No._______

In the Supreme Court of the United States

ESTATE OF JEFFREY H. WARE, BY BARBARA BOYER, INDIVIDUALLY, ON BEHALF OF WRONGFUL DEATH BENEFICIARIES AND AS ADMINISTRATRIX OF THE ESTATE OF JEFFREY H. WARE

Petitioner,

v.

HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, ET AL.

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in applying the Price-Anderson Act to a case where Petitioner was injured while conducting research at the University of Pennsylvania with radioactive materials?

2. Did the District Court err by not remanding the state law claims once the Price-Anderson Act claims were voluntarily withdrawn by Petitioner?

PARTIES TO THE PROCEEDING

Petitioner, Estate of Jeffrey H. Ware, by Barbara Boyer, individually, on behalf of wrongful death beneficiaries and as Administratrix of the Estate of Jeffrey H. Ware was the Appellant in the court below. Respondents, Hospital of the University of Pennsylvania, University of Pennsylvania, University of Pennsylvania Perelman School of Medicine, University of Pennsylvania Trustees, Ann R. Kennedy D.S.C., Gary Kao, M.D., Michelle Alonso-Basanta, M.D., were the Appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Estate of Jeffrey H. Ware, by Barbara Boyer, individually, on behalf of wrongful death beneficiaries and as Administratrix of the Estate of Jeffrey H. Ware respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Third Circuit is unreported, but is reproduced in the Appendix ("App.") at 1a. The Order of the District Court for the Eastern District of Pennsylvania is unreported, but is reproduced in the Appendix ("App.") at 35a.

JURISDICTION

The judgment of the Third Circuit was entered on September 18, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter concerns the Price-Anderson Nuclear Industries Indemnities Act (the "Price Anderson-Act") and 42 U.S.C. § 2210(n)(2). The Price-Anderson Act provides for removal of claims arising from nuclear occurrences. Section 2210(n)(2) grants the District Courts original jurisdiction over any "public liability action arising out of or resulting from a nuclear incident."

STATEMENT OF THE CASE

INTRODUCTION

This matter concerns the tragic death of Jeffrey H. Ware, ("Dr. Ware"), a brilliant neuroscientist and researcher at the University of Pennsylvania. Dr. Ware died at the age of 47 from gliosarcoma, an exceedingly rare form of brain cancer associated with radiation exposure. For several years, Dr. Ware was unwittingly exposed to radiation while researching the biological effects of radiation on animals as a means to understanding the health risks to humans traveling in space and developing countermeasures to such risks.

Petitioner, Barbara Boyer, Dr. Ware's wife, brought this action in an attempt to recover damages as a result of the tremendous suffering that she, Dr. Ware, and their family endured as a result of Respondents' negligent, reckless, and fraudulent conduct.

The nature of this case is a survival action under the Survival Act, 42 Pa.C.S.A. § 8302, on behalf of the Estate of Jeffrey H. Ware and a wrongful death claim under the Wrongful Death Act, 42 Pa.C.S.A. § 8301, on behalf of the statutory beneficiaries under this Act.

> Where a death is caused by negligence, two actions may be brought after death: (1) a "death action" which under statute is for the benefit of the enumerated relatives, such as the husband and children in this case and such action is measured by the pecuniary loss

> sustained by them; and (2) a "survival action," a right which continues after death in the decedent's personal representative. The damages recovered in such action are measured by the pecuniary loss to decedent and therefore accrue to her estate.

Burns v. Goldberg, 210 F.2d 646, 648 (3d Cir. 1954). This matter is on appeal in response to the District Court's Order granting Summary Judgment in favor of all Respondents on all Counts of the Petitioner's Amended Complaint. JA-0006 [Or. 09/08/2016]. Barbara Boyer asserts that the District Court erred in denying Petitioner's Motion to Remand and granting Respondents' Motions for Summary Judgment.

STATEMENT OF FACTS

A. Background Facts

In 2008, the University of Pennsylvania ("Penn") was awarded a $10 million grant from the National Space Biomedical Research Institute ("NSBRI") to study the acute effects of space radiation. JA-0452 [Amend. Compl. 01/20/2015 ¶ 33]. The goal of the study was to better understand the acute (i.e., relatively immediate) effects of radiation on astronauts in space, such as during extended exploration on the moon. JA-0454 [*Id.* at ¶ 42]. Respondent, Ann R. Kennedy, D.S.C., ("Dr. Kennedy"), a Penn radiation biologist, was the principle investigator on the NSBRI research study, but other Penn scientists and physicians, including, Respondent Gary Kao, M.D., ("Dr. Kao") served as co-investigators. JA-0454 [*Id.* at ¶ 43].

Dr. Ware, a neuroscientist and researcher, worked at the University of Pennsylvania for more than 15 years. JA-0452 [*Id.* at ¶ 27]. During this time he enjoyed an excellent reputation as a researcher who exceeded expectations in his annual evaluations. JA-0452 [*Id.* at ¶ 28]. Dr. Ware was hired by Dr. Kennedy to work on the NSBRI research study because of his expertise in the use of protease inhibitors to prevent biologic changes that can lead to cancer. Dr. Ware's particular area of expertise, namely the study of how dietary supplements and protease inhibitors could be used effectively to protect against DNA damage, was a key part of Dr. Kennedy's work with NSBRI. JA-0454 [*Id.* at ¶ 46].

This radiation research attracted millions of research dollars. JA-0452 [*Id.* at ¶ 33]. Despite this, Penn and its various corporate entities, along with Dr. Ware's supervisors and research coordinators, failed to take appropriate precautions to protect Dr. Ware from the various forms of radiation that were the subject of his many years of study.

The list of failures on the part of Penn to observe and take appropriate actions for the well-being of its researchers is extensive. Penn's researchers were expected to handle radioactive material, be in close contact with irradiated animals, and experience prolonged indirect and direct exposure from various irradiating machinery, all without adequate protective equipment and monitoring. JA-0457 [*Id.* at ¶ 63]. Perhaps most importantly, Dr. Kennedy's research scientists were not provided individual dosimeter badges, which would have allowed each individual's radiation exposure to be monitored, a safety measure that was required elsewhere in the industry and at Penn. JA-0456 [*Id.* at ¶¶ 59-60]. The Kennedy lab was often severely understaffed and had a high turnover of employees. Dr. Ware was not the only member of the research team to suffer from and eventually die of cancer. JA-0458 [*Id.* at ¶¶ 69-73].

In stark contrast to the lack of safety precautions for Dr. Kennedy's human researchers, the welfare of the animal subjects was closely monitored. JA-0456 [*Id.* at ¶ 54]. For example, the ferrets were to be studied in exquisite detail as to their vomiting reactions. If any particular ferret vomited excessively in the first several hours after radiation exposure, the animal would be removed from the study and euthanized. JA-0456 [*Id.* at ¶ 57].

Dr. Ware was diagnosed with brain cancer in October, 2010, after a period of time during which he exhibited signs of cognitive dysfunction, such as memory loss and confusion. JA-0465 [*Id.* at ¶ 117]. Following two craniotomies performed at the Hospital of the University of Pennsylvania, the pathology revealed that Dr. Ware's brain cancer was a gliosarcoma, a highly uncommon form of malignant brain cancer that the medical literature associates with radiation exposure. JA-0465 [*Id.* at ¶ 118].

Dr. Ware was then unwittingly turned into a research subject and was enrolled without proper and legal consent, in an experimental study that offered him no real treatment benefit. JA-0466 [*Id.* at ¶ 120]. Respondent Michelle Alonso-Basanta, M.D. ("Dr. Alonso-Basanta"), and other Penn physicians, recommended that Dr. Ware undergo chemotherapy and radiation as a means of slowing the progression of the disease, while making representations to Dr.

Ware and his family that these treatments would improve Dr. Ware's quality of life. JA-0465 [*Id.* at ¶ 118]. However, given the advanced stage of his brain cancer and the extremely poor prognosis, there was little benefit to Dr. Ware undergoing these treatments. JA-0466 [*Id.* at ¶ 120]. Additionally, on November 24, 2010, during a visit in which Barbara Boyer could not accompany her husband, Dr. Ware was enrolled into a research study by Dr. Alonso-Basanta to study the effects of the chemotherapy and radiation on brain cancer patients. JA-0466 [*Id.* at ¶ 122].

In an effort to cover up its terrible record of radiation safety and to protect millions of research dollars, Respondents concealed and withheld documents and data related to Dr. Ware's exposure. Dr. Ware's medical records refer to the experimental research study as an "imaging study," but Penn has failed to release to Dr. Ware's family any further details of this experimental study. JA-0466 [*Id.* at ¶ 123].

Dr. Ware and his family suffered tremendously as a result of the brain cancer and from complications and side effects of the disease and treatments he received. JA-0472 [*Id.* at ¶ 159].

Respondents' fraudulent conduct, in addition to the reckless and outrageous disregard for Dr. Ware's health and well-being during the many years he dedicated himself to his research, provided the basis for the action against the Respondents for both compensatory and punitive damages under Pennsylvania's Survival Act and under the Wrongful Death Act. See 42 Pa.C.S.A. §8302; 42 Pa.C.S.A. § 8301.

B. Proceedings Below

Petitioner originally filed this case in the Court of Common Pleas of Philadelphia County, Pennsylvania, on December 03, 2013. JA-0065 [Compl. 12/03/2013]. All of Petitioner's claims were based on state law. *Id.* On January 2, 2014, Respondents filed a Notice of Removal pursuant to the Price-Anderson Act. JA-0140 [Notice of Removal 01/02/2014]; *see also* 42 U.S.C. § 2210(n)(2).

Section 2210(n)(2) grants the District Courts original jurisdiction over any "public liability action arising out of or resulting from a nuclear incident." On January 27, 2014, Petitioner filed a Motion to Remand which was denied. JA-0293 [Pl.'s Mot. to Remand 01/27/2014]. After Petitioner's Motion to Remand, was denied by Judge Edward G. Smith, Petitioner amended her Complaint, pursuant to Court Order. JA-0004 [Or. 12/19/2014].

