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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This is a textbook case for certiorari. There is a clean and acknowledged split on the question presented: five "circuits have held that federal law preempts state standards of care in a public liability action," while the Eighth Circuit "disagree[s]." Pet.App.10a. That disagreement was outcome determinative: the district court concluded that the "imposition of [a federal] standard [of care] would lead to the *dismissal of the action*." Pet.App.15a (emphasis added). And the question presented is recurring and pivotal for the American nuclear industry: amici warn that the Eighth Circuit's rule "would wreak havoc on nuclear operators" and "destroy the regulatory stability that the industry requires." NEI Br. 3-4.

Plaintiffs' shotgun opposition changes none of this. Plaintiffs acknowledged below that other circuits disagree with the Eighth Circuit's rule. Plaintiffs fought for years over the question presented, understanding the issue to

be critical. Plaintiffs' vehicle issues were of no concern to the Eighth Circuit, which granted interlocutory review to address the question presented. And plaintiffs' claim that the petition's merits theory is new is mystifying, given that petitioners' argument has always been that federal law provides the exclusive standard of care via preemption.

I. The Split Is Clean and Acknowledged

"[F]ive … circuits have concluded federal nuclear safety standards control in a PAA action, rather than traditional state tort standards of care." *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1144 n.19 (10th Cir. 2010). As plaintiffs recognized below, "federal regulations provide the exclusive standard of care" in PAA actions in the Third, Sixth, Seventh, Ninth, and Eleventh Circuits. C.A. Plaintiffs' Br. 40-42 (No. 23-3709). The Eighth Circuit acknowledged that consensus and broke it, choosing "a path different from [its] sister circuits." Pet.App.10a-11a. Only this Court can resolve this "conceded circuit split on an exceedingly important issue" for the industry. NEI Br. 6.

Plaintiffs' efforts to now downplay the split are meritless.

Third Circuit. Plaintiffs (at 25-26) incorrectly contend that the first Three Mile Island ("*TMI*") case was "not about the standard of care," and they entirely ignore the second *TMI* case, which reinforced that state tort standards of care are preempted. In *TMI I*, the Third Circuit held that public liability actions were federal-law actions *because* federal regulations would set the standard of care. *In re TMI Litig. Cases Consol. II* ("*TMI I*"), 940 F.2d 832, 859-60 (3d Cir. 1991). As the Third Circuit in *TMI II* confirmed, *TMI I* "*held* that federal law

preempted state law on the duty of care" and clarified further that federal dosage regulations set the exclusive standard. *In re TMI* ("*TMI II*"), 67 F.3d 1103, 1007, 1113 (3d Cir. 1995) (emphasis added).

Plaintiffs (at 26, 28) cite a footnote in *Ware v. Hospital of the University of Pennsylvania*, which they erroneously assert "made clear" that state law supplies the standard of care. 871 F.3d 273, 278 n.3 (3d Cir. 2017). *Ware* instead observed that the parties "agree[d]" that the plaintiff could "only state a claim for relief if" federal dosage regulations were breached. *Id.* at 278. The court footnoted that the parties did not cite authority for that view, but the court had "no occasion" to dispute it. *Id.* at 278 n.3. That critique of the parties' deficient briefing is not a repudiation of *TMI I* and *II*'s holdings. And even if it were, there would still be a 4-2 split requiring this Court's resolution.

Sixth Circuit. Plaintiffs do not dispute that the Sixth Circuit agrees with the Third that "federal regulations" determine "the applicable standard of care" in a public liability action. *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1552 (6th Cir. 1997). Plaintiffs (at 26) dismiss this statement as "dicta." But the Sixth Circuit later confirmed that *Nieman* "joined with almost every other circuit in *holding* that NRC safety regulations conclusively establish the duty of care" in PAA actions. *TNS, Inc. v. NLRB*, 296 F.3d 384, 398 (6th Cir. 2002) (emphasis added).

Seventh Circuit. Plaintiffs (at 27) also dismiss as "dicta" the Seventh Circuit's rule in *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994), that federal law sets the standard of care in public liability actions. But the Seventh Circuit announced that rule as an alternative holding, *id.*, which means it has "precedential force as a matter of stare decisis." *Boogaard v. Nat'l*

Hockey League, 891 F.3d 289, 295 (7th Cir. 2018) (Barrett, J.) (citation omitted).

