-55. The Third Circuit answered in the affirmative. It explained that although a PAA claim "may have had its origins in state law," Congress had "expressed its intention that state law provides the content of and operates as federal law." *Id.*

In addition, the Third Circuit rattled off several federal questions that would likely have to be answered in the course of analyzing a public liability action: Whether licensees would be required to waive defenses, whether punitive damages awards were precluded, and, yes, whether plaintiffs' rights would be determined "in part" (a phrase petitioners omit from their quotation, *see* Pet. 13) "by reference to federal law." *TMI II*, 940 F.2d at 858-60. All the Third Circuit said about the standard of care in a public liability action, then, is that it might involve a federal question at some point in the litigation, and that federal courts thus had jurisdiction.

The other Third Circuit case petitioners cite for their purported split is *McMunn v. Babcock & Wilcox Power Gen. Grp.*, 869 F.3d 246 (3d Cir. 2017). But

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[4] Petitioners refer to this case as *TMI I.* The Third Circuit refers to this case as *TMI II.*

neither party in *McMunn* was arguing for a state standard of care. Instead, the plaintiffs there took the position that terms in defendants' *federal* license should set the standard of care. *Id.* at 260. The Third Circuit rejected that argument. *Id.* at 260-67.

Were there any doubt, the Third Circuit has recently confirmed (in a case the petition omits) that federal regulations do not supply the exclusive standard of care in public liability actions. *See Est. of Ware v. Hosp. of the Univ. of Pa.*, 871 F.3d 273, 278 n.3, 285 (3d Cir. 2017) (there is no "legal source that would limit liability under the [PAA] to cases where exposure exceeds" federal dosage limits).

2. Petitioners are wrong about what the Sixth, Seventh, and Ninth Circuits say, too. The cases petitioners cite hold that *state*, not federal law, governs. Thus, the language petitioners reference is, at best, dicta.

Petitioners cite a Sixth Circuit case about the statute of limitations in a Price Anderson Act public liability action. Pet. 14 (citing *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997)). *Nieman* made two points, neither relevant to the question presented here. First, it held that there were no "separate causes of action" under state law—all claims arising from nuclear incidents were public liability claims under the PAA. *Nieman*, 108 F.3d at 1553. That holding isn't at issue here; respondents accept that all their claims arise under the PAA, rather than directly under state law. Second, the Sixth Circuit held that state tort law determined the statute of limitations. *Id.* at 1547-48, 1554-59. Needless to say, anything the Sixth Circuit said about federal regulations en route to choosing state law is dicta.

In the Seventh Circuit case, the court again looked to state law to determine the standard of care applicable in public liability actions. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994). Reviewing cases from the Illinois Supreme Court, the Seventh Circuit concluded that, as a matter of *Illinois* law, the state standard of care was set by reference to federal regulations. Petitioners never argue here that Missouri law chooses federal regulation to set the state standard of care.

Petitioners cite the Seventh Circuit's language that, "[e]ven if" Illinois law did not explicitly require consulting federal regulations, such "regulations must provide the sole measure of defendants' duty." Pet 14. But that language was dicta. The Seventh Circuit speculated as much only after resolving the case on state-law grounds. The Seventh Circuit has neither repeated nor relied on that language in the 30 years since.

The Ninth Circuit case petitioners cite likewise held that federal courts must base the standard of care on "what the Washington Supreme Court would likely do," not on federal regulations. *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 1004 (9th Cir. 2008). Indeed, the Ninth Circuit held that defendants were "subject to strict liability" under Washington state law. *Id.* at 1007. To be sure, the Ninth Circuit speculated that there might be other circumstances where federal regulations "would preempt" state standards of care, but that speculation had nothing to do with the outcome there. *Id.* at 1003.