The Amended Complaint filed on January 20, 2015, replaced Petitioner's state law negligence claims with two claims labeled as "Negligence Action under Price Anderson Act," accompanied by four other state law claims against various combinations of Respondents. JA-0446 [Amend. Compl. 01/20/2015].

Respondents then conducted limited discovery on the Price-Anderson Act issues. On December 09, 2015, Petitioner submitted a letter to the Court stating that she would not be able to submit supporting expert reports and would be withdrawing her Price-Anderson Act claim. JA-0728 [Pl.'s Ltr. to the Ct. 12/09/2015].

On December 14, 2015, Petitioner moved to voluntarily dismiss her two negligence Action under the Price Anderson Act claims without prejudice and to remand the remaining claims to the Philadelphia Court of Common Pleas. JA-0729 [Pl.'s Mot. to Withdraw Counts I and II and to Remand Counts III, IV, V, and VI to the Phila. Ct. of Com. Pleas. 12/14/2015]. Following this, on December 16, 2015, Petitioner entered into a Joint Stipulation to Dismiss, which voluntarily dismissed her claims against the National Space Biomedical Institute and the Center for Acute Cancer Radiation Research, with prejudice. JA-1174 [Jt. Stip. to Dismiss 01/04/2016].

Respondents then filed multiple Motions for Summary Judgment on all counts of Petitioner's Amended Complaint. Respondents filed two Motions for Summary Judgment on December 29, 2015. JA-0901 [Mot. for S.J. 12/29/2015]; JA-0921 [Mot. for. S.J. 12/29.2015]. On September 8, 2016, Judge Joseph F. Leeson, Jr., issued the Order granting Respondents' Motions for Summary Judgment. JA-0006 [Or. 09/08/2016]. A timely Notice of Appeal was filed on October 4, 2016. JA-0001 [Pl.'s Notice of App. 10/04/2016].

REASONS FOR GRANTING THE WRIT

I. The District Court erred in finding that the Price-Anderson Act applies to this case where the Plaintiff was injured while conducting research at the University of Pennsylvania with radioactive materials.

The case presently before the Court is one of first impression. The District Court incorrectly held that the Price-Anderson Act, which provides federal jurisdiction over "any public liability action arising out of or resulting from a nuclear incident," applies in this case. JA-0008 [Rpt. and Recommendation 05/05/2014]. The District Court, in reaching its opinion that the Price-Anderson Act applied to the Petitioner's injuries, reasoned as follows:

> Having canvassed relevant decisions from other circuits, I agree with the reasoning of those courts that have interpreted the term "public liability action" broadly to include any suit in which a party asserts that another party bears legal liability arising out of an incident in which the hazardous properties of radioactive material caused bodily injury, sickness or property damage. *See Cotroneo*, 639 F.3d at 194 (5th Cir. 2011) (determining that under this definition claims by workers who were employed to clean up radioactive materials at a former nuclear source fabrication facility arose under the PAA). I do not believe, as Plaintiff suggests, that the PAA is limited to "nuclear incidents occurring at utilization and production facilities and other licensed facilities." *See* "Plaintiff's Reply in Opposition of Defendants' Response to Motion to Remand" [Document 15]12, at 4.
>
> The statutory analysis of those courts which have concluded that possession of a license for radioactive material and/or an indemnification

> agreement is unrelated to establishing jurisdiction under PAA is, to me, persuasive and I adopt it. *See Carey v. Kerr-McGee*, 60 F.Supp.2d at 803-807 (N.D. Ill. 1999)(explaining that in the absence of an express definition, the term "occurrence" which is used in the definition of "nuclear incident" should be given its common ordinary meaning and not read restrictively, as the *Gilberg* Court did, to narrow the intentionally broad class of nuclear liability cases for which Congress created federal jurisdiction under the PAA). *See also Acuna v. Brown & Root, Inc.,* 200 F.3d at 339-340 (5th Cir. 2000)(concluding that there is nothing in the definition of nuclear incident which suggests that removal under the PAA is contingent on licensing or an indemnification agreement).

JA-0008 [*Id.* 05/05/2014]. The District Court is wrong and should be reversed. Its holding is inconsistent with the intent of Congress and application of the Price-Anderson Act under established jurisprudence. A review of the cases cited by the District Court demonstrates that the Price-Anderson Act was not intended to and should not cover university-based radiation-related research activities such as are at issue here.

A. The clear intent of Congress was to limit the application of the Price-Anderson Act to the nuclear energy and weapons industries.

The Supreme Court, in interpreting a statute, has determined that "where Congress has made its intent clear, 'we must give effect to that intent.'" *Miller v. French*, 530 U.S. 327, 336 (2000). Additionally, the Supreme Court has determined that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *Natl. R. R. Passenger Corp. v. Natl. Ass'n of R. R. Passengers*, 414 U.S. 453, 458 (1974).

In *Natl. R. R. Passenger Corp.*, the Supreme Court undertook the task of interpreting a section of an act that created a public cause of action and allowed a private cause of action only in very limited situations. In making a determination as to whether the act would provide a private cause of action such as the one contemplated in that case, the Supreme Court looked to the legislative history of the act. *Id.* at 458.

One of the proposed amendments to the act would have authorized the private cause of action in question. *Id.* at 459. Ultimately, after a review of the act's legislative history, the Supreme Court determined that the Committee's deliberate failure to adopt that proposal was "…substantial indicia that the legislators understood…" that the act would preclude the type of private cause of action being asserted by the respondent. *Id.* at 461. Additionally, the Supreme Court found that their construction was consistent with the act as a whole and with its more generalized legislative history. *Id.*

A brief history of the Price-Anderson Act should prove instructive in the present matter. The Price-Anderson Act was enacted in 1957 to meet two objectives: remove deterrents to private sector participation in atomic energy and to provide funding to pay out liability claims in case of a catastrophic nuclear accident. The Act was designed "to cover liability claims of members of the public for personal injury and property damage caused by a nuclear accident involving a commercial power plant. The legislation helped encourage private investment in commercial nuclear power by placing a cap, or ceiling, on the total amount of liability each nuclear power plant licensee faced in the event of an accident." United States Nuclear Regulatory Commission, *Nuclear Insurance and Disaster Relief*, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.pdf (December 2014).

"The scope of the Act includes nuclear incidents in the course of the operation of power reactors; test and research reactors; Department of Energy nuclear and radiological facilities; and transportation of nuclear fuel to and from a covered facility." Center for Nuclear Science and Technology Information, *The Price-Anderson Act*, 1, http://www.ans.org/pi/ps/docs/ps54-bi.pdf (November 2005). In addition, the Act has also covered such incidents as those in the course of transportation of nuclear fuel to a reactor site, the storage of nuclear fuel at a site, the operation of reactors including discharges of radioactive emissions or effluents, the storage of nuclear wastes at reactor sites, and the transportation of radioactive material from reactors.

See P. Bailey, K. Blake, M. Brown, P. Duback, S. Krill, J. Laurenson, J. Saltzman, *The Price-Anderson Act – Crossing the Bridge to the Next Century: A Report to Congress* xii, Nureg/CR-6617, (ICF Inc. 1998) [hereinafter Crossing the Bridge].

Congress had an opportunity to expand the scope of the Price-Anderson Act to specifically include the kind of exposure at issue in this case, but declined to do so. When Amendments to the Act were considered in 1988, there was an opportunity to include language to cover "persons operating nuclear pharmacies or hospital medicine department" but that language was not enacted. *See* Sen. Rept. 100-218, U.S. Code Cong. & Admin. News 1988, p.1424, 1493, Section 106. The reasonable conclusion is that Congress did not intend for the Act to apply to cases involving pharmacies or hospital medicine departments, such as the Respondents here. Application of the Price-Anderson Act to this case extends the reach of the Act far beyond its original purposes and is contrary to the legislative intent.

As the Supreme Court did in *Natl. R.R. Passenger*, this Court should give significant weight to the fact that Congress specifically chose not to expand the language of the Act to include hospital medicine departments, knowing that it would foreclose the application of the Act to state law claims involving nuclear pharmacies or hospital medicine departments.

Following the Supreme Court's caution against expanding the application of statutes contrary to the clear intentions of Congress, the Third Circuit has refused to stretch the scope of the Price-Anderson Act to apply to a case with facts such as the ones presently before the Court. The Third Circuit has made clear exactly what type of claim is covered under the Act, stating:

> [a]t the threshold of every action asserting liability growing out of a nuclear incident, then, there is a federal definitional matter to be resolved: Is this a public liability action? If the answer to that question is "yes," the provisions of the Price-Anderson Act apply; there can be no action for injuries caused by the release of radiation from **federally licensed nuclear power plants** separate and apart from the federal public liability action created by the Amendments Act.

In Re TMI Litig. Cases Consol. II, ("*TMI II*"), 940 F.2d 832, 855 (3d Cir. 1991) (emphasis added). The District Court, in defining a public liability action, quoted to language from *TMI II*, which states that a "'public liability action' encompasses 'any legal liability' of 'any person who may be liable' on account of a nuclear incident." JA-0013 [Rpt. and Recommendation 05/05/2014 at 7]. It is worth noting that the context and factual situation in which *TMI II* was decided is clearly distinct from Petitioner's case.

The Act was amended in direct response to the 1979 incident at the Three Mile Island nuclear facility in Pennsylvania. *TMI II* at 835. *TMI II* involved a federally licensed nuclear power plant where approximately two thousand plaintiffs asserted claims alleging a wide variety of injuries as a result of exposure to radioactive materials. *Id.*

Application of the Act in *TMI II* was proper because it was precisely the type of situation Congress intended to cover under the scope of the 1988 Amendment.

The 1988 Amendment, in expanding the scope of the Act, allowed the Act to apply in a situation such as *TMI II*, where a covered nuclear power plant had an incident that was considered to be less than an extraordinary nuclear occurrence. Prior to the Amendment, there would have been no federal jurisdiction over the case and the resulting litigation would have been handled in state court. This does not, suggest, however, that the Act was intended to apply to a case where a single researcher contracted cancer and died while conducting research at a non-covered hospital medicine department.