Ninth Circuit. Plaintiffs (at 27) suggest that *In re Hanford*'s preemption holding "had nothing to do with the outcome." But *Hanford* explained that "federal law preempts states from imposing a more stringent standard of care" as a premise to its conclusion that state strict liability was proper only where no federal safety standards existed. 534 F.3d 986, 1003, 1007 (9th Cir. 2008). So the Eighth and Tenth Circuits unsurprisingly understood *Hanford* to "h[o]ld" that federal law sets the standard of care in a public liability action. Pet.App.10a; *supra* p. 2.

Eleventh Circuit. Plaintiffs (at 27-28) admit that the Eleventh Circuit diverges with the Eighth. Their only retort is that the cases are "factually distinguishable." That is beside the point. The liability rule that governs the industry in the Eleventh Circuit conflicts with the decision below.

Plaintiffs cannot muddy this crystal-clear conflict on an issue that demands uniformity.[1]

II. The Question Presented Is Enormously Consequential and Squarely Presented

1. The correct standard of care in a public liability action is a recurring, exceptionally important issue. Plaintiffs (at 29) accuse petitioners of "fearmongering," but the nuclear industry correctly sounds the alarm: the Eighth

[1] Plaintiffs (at 28-29) suggest that the clean split does not warrant review because the circuits have not considered the precise statutory arguments offered here. Incorrect. Every circuit listed above answered the question presented. And the Third and Eleventh Circuits expressly rejected the notion that 42 U.S.C. § 2014(ii) defeats preemption. *See TMI II*, 67 F.3d at 1106-07; *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1307-08 (11th Cir. 1998).

Circuit's "destabilizing and dangerous" rule will "wreak havoc on nuclear operators." NEI Br. 3-4.

a. Plaintiffs (at 29-30) tell the Court not to worry because indemnity and insurance provide a backstop. But whether parties ultimately get reimbursed for liability is irrelevant to whether this Court should grant certiorari. Why? Because liability has enterprise-shaping consequences. Adverse jury verdicts raise insurance premiums, inflict reputational damage, and affect ongoing operations. The Eighth Circuit's rule ushers in a "new era of uncertainty" that could "destroy the regulatory stability that the industry requires to make long-term capital investments." NEI Br. 3-4, 11. Nor can possible indemnity solve the industry's immediate safety concerns. In the Eighth Circuit, "juries may reject nuclear-safety rules that they perceive as counterintuitive" but "are actually best practices." *Id.* 12-15. At bottom, what matters here is that the question presented has divided circuits, is recurring, and demands uniformity.

In any event, attaining indemnity is costly and not guaranteed, as the government has strenuously resisted indemnity. *See, e.g.*, *Tex. Instruments v. United States*, 2011 WL 2784579 (Fed. Cl. June 13, 2011); *Cotter Corp., N.S.L. v. United States*, 127 F.4th 1353 (Fed. Cir. 2025). Cotter alone has incurred tens of millions in defense and liability costs while waiting for and in pursuing indemnity from the government. Moreover, Cotter's alleged liabilities here are uninsured because Cotter was not required to carry insurance under the PAA.

b. Plaintiffs (at 30-31) next assert that the difference between state and federal standards of care will make "no difference" "[i]n the mine run of cases." But their authorities say no such thing. The first held that equivalent state dosage regulations set the standard of care *when* regulatory authority had been expressly delegated to the state.

Taylor v. Interstate Nuclear Servs., Inc., 1999 WL 35809694, at *11 (D.N.M. Apr. 7, 1999). And the second case held that federal dosage regulations preempt even state-law intentional torts. *Corcoran v. N.Y. Power Auth.*, 935 F. Supp. 376, 387-88 (S.D.N.Y. 1996). Both cases recognized the meaningful difference between state and federal standards. Regardless, the nuclear industry needs the predictability of federal rules, not juries' after-the-fact application of state standards.