3. That leaves *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305 (11th Cir. 1998), as the only case petitioners cite to have actually held that a federal,

rather than state, standard of care must apply to a negligence action under the PAA. But as the district court explained, *Roberts* is factually distinguishable. *Roberts* was a case about a worker at a nuclear power plant—the context in which the argument for "exclusive use of federal dosage regulations is strongest based on ordinary preemption principles." Pet. App. 44a. Respondents' case does not involve a nuclear plant (indeed, most of the defendants were not licensed at all), making the case for exclusive use of federal regulations far weaker.

In any event, *Roberts*' one paragraph of analysis relied heavily on its reading of the Third Circuit's caselaw. In the years since *Roberts*, the Third Circuit itself has made clear *Roberts*' reading was incorrect. *See supra*, at 26 (discussing *Ware*). The Eleventh Circuit thus may reconsider even its holding as to federally licensed facilities. *See, e.g.*, *Finestone v. Fla. Power & Light Co.*, 272 Fed. Appx. 761, 765 (11th Cir. 2008) (noting that plaintiffs would need to petition for rehearing en banc to reconsider *Roberts*; plaintiffs did not do so).

4. Finally, this case wouldn't be worthy of this Court's attention even if petitioners *could* show that the Eleventh Circuit (or any other) would apply federal, rather than state, law to the standard of care in this case. Petitioners' argument is that "the law of the State" under the PAA is federal law. Not one of the circuits cited in the petition has considered—let alone adopted—that argument. Indeed, not one of the circuits even engaged with the language of 42 U.S.C. § 2014(ii). Instead, the cases petitioner points to relied on policy considerations about "the carefully crafted balance between private involvement and safety that

Congress has achieved." *See Roberts*, 146 F.3d at 1308 (quoting *O'Conner*, 13 F.3d at 1105).

That sort of sense-of-the-statute analysis is "a relic from a bygone era of statutory construction." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019) (citation omitted). Petitioners appear to recognize as much, which is presumably why they do not defend the reasoning of those lower court decisions. This Court should not grant review based on a purported split where even petitioners do not endorse their side of that split.

IV. Petitioners' claims about the importance of the question presented are vastly overblown.

With no plausible textual argument and no court of appeals that has adopted its proffered reading, petitioners resort to consequentialism, fearmongering that the nuclear industry will go belly-up should the Eighth Circuit's opinion stand. But petitioners' doomsday scenario turns out to be implausible on closer inspection.

1. Petitioners predict that the Eighth Circuit's rule will result in so much liability that companies will be "forced to abandon the nuclear energy and defense industries altogether." Pet. 12; *see also* Pet. 4. But remember, key players in the nuclear industry are protected from catastrophic liability: Congress implemented a system of insurance, self-insurance, and indemnification, combined with liability caps that ensure that none of them will pay a dime in damages. *Supra*, at 3-4.

The petition notes that liability for nuclear incidents between 1957 and 2018 has totaled $522 million in insured losses. Pet. 20 (citing NRC, *The*

Price-Anderson Act: 2021 Report to Congress xx, 1-2 & n.4 (Dec. 2021), https://perma.cc/BN82-HULN). Put that number in perspective: Congress has mandated that important players in the nuclear industry maintain commercial liability insurance that will cover $500 million *per nuclear incident*. NRC Report, *supra*, at xvii. That means that even counting lawsuits prior to 1988—when plaintiffs were suing entirely under state causes of action—the aggregate liability for *all* nuclear incidents barely exceeded the commercial liability coverage for just *one* nuclear incident.

To be sure, Cotter isn't fully part of that scheme. It was not one of the nuclear industry players required to maintain financial protection or secure an indemnification agreement. (Though Cotter may still avoid paying damages: The Federal Circuit recently ruled that Cotter may be indemnified. *Cotter Corp., N.S.L. v. United States*, 127 F.4th 1353, 1366 (Fed. Cir. 2025).) But that was Congress's considered decision. Congress was primarily concerned with entities like nuclear power plants, whose facilities generated critical electricity and who faced the greatest exposure in the event of a nuclear disaster. As to *those* entities, Congress created an extensive financial backstop. Congress simply was not concerned about players like Cotter, which it believed could use ordinary insurance strategies to manage risk. S. Rep. 94-454, at 14 (1975).