Other Courts in the Third Circuit have considered the Price-Anderson Act's scope consistently with *TMI II*. The District Court of New Jersey evaluated the scope of the Act in *Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325 (D.N.J. 1998). *Gilberg,* concerned injuries alleged by residents of an environmentally contaminated community. *Id.* at 328. The contamination arose as a result of environmental exposure to radioactive materials which were produced as a byproduct of a facility that manufactured iridescent gas mantles. *Id.* A gas mantle is a component in portable camping lanterns, pressure lanterns, and some oil lamps. Byproduct tailings from radioactive thorium contaminated real property and water in the surrounding areas. *Gilberg*, after conducting an extensive statutory analysis, concluded that:

> …[P]reemption under Price-Anderson sweeps broadly to include any claim alleging 'public liability;' that is, 'any legal liability arising out of or resulting from a nuclear incident.' §2014(w). For there to be nuclear incident, however, there must be an 'occurrence.' And an occurrence under the Act can only be an 'event …. [at] "the location" or "the contract location" as defined in the applicable … indemnity agreement, entered into pursuant to section 2210.' §2014 (j) & (q). … Therefore, no event alleged by plaintiff can constitute an 'occurrence.' Plaintiff's action, therefore, is not 'one based on "any legal liability" of "any person who may be liable on account of a nuclear incident." *TMI II*, 940 F.2d at 854, and cannot be removed pursuant to 42 U.S.C. §2210(n)(2).

Id. at 345-346. The *Gilberg* Court's opinion is consistent with Congress' intent not to cover manufacturing facilities and other non-covered industries simply because they use radioactive materials in their production process. The Act was only intended to cover facilities and industries using radioactive materials in connection with the nuclear power and nuclear weapons industries.

B. The established case law pertaining to the scope and application of the Price-Anderson Act makes clear that it was meant to cover the conduct of federally regulated power plants, other nuclear energy producers, and the weapons industry.

The non-Third Circuit cases cited to by Judge Angell of the District Court are not factually analogous to the case presently before the Court. The reasoning of the District Court is inapposite since all of the cases concern the nuclear energy or nuclear weapons industries in some way. For example, in *Cotroneo v. Shaw Environment & Infrastructure, Inc., et al.,* 639 F.3d 186, 190 (5th Cir. 2011), the conduct at issue concerned injuries alleged by workers who were cleaning up radioactive materials at a former nuclear source fabrication facility, which is where enriched uranium is converted into fuel for nuclear reactors. Similarly, in *Cotromano v. United Technologies Corp.*, 2014 WL 1259629 (S.D. Fla. 2014), the conduct at issue was environmental pollution caused by the dumping of uranium and thorium, by mining operators, which the plaintiff did not dispute was a nuclear incident. *Id.* at 1257. In *Carey v. Kerr-McGee Chemical Corporation*, 60 F. Supp. 2d 800 (N.D. Ill. 1999), another case cited to by the District Court, The Act was found to apply, but once again, the context is important to the analysis. *Carey* was brought by landowners who alleged property damage and potential personal injury as a result of improper disposal of radioactive material byproduct by a licensed nuclear facility. There is no dispute that *Cotroneo, Cotromano,* and *Carey,* all fall within the intended scope of the Act.

While the District Court does not give much weight to *Dumontier v. Schlumberger Tech. Corp.,* 543 F.3d 567 (9th Cir. 2008), Respondents heavily relied on this opinion. In *Dumontier,* workers sued an oil and gas technology company, asserting state law claims of emotional distress, medical monitoring, and actual malice based on the worker's exposure to Cesium-137. The workers in *Dumontier* were exposed the radioactive materials while working on a drilling rig. The issue in *Dumontier* was whether the plaintiffs suffered a bodily injury as defined under the Act. This case is inapposite and the only similarity between it and the facts presently before the Court is the nature of the radioactive material used. Cesium-137 is widely used: in medicine it is used to treat cancer; in industry, it is used in flow meters, thickness gauges, moisture density gauges, and well-logging devices. It has also been used to date wine and detect counterfeits.

Of the hundreds of facilities that use cesium irradiators (and therefore, Cesium-137, the material in question), no case has been cited in support of Respondents' position that all medical facilities, research facilities, and scientific facilities should fall under the Price-Anderson Act's provisions simply for using this technology and material.

Finally, the District Court cited to *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000), but failed to note the Fifth Circuit Court of Appeals' holding that the Price-Anderson Act is limited to the conduct of nuclear industries and institutions. In *Acuna*, the employees of a uranium mining company brought personal injury actions against the defendant company as a result of their exposure to radioactive materials. *Id.* at 338. Plaintiffs, in that action, objected to the application of the Price-Anderson Act to their claims. *Id.* at 340. *Acuna* determined that the Act "…sets up an indemnification and limitation of liability scheme for public liability arising out of the conduct of the **nuclear energy and weapons industries.**" *Id.* at 339 (emphasis added). Ultimately, *Acuna* held the Price-Anderson Act applicable because "uranium extraction and processing are part of the nuclear weapons and power industries, and therefore come within the ambit of § 2210(n)(2)." (granting federal jurisdiction in public liability actions arising out of a nuclear incident). *Id.* at 340; *See also Irwin v. CSX Transp. Inc.*, 2011 WL 976376 (E.D. Tenn. 2011) (holding that the Price-Anderson Act only applies to the nuclear energy and weapons industry and granting the motion for remand where Plaintiff alleged exposure to "ionizing radiation/radioactive substances" while employed at Defendant's railroad).

Similar to the Fifth Circuit Court of Appeals decision in *Acuna,* the District Court for the Northern District of Florida held that the Price-Anderson Act did not apply in a case dealing with environmental contamination from exposure to uranium, a material specifically listed in the Act as a "source material." *See Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1320 (N.D. Fla. 2001). Defendants in *Samples*, an oil company, chemical company, and wood treating company, argued for application of the Price-Anderson Act, claiming that the language of the Act covers "any claim of injury to property allegedly caused by certain nuclear material." *Id.* at 1320.

The *Samples* defendants argued that Congress used 'sweepingly broad language, expressly covering any occurrence causing' damage to property." *Id.* at 1321. To this, the District Court correctly exclaims, "[h]ogwash! This argument is frivolous. The defendants should know the PAA only applies to the nuclear energy and weapons industries." *Id.* The Court in *Samples* agreed with the holding in *Acuna* and concluded that an occurrence "as used in the definition of 'nuclear incident' means 'that event at the site of the licensed activity, or activity for which the commission has entered into a contract, which may cause damage.' " *Id.* at 1321. (citing) *S.Rep. No. 296*, at 16 (1957) (quoted in) 10 C.F.R. § 8.2, at 202 (2001).

As part of its analysis, the *Samples* Court considered a quote by Dan Berkovitz, an attorney with the Office of General Counsel, U.S. Nuclear Regulatory Commission ("NRC"):

> The Price–Anderson Act ... governs liability and compensation in the event of a 'nuclear incident' arising from activities of Nuclear Regulatory Commission ("NRC") licensees and Department of Energy ("DOE") contractors. The coverage for NRC licensees encompasses activities of commercial nuclear power plants, certain fuel fabrication facilities, and non-DOE reactors used for educational and research purposes. Activities of DOE contractors are covered if they involve 'the risk of public liability for a substantial nuclear incident.' These contractor activities include nuclear weapons research, development and testing, nuclear energy research and

> development, and nuclear waste activities. The Act specifies the procedures for determining the amount and sources of compensation available to compensate persons injured as a result of a nuclear incident arising from these activities.

Id. (quoting) Dan M. Berkovitz, *Price–Anderson Act: Model Compensation Legislation?—The Sixty–Three Million Dollar Question,* 13 Harv.Envtl.L.Rev. 1, 1–2 (1989) (footnotes omitted).

The District Court for the Southern District of Ohio has also ruled on the application of the Act in a case that is strikingly similar to the one before the Court. *See In re Cincinnati Radiation Litigation,* 874 F. Supp. 796, 832 (S.D.Ohio 1995). *In re Cincinnati* determined that there is no nuclear incident when patients at the Cincinnati General Hospital became the unwitting subjects of human radiation experiments. *Id.* at 832. The Court agreed with the defendant's argument that "Price-Anderson was never intended to create a federal claim for the contained application of nuclear medicine, and that such use of radiation in a controlled environment is distinguishable from the Fernald and Three Mile Island occurrences typical to those that the 1988 Amendments were designed to address." *Id.* The conduct of the Hospital, though perhaps reprehensible, was not found to be within the scope of the Price-Anderson Act because there was no unintended escape or release of nuclear energy, which would be necessary to find a nuclear incident had occurred. *Id.*

Although the reasoning behind *In re Cincinnati* is different than that of *Gilberg*, the result leads us to the same place: Congress did not, in amending the Act, intend to provide federal courts with such sweeping jurisdiction over any and all claims that might arise as a result of exposure to radiation. The incident causing harm must fall within the intended scope of the Act or it will not be covered.

Here, it was error for the District Court to apply the Act for several reasons. This case does not involve a nuclear power facility or other facility or industry regulated by the Act such as in *Cotroneo*, *Carey*, *Cotromano*, and *Acuna*. Unlike in *TMI II*, Respondents are not a federally licensed nuclear power plant. Moreover, as in *Gilberg,* Respondents lack the indemnity agreement required to make the Act apply. Even the District Court in its Opinion noted that a "public liability action arising out of or resulting from a nuclear incident…would seem to be a peculiar way to describe a case alleging that a researcher was injured while working on the campus of the University of Pennsylvania…" JA-0035 [Mem. Op. 09/08/2016 at 2].

In light of the clear Congressional intent of *TMI II*, it is not peculiar, but it was error to find this case was covered by the Act.

C. The Nuclear Regulatory Commission licensing scheme and policies also make clear that the Price-Anderson Act was not intended to apply to a case such as the one here.