Plaintiffs (at 31-32) claim that state and federal standards are similar because in 1991, NRC passed stricter dosage regulations and instructed licensees to keep radioactive releases "as low as reasonably achievable" (ALARA). Yet these 1991 regulations have existed for the entire life of the circuit split, and plaintiffs still bring cases under state law, and courts dismiss them based on preemption. *See, e.g.*, *Roberts*, 146 F.3d at 1308.[2] Moreover, absent preemption, nothing stops states from imposing a stricter standard of care—and indeed plaintiffs here raise strict liability claims under Missouri law, making compliance with the federal standard irrelevant. In any event, the post-1991 regulations do not apply in cases (like this one) stemming from pre-1991 conduct. *See also, e.g.*, *Banks v. Cotter Corp.*, 2019 WL 1426259 (E.D. Mo. Mar. 29, 2019).

c. Plaintiffs' suggestion (at 33) that the question presented is becoming less important with time borders on unserious: "nuclear power plants" already "generate almost 20 percent of the electricity in America," *NRC v.*

[2] Moreover, to the extent plaintiffs suggest ALARA is part of the federal standard of care, the first circuit case they cite held that ALARA is not. *TMI II*, 67 F.3d at 1114. And the second—contrary to plaintiffs' characterization (at 32)—said it was "not called upon to decide whether" ALARA governs post-1991 claims. *Finestone v. Fla. Power & Light Co.*, 272 Fed. App'x 761, 766 (11th Cir. 2008).

Texas, 145 S. Ct. 1762, 1769 (2025), and the United States "is looking … to *triple*" its nuclear energy capacity "over the coming decades," largely because of the staggering demands of "cloud computing and artificial intelligence," NEI Br. 8 & n.2. The standard of care in tort suits arising from the federally regulated material involved in these enterprises should not remain fractured.

2. This case is a picture-perfect vehicle. For all the opposition's bluster, the district court certified a controlling question of law under 28 U.S.C. § 1292 and stated point blank that it would have dismissed this case had it applied the federal standard of care. Pet.App.15a. The Eighth Circuit accepted certification and limited its holding to the question presented.

a. Plaintiffs (at 11) note the case's interlocutory posture. But this Court regularly grants certiorari in preemption cases on interlocutory appeal.[3] Here, a limited and dispositive appeal is a virtue, not a vice. The district court certified this "controlling" "question of law" because reversal "would terminate the action." Pet.App.14a-15a. This posture also ensured that the decision below cleanly and narrowly focused only on the question presented.

b. Plaintiffs' next vehicle argument (at 11, 28-29)—that the petition's merits theory was not presented below—is bewildering. Petitioners' theory always has been that federal law provides the standard of care in public liability actions because federal law preempts state "regulat[ion of] radiation safety … through common law" standards of care. C.A. Cotter Br. 24.

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[3] *See, e.g.*, *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024); *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012); *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003).

The Eighth Circuit rejected petitioners' argument based on the view that a subpart of a definitions section (section 2014(ii)) defeats preemption by directing federal courts to apply state substantive law in public liability actions. Petitioners' response is not new. The petition argues that section 2014(ii) operates against the backdrop of already-existing preemption, which has "displace[d] any overlapping state standard." Pet. 24. Applying state substantive law therefore means applying federal law for the standard of care. *Id.* Petitioners' argument below was the same: "one part of one section taken out of context" cannot defeat preemption because it operates against the "backdrop of federal preemption[] and surrounding federal regulatory structure." C.A. Cotter Reply Br. 1. That bell was struck repeatedly:

- Because "ordinary preemption principles still operate," section 2014(ii) "should be read in conjunction with the field preemption operating throughout … the larger statutory scheme." C.A. Cotter Br. 22, 28.
- Section 2014(ii) "works in conjunction with the broader field preemption of nuclear safety standards." *Id.* at 29; C.A. Cotter Reply Br. 10-11.

In any event, petitioners can of course provide additional reasons in this Court why the Eighth Circuit's reasoning was incorrect.

c. Finally, plaintiffs (at 13-19) state that regardless of the question presented, they have other claims against other defendants and other ways for them to win on their ordinary negligence theory. These are more red herrings. As the district court found, the "driving force behind the resolution of the present action" is "[t]he standard of care." Pet.App.17. Plaintiffs' alternate claims for negligence per se and civil conspiracy require an underlying

nuclear-safety related tort. Plaintiffs thus tied their claims together. *See, e.g.*, Compl. ¶¶ 125, 146. And plaintiffs' remaining strict liability claim would also be preempted, because when Congress preempts state tort duties, it preempts strict liability claims as well. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-24 (2008). So the district court rightly understood that plaintiffs' entire "*action*" would be dismissed if federal law preempts state standards of care. Pet.App.15a (emphasis added).