2. Petitioners' second sky-is-falling claim—that using state-law negligence standards in public liability actions "effects a startling expansion of liability" (Pet. 16)—fares no better.

In the mine run of cases, the difference between liability predicated on violations of federal regulations and liability predicated on state-law negligence standards will be no difference at all. *See, e.g., Taylor v. Interstate Nuclear Servs., Inc.*, 1999 WL 35809694, at *11 (D.N.M. Apr. 7, 1999) (state standard of care turned out to be "exactly the same" as federal regulations); *Corcoran v. New York Power Auth.*, 935 F. Supp. 376, 388 (S.D.N.Y. 1996) (to prove violation of state law, plaintiffs had to prove violation of federal dose limits). And even where state law does not automatically track federal law, federal regulations are often still relevant to identifying the state-law standard of care in a negligence action. *See, e.g.*, *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 221 (D. Me. 1996) (violation of state law "may be difficult to establish in the absence of proving a violation of the federal safety standards"). The Eighth Circuit noted as much in this very case. Pet. App. 10a n.2.

For claims arising after 1991, the delta between federal regulations and state-law negligence standards is smaller still, for two reasons. First, in 1991, the NRC issued new regulations reducing the annual permissible exposure rate fivefold from the rates that governed in the 1960s and 1970s. *See In re TMI*, 67 F.3d 1103, 1111 n.18 (3d Cir. 1995) (citations omitted). Almost by definition, then, a modern-day operator who has complied with federal regulations will have taken the kind of due care that would satisfy a state-law standard of care, too.

Second, also in 1991, the NRC mandated that the nuclear industry was required to keep radiation releases "as low as reasonably achievable"—even if

that required them to maintain an exposure rate even lower than the stringent federal regulations. *See Finestone v. Fla. Power & Light Co.*, 272 Fed. Appx. 761, 765-66 (11th Cir. 2008) (citation omitted) ("as low as is reasonably achievable" standard governs post-1991 claims); *McCafferty v. Centerior Serv. Co.*, 983 F. Supp. 715, 720 (N.D. Ohio 1997) (same). As the Third Circuit put it, an "as low as is reasonably achievable" standard is "essentially" the same as a common-law negligence standard. *In re TMI*, 67 F.3d at 1115 (citation omitted). At this point, then, state and federal standards of care have more or less converged, and the question presented does not particularly matter.

Petitioners protest that the problem isn't the state-law negligence standard itself, but "lay juries" who will "Monday morning quarterback" defendants' decisions. Pet. 4, 20. But of course, if Congress was worried about lay juries, it could have required a bench trial for Price Anderson Act claims. It has done so for other kinds of cases. *See, e.g.*, 28 U.S.C. § 2402 (bench trial for Federal Tort Claims Act cases). It didn't, presumably because juries occupy "so firm a place in our history and jurisprudence." *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109, 121 (2024) (citation omitted). We trust juries to make all sorts of important decisions, including in highly complex areas of the law governed by comprehensive federal regulations. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 559-63, 581 (2009) (allowing jury to decide, in a state tort suit, whether intra-arterial injection warning on antihistamine drug label constituted a failure to warn under FDA regulations). Petitioners offer no reason this case would be any different.

3. One final note: The question presented is relevant to a dwindling category of lawsuits. Resolving the question presented requires this Court to wade into petitioners' interpretation of 50-year-old regulations, which have changed a dozen times since. *See* Pet. 26 (citing federal regulations from 1970 as governing). And the egregiously careless conduct at issue in this case—mixing nuclear waste into soil without taking any precautions—is similarly an artifact of the 1960s and 1970s; no modern-day nuclear operator or handler of radioactive waste material would do the same.

To be sure, as petitioners note, cases may continue to arise from decades-old conduct, governed by decades-old regulations. But their numbers will dwindle. Arguments over the details of that era are not worth this Court's time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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