As determined by *Gilberg*, the presence or absence of the proper indemnification agreement is critical in determining whether the Act applies. The Price-Anderson Act, covers a number of NRC licensees, each of which is required to execute an indemnity agreement. Those licensees are primarily in the field of nuclear production and utilization facilities. These terms include nuclear reactors, research reactors, and test reactors. The Price-Anderson Act also allows the NRC discretionary authority to apply the Act to additional licensees, such as those in possession of radioactive materials. The NRC has used this authority to cover, in addition to production and utilization facilities, large commercial reactors under 100 MW(e) including federal licensees and nonprofit educational institutions and plutonium processing and fuel fabrication facilities. *See Crossing the Bridge* at 3-5.

The NRC Fact Sheet further states that 104 reactors are currently licensed to operate. This number includes 31 research and test reactors. *See* United States Nuclear Regulatory Commission, *Nuclear Insurance and Disaster Relief*, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.pdf (December 2014). However, none of the equipment Dr. Ware operated in connection with his research at Penn involved a reactor included on the list published by the NRC and thus, the Price-Anderson Act should not be applied. *See* United States Nuclear Regulatory Commission, *Facility Locator,* https://www.nrc.gov/info-finder/region-state/pennsylvania.html (October 2015).

Although Congress did contemplate that in certain circumstances the Price-Anderson Act could be applied to nonprofit education institutions, the NRC applies the provisions of the Act in the context of those nonprofit education institutions operating nuclear reactors under 100 MW(e). *See Crossing the Bridge* at 3-5; s*ee also* 10 C.F.R. §140.72 (concerning nonprofit educational institution indemnity agreements). Respondent University of Pennsylvania, however, does not fall into this category, as the license provided by the Commonwealth of Pennsylvania to them is for materials only, not for any type of reactor facility.

The District Court's determination that the Act applies to this case, sets an impossible standard for this Plaintiff and future plaintiffs to meet. To trigger the liability of a covered industry or nuclear power plant under the Act, a plaintiff must be able to demonstrate that he has been exposed to a level of radiation beyond the limits set by the Act. *See* 10 C.F.R. §20.1201(a)(1)(iii) (The licensee must control the occupational dose to individuals to be less than the equivalent of 50 rems (0.5 Sv), annually.) This is an impossibly high dose of radiation for a plaintiff to demonstrate, other than in a nuclear incident. This level of radiation is not typical of the dose to which a researcher in a university hospital research lab would ever be exposed. Accordingly, it is unreasonable to suggest that a plaintiff, such as Dr. Ware, should be required to meet that radiation dose threshold to show liability.

The State law standard, on the other hand, is reasonable and should be used to determine Respondents' liability. There are smaller doses of radiation than what is required under the Act to which a person could be exposed to and still develop serious long-term health effects. Under the State law standard, a plaintiff could demonstrate exposure to radiation at these levels, satisfy the State law causation standard, and be given an opportunity to have his case heard. This produces a more fair result and holds the industries that use radiation accountable for their conduct.

Requiring such a high dose of radiation in order to establish liability under the Act speaks to the Congressional intent regarding the scope of the act. The amount of radiation, though not typical of something a researcher in a university hospital lab would be exposed to, is on the other hand, closer to what a reactor produces or a plaintiff living near a nuclear power plant that has an accident might be exposed to. If Congress had intended the act to apply to any and all cases involving injury as a result of exposure to radiation, with the knowledge that not all of the injuries would arise from covered industries and power plants, they surely would have set the threshold for showing liability at a much lower level.

Radioactive materials are presently used in medicine to diagnose, monitor, and treat a wide assortment of medical conditions in humans. These materials are used in universities, colleges, high schools, and other academic and scientific institutions for course work, laboratory demonstrations, and experimental research, such as the research Dr. Ware was conducting. Radiation can be used to irradiate food and medical equipment to kill germs, without harming the substance that is being disinfected. They can be used to help remove toxic pollutants, such as exhaust gases from coal-fired power stations and industry. Radiation is important in food production and packaging, such as polyethylene shrink-wrap that has been irradiated, allowing it to be heated above its usual melting point. Reflective signs are treated with radioactive tritium and phosphorescent paint, allowing us to see them at night, and ionizing smoke detectors use radiation to keep us safe while we sleep. Radioactive materials are present all around us and make up the things we use and rely on every single day.

Despite the wide-spread application of radioactive materials in all facets of everyday life, there are no cases Respondents have offered to even suggest that their interpretation of the Act is the correct one. To the contrary, they offer one, factually inapposite case and no authority to support application of the Act to the situation presently before the Court. If the Act had been intended to apply to every case involving injury as a result of exposure to radiation, there would be some cases in which the Act was found to apply to a university hospital or research lab, places where radiation use is a daily occurrence.

Application of the Price-Anderson Act to this case, with its heightened standard of liability, will provide any industry, business, or organization, which uses radioactive materials, with a license to be careless, negligent, or even reckless with the safety and health of their employees, consumers, and the people living near their work sites. Application here will effectively bar future plaintiffs in comparable situations from being able to obtain compensation for injuries and loss as a result of exposure to radiation. This surely was not Congress' intent. The District Court's application of the Price-Anderson Act to this case is inconsistent with Congressional intent, legislative history, and established case law.

II. The District Court erred by not remanding the state law claims once the Price-Anderson Act claims were voluntarily withdrawn by the Petitioner.

Once Petitioner voluntarily dismissed her negligence under the Price-Anderson Act claims, the District Court should have been divested of its jurisdiction and the case remanded to the Philadelphia Court of Common Pleas.

Respondents' Notice of Removal was filed on January 02, 2014. JA-0140 [Notice of Removal 01/02/2014]. In response, Petitioner filed her Motion to Remand shortly after, on January 27, 2014, which was not denied by Judge Edward G. Smith until December 19, 2014. *See* JA-0293 [Pl's. Mot. to Remand 01/27/2014]; JA-0004 [Or. 12/19/2014].

Petitioner learned that the Price-Anderson Act was definitively going to apply to her case when the District Court issued its Order adopting the Report and Recommendation of Judge Angell in December 2014. In response, Petitioner filed her Amended Complaint containing the Price-Anderson Act Claims on January 20, 2015. JA-0446 [Am. Compl. 01/20/2015]. Once it was clear that Petitioner could not meet the heightened standard of liability under the Act, she sought to dismiss the Price-Anderson Act Claims through her Motion to Withdraw and Remand. JA-0729 [Mot. to Withdraw and Remand 12/14/2015]

The District Court in its Memorandum Opinion denying Plaintiff's Motion to Withdraw and Remand, determined that the negligence under the Price-Anderson Act claims could not be dismissed because to have done so would have caused prejudice which, "…amounts to more than just 'the mere prospect of a second lawsuit.'" JA-0040 [Mem. Op. 09/08/2016 at 7]. The District Court considered that Respondents

> ...retained four experts to speak specifically to whether Defendants failed to protect Ware from exposure to excessive amounts of radiation and whether that exposure may have caused his cancer-issues at the heart of these claims, and issues that may not have needed to be explored had Boyer dismissed them before discovery commenced.

JA-0041 [*Id.* at 8]. The District Court also determined that if Petitioner had sought to withdraw her Price-Anderson Act claims soon after the December 19, 2014, Order, "…she likely would have been permitted to do so." JA-0040 [*Id.* at 7].

The District Court's reasoning presents Petitioner with a near impossible situation. After filing her Amended Complaint, Petitioner conducted limited discovery on liability under the Act. As discussed in the first section of this Brief, the Price-Anderson Act has a heightened standard of liability (radiation dose), which presents an extraordinary hurdle for a plaintiff to overcome in a case such as the one presently before the Court. After less than 12 months of limited discovery in this very technical and complex matter, Petitioner determined that she would not be able to meet the heightened standards as required under the Act. Accordingly, she sought to withdraw her claims under the Price-Anderson Act. Any prejudice to the Respondents was a result of the

District Court taking more than 11 months to decide Petitioner's Motion to Withdraw and Remand.

It is a circular proposition to suggest that Respondents were prejudiced by Petitioner's failure to voluntarily withdraw the claims at an earlier date, as Petitioner could not know she would be unable to satisfy the heightened standards required under the Act. Only through the conduct of her limited discovery was she able to make this determination in the first place.

In the District Court's Memorandum Opinion, it determined that even if the Price-Anderson Act negligence claims were dismissed, a remand would not have been possible because the Court still had jurisdiction over Petitioner's fraud and negligent infliction of emotional distress claims, as they would be considered a "public liability action" under the Act. JA-0039 [*Id.* at 6]; s*ee* 42 U.S.C. § 2210(n)(2) (granting district courts original jurisdiction over any "public liability action arising out of or resulting from a nuclear incident.") The reasoning behind the Court's conclusion is that the fraud and negligent infliction of emotional distress claims "…arise, at least in part, out of the harm that Ware allegedly suffered from exposure to radioactive materials." JA-0039 [*Id.* at 6]. Petitioner respectfully disagrees.

Contrary to the Court's Opinion, neither Petitioner's fraud nor her negligent infliction of emotional distress claims arise out of the harm that Dr. Ware suffered from his exposure to radioactive materials. The harms alleged arise out of his subsequent medical treatment and not his research.

Petitioner's fraud claim arises out of the harm caused by Respondents intentional concealment, withholding, and refusal to produce all data and information about Dr. Ware's exposure to radiation, which, had it been disclosed in a timely manner, could have led to earlier medical diagnosis and treatment of Dr. Ware's cancer. JA-0481 [Amend. Compl. 01/20/2015 ¶¶ 195-199]. Additionally, the harm arises out of Respondents intentional concealment of Dr. Kao's involvement in the experimental study in which Dr. Ware was enrolled without his proper legal consent, as well as the concealment of Penn's significant financial interest in the outcome of that study. JA-0482 [*Id.* at ¶¶ 200-202]. Had Respondents not intentionally misled Dr. Ware and his family, they would have been able to seek treatment sooner, and would have considered other options to improve Dr. Ware's quality of life. For example, Petitioner wanted to arrange for palliative care for her husband instead of chemotherapy but Respondents refused to agree as they knew it was important for Dr. Ware to stay committed to his treatment for the purpose of the experimental study. As it turns out, the complications from the treatment only caused Dr. Ware and his family to suffer tremendously. JA-0474 [*Id.* at ¶¶ 161-164]. This fraud claim arises from the Respondents' intentional withholding of critical information pertinent to Dr. Ware's health and well-being, and not, as the Court's Opinion holds, his exposure to radiation though his research.