Plaintiffs similarly ignore the record in claiming (at 17) that the complaint alleged violations of the applicable federal dosage limits. Plaintiffs' one-line allegation was entirely conclusory—the complaint did not mention what the dosage limits were at the time, how Cotter had exceeded them, or whether plaintiffs were exposed by Cotter in excess of federal levels. And the "surveys" plaintiffs reference (at 17) show no releases, let alone exposure to plaintiffs, above the federal levels. Compl. ¶¶ 60-61. Small wonder that the district court did not credit these allegations and concluded: "the standard of care … is controlling because resolution of the standard of care, and the potential imposition of [petitioners'] proposed standard, would lead to the dismissal of the action." Pet.App.15a.

Plaintiffs (at 14) also point to claims against parties that are not before this Court. But even if plaintiffs have other claims against other defendants, that is irrelevant when a petition presents an outcome-determinative question on an independent theory of liability for the parties before the Court—especially when the answer will affect many other cases. *See, e.g.*, *Allen v. Cooper*, 589 U.S. 248, 252-54 (2020) (resolving claims against some of several defendants).

III. The Decision Below Is Incorrect

Like the Eighth Circuit, plaintiffs do not dispute that federal law preempts state "before-the-fact nuclear safety regulations." BIO 22 (citation omitted); Pet.App.7a. Plaintiffs just resist the logical implication: that preemption extends to after-the-fact regulation imposed by state tort law, too. Pet. 23-24.

1. When federal law preempts state regulation, there is "no exception for state common-law duties and standards of care." Pet. 24 (quoting *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012)). To the contrary, state tort law "disrupts the federal scheme" as much as (and often more than) written regulations. *See* Pet. 24-25 (citations omitted). Plaintiffs do not dispute this general proposition.

Instead, plaintiffs (at 22-23) claim that *Silkwood v. Kerr-McGee Corp.* held that the PAA does not preempt state tort standards of care. But *Silkwood* was a case about *remedies*—it held merely that then-existing federal law did not preempt state punitive damage awards. 464 U.S. 238, 258 (1984). Plaintiffs (at 23) assert that "this Court" confirmed their overbroad reading of *Silkwood*, but what plaintiffs call "this Court" is a three-Justice opinion, and even that opinion stated that *Silkwood* was about whether federal law "preempted state tort *remedies*." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 773 (2019) (emphasis added) (opinion of Gorsuch, J.).

Plaintiffs (at 21) resort to the presumption against preemption. But nuclear safety is not a "field which the States have traditionally occupied." *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted).

2. Like the Eighth Circuit, plaintiffs (at 19-21) rely on 42 U.S.C. § 2014(ii), which they fundamentally misconstrue. Section 2014(ii) is like an *Erie*-style choice-of-law

clause; it tells federal courts to proceed substantively as if the public liability action had been brought in state court—"the substantive rules for decision … shall be derived from the law of the State." When preempted, the law of the state is provided by federal law. Thus, in federal court (just as in state court) federal law provides the standard of care, and state law provides everything else, but only to the extent it is not otherwise preempted. Pet. 25; NEI Br. 19-20. Section 2014(ii) is hardly "superfluous." *Contra* BIO 21.

3. Plaintiffs' inapposite agency guidance does not bolster their textual case. Plaintiffs (at 24) misread 10 C.F.R. § 20.1001(b) as an anti-preemption provision. That provision is a necessity defense, which states that the regulations do not "limit[] actions that may be necessary to protect health and safety"; "actions" means a nuclear operator's literal preventative "actions," *i.e.*, conduct necessary to avert a nuclear threat, not "actions" as in tort suits.

Plaintiffs' cited DOE report simply states (in passing) that the PAA "operates *on top of* the existing tort law of the State,"[4] not that the PAA "preserves" anything, *contra* BIO 23.

Plaintiffs (at 24) also overread *In re A.N. Tschaeche*, 23 N.R.C. 461 (1986). That NRC decision did not answer the preemption question here; it simply denied a request for rulemaking because NRC "has no … authority" to "promulgate rules of evidence for the courts." *Id.* at 463. Plaintiffs (at 24) quote the NRC out of context as saying that it "did not intend [federal] standards to establish absolute safe levels of exposure below which no injury could occur," but NRC was explaining that, as an evidentiary

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[4] DOE, *Price-Anderson Act: Report to Congress* 5 (Jan. 2023), https://tinyurl.com/5n6u5z7j (emphasis added).

matter, it could not make a "technical … finding" that no injury can occur from radiation below the dosage limits. *Id.* at 464. NRC was not taking a position on preemption.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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JULY 16, 2025