Petitioner's negligent infliction of emotional distress claim cannot be considered a public liability action under the Price-Anderson Act for similar reasons. Petitioner's claim arises out of the harm caused to Dr. Ware as a result of the substandard and negligent care that was provided to him by the Hospital of the University of Pennsylvania, Dr. Kennedy, Dr. Kao, and Dr. Alonso-Basanta. Some of Respondents deviations included a failure to recognize that the radiation therapy being provided was contra-indicated given Dr. Ware's particular type of cancer, failure to provide and recommend treatment that was reasonably related to improving Dr. Ware's prospects for a quality of life, and failure to disclose the pertinent risks, benefits, and alternatives to the experimental study, including the risk of profound brain damage from the radiation. JA-0484 [*Id.* at ¶ 211]. This claim arises out of the care that Dr. Ware received after his diagnosis of brain cancer, and not, as the Court's Opinion holds, his exposure to radiation.

The District Court, for whom jurisdiction was no longer proper following Petitioner's voluntary withdraw of her Price-Anderson Act claims, determined in its Opinion, that even if the claims were dismissed, the other Counts of Petitioner's Amended Complaint would not have survived summary judgment. *See* JA-0043 [Mem. Op. 09/08/2016 at 10-14]. Petitioner respectfully disagrees with this conclusion as well.

The District Court determined that Petitioner's negligence, fraud, and corporate negligence claims, would not have survived summary judgment because Petitioner failed to produce expert testimony on the issue of causation. The reason behind Petitioners failure to produce expert reports on causation for the state law claims is straightforward. Petitioner only conducted limited discovery on the Price-Anderson issues.

After consultation with her expert regarding the Price-Anderson Act claims, Petitioner learned that she would not be able to meet the heightened standards of the Act and filed her Motion to Withdraw and Remand, which was not ruled on until almost one year after it was filed. It is troubling to suggest that Petitioner should have conducted discovery on the state law issues while her Motion to Withdraw and Remand was still pending.

Once the Price-Anderson Act claims were withdrawn, the District Court would have been divested of jurisdiction over this matter and the case should have been remanded to the Philadelphia Court of Common Pleas. Once the case was back in the Philadelphia Court of Common Pleas, a case management order would have been issued and Petitioner could have begun discovery on the state law claims (negligence under Mcare, fraud, corporate negligence, and negligent infliction of emotional distress).

It is another circular proposition to suggest that Petitioner's claims should be dismissed by way of summary judgment because she failed to produce evidence of causation on state law matters, when her discovery was limited to issues under the Price-Anderson Act, which should not have applied to this matter given the facts alleged. Had the case been remanded after her voluntary withdraw of the Price-Anderson Act claims, discovery would have been allowed to commence regarding her state law claims. Petitioner then would have been able to produce expert reports regarding causation and the claims would have survived Respondents' Motions for Summary Judgment.

CONCLUSION

For the reasons stated above, Petitioner respectfully submits that her Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

ESTATE OF JEFFREY H. WARE, BY BARBARA BOYER, INDIVIDUALLY, ON BEHALF OF WRONGFUL DEATH BENEFICIARIES AND AS ADMINISTRATRIX OF THE ESTATE OF JEFFREY H. WARE

Petitioner,

v.

HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, ET AL.

Respondent.

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

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3801

ESTATE OF JEFFREY H. WARE, By Barbara Boyer, individually, on behalf of wrongful death beneficiaries and as Administratrix of the Estate of Jeffrey H. Ware,
Appellant

v.

HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA;
UNIVERSITY OF PENNSYLVANIA;
UNIVERSITY OF PENNSYLVANIA PERELMAN SCHOOL OF MEDICINE;
UNIVERSITY OF PENNSYLVANIA TRUSTEES;
ANN R. KENNEDY, D.S.C.;
GARY KAO, M.D.; MICHELLE ALONSO-BASANTA, M.D.; NATIONAL SPACE BIOMEDICAL RESEARCH INSTITUTE;
CENTER FOR ACUTE RADIATION RESEARCH

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-14-cv-00014)
District Judge: Honorable Jospeh F. Leeson, Jr.

Argued June 28, 2017

Before: AMBRO, RESTREPO, and COWEN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued on June 28, 2017.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated September 8, 2016, is hereby affirmed. Costs are not taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

Dated: September 18, 2017

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3801

ESTATE OF JEFFREY H. WARE, By Barbara Boyer, individually, on behalf of wrongful death beneficiaries and as Administratrix of the Estate of Jeffrey H. Ware,
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(Opinion filed September 18, 2017)

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OPINION OF THE COURT

AMBRO, Circuit Judge

Barbara Boyer, the widow of a cancer researcher who developed a fatal tumor allegedly as a result of inadequate safety precautions taken to protect him from radiation in his lab, sued the University of Pennsylvania together with affiliated persons and entities[1]. Before us is the reach of the Price-Anderson Act, *see* 42 U.S.C. § 2011, *et seq.*, and its remedy-limiting provisions. The Act gives federal courts jurisdiction to resolve a broad set of claims involving liability for physical harm arising from nuclear radiation. Boyer asserts, however, that the Act's unexpressed intent would exempt her husband's injuries from its jurisdictional grant.

Her claims fall within the text of the Act, so if we are to limit it to a zone of interests narrower than its text provides, Boyer must offer a compelling limiting principle that would put her allegations beyond the Act's reach. Although she suggests several implicit limitations, each is

[1] The defendants in this action are the University of Pennsylvania; the Hospital of the University of Pennsylvania; the Perelman School of Medicine; the Trustees of the University of Pennsylvania; and Drs. Ann Kennedy, Gary Kao, and Michelle Alonso-Basanta. We refer to them jointly as the "UPenn defendants"; "UPenn" refers, depending on context, to the University of Pennsylvania or all the defendants.

either unconvincing or, even if adopted, would leave this case still within the Act's reach. Thus we must affirm.

I. BACKGROUND

Jeffrey H. Ware, Ph.D., was a neuroscientist at the University of Pennsylvania who studied the effects of radiation on biological organisms with the goal of better understanding how radiation affects astronauts while in orbit. In the course of his research Ware used cesium-137 irradiators to track the effects of low-level radiation on mice and rats.

Tragically, Ware suffered in 2010 a rare form of brain cancer called gliosarcoma. Boyer claims gliosarcoma is associated with radiation exposure (however, because she produced no expert reports, there is nothing in the record to support this link). She also alleges that Ware's cancer specifically resulted from radiation exposure that UPenn failed to monitor properly or protect against. Moreover, UPenn failed to inform Ware of the level of radiation to which he was exposed.

Following his diagnosis, Ware turned to the University's affiliated hospital for medical care. He underwent chemotherapy and radiation in order to slow the cancer's progression. Boyer alleges that Ware was not given appropriate information about these treatments; that, given the advanced stage of his disease, they provided little benefit; and that, at one appointment where she was not present, a UPenn doctor enrolled Ware in a research study to investigate the effects of chemotherapy and radiation on brain cancer patients without his knowing consent. According to Boyer, UPenn concealed and withheld documents and data related to the study to "cover up its terrible record of radiation safety and to protect millions of research dollars." Boyer's Br. at 9.

UPenn also discouraged Ware from seeking palliative care, she claims, in order to maintain his participation in the study.

Just a year after his diagnosis, Ware died from his cancer at age 47. Boyer filed a complaint in the Pennsylvania Court of Common Pleas as administratrix of Ware's estate as well as on behalf of herself and Ware's surviving children. Her initial complaint alleged numerous counts, including negligence, fraud, retaliation, and negligent infliction of emotional distress. She added to the UPenn defendants the National Space Biomedical Research Institute ("NSBRI"), a research organization started by NASA that funded Ware's work.

UPenn and the NSBRI removed the case to federal court on the grounds that (1) claims against UPenn are covered by the Price-Anderson Act, which provides federal jurisdiction over claims asserting "public liability" arising from a "nuclear incident," *see* 42 U.S.C. §§ 2014(q), (w), (hh), & 2210(n); and (2) 28 U.S.C. § 1442(a) permits removal of claims against NSBRI because it is a federal agency.

Following Boyer's unsuccessful motion to remand, the District Court adopted a Magistrate

Judge's Report and Recommendation that the Price-Anderson Act applies to Boyer's claims alleging that Ware was harmed by radiation from cesium-137 used in his lab and that the NSBRI is a federal agency. Boyer responded by dismissing all claims against the NSBRI and amending her complaint to include two counts of "negligence under the Price-Anderson Act" (the "Price-Anderson claims") and additional counts styled as state-law claims for fraud, negligent infliction of emotional distress, malpractice, and "corporate negligence." J.A. 476-488.

Discovery began, and UPenn produced five expert reports and thousands of pages of documents. Boyer failed to produce a single expert report to substantiate her claims. UPenn filed four motions that the District Court construed as motions for summary judgment, to which Boyer never responded.

Per regulations issued by the Nuclear Regulatory Commission ("NRC"), entities holding licenses to handle certain nuclear materials must limit the dose of radiation received by employees from occupational exposure to five rem (5,000 millirem) per year. 10 C.F.R. § 20.1201 ("Occupational dose limits for adults"). It is uncontested that Ware's total occupational radiation exposure over 16 years was only 0.075 rem (75 millirem), which would yield an annual average of only 0.0047 rem (4.7 millirem)[2]. Because this

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[2] Boyer alleges that Ware was not, but should have been, provided with a dosimeter badge at all times to monitor his individual radiation exposure. However,

amount is far below the five-rem standard set in § 20.1201, Boyer concluded that she could not prevail on any claims governed by the Price-Anderson Act, so she moved to withdraw her Price-Anderson claims and to remand the remainder of her claims to state court.

The District Court denied the motion to withdraw, and, because Boyer had failed to produce any expert reports or even oppose UPenn's motions for summary judgment, it granted summary judgment to UPenn on all of her claims. Boyer appeals, challenging the District Court's determination that the Price-Anderson Act applies to her negligence claims as well as the Court's denial of her motion to withdraw while retaining jurisdiction over her remaining state-law claims.

II. STANDARD OF REVIEW

We review *de novo* the District Court's interpretation of the Price-Anderson Act and exercise the same review over whether subject-matter jurisdiction exists. *See Fair Hous. Rights Ctr. in Se. Pennsylvania v. Post Goldtex GP, LLC*, 823 F.3d 209, 213 (3d Cir. 2016); *Weitzner v. Sanofi Pasteur, Inc.*, 819 F.3d 61, 63 (3d Cir. 2016). Our review of the District Court's denial of Boyer's request for

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she does not dispute the 0.075 rem total exposure calculation.

voluntary dismissal is for abuse of discretion. *Ferguson v. Eakle*, 492 F.2d 26, 28 (3d Cir. 1974).

III. ANALYSIS

A. The Price-Anderson Act Governs Boyer's Negligence Claims.

The District Court held the Price-Anderson Act applies to Boyer's claims asserting that Ware was harmed by radiation emitted from cesium-137 irradiators used in his lab. The Act provides for removal to federal court of any "public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n). As noted, Boyer and UPenn agree that, if the Act applies, Boyer can only state a claim for relief if Ware received more than five rem of radiation per year [3]. It is undisputed that Ware's average annual radiation exposure was much less than five rem, so any claim to which the Act applies is not viable.

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[3] The NRC regulations the parties cite merely set out rules binding entities with licenses to hold certain nuclear materials. *See* 10 C.F.R. § 20.1201. Neither party offers any legal source that would limit liability under the Price-Anderson Act to cases where exposure exceeds § 20.1201's limits. But because Boyer accepts this limitation as true and failed to oppose summary judgment, we have no occasion to challenge it.

But that is not the worst of Boyer's situation: if the Price-Anderson Act applies, even her claims that don't stem from Ware's radiation exposure are lost as well. Boyer failed to oppose summary judgment on any of her claims (even those, like medical malpractice, that the parties agree are not governed by the Act). Thus, on appeal Boyer attempts to save her claims by contending that the District Court either lacked jurisdiction over her claims or abused its discretion by exercising it.

For these reasons, Boyer contends the Price-Anderson Act, which grew out of the federal Government's initial efforts to regulate nuclear weapons and power plants in the 1940s and '50s, does not apply to laboratory research. Her interpretation of the Act conflicts with its text, and she identifies no principle that would both rule out its application to Ware's research and be true to the Act's purpose and structure.

1. The Price-Anderson Act

a. History

"With the object of encouraging the private sector to become involved in the development of atomic energy for peaceful purposes, Congress passed the Atomic Energy Act of 1954[], 68 Stat. 919, a broad scheme of federal regulation and licensing." *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 476 (1999) (internal brackets, quotation marks, and citation omitted). "[I]n 1957 Congress amended the [Atomic Energy Act] with the Price-Anderson Act, 71

Stat. 576[, which] provided certain federal licensees with a system of private insurance, Government indemnification, and limited liability for claims of 'public liability,' now defined generally as 'any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation[.]" *Id.* (quoting 42 U.S.C. § 2014(w)).

Congress has continued to build on the Price-Anderson Act's foundation, expanding its scope and functions. The Act initially relied on state courts and state law to rule on and govern liability for nuclear accidents. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 852 (3d Cir. 1991). However, amendments in 1966 "provided for the transfer, to a federal district court, of all claims arising out of an extraordinary nuclear occurrence"[4] and brought about greater uniformity of liability determinations while retaining state-law causes of action. *Id.* The amendments

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[4] (4) An "extraordinary nuclear occurrence" is

> any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite . . . .

42 U.S.C. § 2014(j).

require indemnified entities "to waive the defenses of negligence, contributory negligence, charitable or governmental immunity, and assumption of the risk in the event of an action arising as the result of an extraordinary nuclear occurrence." *Id.*

"In the wake of the 1979 accident at the Three Mile Island nuclear power plant, suits proliferated in state and federal courts, but because the accident was not an 'extraordinary nuclear occurrence,' within the meaning of the Act, *see* § 2014(j), there was no mechanism for consolidating the claims in federal court." *El Paso Nat. Gas*, 526 U.S. at 477. So Congress acted again in 1988, providing for federal jurisdiction over any actions "asserting public liability" arising from a "nuclear incident," which generally includes any "occurrence" causing physical harm resulting from the radioactive properties of nuclear material. *See id.* The 1988 amendments also took another step toward federalizing the law applicable to nuclear accidents by providing that "any suit asserting public liability . . . shall be deemed to be an action arising under [the Price-Anderson Act]" rather than state law. 42 U.S.C. § 2014(hh).

These 1988 amendments, which are at the heart of this case, deliberately increased the scope of the Act's coverage. *See Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000) ("'Nuclear incident' is not limited to a single, catastrophic accident: indeed, one purpose behind the 1988 amendments was to expand the scope of federal jurisdiction beyond actions arising from 'extraordinary nuclear occurrences' only." (citing *Kerr–McGee Corp. v. Farley,* 115 F.3d 1498, 1502 (10th Cir. 1997))). They provide federal jurisdiction in a wider variety of situations than the prior version of the law. *See, e.g.*, *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1133, 1140–42 (10th Cir. 2010) (claims of property owners at risk of nuclear material blowing onto their properties from nuclear weapons plant turned wildlife refuge); *Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 569 (9th Cir. 2008) (claims of workers exposed to cesium-137 carelessly left on oil drilling rig); *Acuna*, 200 F.3d at 338 (claims of workers, their family members, and nearby residents for harm from uranium mine).

Although the history of the Act's amendments tracks major events in the development of nuclear power and weapons, the Act's concerns are not so narrow. As noted above, Congress has "encourag[ed] the private sector to become involved in the development of atomic energy for peaceful purposes[.]" *El Paso Nat. Gas*, 526 U.S. at 476. Among the purposes pointed to by Congress at the outset of its plan for regulating atomic energy are "providing for . . . a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress[,] . . . for the dissemination of unclassified scientific and technical information[,] and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress[.]" 42 U.S.C. § 2013. Highlighting the Act's scientific aims, § 2210(k) specifically sets certain financial requirements that apply to non-profit educational institutions.

b. Key Provisions

Today the Price-Anderson Act provides for the removal to federal court of any "public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n). As the District Court commented, this "would seem to be a peculiar way to describe a case alleging that a researcher was injured while working on the campus of the University of Pennsylvania," *Ware v. Hosp. of the Univ. of Pennsylvania*, No. 2:14-CV-00014, 2016 WL 4702117, at *2 (E.D. Pa. Sept. 8, 2016), but any peculiarity simply derives from Congress' slow expansion of the Act's statutory definitions to bring a growing set of matters within its scope.

In essence, the Act provides federal jurisdiction over claims asserting legal liability for "any occurrence" causing physical harm or property damage resulting from the radioactive properties of nuclear material. 42 U.S.C. §§ 2014(q), (w), (hh) & 2210(n)(2). However, because its definitions are complicated, interlocking, and use words in unintuitive ways, it is worth pausing to consider the Act's key provisions.

Section 2210(n)(2) contains the jurisdictional grant:

> With respect to any public liability action arising out of or resulting from a nuclear

> incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy.

That grant, in turn, depends on the definitions of "public liability action" and "nuclear incident." A "public liability action" is simply "any suit asserting public liability." *Id.* § 2014(hh)[5]. And "public liability" means (apart from certain exceptions not relevant here) "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." *Id.* § 2014(w). That brings us to "nuclear incident":

> The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or

[5] Under the Price-Anderson Act "the substantive rules for decision in [a public liability] 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 [the Act]." 42 U.S.C. § 2014(hh). That is, although (1) the case proceeds in federal court, (2) the cause of action is itself federal, and (3) certain state-law defenses may not be raised, *see* 42 U.S.C. §§ 2014(hh) & 2210(n)(1), state law nonetheless will provide the elements of any public liability action except to the extent that a provision of the Act requires something different.

other hazardous properties of source, special nuclear, or byproduct material[.]

Id. § 2014(q).

This definition of "nuclear incident" is facially quite broad, and, because the definitions above all rely on it, the Price-Anderson Act's jurisdictional grant is also broad.

2. Boyer's Price-Anderson Claims

Despite these expansive definitions, Boyer contends the District Court erred when it held that the Price-Anderson Act applied to all of her claims alleging that Ware was harmed by radiation from cesium-137 used in his lab. We disagree.

The Act's text maps neatly onto Boyer's allegations. There is no dispute that cesium-137 is a by product material,"[6] and, according to Boyer, its radioactive properties caused Ware's "bodily injury, sickness, disease, [and ultimately] death." 42 U.S.C. § 2014(q). As long as we give the word "occurrence" its ordinary meaning—"something that takes place; esp. something that happens unexpectedly and without design; or the action or process of happening or taking place," *Carey v. Kerr–McGee Chem. Corp.*, 60 F. Supp. 2d 800, 805 (N.D. Ill. 1999) (quoting

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[6] (6) *See* 42 U.S.C. § 2014(e) (defining "byproduct material"); *Dumontier*, 543 F.3d at 569 (applying § 2014(q) to injuries caused by cesium-137).

Webster's Third New International Dictionary (1993))—the facts alleged constitute a "nuclear incident" under § 2014(q).

Boyer claims UPenn bears legal liability arising from this nuclear incident, so what she alleges is "public liability" under § 2014(w). Any suit asserting public liability is a "public liability action . . . arising under section 2210" of the Price-Anderson Act. *Id.* § 2014(hh). Accordingly, per § 2210(n)(2) the District Court had jurisdiction over Boyer's claims, and UPenn had the right to remove them to federal court.

Boyer nonetheless raises arguments why the Act does not apply. There may exist some limiting principle that would effectively cabin the sweeping language Congress used to describe any nuclear incident subject to the Act, but none is persuasive here.

As noted, the Price-Anderson Act's history largely tracks major events in the development of the nuclear power and energy industries. Thus Boyer's first argument is that its jurisdictional grant applies *only* to nuclear accidents involving nuclear power plants or weapons facilities. For support, she looks to cases, agency fact-sheets, and academic publications summarizing the Act's applicability. *E.g.*, *In re TMI II*, 940 F.2d at 855 ("[T]here can be no action for injuries caused by the release of radiation from federally licensed nuclear power plants separate and apart from the federal public liability action created by the [Price-Anderson] Act [amendments of 1988].");

See Acuna, 200 F.3d at 339 ("The Price Anderson Act sets up an indemnification and limitation of liability scheme for public liability arising out of the conduct of the nuclear energy and weapons industries."); United States Nuclear Regulatory Commission, *Nuclear Insurance and Disaster Relief*, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.pdf (December 2014) ("The Price-Anderson Act . . . cover[s] liability claims of members of the public for personal injury and property damage caused by a nuclear accident involving a commercial nuclear power plant."); Dan M. Berkovitz, *Price-Anderson Act: Model Compensation Legislation?–the Sixty-Three Million Dollar Question*, 13 Harv. Envtl. L. Rev. 1, 1 (1989) ("The Price-Anderson Act['s] . . . coverage for NRC licensees encompasses activities of commercial nuclear power plants, certain fuel fabrication facilities, and non-[Department of Energy] reactors used for educational and research purposes.").

Boyer contends these descriptions limit the Act's application regardless of what is in its text. But the summaries she cites do not purport to explore its scope. They merely give the reader a rough sense of the Act's general purpose. *In re TMI II*, for example, addresses "federally licensed nuclear power plants" because that's what the case was about. 940 F.2d at 835[7]. No one would take a court's statement that

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[7] True, one District Court has cited the Fifth Circuit's *Acuna* decision for the proposition that "the [Price-Anderson Act] *only* applies to the nuclear energy and weapons industries." *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1321 (N.D. Fla. 2001) (emphasis in original) (calling a plain text reading of the statute "Hogwash!"). But a close reading suggests *Samples*' real concern was the defendants' attempt to use the Act's tail to wag the dog. They sought to apply the Act to the plaintiffs' action because uranium was listed among "the
[many] hazardous substances found in the sludge ponds" at a chemical waste site. *Id.* at 1320 n.16. The Court evidently found this connection farfetched and gave the Price-Anderson argument short shrift.
Moreover, *Samples* later suggests that a defendant's possession of a license to handle nuclear materials would trigger the Act's reach. *Id.* at 1321 ("The Defendants have failed to provide the Court with proof demonstrating they are a [Department of Energy] contractor or an NRC licensee. Therefore, Plaintiffs' lawsuit does not state a cause of action under the [Price-Anderson Act.]"). As we discuss below, UPenn had such a license. Thus, depending on how one reads *Samples*—*i.e.*, (1) the Act applies only to the nuclear power and weapons industries or (2) the Act applies only to the holders of licenses to possess nuclear materials—even that Court could have held UPenn to be covered by the Act.

"Title VII of the Civil Rights Act provides a cause of action to employees fired because of their race" to mean Title VII provides no cause of action to individuals suffering discrimination on the basis of sex, religion, or national origin.

What is more, the Price-Anderson Act plainly applies in at least some contexts to research universities, as it has provisions that cover specifically institutions like the University of Pennsylvania. Section 2210(k) provides that "nonprofit educational institution[s]" conducting "educational activities" pursuant "to any license issued" under the federal atomic energy scheme shall be indemnified by the NRC for "public liability in excess of $250,000 arising from nuclear incidents." 42 U.S.C. § 2210(k)(1). "[C]ontracts of indemnification [entered into by the institution and the Commission] shall cover public liability arising out of or in connection with the licensed activity[.]" 42 U.S.C. § 2210(k)(2). This section also exempts these licensed institutions from certain "financial protection" requirements under the Act. Id. It would make no sense for the Act to contain these provisions if it did not apply outside the weapons and energy industries. That is, Congress' choice to include a provision indemnifying licensed nonprofit educational institutions from public liability suggests strongly (perhaps overwhelmingly) that the Act applies to them[8].

Boyer next argues, following the reasoning of a District Court in our Circuit, that even if the Price-Anderson Act applies to a broad set of industries, it only covers defendants that have indemnity agreements with the NRC. See Gilberg v. Stepan Co., 24 F. Supp. 2d 325, 339 (D.N.J. 1998), supplemented, 24 F. Supp. 2d 355 (D.N.J. 1998).

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[8] In the alternative, Boyer claims that, even if the Price-Anderson Act applies to university research labs, it applies only to labs that operate nuclear reactors. She cites no portion of the Act in favor of this position. The most she does is point to regulations dealing with indemnity agreements required for institutions that do use reactors. *See* 10 C.F.R. § 140.72. But the existence of regulations specifying requirements for institutions with reactors does not imply that those without them are somehow exempt from the Act entirely. She goes on to cite the NRC's list of institutions with nuclear reactors in Pennsylvania and notes the University's absence. *See* United States Nuclear Regulatory Commission, https://www.nrc.gov/info-finder/region-state/pennsylvania.html. Its presence on the reactor list is relevant only if having a reactor is a prerequisite to the Act's coverage, and we see no reason to hold that it is.

Noting § 2014(q)'s broad definition of "nuclear incident," the *Gilberg* Court looked for a limit to its reach in the nearby definition of "extraordinary nuclear occurrence." *Id.* (Recall that extraordinary nuclear occurrences were the only events that triggered federal jurisdiction before the 1988 Price-Anderson Act amendments.) Following a long and complicated analysis of the Act's history and structure, *Gilberg* concluded that a nuclear incident may only occur (and the Act applies) when harm happens at a site covered by an indemnification agreement with the NRC. *Id.* The University of Pennsylvania has no such agreement, Audio Recording of Oral Argument held June 28, 2017 at 31:23 to 31:40 (http://www2.ca3.uscourts.gov/oralargument/audio/16-3801EstateofJeffreyHWarevHospitaloftheUnivesityofPennsylvaniaetal.mp3); so, the argument goes, its negligence toward Ware did not cause a nuclear incident.

We are unpersuaded that an indemnification agreement is necessary to trigger the Act's applicability. What *Gilberg* misses is that "one purpose behind the 1988 amendments was to expand the scope of federal jurisdiction beyond actions arising from 'extraordinary nuclear occurrences[.]'" *Acuna*, 200 F.3d at 339 (citing *Kerr–McGee,* 115 F.3d at 1502). Indeed, that is why the definition of "nuclear incident" is so broad. *Id.* Thus we agree with the Fifth Circuit's conclusion that *Gilberg*'s "attempts to reintroduce the limitations of 'extraordinary nuclear occurrence' into the 1988 amendments' substitution of 'nuclear incident' rely on faulty statutory interpretation and are contrary to Congressional intent." *Id.* (citing *Carey,* 60 F. Supp. 2d at 803–07).

The remaining arguments suffer from the same flaw. Even if we were to accept the limiting principles Boyer proposes, her claims would still be governed by the Act. For this reason, we have no need to pass on whether the Act is limited in the remaining ways Boyer suggests. We note only that, even so, the outcome here would be no different.

Boyer argues that the Act applies only when a defendant has a license to possess nuclear materials. Indeed, § 2210(k)'s reference to "any license issued" under the federal scheme for atomic energy could be read to suggest that universities are covered by Price-Anderson only when they hold a license to use the materials involved in any nuclear incident. One District Court has held that, regardless of the type of institution in question, the Act applies exclusively to entities holding licenses. *Irwin v. CSX Transp., Inc.*, No. 3:10-CV-300, 2011 WL 976376, at *2 (E.D. Tenn. Mar. 16, 2011). And the unpersuasive *Samples* opinion mentioned above in footnote 7 gives a nod to that view as well, 165 F. Supp. 2d at 1321 ("the word occurrence as used in the definition of nuclear incident means that event at the site of the *licensed activity, or activity for which the Commission has entered into a contract*, which may cause damage" (internal quotation marks and citations omitted) (emphasis in original)). For this reason too, Boyer asserts, UPenn is not covered by the Act.

But the University of Pennsylvania has such a license. Its license to engage in research using cesium-137 irradiators was issued by the Pennsylvania Department of Environmental Protection Bureau of Radiation Protection, which exercises delegated authority from the NRC per § 274 of the Atomic Energy Act of 1954, 42 U.S.C. § 2021. Boyer says that's not good enough; the license must be issued by the NRC directly. Her argument, however, is hard to follow.

The Price-Anderson Act is part of the Atomic Energy Act. The latter gives the NRC authority to enter into agreements with states allowing them to issue licenses in the NRC's stead. *See* 42 U.S.C. § 2021. In her Reply, Boyer seems to argue that, because UPenn has a state-issued license, only state nuclear regulations apply to its and its affiliates' conduct, and thus the Price-Anderson Act does not apply to her suit. But Boyer never says why this would be true. Indeed, our sister Circuit has held that "[t]here is nothing in the definition of 'nuclear incident' which suggests [the Act's application] should be contingent on whether the occurrence took place in a state which regulates its own [nuclear material] industry under NRC guidelines" or leaves that regulation to the NRC directly. *Acuna*, 200 F.3d at 339. We thus reject the argument that UPenn's state-issued license is meaningfully different in this context from a license issued directly by the NRC. As a result, even if Boyer is correct that possession of a license is the lynchpin for Price-Anderson's applicability, UPenn's license would satisfy that requirement here.[9]

Next up is Boyer's claim that the Act applies only to unintentional releases of nuclear energy. For support, she looks to one District Court that declined to apply the Act to claims of cancer patients intentionally subjected to radiation because "all of the cases applying the Price–Anderson Act have extended potential liability only to the *unintended* escape or release of nuclear energy." *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 832 (S.D. Ohio 1995) (emphasis added). Boyer contends her claims similarly do not implicate an unintentional release of nuclear energy. But that's not true. Her complaint alleges that Ware was harmed by UPenn's neglect of its duty to protect him adequately from radiation—that is, negligence, not deliberate exposure. So even if this exception to the Act exists, it wouldn't apply to this case.

Finally, the *Cincinnati Radiation* Court also noted that, during the legislative process leading to the 1988 amendments, Congress considered explicitly expanding the Act's reach to cover "persons operating nuclear pharmacies or hospital medicine

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[9] We do not hold that possession of a license determines the Act's applicability. Rather, we note only that, if having a license matters in this context, it makes no difference whether the license was issued by the NRC directly or by a state acting under delegated authority.

department[s,]" but declined to enact the expansion. *Id.* at 832 n.33 (citing S. Rep. No. 100–218, at 18 (1988), *reprinted as* 1988 U.S.C.C.A.N. 1476, 1493). So, Boyer argues, we should hold Congress' failure to adopt this language implies a limit on the Act's application to harm from radiation used for medical care.

But even if we were to read so much into Congress' inaction, it wouldn't help Boyer. The cesium-137 irradiators that allegedly harmed Ware were not used for patient care or any medical purpose nor were they kept in a nuclear pharmacy. They were used for research only and kept in a lab. The language Congress declined to enact simply has nothing to do with the facts of this case.

None of this is to say that the Act applies to all harm occurring from nuclear material in any situation whatsoever. Counsel for UPenn conceded at oral argument that any nuclear incident must, at the very least, involve "source, special nuclear, or byproduct material[.]" *See* 42 U.S.C. § 2014(q). According to counsel, that limitation would exempt harm arising from, among other things, x-rays, CAT scans, and naturally occurring uranium and radium. Audio Recording of Oral Argument held June 28, 2017 at 32:30 to 33:18 (http://www2.ca3.uscourts.gov/oralargument/audio/16-3801EstateofJeffreyHWarevHospitaloftheUnivesityofPennsylvaniaetal.mp3). Moreover, as mentioned, we do not decide whether the possession of a license, the intent of any nuclear energy release, or the medical use of nuclear material, might affect the Act's applicability to a particular case. We note only that these implicit limitations on the Price-Anderson Act's scope would not preclude its application here.

* * * * *

In sum, Boyer's claims alleging that Ware's cancer developed because UPenn negligently exposed him to cesium-137 are covered by the Price-Anderson Act. The claims allege a "nuclear incident" in that they describe an "occurrence . . . causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive . . . properties of . . . byproduct material[.]" 42 U.S.C. § 2014(q). Boyer contends UPenn is liable for the harm arising from this nuclear incident, so her action is a "public liability action" subject to federal court jurisdiction. *Id.* §§ 2014(w), (hh) & 2210(n)(2). We know no compelling limiting principle that would bar this straightforward application of the Act's text to her case, so we affirm the District Court's exercise of jurisdiction.

B. The District Court Did Not Err When It Declined to Permit Voluntary Dismissal of the Price-Anderson Claims and Retained Jurisdiction over Boyer's Remaining Claims.

When Boyer failed to convince the District Court that the Price-Anderson Act did not apply to her negligence claims (and later discovered that she would be unable to make the showing necessary to prevail on them), she asked to withdraw them and remand the remaining claims to state court. This tactic failed when the Court ruled that Boyer could not withdraw her claims so late in the game and thus retained jurisdiction over the entire case. It went on to grant summary judgment to the UPenn defendants on all of Boyer's claims because she failed to oppose any of their motions.

Boyer argues the District Court abused its discretion by denying her request to withdraw her Price-Anderson negligence claims and by refusing to remand the remainder of her claims. For the reasons that follow, we disagree.

1. Motion to Withdraw

Federal Rule of Civil Procedure 41 provides that a "plaintiff may dismiss an action without a court order by filing . . . a notice of dismissal *before* the opposing party serves either an answer or a motion for summary judgment[.]" Fed. R. Civ. P. 41(a) (emphasis added). Boyer waited to withdraw her Price-Anderson claims until after UPenn had filed its answer. At that point, any dismissal could occur "only by court order[] on terms that the court considers proper." *Id.*; *accord Ferguson v. Eakle*, 492 F.2d 26, 28 (3d Cir. 1974) (once an answer has been filed, whether to permit dismissal is left to the discretion of the District Court).

Of course, the District Court's discretion is not without limit. It must consider "the presence or extent of any prejudice to the defendant by the draconian measure of dismissing [a] plaintiff's complaint." *Ferguson*, 492 F.2d at 29. We have noted that "Rule 41 motions 'should be allowed unless defendant will suffer some prejudice other than the mere prospect of a second lawsuit.'" *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 863 (3d Cir. 1990) (citing 5 J. Moore, *Moore's Federal Practice* ¶ 41.05[1], at 41–62 (1988)). The record reflects that UPenn would indeed have suffered prejudice had the Price-Anderson negligence claims been withdrawn

The Magistrate Judge held that the Act applied to at least some of Boyer's claims in May 2014, and the District Court adopted the Magistrate Judge's Recommendation in full in December 2014. By the time Boyer filed her withdrawal motion a year later in December 2015, UPenn had produced five expert reports and thousands of pages of documents and had filed one of its four motions for summary judgment (the other three would follow the next month).

These facts are of a piece with *Ferguson*, 492 F.2d at 29, which held that a District Court abused its discretion by granting withdrawal "[f]ourteen months after [the objecting parties] became defendants in one case and had gone to the expense of retaining counsel, six months after they had gone through pre-trial, and at least two months after they had expected that all discovery had been completed[.]" Were Boyer permitted to withdraw her claims without prejudice, UPenn would have faced the prospect of potentially relitigating, at some later date, claims it had put significant time and resources into defending and already litigated to the summary-judgment stage. Thus we have no doubt the District Court acted within its discretion when it denied Boyer's motion.

2. Retention of Jurisdiction over Boyer's Remaining Claims

Boyer contends the District Court abused its discretion by retaining jurisdiction over her remaining claims of fraud, negligent infliction of emotional distress, medical malpractice, and corporate negligence. We again disagree.

Per 28 U.S.C. § 1367, the District Court had authority to exercise supplemental jurisdiction over any state-law claims. Even had it permitted withdrawal of claims governed by the Price-Anderson Act, the Court would not have lost jurisdiction to hear any state-law claims "that are so related to [the federal] claims . . . that they form[ed] part of the same case or controversy." *Id.*; *cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513–14, (2006) ("[W]hen a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to § 1367, over pendent state-law claims."). And Boyer offers no argument that her state-law claims were not part of the same case or controversy as those governed by the Price-Anderson Act. We have explained that the decision to retain supplemental jurisdiction "should be based on considerations of judicial economy, convenience and fairness to the litigants." *Kach v. Hose*, 589 F.3d 626, 650 (3d Cir.

2009) (internal quotation marks omitted). As discussed above, the parties had already engaged in significant litigation before the District Court, so values of economy, convenience, and fairness all supported its retention of jurisdiction. We see no reason to second-guess it now.[10]

IV. CONCLUSION

The facts of Boyer's action are tragic: her husband, a 47-year-old researcher whose life's work was studying the effects of radiation on biological organisms, died from a rare form of brain cancer. But as often happens in the law, this case provides us little opportunity to contemplate Ware's suffering from his illness or his family's suffering from his loss. Instead, our review is confined to bloodless questions of statutory interpretation and appropriate management of litigation. On these issues we find no fault with the District Court's holdings. The Price-Anderson Act governed Boyer's negligence claims, and the Court did not abuse its discretion in denying

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[10] The District Court held that its retention of jurisdiction was all the more appropriate because Boyer's claims of fraud and negligent infliction of emotional distress were in fact federal claims governed by the Price-Anderson Act. Because we hold that the District Court properly exercised supplemental jurisdiction over Boyer's "state-law" claims per § 1367, we do not reach this alternative jurisdictional ground.

her request to withdraw those claims and to remand her others. We thus affirm its judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ESTATE OF JEFFREY H. WARE by Barbara Boyer, individually, on behalf of wrongful death beneficiaries and as administratrix of the Estate of Jeffrey H. Ware,	:
Plaintiff,	:
v.	:
HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA; UNIVERSITY OF PENNSYLVANIA; PERELMAN SCHOOL OF MEDICINE UNIVERSITY OF PENNSYLVANIA; TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA; ANN R. KENNEDY, D.S.C.; GARY KAO, M.D.; MICHELLE ALONSO-BASANTA, M.D.; NATIONAL SPACE BIOMEDICAL RESEARCH INSTITUTE; and CENTER FOR ACUTE RADIATION RESEARCH,	:
Defendants.	:

JUDGMENT

And now, this 8thday of September, 2016, for the reasons set forth in the accompanying Memorandum Opinion issued this day, IT IS ORDERED as follows:

1. Plaintiff's Motion to Withdraw Counts I and II and to Remand Counts III, IV, V, and VI to the Philadelphia Court of Common Pleas, ECF No. 78, is DENIED.

2. Defendants' Motion for Summary Judgment on the Price-Anderson PLA and on All Federal Issues in Counts Three and Four, ECF No. 82, is GRANTED.

3. Defendants' Motion for Summary Judgment as to Plaintiff's Claims of Medical Negligence, Counts 3, 4 and 5, ECF No. 81, is GRANTED.

4. Defendants' Motion to Determine the Duty Owed to Dr. Ware in the Price-Anderson Public Liability Action, ECF No. 72, is DENIED as moot.

5. Defendants' Motion to Determine the Causation Test in a Price-Anderson PLA, ECF No. 80, is DENIED as moot.

6. Defendants' Joint Motion for Order Compelling Plaintiff to Produce Expert Reports or be

Precluded and for Modification of Amended Scheduling Order, ECF No. 73, is DENIED as moot.

7. Defendants' Joint Motion for an Order Compelling Plaintiff to Produce Answers to Contention Interrogatories Served on September 28, 2015, David Ware and Jean Boyer for Depositions and Signed Verifications for Release of IRS and Social Security Records, ECF No. 74, is DENIED as moot.

8. Defendants' Proposed Findings of Fact and Conclusions of Law, ECF No. 85, is STRICKEN.

9. JUDGMENT IS ENTERED in favor of all Defendants and against the Plaintiff.

10. The Clerk of Court is directed to close this case.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge