

No.

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**In the Supreme Court of the United States**

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UNITED STATES OF AMERICA, PETITIONER

*v.*

COTTER CORP., N.S.L.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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### QUESTION PRESENTED

The Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576, authorized the federal government to “enter into agreements of indemnification with its contractors” under “contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident,” in order to provide government indemnification against “public liability arising out of or in connection with the contractual activity.” § 4, 71 Stat. 577 (42 U.S.C. 2210(d) (1964)). In this case, respondent is not a government contractor. It is instead a private, downstream purchaser of nuclear material that was originally produced under a contract between the government and another party for the benefit of the United States’ atomic-weapons program, but the government then sold the material “as is” to yet another party, and the material passed through still more private hands before respondent purchased the material for its own benefit and then allegedly mishandled the material. The question presented is as follows:

Whether a downstream purchaser’s liability for mishandling nuclear material that the purchaser obtained for private benefit, but that was originally produced more than a decade earlier under a government contract with another party, is subject to indemnification by the United States under the original government contract because it qualifies as “public liability arising out of or in connection with the contractual activity” under 42 U.S.C. 2210(d).

**PARTIES TO THE PROCEEDING**

Petitioner (defendant-appellee below) is the United States of America.

Respondent (plaintiff-appellant below) is Cotter Corp., N.S.L.

**RELATED PROCEEDINGS**

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United States Court of Appeals (Fed. Cir.):

*Cotter Corp., N.S.L. v. United States*, No. 23-1826  
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## **OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 127 F.4th 1353. The memorandum opinion and order of the Court of Federal Claims (App., *infra*, 41a-70a) is reported at 165 Fed. Cl. 138.

## **JURISDICTION**

The judgment of the court of appeals was entered on February 10, 2025. A petition for rehearing was denied on October 24, 2025 (App., *infra*, 71a-72a). On January 9, 2026, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 23, 2026. On February 9, 2026, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including March 23, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

Pertinent statutory provisions are reproduced in the appendix. App., *infra*, 73a-78a.

**INTRODUCTION**

In 1957, Congress enacted and President Eisenhower signed into law the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576, to provide government indemnification for “a portion of the damages suffered by the public,” *ibid.* (42 U.S.C. 2012(i) (1964)), from “a limited class of nuclear incidents,” *Hercules Inc. v. United States*, 516 U.S. 417, 429 (1996).<sup>1</sup> To encourage industry’s participation in the United States’ atomic-weapons and atomic-energy programs, Price-Anderson authorized the government to “enter into agreements of indemnification with its contractors” under “contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident.” 42 U.S.C. 2210(d) (1964). When the government chooses to enter into such an agreement, it is obliged to provide indemnification for “public liability arising out of or in connection with the contractual activity.” *Ibid.*

This case threatens a vast expansion of the statute’s limited government-contract indemnity. Respondent is a private company that purchased nuclear material from a second company, which had acquired the material by foreclosing on the assets of a third company, which had purchased the material “as is” from the government, more than a decade after the material had been produced under a separate contract between the

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<sup>1</sup> Because this case involves a 1962 agreement, App., *infra*, 12a, this petition cites the contemporaneous version of Price-Anderson, as it appeared in the 1964 edition of the United States Code.

government and a fourth company. Respondent purchased the material for its own benefit, seeking to extract valuable uranium for resale. The government undisputedly did not enter into any relevant contract with respondent. When the government granted respondent a license to handle that nuclear material, it exercised its statutory discretion to *decline* to indemnify respondent.

Yet, when respondent later incurred \$15 million in liability and costs from a private lawsuit for its alleged mishandling of that material, it turned around and filed this suit against the United States, seeking statutory indemnification under Price-Anderson. The sole asserted “connection” with “contractual activity” on which respondent premises its claim is that the nuclear material was originally produced, more than a decade earlier, under a contract between the government and its former contractor, Mallinckrodt Chemical Works, which had included an indemnification agreement.

The Court of Federal Claims dismissed respondent’s suit, holding that the statutory-indemnification claim fails as a matter of law because respondent has not alleged a sufficient connection between its own liability and the government’s contract with Mallinckrodt. But the Federal Circuit reversed and remanded for the suit to go forward.

The court of appeals’ decision is unprecedented and untenable. In place of the trial court’s textual analysis of the statute, the Federal Circuit announced a “‘very sweeping’” reading, inspired by its own “broad” understanding of congressional “purpose” and by a wide-ranging tour of pre- and post-enactment legislative history. App., *infra*, 30a, 33a (citation omitted). In place of the limited scheme of contract-related indemnity that Congress authorized, the Federal Circuit substituted

an amorphous “standard of ‘reasonable, objective foreseeability,’” borrowed from unrelated circuit precedent “in another context,” which makes the government’s indemnification obligations “outlast the contract” and attach regardless of whether “the indemnity claimant’s activities (generating liability to others) \* \* \* contribut[ed] to the performance of the contract” in any way. *Id.* at 23a, 25a, 30a, 32a (citation omitted). Among other flaws, that ruling effectively negates Congress’s express grant of governmental discretion *not* to indemnify parties (like respondent) that the government licenses to handle nuclear material (including material originally produced under a government contract that included an indemnification agreement). That grant of discretion suggests that Congress did not expect the government to assume indemnification obligations for essentially all nuclear material.

The decision below warrants this Court’s review. It subjects the United States to the threat of indemnification obligations far exceeding what Congress authorized and what the government agreed to in nuclear-related contracts over the past 70 years. Given the nature of claims involving nuclear materials, that translates into potentially enormous liability—up to a maximum of \$16.6 billion *for each nuclear incident*—all to be borne by taxpayers, instead of by the third parties whose post-contract activities gave rise to those incidents. The decision also undermines important nuclear-related policies of the President and Congress. Because the Federal Circuit has exclusive jurisdiction over indemnification claims like respondent’s, there is no possibility of further percolation. And because the Federal Circuit denied the government’s petition for rehearing

en banc, there is little prospect that that court will correct its own error.

This Court should grant the petition for a writ of certiorari and reverse the Federal Circuit's judgment.

#### STATEMENT

##### A. Legal Background

1. The Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, “erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment.” *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 194 (1983). “The Act implemented this policy decision by providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors,” as well as other activities involving “the transfer, delivery, receipt, acquisition, possession and use of nuclear materials.” *Id.* at 207.<sup>2</sup>

2. In 1957, the Price-Anderson Act amended the Atomic Energy Act of 1954 to provide additional mechanisms to “protect[] the public and . . . encourag[e] the development of the atomic energy industry.” *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 64 (1978) (quoting 42 U.S.C. 2012(i)). In essence, Price-Anderson provided that “the United States may make funds available for a portion of the damages suf-

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<sup>2</sup> Since the abolition of the Atomic Energy Commission in the 1970s, responsibility for implementing the Atomic Energy Act has been shared among the Nuclear Regulatory Commission, which serves as the principal licensing and safety regulator, see 42 U.S.C. 5841-5845; the U.S. Department of Energy, which oversees research, promotional, and national-security activities, see 42 U.S.C. 5811-5813, 7151(a); and the Environmental Protection Agency, which establishes standards for certain radiation hazards, *e.g.*, 42 U.S.C. 2022.

ferred by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.” 42 U.S.C. 2012(i) (1964).<sup>3</sup>

Price-Anderson adopted two parallel indemnification frameworks: one for licensees and one for government contractors. As to licensees, “Price-Anderson 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.’” *El Paso Nat. Gas Co. v. Nextsosie*, 526 U.S. 473, 476 (1999) (quoting 42 U.S.C. 2014(w)). It did so by adding Section 170(a)-(c) to the Atomic Energy Act. Price-Anderson Act § 4, 71 Stat. 576-577 (42 U.S.C. 2210(a)-(c) (1964)). Under those provisions, certain kinds of licenses (including those held by reactor operators) “shall” include “as a condition of the license a requirement that the licensee have and maintain financial protection”—*i.e.*, private insurance—“of such type and in such amounts as the [government] shall require \* \* \* to cover public liability claims.” *Ibid.* (42 U.S.C. 2210(a) (1964)). But other licenses—including the one held by respondent, see p. 12, *infra*—“may” include a private-insurance requirement, at the government’s discretion. 42 U.S.C. 2210(a) (1964). When the government issues a license including such a requirement, it must also agree to indemnify “the licensee and other persons indemnified” against “public

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<sup>3</sup> The Price-Anderson framework for licensee and contractor indemnification remains in effect, subject to certain amendments that postdate the events underlying this case. See 42 U.S.C. 2012, 2014, 2210(a)-(d). Like the decision below, this petition generally refers to the version of the statute that was in effect during the events underlying this case. See App., *infra*, 6a n.2; see also p. 2 n.1, *supra*.

liability arising out of or in connection with the licensed activity” that is “in excess of the level of financial protection required of the licensee.” 42 U.S.C. 2210(c) (1964).

As to government contractors, the next Subsection, Section 170(d) of the Atomic Energy Act, authorized the government to “enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident.” 42 U.S.C. 2210(d) (1964). It specified that the government “may” require contractors to have “financial protection” to cover that liability, “as the Commission shall determine to be appropriate.” *Ibid.* And it provided that such agreements “shall indemnify the persons indemnified against” claims for “public liability arising out of or in connection with the contractual activity,” insofar as it exceeds the amount of any financial protection required. *Ibid.*

In both the license and contract contexts, Price-Anderson originally limited the government’s aggregate indemnification obligations to \$500 million for each nuclear incident. 42 U.S.C. 2210(c) and (d) (1964). As amended and adjusted for inflation, the limit for liability arising from contractual activity is now about \$16.6 billion for each incident. See 42 U.S.C. 2210(d)(2)(B) and (t)(2); *Adjustment of Indemnification Amount for Inflation*, 88 Fed. Reg. 78,011 (Nov. 14, 2023).

Congress defined various terms used in the Price-Anderson Act. In the context of nuclear incidents in the United States, it defined “person indemnified” as both “the person with whom an indemnity agreement is executed” and “any other person who may be liable for pub-

lic liability.” 42 U.S.C. 2014(r) (1964). It defined “‘public liability’” as “any legal liability arising out of or resulting from a nuclear incident,” with exceptions not relevant here. 42 U.S.C. 2014(u) (1964). And it defined “‘nuclear incident’” as “any occurrence within the United States causing bodily injury, sickness, disease, or death, or loss of or damage to property, or for loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of [nuclear] material.” 42 U.S.C. 2014(o) (1964).<sup>4</sup>

3. Following Price-Anderson’s enactment, the Atomic Energy Commission promulgated regulations adopting standard clauses to be “incorporated into [a] contract pursuant to the authority contained in subsection [2210](d).” *Use of Standard Clauses*, 27 Fed. Reg. 7879, 7880 (Aug. 9, 1962). The standard language defined the scope of the indemnification as including “public liability which (i) arises out of or in connection with the contractual activity; and (ii) arises out of or results from \* \* \* a nuclear incident which involves items (such as

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<sup>4</sup> Price-Anderson originally authorized indemnification only with respect to nuclear incidents occurring “within the United States.” 42 U.S.C. 2014(o) (1958). In 1962, however, Congress extended its reach to some foreign incidents. In that context, it added language defining “‘person indemnified’” as “the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the [government] or any project to which indemnification under the provisions of section [2210(d)] has been extended or under any subcontract, purchase order or other agreement, of any tier, under any such contract or project”; and it defined “‘nuclear incident’” in that context as a nuclear incident that “involves a facility or device owned by, and used by or under contract with, the United States.” Act of Aug. 29, 1962, Pub. L. No. 87-615, §§ 4-5, 76 Stat. 410 (42 U.S.C. 2014(o) and (r) (1964)).

equipment, material, facilities, or design or other data) produced or delivered under this contract.” *Ibid.* The Commission also promulgated standard language for contractors to include in “subcontracts” or “purchase orders,” which stated that the government “has agreed to indemnify the Contractor and other persons indemnified, including the subcontractor, against claims for public liability (as defined in [Price-Anderson]) arising out of or in connection with the contractual activity.” *Indemnification of AEC Contractors*, 27 Fed. Reg. 7877, 7878-7879 (Aug. 9, 1962). But such indemnification would generally “not include” activity at “the subcontractor’s plant and facilities,” absent an otherwise sufficient connection to the government contract. *Id.* at 7879.

Congress has required the Executive to “submit to the Congress \* \* \* detailed reports concerning the need for continuation or modification of the provisions of [Section 2210].” 42 U.S.C. 2210(p). Those reports have explained that “[t]he phrase ‘arising out of or in connection with the contractual activity’” in Section 2210(d) “is an important element of the statute and the implementing agreements.” U.S. Dep’t of Energy, *Report to the Congress as Required by Section-170 p. of the Atomic Energy Act of 1954, as amended 2* (Aug. 1, 1983) (1983 Report) (citation omitted). The Department of Energy has stated that “[t]here must be a sufficient nexus between activities undertaken pursuant to a [government] contract and a nuclear incident to demonstrate a causal connection that provides a basis for legal liability,” *Price-Anderson Act Report to Congress 7* (Jan. 2023) (2023 Report), because “[r]esponsibility for [the liability-producing] events can be logically attributed to the Government” only in “situations that are largely within the scope of the prime contractor’s and

[government's] overall health and safety measures and controls." 1983 Report 7.

The Department's reports have further explained that Price-Anderson's "carefully devised" indemnity framework does not extend so far as to cover "any" and all "damage from nuclear material." 1983 Report 7. For example, indemnification may not reach "harm caused by sabotage," "[t]errorism," or "theft of nuclear materials," *ibid.*, or by "commercial activities that are not for the account of [the government], even if such activities take place on [government] property," C.A. App. 1236 (1999 Report). And it generally does "not cover a nuclear incident involving radioactive material not under the possession and control of [the government] or a [government] contractor at the time of the nuclear incident, even though the material had previously been used in or generated by a [government] contractual activity." 2023 Report 7.

#### **B. Factual Background**

1. a. From 1942 through 1966, the government entered into a series of contracts with Mallinckrodt Chemical Works, a private company that is not a party to this case. App., *infra*, 9a-10a. Mallinckrodt "processed uranium for use in the government's atomic-weapons program" by "operat[ing] government-owned plants" in Missouri, using "government furnished" supplies. *Ibid.* Mallinckrodt was required to "deliver any unused materials to the government," which "maintained ownership over the radioactive material." *Id.* at 10a, 45a.

In return, the government agreed to pay Mallinckrodt for "materials delivered and accepted or services rendered." C.A. App. 47. It also agreed to provide contractor indemnification under 42 U.S.C. 2210(d) (1964), using the standard language adopted by federal regula-

tion. Specifically, in a 1962 modification of its contract with Mallinckrodt, the government agreed to “indemnify the Contractor, and other persons indemnified,” against “claims for public liability,” defined as liability that “(i) arises out of or in connection with the contractual activity; and (ii) arises out of or results from \* \* \* a nuclear incident which involves items \* \* \* produced or delivered under this contract.” App., *infra*, 12a-13a (quoting C.A. App. 781-782) (emphases omitted).

Mallinckrodt ultimately “purified and provided all of the uranium oxide used by the Manhattan Project,” App., *infra*, 45a n.4 (brackets and citation omitted), and continued to perform work under its contracts with the government through 1967, *id.* at 10a. Between 1946 and 1957, Mallinckrodt’s work at government-owned plants produced radioactive materials and residues. *Id.* at 2a-3a; C.A. App. 1343. Under the contracts, the government retained ownership of that nuclear material, which was put in storage by the late 1950s. See App., *infra*, 45a-46a; C.A. App. 25 (Compl. ¶ 15).

b. In 1966, the government sold approximately 117,000 tons of the nuclear material to Continental Mining & Milling Co., another private company that is not a party to this case. App., *infra*, 13a, 47a-48a. Continental intended to “extract[]” certain “‘contents of value,’ such as rare earth metals and uranium,” *id.* at 13a (citation omitted), for “resale,” C.A. App. 1328.

In the bill of sale, the government agreed to convey the material “as is” and disclaimed any warranty. App., *infra*, 47a; C.A. App. 1107-1108. Continental agreed to pay the government \$126,500, C.A. App. 1106, and to assume “full responsibility for the care and custody of the material,” App., *infra*, 47a (citation omitted). It agreed to obtain a license to handle the material, *ibid.*, which

the government issued, C.A. App. 27 (Compl. ¶ 21). The bill of sale did not include any agreement by the government to indemnify Continental. Gov't C.A. Br. 36-37.

Continental then moved the material from the government-owned facility to a storage site on Continental's own property. App., *infra*, 13a-14a.

c. In early 1967, Commercial Discount Corp.—another private company that is not a party here—foreclosed on Continental's assets, including the nuclear material at Continental's storage site. App., *infra*, 48a; Gov't C.A. Br. 12. The government did not enter into any contract with Commercial in connection with the material.

d. From 1967 through 1969, Commercial entered into a series of contracts to sell some of the nuclear material at the storage site to respondent. App., *infra*, 14a, 48a. Commercial agreed to deliver the material under specified conditions. C.A. App. 1114. In return, respondent initially agreed to pay Commercial at least "90% of [the] value" of any uranium that respondent "recovered" from the material (estimated at \$3 per pound, multiplied by over 400,000 pounds of recoverable uranium). *Id.* at 1118-1119; see *id.* at 1125. Respondent also later agreed, while delivery was ongoing, to pay Commercial \$596,766.04, plus 10% interest, for one portion of the remaining material. *Id.* at 1130-1131.

Commercial and respondent sought federal licenses to handle the material, which the government granted. App., *infra*, 14a-15a. Respondent's license application stated that the "purpose for which [the] material will be used" was for respondent to "process the material to recover uranium." C.A. App. 1142 (capitalization omitted). Respondent's license included no agreement by the government to indemnify respondent. See *id.* at 1146.

Respondent took possession of the material and dried it for processing. C.A. App. 1129, 1137, 1139, 1142. Respondent then transported most of the material to its facility in Colorado, and disposed of a portion of the material in a landfill in Missouri. See App., *infra*, 14a, 48a-49a. Respondent's license expired in 1974. *Id.* at 48a.

2. Beginning in 2012, hundreds of individuals sued respondent and others in litigation later largely consolidated as *McClurg v. MI Holdings, Inc.*, No. 12-cv-361 (E.D. Mo. Jan. 25, 2022). App., *infra*, 15a. The *McClurg* plaintiffs alleged that respondent improperly processed, handled, transported, stored, and disposed of the nuclear material between 1969 and 1973, resulting in the release of hazardous, toxic, and radioactive substances into the air, soil, surface water, and ground water in Missouri, and that the contamination caused the plaintiffs to suffer injury, sickness, disease, and death. *Id.* at 15a-16a. They sought compensatory and punitive damages for “great physical pain and suffering,” wrongful “death,” and “hospital, medical, pharmaceutical, and other expenses” caused by respondent’s “intentional, malicious, grossly negligent, and reckless” conduct. 12-cv-361 D. Ct. Doc. 592, at 8, 14-15, 31-32 (June 13, 2017).

Respondent entered into a confidential settlement with the *McClurg* plaintiffs in 2018, and the district court approved the settlement in 2019. App., *infra*, 17a-18a. The government did not participate in the *McClurg* litigation or its settlement. *Id.* at 16a-17a.

### C. Proceedings Below

1. In 2022, respondent filed this suit against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1). App., *infra*, 18a. Respondent’s complaint alleges that respondent is entitled to government indemnification for the costs of settling

and defending the *McClurg* litigation, amounting to about \$15 million. *Ibid.* As relevant here, respondent alleges that, under Section 2210(d), it is entitled to government-contract indemnification because its costs are “public liability arising out of or in connection with the contractual activity” under a “contract[] for the benefit of the United States,” 42 U.S.C. 2210(d) (1964)—specifically, the contract between Mallinckrodt and the government for the benefit of the United States’ atomic-weapons program, App., *infra*, 18a, 23a.

The Court of Federal Claims granted the United States’ motion to dismiss the complaint. App., *infra*, 41a-70a. As relevant here, the court held that respondent has failed to state a claim for statutory indemnification under Section 2210(d) because its complaint does not allege a sufficient “nexus to a contractual relationship for the benefit of the government.” *Id.* at 59a. The court rejected respondent’s contrary argument that the statute makes indemnification run “inextricabl[y]” with the “material that Mallinckrodt produced for the United States” without requiring any further connection to contractual activity. Fed. Cl. Doc. 17, at 9-10 (Sept. 22, 2022).

The Court of Federal Claims “beg[a]n ‘with the language of the statute’” and determined that Section 2210(d)’s “plain language”—including its references to “activities under contracts for the benefit of the United States” and to indemnity “in connection with such contract”—“requires a nexus” or a sufficient “relationship” between the “contractual activity” and the liability to be indemnified. App., *infra*, 53a-55a (citations omitted). The court found that respondent has not plausibly pleaded “the nexus required” to trigger the government’s obligation to indemnify respondent under

Section 2210(d). *Id.* at 61a-62a. Considering the complaint and documents incorporated by reference, the court “agree[d] with the United States” that respondent’s liability-producing conduct was “too far ‘downstream’” from the government’s contract with Mallinckrodt, for multiple reasons. *Id.* at 61a (citation omitted).

2. The Federal Circuit reversed and remanded. App., *infra*, 1a-40a. As relevant here, the court held that respondent has stated a claim for government-contract indemnification under Section 2210(d). *Id.* at 22a-33a. It rejected the trial court’s “narrow interpretation” of Section 2210(d), which the court of appeals construed as “effectively requir[ing] (a) a contemporaneous relationship between the liability-generating acts of the non-contractor indemnity claimant ([respondent]) and the performance of the contract (by Mallinckrodt or the government) and, seemingly, (b) that the indemnity claimant’s activities (generating liability to others) were related to the contractual activities in the particular sense of contributing to the performance of the contract.” *Id.* at 23a.

Instead, the Federal Circuit interpreted Section 2210(d) to provide indemnification where “the eventual exposure of the public in the asserted nuclear incident meets a standard of ‘reasonable, objective foreseeability.’” App., *infra*, 32a (citation omitted). The court read the statute as “focused simply on the hazard from the [nuclear] material,” which “will outlast the contract” and may arise “‘at any time’”—perhaps even after “‘hundreds of years.’” *Id.* at 25a, 26a n.6 (citations omitted). Finding the statutory text “‘very sweeping in scope,’” based on circuit precedent interpreting other statutes “in another context,” the court invoked its understanding of the “purposes” and “objectives” of Price-

Anderson in general, and of the “purpose” and “aim” of Section 2210(d) in particular. *Id.* at 26a, 30a-31a, 33a (citation omitted). The court determined that Congress’s purpose “was a broad one”: “to guarantee the (domestic) public compensation for harm if [a nuclear] incident occurred; and to induce private-sector investment in work Congress deemed of great value to the country.” *Id.* at 33a. The court also deemed significant Congress’s 1962 amendment authorizing “narrower” indemnification for certain “foreign” nuclear incidents, while “retain[ing]” the “breadth” of Price-Anderson’s “pre-existing scope for domestic occurrences.” *Id.* at 27a-28a. And the court relied on the legislative history of Price-Anderson, *id.* at 5a, 26a, of prior statutes, *id.* at 25a n.6, and of “later” statutes that postdated the events underlying this case, *id.* at 26a.

The Federal Circuit concluded that respondent has stated “a plausible allegation of entitlement to indemnification” under Section 2210, considering the allegations in the complaint, documents incorporated by reference, and other judicially noticeable facts. App., *infra*, 21a; see *id.* at 4a. The court found it sufficient that respondent allegedly incurred liability by mishandling material “originally produced by Mallinckrodt for the government under the [government]-Mallinckrodt contract,” that “[t]he [government]-Mallinckrodt contractual activity of creating the nuclear material at issue was a but-for cause of the public liability,” and that “[t]he path from the contractual activity to the nuclear incident was not a long or tortuous one.” *Id.* at 28a, 31a.

3. The Federal Circuit denied the government’s petition for rehearing en banc. App., *infra*, 71a-72a.

### REASONS FOR GRANTING THE PETITION

The Federal Circuit erred in holding that respondent has stated a claim for indemnification under the Price-Anderson Act for public liability arising out of or in connection with contractual activity under a contract for the benefit of the United States. The government undisputedly never entered into an indemnification agreement with respondent, which purchased nuclear material on the private market for its own benefit, not the Nation's, and then allegedly caused injury and death by intentionally, maliciously, grossly negligently, and recklessly mishandling that material. In holding that the government must nonetheless foot the bill for respondent's alleged misdeeds, the Federal Circuit announced a sweeping new standard for indemnification that far outstrips what Congress authorized and what the government agreed to give. That standard will now govern all claims for Price-Anderson indemnification, which fall within the Federal Circuit's exclusive jurisdiction. If left uncorrected, the decision below will threaten the government (and ultimately, federal taxpayers) with huge and unjustified liabilities for purely private wrongs, while granting windfalls to the parties actually responsible, and will have other serious negative consequences. The Court should grant the petition for a writ of certiorari and reverse the court of appeals' judgment.

#### A. The Federal Circuit's Decision Is Incorrect

1. a. The controlling provision of the Price-Anderson Act authorizes indemnification only against "public liability arising out of or in connection with the contractual activity" under a "contract[] for the benefit of the United States." 42 U.S.C. 2210(d) (1964). The "plain language" of that provision "requires a nexus" between liability and "contractual activity," as the Court of Federal Claims correctly explained below. App., *infra*, 55a.

That is the “ordinary meaning” of the terms “‘arising out of or in connection with,’” which indicate that “there must be a relationship,” “tie,” or “nexus” to “contractual activity.” *Id.* at 58a-59a (citation omitted). A contrary reading would improperly “disregard” and “render[] superfluous” those key terms limiting the scope of indemnification. *Id.* at 57a-58a.

Other language in Section 2210(d) bolsters the Court of Federal Claims’ interpretation. The provision’s repeated references to “‘activities’” are “always couched in relation to the [government’s] contractors or those operating ‘under contract,’” and the government’s “authority to enter into indemnification agreements is presented within the context of a contractual activity that benefits the government’s nuclear program.” App., *infra*, 55a-56a (quoting Section 2210(d)). Moreover, the provision specifies that indemnification applies only to public liability “above the amount of the financial protection required \* \* \* *in connection with such contract.*” 42 U.S.C. 2210(d) (1964) (emphasis added). Thus, “the statutory language itself explicitly underscores the importance of a contractual relationship,” in multiple ways—including by its reference to “financial protections required by the [government],” which undisputedly apply to the contractor alone. App, *infra*, 56a; see p. 7, *supra*. That language confirms that the Court of Federal Claims did not “‘overread’” Section 2210(d) in concluding that the provision “limit[s] government liability by emphasizing a relationship with the government itself or an indemnified contractor.” *Ibid.* (citation omitted).

The Court of Federal Claims correctly explained that indemnification under Section 2210(d) requires “a contractual relationship *for the benefit of the [United*

*States*].” App., *infra*, 59a (emphasis added). By authorizing indemnification only “under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident,” Congress identified the essential characteristics of the covered contractual activity, which necessarily inform what it means for liability to “aris[e] out of or in connection with th[at] contractual activity.” 42 U.S.C. 2210(d) (1964). That “language limits who may \* \* \* benefit from an indemnification agreement,” based on whether a claimant has the kind of “nexus to a contractual relationship” that Congress has required. App., *infra*, 59a-60a. Accordingly, even when liability-producing activities directly involve a nuclear incident, no one may claim Price-Anderson indemnity for liability that is unrelated to activities “for the benefit of the United States.” 42 U.S.C. 2210(d) (1964).

b. Statutory structure, on multiple levels, confirms that reading and further illuminates the nature of the relationship to contractual activity that Section 2210(d) requires.

To start, the immediately preceding provisions indicate that Section 2210(d) cannot be read so broadly as to *mandate* indemnification for everyone who receives a license to handle nuclear material, including material originally created under a government contract. To the contrary, Congress provided that most licensees “may” —and hence may not—be subject to indemnification and financial-protection requirements, at the government’s discretion. 42 U.S.C. 2210(a)-(c) (1964); see *Bouarfa v. Mayorkas*, 604 U.S. 6, 13 (2024) (“As this Court has repeatedly observed, the word ‘may’ *clearly* connotes discretion.”) (quoting *Biden v. Texas*, 597 U.S. 785, 802 (2022)) (brackets and some internal quotation

marks omitted). By contrast, Congress mandated that the government “shall” provide indemnification only for a narrow category of licensees (such as nuclear reactor operators) that is not at issue here. See p. 6, *supra*. That “reticulated” framework should foreclose an “unbounded interpretation” of Section 2210(d) that would “circumvent” or “swallow the preceding” Subsections’ limitations. Cf. *BLOM Bank SAL v. Honickman*, 605 U.S. 204, 211 (2025) (citations and internal quotation marks omitted).

Moreover, Price-Anderson began with a congressional finding that “the United States may make funds available for *a portion* of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.” 42 U.S.C. 2012(i) (1964) (emphasis added). This Court has recognized that the statute’s “indemnity scheme” reaches only “a limited class of nuclear incidents.” *Hercules Inc. v. United States*, 516 U.S. 417, 428-429 (1996) (citing *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 63-67 (1978)). Section 2210(d)’s requirement that public liability “aris[e] out of or in connection with” contractual activity—along with Section 2210(c)’s parallel requirement of a nexus to licensed activity, in the license-indemnification context—is a key aspect of that limitation. 42 U.S.C. 2210(c) and (d) (1964).

Other provisions of the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, confirm that Congress knew how to, and did, impose other obligations that run perpetually with nuclear material, without requiring a nexus to contractual activity. As relevant here, for example, Congress categorically provided that “no person” may “transfer, deliver, receive possession of or title to, or import into or export from the United States any [nu-

clear] material” of the kind at issue in this case without a “license issued by the [government].” 42 U.S.C. 2092 (1964); see, *e.g.*, 42 U.S.C. 2111 (1964) (similar requirement for another kind of nuclear material). If Congress similarly wanted to mandate government indemnification across the board for anyone who handles nuclear material, “it easily could have drafted language to that effect.” *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014). Instead, it eschewed such broad coverage in Section 2210(d) and required a tighter connection to contractual activity for the benefit of the United States before indemnification would apply.

c. Historical context confirms the strength of those structural inferences. “Until 1954, the use, control, and ownership of all nuclear technology remained a federal monopoly.” *English v. General Elec. Co.*, 496 U.S. 72, 80 (1990). Even after that date, “the Federal Government retained extensive control over” the “development of atomic energy,” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984), including by retaining “exclusive authority over plant construction and operation,” *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212 (1983). Thus, at the time of Price-Anderson’s enactment, essentially *all* nuclear material had originally been produced under a government contract, a federal license, or both. See, *e.g.*, App., *infra*, 45a n.4 (the government’s contractor Mallinckrodt “purified and provided all of the uranium oxide used by the Manhattan Project”) (brackets and citation omitted). Even today, the decades-long history of government involvement in uranium enrichment means that a large volume of nuclear material was originally produced under a government contract or license.

That backdrop makes clear that merely handling material that can be traced back to a government contract cannot, without more, suffice to make liability “arising out of or in connection with the contractual activity.” 42 U.S.C. 2210(d) (1964). If it did, indemnification would universally attach to essentially all nuclear material, nullifying Congress’s choice to indemnify only “a limited class of nuclear incidents,” *Hercules Inc.*, 516 U.S. at 429. That stark historical reality confirms the proper interpretation of Price-Anderson’s meaning “at the time Congress enacted the statute.” *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) (quoting *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)).

d. The Executive Branch has interpreted Section 2210(d) consistently with those limitations since shortly after Price-Anderson’s enactment. See pp. 8-10, *supra*. In 1962, the Atomic Energy Commission promulgated regulations adopting standard contract language, which provided for indemnification where liability *both* “(i) arises out of or in connection with the contractual activity; *and* (ii) arises out of or results from \* \* \* a nuclear incident which involves items (such as equipment, material, facilities, or design or other data) produced or delivered under this contract.” 27 Fed. Reg. at 7880 (emphasis added). Those “requirements are connected by the conjunctive ‘and,’ meaning [claimants] must meet all” of them. *United States v. Palomar-Santiago*, 593 U.S. 321, 326 (2021). The standard contract language—which was included in the government’s contract with Mallinckrodt—therefore provides that “a nuclear incident which involves \* \* \* material \* \* \* produced or delivered under th[e] contract,” 27 Fed. Reg. at 7880, is not sufficient. Indemnification requires a further nexus to contractual activity, such as a contribution

to the performance of the contract by a “subcontractor” or supplier. See 27 Fed. Reg. at 7878-7879.

The Executive has adhered to that view for decades, including in its statutorily required reports to Congress. See pp. 9-10, *supra*. As the Department of Energy has long maintained, indemnification under Section 2210(d) is unavailable where “[r]esponsibility” cannot “be logically attributed to the Government,” 1983 Report 7, as where liability arises from “activities that are not for the account of [the government],” C.A. App. 1236, and therefore lacks a “sufficient nexus” to contractual activity “even though the material had previously been used in or generated by a [Department of Energy] contractual activity,” 2023 Report 7. Because the government’s own interpretation was “issued contemporaneously with the statute” and has “remained consistent over time,” it is “especially useful in determining the statute’s meaning.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024).

2. In this case, respondent has failed to state a claim for government-contract indemnification under Section 2210(d). Respondent was undisputedly not a party to the government’s contract with Mallinckrodt for the benefit of the United States’ atomic-weapons program, which is the sole “contract for the benefit of the United States” on which respondent premises its claim. See pp. 10-13, *supra*. Moreover, “[i]t is undisputed that [respondent] was not in privity of contract with Mallinckrodt” as a subcontractor, supplier, or in any other capacity relevant to the contractual activity. App., *infra*, 61a. Rather, “the benefit to the government’s nuclear program” had already “ended” by the time of respondent’s liability-producing activities. *Ibid*. The government had sold the material “as is,” disclaiming any war-

ranty and declining to indemnify a private purchaser (already upstream from respondent). *Id.* at 47a (citation omitted). That private purchaser accepted “full responsibility” for the material, *ibid.* (citation omitted), and moved it to private property so that the purchaser could “extract[]” “‘contents of value’” from the material, *id.* at 13a (citation omitted), for “resale,” C.A. App. 1328. The material then passed through still more private hands before its purchase by respondent, which similarly sought to extract valuable uranium from the material for its own profit, without an indemnification agreement from the government. It was in the course of that private activity for its own benefit, off of government property, that respondent allegedly mishandled the material from 1969 to 1973, causing sickness and death to Missouri residents. See p. 13, *supra*.

Under these circumstances, the Court of Federal Claims correctly held that respondent’s claim for government-contract indemnification fails as a matter of law because respondent’s liability and expenses were “unconnected to Mallinckrodt’s contractual activity performed for the benefit of the government.” App., *infra*, 61a. Because merely “handling material that was once under Mallinckrodt’s contract is an insufficient causal sequence to trigger indemnification,” respondent’s conduct “was too far ‘downstream’ from Mallinckrodt, rendering it outside the Section [2210](d) indemnification obligation.” *Id.* at 61a-62a (citation omitted).

3. The Federal Circuit’s contrary reasoning is unsound. Unlike the trial court, the Federal Circuit did not interpret the ordinary meaning of Section 2210(d)’s text within the limits of Price-Anderson’s structure, the broader Atomic Energy Act, and historical context. Instead, it turned to inapposite circuit precedent assign-

ing a “very sweeping” interpretation to partially similar (but distinct) language plucked from “another context.” App., *infra*, 30a (quoting *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999)) (discussing jurisdictional grant over procurement-related claims); see *id.* at 29a (also relying on circuit precedent “in the patent-damages setting”). From that disparate soil, the Federal Circuit transplanted “a standard of ‘reasonable, objective foreseeability’” as the limit of the government’s indemnification obligations. *Id.* at 32a (quoting *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1546 (Fed. Cir.) (en banc), cert. denied, 516 U.S. 867 (1995)).

The Federal Circuit’s sweeping new standard is incompatible with Price-Anderson’s limited indemnification framework. As the court of appeals itself acknowledged, the hazards from nuclear material “may be long lasting” and could foreseeably present dangers “for long periods of time, often for hundreds of years.” App., *infra*, 25a, 26a n.6 (quoting *New York v. United States*, 505 U.S. 144, 149-150 (1992)). But notwithstanding those manifest dangers, Congress provided indemnification for only “a limited class of nuclear incidents.” *Hercules Inc.*, 516 U.S. at 429. Contrary to the Federal Circuit, Congress did not “focus[] simply on the hazard from the material,” App., *infra*, 25a; instead, it focused on “activities under contracts for the benefit of the United States” and provided indemnification only for liability sufficiently connected to those contractual activities, 42 U.S.C. 2210(d) (1964). Like respondent, the Federal Circuit erroneously rewrote the statute to make indemnification run “inextricabl[y]” with the nuclear material, Resp. C.A. Br. 25, “outlast[ing] the contract” and applying whether or not the liability-produce-

ing activity “contribut[ed] to contract performance,” App., *infra*, 24a-25a.

To be sure, all agree that indemnification under Section 2210(d) may reach certain parties that are not in privity with the government. For example, in 1966, “an employee of a subcontractor to a firm contracting with the [government] spilled some depleted uranium on her hand while opening a vial of the material and claimed that she incurred damages from such incident,” and the government subsequently “approved settlement of the claim under the indemnity provision of the contract.” 1983 Report 3. In such circumstances, “[r]esponsibility \* \* \* can be logically attributed to the Government” because the “situations” that produce such liability “are largely within the scope of the prime contractor’s and [the government’s] overall health and safety measures and controls.” *Id.* at 7; see pp. 8-10, *supra*.

But responsibility cannot logically be attributed to the government under Section 2210(d) for conduct that does not contribute to contractual activity and that the government lacks the means to control. Thus, a “[t]erroris[t]” could not claim indemnification for a nuclear incident that he caused by “sabotag[ing]” ongoing activity under a government contract, even if he did so with nuclear material produced under that contract. 1983 Report 7. And here, respondent cannot claim indemnification for a nuclear incident that it allegedly caused by its own malfeasance, with material that it had purchased for its own profit.

The Federal Circuit surmised that “[t]he path from the contractual activity to the nuclear incident was not a long or tortuous one,” in terms of time or number of transactions. App., *infra*, 31a. That quantitative assessment is questionable on its own terms, given the

multiple steps separating Mallinckrodt's contractual production of the material, between 1946 and 1957, from respondent's liability-producing conduct between 1969 and 1973. See pp. 11-13, *supra*. But more fundamentally, the Federal Circuit missed the qualitative point that respondent, as a private downstream purchaser using material for which *respondent paid* to use for its own benefit, is essentially different from a government contractor, which *the government pays* to handle material for the benefit of the United States. Where liability lacks that essential qualitative nexus to contractual activity, indemnification is unavailable as a matter of law.

The Federal Circuit further erred in relying on Congress's 1962 amendments to Price-Anderson, which amended various definitional provisions to provide limited coverage for certain foreign nuclear incidents. See pp. 7-8 & n.4, *supra*. Those amendments did not alter Section 2210(d) at all, and they did not alter any definition in Price-Anderson for the purpose of nuclear incidents occurring in the United States. They therefore hold little if any relevance to this case involving an alleged nuclear incident in Missouri. *Contra App., infra*, 7a-9a, 27a-28a, 30a-31a. To the extent the amendments bear on the scope of indemnification in the domestic context, they do not support the Federal Circuit's standard of reasonable foreseeability untethered to contractual activity.

Nor does the Federal Circuit's overbroad reading draw support from its repeated invocation of putative statutory "purposes," "objectives," and "aim." *App., infra*, 26a, 31a, 33a. To the extent that the court looked beyond the "plain language" of the operative provision, *id.* at 55a, it should have heeded Congress's express finding, in the first section of Price-Anderson, that the

statute aimed to indemnify only “a portion of the damages suffered by the public from nuclear incidents,” 42 U.S.C. 2012(i) (1964). That limited purpose does not support the Federal Circuit’s imposition of “broad” and “very sweeping” indemnification to “guarantee” public compensation for domestic nuclear incidents. App., *infra*, 30a, 33a (citation omitted). And in any event, “no legislation pursues its purposes at all costs.” *Bowe v. United States*, 146 S. Ct. 447, 462 (2026) (quoting *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012)) (brackets omitted).

Finally, the Federal Circuit erred in relying on a variety of legislative-history materials. By contrast, the Court of Federal Claims properly “decline[d] to analyze [Price-Anderson’s] legislative history” because the statutory text and structure are “clear and unambiguous” in barring respondent’s claim. App., *infra*, 59a. Even considered on its own terms, moreover, the legislative history is at most equivocal, and therefore “does little to ‘shed light’” on the statutory text, as the trial court explained in detail. *Id.* at 60a (citation omitted). Yet the Federal Circuit overlooked those obstacles and relied with little explanation on a hand-picked array of legislative-history materials, including a 1957 committee report, *id.* at 5a, 26a, an individual’s 1945 congressional testimony regarding prior legislation, *id.* at 25a n.6, and, most egregiously, a 1987 committee report supposedly offering a “later committee’s understanding” of Price-Anderson, *id.* at 26a. “[L]egislative history is not the law,” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018), and such “post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation,” *United States v. Woods*,

571 U.S. 31, 48 (2013) (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011)) (brackets omitted).

#### **B. The Decision Below Warrants Further Review**

The Federal Circuit “has decided an important question of federal law that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c). The scope of Price-Anderson indemnification affects potentially vast outlays, given that the Department of Energy’s indemnification obligations are currently capped at \$16.6 billion for each nuclear incident. See p. 7, *supra*. By the end of 2018, “claims for 243 alleged incidents involving nuclear material” had been filed with the industry association that “writes all nuclear liability insurance policies.” U.S. Nuclear Regul. Comm’n, *The Price-Anderson Act: 2021 Report to Congress* xx (Dec. 2021). And while the extent of indemnification payments has historically been confined by the government’s interpretation of the governing statute, see 2023 Report 20-21, the Federal Circuit’s decision threatens to impose significant burdens by announcing a new “standard” that sweeps far more broadly than the scope of indemnification that has been applied in practice over the past seven decades, App., *infra*, 32a.

The Federal Circuit’s decision also threatens significant harms even beyond its fiscal consequences. The President has declared that “[i]t is the policy of the United States to \* \* \* [r]eestablish the United States as the global leader in nuclear energy” while “[m]aintain[ing] the United States’ leading reputation for nuclear safety.” Exec. Order No. 14,300, § 2(a) and (f), 90 Fed. Reg. 22,587, 22,587-22,588 (May 29, 2025); see Exec. Order No. 14,302, 90 Fed. Reg. 22,595 (May 29, 2025) (identifying additional related policy goals). Moreover, Congress has ratified an international nuclear

treaty premised on the finding that Price-Anderson “provides a predictable legal framework necessary for nuclear projects.” 42 U.S.C. 17373(a)(1)(A)(i). The Federal Circuit’s decision, however, threatens to impede the development of safe nuclear technology by diverting limited government resources to pay for private wrongs unrelated to government programs, while destroying the predictability historically afforded by the government’s longstanding application of Price-Anderson. If left uncorrected, the decision below will undermine the declared policies of both political branches in an area of critical importance to the Nation’s economy and security.

The Court’s ordinary preference to grant review to resolve disagreements among the federal courts of appeals is inapposite given that the Court of Federal Claims and Federal Circuit have exclusive jurisdiction to review indemnification claims in excess of \$10,000 (a level routinely exceeded by Price-Anderson claims, as in this case). See 28 U.S.C. 1295(a)(3), 1491(a)(1); *Clinton v. Goldsmith*, 526 U.S. 529, 539 n.13 (1999). And the Federal Circuit’s denial of rehearing en banc in this case confirms that the court of appeals is quite unlikely to correct its erroneous course. See App., *infra*, 71a-72a. This Court regularly grants certiorari to review the Federal Circuit’s resolution of an important federal question on a matter within its exclusive jurisdiction. See, e.g., *Hikma Pharms. USA Inc. v. Amarin Pharma, Inc.*, cert. granted, No. 24-889 (Jan. 16, 2026); *Soto v. United States*, 605 U.S. 360 (2025); *Feliciano v. Department of Transportation*, 605 U.S. 38 (2025); *Bufkin v. Collins*, 604 U.S. 369 (2025); *Rudisill v. McDonough*, 601 U.S. 294 (2024). It should follow the same course here.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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## APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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2023-1826

COTTER CORP., N.S.L., PLAINTIFF-APPELLANT

*v.*

UNITED STATES, DEFENDANT-APPELLEE

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Decided: Feb. 10, 2025

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Appeal from the United States Court of Federal  
Claims in No. 1:22-cv-00414-DAT,  
Judge David A. Tapp.

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Before MOORE, *Chief Judge*, TARANTO, *Circuit Judge*,  
and SCHROEDER, *District Judge*.<sup>1</sup>

TARANTO, *Circuit Judge*.

In 1957, in order to protect the public and to encourage private-sector engagement in activities involving atomic energy, Congress enacted the Price-Anderson Act (PAA), Pub. L. 85-256, 71 Stat. 576 (Sept. 2, 1957) to amend the Atomic Energy Act of 1954 (1954 Act or AEA), Pub. L. 83-703, 68 Stat. 919 (Aug. 30, 1954), which had replaced the Atomic Energy Act of 1946 (1946 Act),

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<sup>1</sup> Honorable Robert W. Schroeder III, District Judge, United States District Court for the Eastern District of Texas, sitting by designation.

Pub. L. 79-585, 60 Stat. 755 (Aug. 1, 1946). The PAA provided, as relevant here, that when the government entered into a contract for a contractor to engage in specified nuclear-energy “activities under the risk of public liability for a substantial nuclear incident” and the contract included a specified indemnity provision, the government “shall indemnify” not only its contractor, but also the broader class of “persons indemnified” for “public liability arising out of or in connection with the contractual activity.” PAA § 4, 71 Stat. at 576-77 (adding new § 170(d) to AEA). The PAA defined the key terms: “person indemnified” included both “the person with whom an indemnity agreement is executed and any other person who may be liable for public liability”; “public liability” broadly covered “any legal liability arising out of or resulting from a nuclear incident”; and “nuclear incident” broadly covered occurrences within the United States causing personal or property-related harm “arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.” *Id.* § 3, 71 Stat. at 576 (adding § 11(o), (r), (u) to AEA). A 1962 amendment to the 1954 Act, made by Pub. L. 87-615, §§ 4-5, 76 Stat. 409, 410 (Aug. 29, 1962) (1962 Act), essentially reiterated the definitions of “nuclear incident” and “person indemnified” for domestic incidents.

In 1962, the Atomic Energy Commission (AEC) entered into a PAA-covered, indemnity-containing contract (the Indemnification Agreement) with Mallinckrodt Chemical Works (Mallinckrodt), which had processed uranium for the government’s use since early in World War II. In the late 1960s, Cotter Corporation (N.S.L.) (Cotter) bought some of the radioactive material and residues (“source materials” under the AEA as

amended) originally produced by Mallinckrodt. And in 2012, numerous plaintiffs brought a tort action in federal court in Missouri against Cotter, Mallinckrodt, and others, the plaintiffs seeking compensation based on allegations of serious harm from the release of radioactive material (*i.e.*, a “nuclear incident” under the PAA-amended AEA) in the St. Louis area. Public Redacted Complaint at 9 ¶ 36, *Cotter Corporation (N.S.L.) v. United States*, 165 Fed. Cl. 138 (Fed. Cl. 2023) (No. 22-cv-00414), ECF No. 13 (Public Redacted Compl.).

In 2022, Cotter brought the present action against the United States under the Tucker Act, 28 U.S.C. § 1491(a), in the United States Court of Federal Claims (Claims Court), seeking indemnification under the PAA for the costs of defending and settling the Missouri case, which Cotter asserted was a “public liability” action under the PAA. *Id.* at 1 ¶ 1, 2 ¶ 4, 3 ¶¶ 7-9, 9-13 ¶¶ 36-52. In the Claims Court, Cotter alleged that it was entitled to government indemnification on two bases under the Tucker Act. One basis was directly under the money-mandating PAA. *Id.* at 13-14 ¶¶ 54-59. The other was under the (AEC-Mallinckrodt) Indemnification Agreement, of which Cotter asserted it was a third-party beneficiary. *Id.* at 14-15 ¶¶ 61-74.

The government moved to dismiss Cotter’s complaint for failure to state a claim for statutory indemnification and, regarding the claim for contractual indemnification, for lack of subject-matter jurisdiction (based on lack of standing) and for failure to state a claim. The Claims Court granted the motion on all grounds. *Cotter Corporation (N.S.L.) v. United States*, 165 Fed. Cl. 138, 142, 152 (Fed. Cl. 2023) (*Claims Court Opinion*). We

now reverse, and we remand for the case to proceed past the motion-to-dismiss stage.

## I

We first describe the relevant statutory regime. We then summarize facts we accept as true for purposes of this appeal, which the parties agree include the allegations of the complaint here, the AEC-Mallinckrodt contract as repeatedly supplemented (*e.g.*, Indemnification Agreement), and judicially noticeable facts about the Missouri case that underlies the claim for government indemnification. We then describe the present litigation.

## A

After the Manhattan Project's development of fission-based atomic bombs during World War II, Congress enacted the AEA in 1946 to create the AEC and establish tight AEC control over atomic energy, including through government ownership of "fissionable materials" (*e.g.*, certain enriched uranium), AEC near-monopolization of the production of such materials (*e.g.*, through enriching or processing uranium, uranium ore, or other "source material") and the distribution of "byproduct materials," and requiring licenses for activities involving "source materials," "fissionable materials," and "atomic energy." 1946 Act §§ 1-2, 4-5, 7, 9, 12, 60 Stat. at 755-66, 770-71. Congress enacted a full revision of the 1946 Act in the 1954 Act, which sought "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes." AEA § 3(d), 68 Stat. at 922. (In a newly centralized definitional provision, it also substituted "special nuclear materials" for the 1946 Act's "fissionable materials." AEA §§ 11(t), 41, 68 Stat. at 924, 928; 1946 Act § 4, 60 Stat. at 759.) The

Supreme Court explained in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* that, whereas the 1946 Act “contemplated that the development of nuclear power would be a Government monopoly,” the 1954 Act’s “policy,” reflected in various provisions, was to “encourage[] the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing.” 438 U.S. 59, 63 (1978).

“It soon became apparent,” however, that the risk of substantial liability following a nuclear incident (though such an incident appeared unlikely) was a “major obstacle” to private industry making the desired investments into the atomic energy industry. *Id.* at 63-64; *see* S. REP. NO. 85-296, at 1 (1957) (explaining that “the problem of liability has become a major roadblock” to “further industrial participation in the [atomic energy] program”). The Price-Anderson Act of 1957 was Congress’s response to that problem. The PAA amended the AEA to authorize the government to “make funds available for a portion of the damages suffered by the public from nuclear incidents” and to “limit the liability of those persons liable for such losses” “[i]n order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security.” PAA, 71 Stat. at 576 (amending AEA § 2); *see Duke Power*, 438 U.S. at 64-65; S. REP. NO. 85-296, at 1, 15. And, what is key in the present matter, the PAA also added several provisions concerning government indemnification of persons liable for harm from nuclear incidents. *See* PAA § 3, 71 Stat. at 576 (adding definitional provisions to

AEA § 11); PAA § 4, 71 Stat. at 576-79 (adding a new § 170 to AEA).<sup>2</sup>

As relevant here, PAA-added § 170 of the AEA, after addressing indemnification related to certain government licensees (not at issue before us), provided in subsection (d) for indemnification agreements with government *contractors*. PAA-amended AEA § 170(d) provided:

[T]he [AEC] is *authorized . . . to enter into agreements of indemnification with its contractors* for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident. In such agreements of indemnification the [AEC] may require its contractor to provide and maintain financial protection of such a type and in such amounts as the [AEC] shall determine to be appropriate to cover *public liability arising out of or in connection with the contractual activity*, and shall *indemnify the persons indemnified against such claims* above the amount of the financial protection required, in the amount of [the public-liability cap of] \$500,000,000 including the reasonable costs of investigating and settling claims and defending suits for

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<sup>2</sup> The parties and the Claims Court agree that the provisions we quote in text govern this case, given the timing of the actions and incidents at issue. We follow suit. For current versions, *see, e.g.*, 42 U.S.C. §§ 2010, 2011, 2014. We refer to the AEC, even though in 1974 its functions were transferred to a pair of new agencies. *See* Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1233 (Oct. 11, 1974). The indemnification function at issue here is now performed by the U.S. Department of Energy. *See* 42 U.S.C. § 2210(d).

damage in the aggregate for all persons indemnified in connection with such contract and for each nuclear incident.

PAA § 4, 71 Stat. at 577 (adding AEA § 170) (emphases added). The first sentence, at least on its face, provided the AEC discretion to enter into an indemnity agreement with a contractor; and the second sentence, in its first portion, provided discretion to require the contractor to purchase its own insurance for “public liability arising out of or in connection with the contractual activity.” But the second half of the second sentence provided that, at least when an indemnity agreement is made, the indemnification “shall” extend to “the persons indemnified against such claims”—where the antecedent of “such claims” is necessarily claims asserting “public liability arising out of or in connection with the contractual activity.”

The PAA expressly defined the key terms used in § 170(d). Thus, PAA-amended AEA § 11 defined “person indemnified” as “the person with whom an indemnity agreement is executed *and* any other person who may be liable for public liability”; “public liability” as “any legal liability arising out of or resulting from a nuclear incident”; and “nuclear incident” as “any occurrence within the United States causing bodily injury, sickness, disease, or death, or loss of or damage to property, or for loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material.” PAA § 3, 71 Stat. at 576 (adding § 11(r), (u), and (o) to AEA) (emphasis added).

In 1962, in Pub. L. 87-615, 76 Stat. at 410, Congress amended two of the PAA’s definitional provisions. One

was the definition of “person indemnified” in PAA-amended AEA § 11(r). 1962 Act § 5, 76 Stat. at 410. The amendment reaffirmed that, for a “nuclear incident occurring *within* the United States” (and one involving the nuclear ship Savannah, even when it was abroad), “person indemnified” meant “the person with whom an indemnity agreement is executed *and any other person who may be liable for public liability.*” PAA-amended AEA § 11(r) (after 1962 amendment) (emphases added). In contrast, for nuclear incidents “occurring *outside* the United States” (except when involving the Savannah), “person indemnified” was more limited: It meant “the person with whom an indemnity agreement is executed and any other person who may be liable for public liability *by reason of his activities under any contract with the [AEC]*” or certain other “project[s].” *Id.* (emphases added).<sup>3</sup> The domestic-incident “person indemnified” is not limited by such a requirement of a connection to under-contract-or-project activities.

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<sup>3</sup> New § 11(r) of the AEA read: “The term ‘person indemnified’ means (1) with respect to a nuclear incident occurring within the United States and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability; or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the [AEC] or any project to which indemnification under the provisions of section 170d. has been extended or under any subcontract, purchase order or other agreement, of any tier, under any such contract or project.” 1962 Act § 5, 76 Stat. at 410.

The second altered provision was the definition of “nuclear incident,” PAA-amended AEA § 11(o), for which Congress introduced a similar domestic/foreign distinction. 1962 Act § 4, 76 Stat. at 410. For incidents occurring *within* the United States (and for the ship Savannah), Congress essentially retained the broad 1957 definition but clarified that the term applied where the resulting *harms* caused by the occurrence were “within or outside the United States.” *Id.* In contrast, coverage was narrowed for an “occurrence outside the United States” to require that the “occurrence involve[] a facility or device *owned by, and used by or under contract with, the United States.*” *Id.* (emphasis added).<sup>4</sup>

## B

## 1

Starting in 1942, Mallinckrodt processed uranium for use in the government’s atomic-weapons program. *Claims Court Opinion*, at 143 & n.4; J.A. 39-40, 44. In 1943, the United States (for the War Department) entered into a contract with Mallinckrodt (effective late 1942) to operate government-owned plants located in

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<sup>4</sup> New § 11(o) of the AEA read: “The term ‘nuclear incident’ means any occurrence within the United States causing, within or outside the United States, 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 other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in subsection 170l. [concerning the Savannah], it shall include any such occurrence outside the United States: *And provided further,* That as the term is used in section 170d., it shall include any such occurrence outside the United States if such occurrence involves a facility or device owned by, and used by or under contract with, the United States.” 1962 Act § 4, 76 Stat. at 410.

downtown St. Louis, Missouri (“St. Louis Downtown Site,” or SLDS, Public Redacted Compl. at 4 ¶ 14) and to produce, store, and prepare for shipment specific quantities of secret products (refined uranium). J.A. 41-64; see J.A. 131-37 (map of some of the facilities in downtown St. Louis provided in 1947 supplemental agreement No. 15), 309-20 (describing and showing the same from supplemental agreement No. 45, entered into in 1950); *Claims Court Opinion*, 143. The government furnished supplies to Mallinckrodt for the latter to process into uranium products and required Mallinckrodt to deliver any unused materials to the government and to dispose of “finished product or any part thereof . . . found not to meet the [government] specifications . . . as directed by the Contracting Officer.” J.A. 44-45 (1943 contract Articles 1, 4), 62 (1943 contract Article 33). In 1945, the War Department also contracted Mallinckrodt for “research consultant services and plant operations.” J.A. 65.

Over the years, Mallinckrodt and the government adopted more than a hundred supplemental agreements (SAs) to modify their contractual relationship. See J.A. 65-815. One recognized the transfer of the War Department’s role to the AEC shortly after the 1946 Act became law, J.A. 96, 110 (1947 SA No. 10), and the last (entered into in August 1966) stated that the contract work would continue “through June 30, 1967,” J.A. 814 (1966 SA No. 129). Several SA provisions have particular importance here.

SA No. 45 (entered into in 1950 but effective as of October 1949), J.A. 250-333, merged the 1943 and 1945 contracts and required, among other things, that Mallinckrodt transport certain “uranium containing raw materi-

als” from a government-owned storage site near the airport (“St. Louis Airport Site” or SLAPS) to the government plants (at SLDS), J.A. 261 (Article I-A ¶ 7(c)), and transport certain residues and byproducts from the plants to SLAPS and “dispose of these by-products in the facilities supplied at the Airport Site, as directed by the [AEC],” J.A. 260 (Article I-A ¶ 7(b)). SA No. 45 also provided for government indemnification of Mallinckrodt for losses, expenses (including for litigation), and damages “arising out of, based on or caused by the toxicity and/or radioactivity of uranium-bearing raw materials and/or products or by-products derived therefrom that may be or may at any time have been involved in the performance of the work under this contract.” J.A. 286 (Article III-E ¶ 1). Mallinckrodt was to notify the AEC of any “claim . . . described in” the above language and to authorize, if requested by the AEC, a government representative to “settle or defend any such claim.” J.A. 287-88 (Article III-E ¶ 3); *see also* J.A. 532-34 (SA No. 81, entered into in 1952 but effective 1953, reaffirming the indemnification and litigation claims), 691-92 (SA No. 115, entered into in 1955 but effective 1956, reaffirming government indemnification for litigation and claims under Article XIV, J.A. 711-12).

SA No. 122 (entered into in 1961 but effective as of November 1960), J.A. 763-75, addressed certain post-contract-termination duties and rights. The government was to take “reasonable efforts to decontaminate” property. J.A. 772; *see also* J.A. 765-74. And for five years, Mallinckrodt could dispose of contaminated material in a government-owned Weldon-Spring Quarry Site, J.A. 773—which was near production facilities constructed, operated, and maintained by Mallinckrodt

pursuant to SA No. 110 (entered into in 1955), J.A. 660-66, and SA No. 126 (entered into in 1963), J.A. 789-801.

On August 28, 1962, the day before enactment of the 1962 PAA amendment, Mallinckrodt and the United States (represented by the AEC) entered into SA No. 124 (the Indemnification Agreement), J.A. 780-85, “for the purpose of including . . . certain provisions relative to the indemnification of the Contractor and others with respect to public liability resulting from certain nuclear incidents,” as authorized by the PAA-amended AEA, J.A. 780. It provided in part:

3. a. To the extent that the Contractor and any other persons indemnified are not compensated by any financial protection permitted or required by the [AEC], the [AEC] will and does hereby indemnify the Contractor, *and other persons indemnified*, against (i) claims for public liability as described in Paragraph b. of this Section 3; and (ii) the reasonable costs of investigating and settling claims, and defending suits for damage for such public liability, provided that the [AEC’s] liability under all indemnity agreements entered into by the [AEC] under Section 170 of the [Atomic Energy] Act, including this contract, shall not exceed \$500,000,000, including such reasonable costs, in the aggregate for each nuclear incident irrespective of the number of persons indemnified in connection with this contract.

b. The public liability referred to in Paragraph a. of this section is public liability which (i) *arises out of or in connection with the contractual activity*; and (ii) arises out of or results from: . . .

(4) a nuclear incident which involves items (such as equipment, material, facilities, or design or

other data) produced or delivered under this contract, . . . .

J.A. 781-82 (emphases added). The Indemnification Agreement also stated that “[t]he obligations of the [AEC] . . . shall not be affected by any failure on the part of the Contractor to fulfill any of its obligations under this contract, and shall be unaffected . . . by the completion, termination or expiration of this contract.” J.A. 783.

As early as 1960 or as late as 1962, the AEC started to solicit private companies to purchase radioactive residues stored at SLAPS. Public Redacted Compl. at 5 ¶¶ 16-17; J.A. 1108. According to the complaint here, the AEC stated that “contents of value,” such as rare earth metals and uranium, could be extracted from this “source material” and that the remaining material could be disposed of at the government-owned Weldon Spring Quarry Site. Public Redacted Compl. at 5 ¶ 16.

In February 1966, the AEC completed a sale to Continental Mining & Milling Co. (Continental)—a Delaware corporation with its principal office in Chicago, Illinois—of approximately 117,000 tons of materials and “[m]iscellaneous [r]esidues” from SLAPS. *See id.* at 6 ¶ 21; J.A. 1106-12. To take possession of this “source material,” as defined by the AEA, Continental was required to obtain a license from the AEC, which the AEC issued. Public Redacted Compl. at 6 ¶ 21. Continental was to move the materials to a storage site in Hazelwood, Missouri, referred to in this case as “Latty Avenue.” *Id.*

In quick succession, within the following sixteen months, two important changes in possession occurred. First, Commercial Discount Corporation (Commercial) foreclosed on Continental's assets, including the radioactive materials and Continental's property at Latty Avenue, where at least some of the radioactive materials were stored. Complaint at 10-11 ¶ 12.B.3 & nn.2-3, 21 ¶ 43, *McClurg v. MI Holdings, et. al*, No. 4:12-cv-00361 (E.D. Mo. Feb. 28, 2012), ECF No. 1 (McClurg Compl.). Then, on June 9, 1967, Commercial sold 54,000 dry tons of mineral residue at Latty Avenue to Cotter—a New Mexico corporation with a facility in Cañon City, Colorado.<sup>5</sup> J.A. 1114-26. Commercial was to deliver the material to a specified location and indemnify Cotter for liability “attributable to the period prior to delivery.” J.A. 1114-15; *see also* J.A. 1134. Commercial and Cotter entered into additional purchase agreements, including an August 1969 agreement for Cotter to pick up certain materials left at Latty Avenue. J.A. 1128-40. Both parties were to have an AEC license, J.A. 1119-20, and Cotter would “sample the residue by methods presently employed by it in accordance with contractual requirements imposed upon [Cotter] by the [AEC],” J.A. 1117; *see also* J.A. 1135.

In December 1969, Cotter applied for, and received, a “source material” license from the AEC to transport the material, noting in its application that its “activities will be conducted in a manner identical to those previ-

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<sup>5</sup> The record before us contains information about Cotter's subsequent history and possible non-government indemnification for at least some of the *McClurg* liability. *See* McClurg Compl. at 11-13 ¶¶ 12.B.5, 12.B.6, 12.B.12, 12.B.13; *see also* J.A. 1380. The issue before us does not turn on that information.

ously conducted by Commercial” under its own AEC license. J.A. 1141-46; *see also* J.A. 1142 (identifying “ore residues” with “.3-2.0% U”); Public Redacted Compl. at 2-3 ¶¶ 4-6 (referring to “radioactive source material”). Most of the material was transported by rail to Cotter’s Cañon City plant between 1970 and 1973. Public Redacted Compl. at 6 ¶ 22. The AEC withdrew its offer for Cotter to dispose of the remaining Latty Avenue material at the government-owned Weldon Spring Quarry Site. *Id.* at 6 ¶ 23. Cotter subsequently had some of the source material transported by other entities to the West Lake Landfill in Bridgeton, Missouri, between July and October 1973. *Id.*; *id.* at 3 ¶ 6. In 1973, Cotter’s license ended after Cotter ceased its operations at Latty Avenue. *Id.* at 6-7 ¶ 24. A 1974 AEC inspection of Latty Avenue confirmed compliance with relevant regulations and requirements. *Id.*

## C

In 2012, more than 500 plaintiffs sued Cotter, Mallinckrodt, and others in the Eastern District of Missouri (*McClurg* litigation). Public Redacted Compl. at 9 ¶ 36; McClurg Compl. at 10-13 ¶ 12. In a second amended complaint, plaintiffs asserted that their filing constituted a “public liability action” within the meaning of the PAA against Mallinckrodt (for its activities between 1942 and 1957) and Cotter (for its activities between 1969 and 1973). Second Amended Complaint at 3-4 ¶¶ 6-12, 4-5 ¶¶ 16-20, 25-26 ¶¶ 70-72, *McClurg v. MI Holdings, et. al*, No. 4:12-cv-00361 (E.D. Mo. Jan. 10, 2014), ECF No. 178 (*McClurg* Second Amended Compl.). According to the complaint, Mallinckrodt and Cotter’s release of hazardous, toxic, and radioactive waste materials caused the plaintiffs bodily injury, sickness, disease, or death, for

which the plaintiffs were asserting tort liability under Missouri law, based on a “nuclear incident” (or series of such incidents). *Id.* at 25-30 ¶¶ 70-88.

In particular, the *McClurg* plaintiffs alleged that Mallinckrodt and Cotter contaminated the air, soil, surface water, and ground water in the St. Louis area by improper processing, handling, transportation, storage, and disposal of radioactive materials and residues that had been originally produced by Mallinckrodt (under its contract with the government) at and around SLDS, SLAPS, Latty Avenue facility, and West Lake Landfill. *Id.* at 3 ¶¶ 7, 10-11, 4-5 ¶¶ 15-18, 16-20 ¶¶ 27-43. Radioactive materials and residues in Coldwater Creek, which is close to and a major drainage mechanism for SLAPS and Latty Avenue, allegedly migrated to other sites in St. Louis. *Id.* at 17 ¶ 30, 18-19 ¶ 39, 21 ¶ 47, 22 ¶ 52, 23-24 ¶¶ 58-65. The plaintiffs further alleged harm from the use of contaminated soil from the West Lake Landfill for landfill in other locations, *id.* at 4-5 ¶ 16, 22 ¶ 51, and from improper transportation of radioactive material and residues from SLAPS to Latty Avenue, *id.* at 22 ¶ 53.

In the present case, Cotter alleges that the federal government—specifically, the U.S. Department of Energy (DOE), which by then had responsibility for indemnification functions under the AEA, 42 U.S.C. § 2210(d), *see supra* n.2—was notified of the *McClurg* litigation no later than March 2012. Public Redacted Compl. at 10 ¶ 38. Moreover, the *McClurg* record is clear that in February 2018, the district court ordered settlement discussions with a court-appointed mediator. Memorandum and Order for Settlement Discussions at 1-2, *McClurg v. MI Holdings, et. al.*, No. 4:12-cv-00361 (E.D. Mo. Feb.

22, 2018), ECF No. 690 (Settlement Order). In that order, noting that DOE may be “a possible indemnitor in this case” and that, despite the plaintiffs’ requests, no DOE representative had appeared at any mediation conferences to date, the district court directed that a DOE representative attend the settlement conference and that counsel for Mallinckrodt provide the order to DOE. *Id.*

In a letter sent the day before the scheduled mediation, DOE declined to participate, saying that it was not its “usual practice for addressing potential indemnification . . . to participate directly in [the underlying tort litigation] settlement discussions.” Letter to Court from Department of Energy re: Order ECF No. 690 at 1, *McClurg v. MI Holdings, et. al*, No. 4:12-cv-00361 (E.D. Mo. Mar. 7, 2018), ECF No. 692 (DOE Letter). DOE added that “[i]ndemnification . . . is primarily an issue of contract between DOE and a contractor;” so indemnification was better addressed as “separate and distinct” from the “claims of liability by private parties (who do not have privity of contract with the Government) against a DOE contractor.” *Id.* DOE further stated that “to the extent that DOE has any indemnification liability in connection with the claims in this litigation—which DOE does not concede—any such liability, as noted above, would be as a result of a contractual relationship with a party to this litigation.” *Id.* at 2.

On September 12, 2018, with amendments made on April 29, 2019, the *McClurg* plaintiffs entered into Master Settlement Agreements with Mallinckrodt and Cotter to resolve the “asserted ‘public liability actions’ . . . for injuries and death allegedly resulting from exposure to hazardous, toxic, and radioactive substances (byprod-

uct materials) handled by Defendants at various times between 1942 and 1974, near Plaintiffs' residences and places of employment in north St. Louis County, Missouri." Order Approving Wrongful Death Settlements, Attorney Fees, and Costs at 1-2, *McClurg v. MI Holdings, et. al*, No. 4:12-cv-00361 (E.D. Mo. Dec. 30, 2019), ECF No. 806. The district court approved the settlements as "fair and reasonable compensation for the[] wrongful death claims." *Id.* at 4; *see also* Public Redacted Compl. at 12 ¶ 48.

#### D

On April 11, 2022, Cotter filed the present action under the Tucker Act in the Claims Court, seeking compensation from the United States under the PAA in the amount of \$14,961,418.74 "for the costs of settling and defending the public liability action" in the *McClurg* litigation. Public Redacted Compl. at 1; *see also id.* at 3 ¶¶ 7-8, 13-14 ¶¶ 57-59, 15 ¶¶ 72-74. Cotter asserted entitlement to indemnification based on two counts: statutory indemnification pursuant to the PAA and contractual indemnification as an intended third-party beneficiary of the AEC-Mallinckrodt Indemnification Agreement. *Id.* at 13-15 ¶¶ 53-74. In August 2022, the United States filed a motion to dismiss. Def.'s Mot. to Dismiss, *Cotter Corporation, (N.S.L.) v. United States*, 165 Fed. Cl. 138 (Fed. Cl. 2023) (No. 22-cv-00414), ECF No. 16; *see also Claims Court Opinion*, at 141-42. Regarding the statutory claim, the government argued that Cotter failed to state a claim on which relief could be granted under Rule 12(b)(6) of the United States Court of Federal Claims (RCFC) because Cotter failed to plead a basis for statutory indemnification under the PAA. Def.'s Mot. to Dismiss at 17-33. Regarding the contract claim,

the government sought dismissal under RCFC Rule 12(b)(6) for want of plausible allegations that it was an intended third-party beneficiary of the Indemnification Agreement and also sought dismissal under RCFC Rule 12(b)(1) for want of jurisdiction because, the government argued, Cotter lacked standing. *Id.* at 33-37.

On March 3, 2023, the Claims Court granted the government's motion to dismiss on all grounds and entered judgment. *Claims Court Opinion*, at 138; Judgment, *Cotter Corporation (N.S.L.) v. United States*, 165 Fed. Cl. 138 (Fed. Cl. 2023) (No. 22-cv-00414), ECF No. 21. Regarding the statutory claim, the Claims Court concluded that the “clear and unambiguous” language of § 170(d) “limits who may be party to or benefit from an indemnification agreement” by providing for indemnification for “public liability ‘*arising out of or in connection with the contractual activity,*’” § 170(d) (emphasis added)—meaning, in the court's view, liability that “originate[s] from” or has “a relationship to” the contractual activity. *Claims Court Opinion*, at 148-49. Considering that formulation, and the PAA as a whole, the Claims Court then held the complaint insufficient, reciting several reasons: Cotter “was not in privity of contract with Mallinckrodt”; the “benefit to the government's nuclear program” ended when Mallinckrodt stopped its contractual activities; “Cotter's handling of the material did not ‘originate from’ Mallinckrodt's contractual activity, but rather possession by third parties”; and Cotter's “handling [of] material that was once under Mallinckrodt's contract is an insufficient causal sequence to trigger indemnification obligations.” *Id.* at 149.

The court dismissed the contract count of the complaint, concluding that Cotter lacked subject-matter ju-

risdiction and failed to state a claim upon which relief can be granted. *Id.* at 150-52. Because Cotter “d[id] not fall within the class ‘clearly intended to be benefit[t]ed’ by the PAA’s indemnification under Section 170(d),” the Claims Court concluded that Cotter “failed to establish it has standing as an intended third-party beneficiary of the Mallinckrodt contract and indemnification agreement.” *Id.* at 152. Without standing, the Claims Court determined it must grant the motion for lack of subject-matter jurisdiction. *Id.* at 151. Moreover, “[e]ven if Cotter had standing,” the Claims Court concluded, Cotter could not “plausibly allege an ‘actual breach’ of [the AEC-Mallinckrodt] contract” necessary for a contract claim because Cotter never asked the government for indemnity and so was never denied it. *Id.* at 152.

Cotter timely filed an appeal to this court on April 25, 2023. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

## II

“We review the dismissal for lack of subject-matter jurisdiction *de novo*. We review the dismissal for a failure to state a claim on which relief can be granted *de novo*.” *Taylor v. United States*, 959 F.3d 1081, 1086 (Fed. Cir. 2020) (citations omitted). The Rule 12(b)(6) inquiry is whether the factual allegations “cross the line to support a plausible inference” that the government is statutorily or contractually liable for indemnifying Cotter. *See UTTO Inc. v. Metrotech Corp.*, 119 F.4th 984, 991-92 (Fed. Cir. 2024) (citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57, 570 (2007). The “plausibility” requirement also applies to the government’s facial Rule 12(b)(1) challenge to jurisdiction over the contract claim here, which challenges Cotter’s

standing: The inquiry is whether the complaint “‘contain[s] sufficient factual matter’ that would plausibly establish standing.” *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1354-55 (Fed. Cir. 2018) (quoting *Iqbal*, 556 U.S. at 678). In reviewing both dismissals, we accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of Cotter. *Harris v. United States*, 868 F.3d 1376, 1379 (Fed. Cir. 2017); see also *Taylor*, 959 F.3d at 1086; *Ute Indian Tribe of the Uintah & Ourah Indian Reservation v. United States*, 99 F.4th 1353, 1364 (Fed. Cir. 2024). “We ‘may also look to matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record.’” *Ute Indian Tribe*, 99 F.4th at 1364 (quoting *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014)). We interpret both the statute and the contract at issue here de novo. See *Harris*, 868 F.3d at 1379; *NOAA Maryland, LLC v. Administrator of the General Services Administration*, 997 F.3d 1159, 1165 (Fed. Cir. 2021); *Genentech, Inc. v. Immunex Rhode Island Corp.*, 964 F.3d 1109, 1111 (Fed. Cir. 2020).

We conclude that the Claims Court erred in dismissing Cotter’s statutory indemnification claim for failure to state a claim, because the complaint states a plausible allegation of entitlement to indemnification under the PAA. We then address the contract claim. We reverse the district court’s conclusion of lack of standing, which rested on the court’s error on the statutory entitlement question. We also reverse the dismissal of the contract claim, because, on the present record and arguments, the only argument made for insufficiency of the contract claim is the same argument we reject in reversing the dismissal of the statutory claim.

As is undisputed, the Claims Court had jurisdiction to adjudicate the claim made under § 170(d). The Tucker Act gives the Claims Court jurisdiction, and waives the sovereign immunity of the United States, for money claims “against the United States founded [upon] . . . any Act of Congress.” 28 U.S.C. § 1491(a)(1). That provision applies when the statute invoked is a “so-called money-mandating provision[ ],” *i.e.*, “it can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.” *Maine Community Health Options v. United States*, 590 U.S. 296, 324, 322 (2020) (internal quotation marks and citation omitted). Section 170(d)’s “shall indemnify” language, like the “shall pay” language held sufficient in *Maine Community*, 590 U.S. at 324-25, qualifies under that standard. We therefore address the merits question of what is required to come within § 170(d)’s “shall indemnify” language and whether Cotter has met the requirement for motion-to-dismiss purposes.

The “shall indemnify” obligation, where (as here) there is a government-contractor indemnity agreement, reached “persons indemnified” for “public liability arising out of or in connection with the contractual activity.” § 170(d). That language plainly required, because of the express definitions of the key terms in § 170(d), that the indemnification duty, for a domestic nuclear incident (such as the one at issue here), extends beyond the contractor to “*any other person who may be liable for public liability.*” PAA-amended AEA § 11(r) (before and after 1962 amendment) (emphasis added). The last

phrase—“public liability”—meant “any legal liability arising out of or resulting from a nuclear incident” (for a domestic nuclear incident). PAA-amended AEA § 11(u) (before and after 1962).

This appeal turns on who is a “person indemnified” for “public liability arising out of or in connection with the contractual activity.” Those terms, with their embedded statutory definitions, are what address the needed relationship between the indemnity-claiming person’s liability and the “contractual activity.” There is no meaningful dispute before us about two premises needed for that language to apply. First, there was a qualifying indemnity agreement, *i.e.*, the 1962 AEC-Mallinckrodt Indemnification Agreement. *See supra* Part I.B.1. And second, Cotter is asserting a right to indemnity for a liability arising out of or resulting from a domestic occurrence causing harms from radioactive and other hazardous properties of covered nuclear materials—materials created as part of Mallinckrodt’s performance of its contract with the government. *See, e.g.*, Cotter Opening Br. at 9-10, 21-22; Government Response Br. at 10-11.

The Claims Court gave the statutory provision at issue a narrow interpretation, which effectively required (a) a contemporaneous relationship between the liability-generating acts of the non-contractor indemnity claimant (Cotter) and the performance of the contract (by Mallinckrodt or the government) and, seemingly, (b) that the indemnity claimant’s activities (generating liability to others) were related to the contractual activities in the particular sense of contributing to the performance of the contract. Such a view is suggested by the Claims Court’s reasons for finding the standard not met even for motion-to-dismiss purposes. Those reasons focus on

the fact that Cotter’s actions (giving rise to liability) post-dated Mallinckrodt’s work for the government, and they deem other facts insufficient—*e.g.*, that the materials Cotter was handling were created for the government under the contract, had an obvious potential to remain hazardous for an extended period, were sold by the government before the contract ended, and shortly thereafter were acquired by Cotter and held under an AEC license. *Claims Court Opinion*, at 148-50. In this court, the government insists on what we understand to be materially the same focus on a contemporaneous contribution to contract performance when it says that the statutory standard is met where the indemnity claimant “work[ed] under, in support of, in connection with, or at the site of an AEC weapons production contract for the benefit of the United States” (*i.e.*, when the contract was being performed) but not where the claimant has “mere later ownership and possession of radioactive material that resulted from [such a] Contract.” Government Response Br. at 3-4; *see, e.g., id.* at 19-20, 23, 25.

For the reasons we next explain, we conclude that the narrow view taken by the Claims Court and argued by the government is not the best reading of the statute and that Cotter properly survives the motion to dismiss here.

## 3

To begin with the terms that precede “arising out of or in connection with”—“persons indemnified” for “public liability”—it is clear that those terms (with the embedded definition of “nuclear incident”) contemplate a broader range of indemnity than the narrow view taken by the Claims Court. The phrase “persons indemnified” is defined broadly to cover not just the contractor but

“*any* other person who may be liable for public liability.” PAA-amended AEA § 11(r) (before and after 1962 amendment) (emphasis added). Public liability, in turn, broadly reaches the “public” by embracing “*any* legal liability arising out of or resulting from a nuclear incident,” with exceptions (not at issue here) for workers’ compensation for certain incident-site employees and for certain losses of incident-site property. *Id.* § 11(u) (emphasis added). And the definition of “nuclear incident” covers “*any* occurrence within the United States causing bodily injury . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.” PAA-amended AEA § 11(o) (emphasis added).

None of those provisions limits indemnity to the period before the government contract ended or includes a requirement that the indemnity claimant’s (exposure-causing) activity was contributing to the contracting parties’ performance. They are focused simply on the hazard from the material—a hazard that is not limited in time to the period of performance of a particular contract and may be long lasting, for at least some of the covered nuclear materials. *See, e.g.,* J.A. 286 (1950 S.A. No. 45 provisions recognizing that harms may arise from radioactive materials, products, or byproducts “that may be or may at any time have been involved in the performance of the work under this contract”), 298-300 (1950 S.A. No. 45 provisions recognizing that hazards will outlast the contract), 772-73 (1961 S.A. No. 122 provisions recognizing the same).<sup>6</sup> Unless potential in-

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<sup>6</sup> *See also Atomic Energy Part 1: Hearings Before the Special Comm. on Atomic Energy Pursuant to S. Res. 179, 79th Cong.* 149 (1945) (“The manufacture of fissionable materials is by long odds the

vestors in nuclear energy were confident that such materials, as byproducts of contract use or residues from creating material for such use, would no longer be hazardous beyond the time of contract performance—and we have been given no reason to infer such confidence—a contract-termination temporal limit (*i.e.*, excluding government compensation if and when harm occurred after termination) would undermine the declared statutory purposes “to protect the public” and to remove an important deterrent to private investment in nuclear energy. PAA, 71 Stat. at 576 (amending AEA § 2); *see* S. REP. 85-256, at 16 (recognizing the government’s “primary concern” of protecting the public, that “the steady exposure to radiation, such as from an undetected leak of radioactive materials from a storage bin” cannot be “pinpointed in time,” that covered incidents do not “necessarily have to occur within any relatively short period of time,” and (discussing licensees) that “[t]he indemnity agreements are intended to cover damages caused by nuclear incidents for which there may be liability no matter when the damage is discovered, *i.e.*, even after the end of the license”); S. REP. 100-218, at 2 (1987) (later committee’s understanding of PAA as “remov[ing] the deterrent of potentially catastrophic liabil-

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most dangerous manufacturing process in which men have ever engaged. The process is accompanied by the production of radioactive by-products as poisonous as the basic material itself . . . .”) (statement of Dr. Vannevar Bush, President, Carnegie Institution of Washington, and Director, Office of Scientific Research and Development); *New York v. United States*, 505 U.S. 144, 149-50 (1992) (observing that even “low level radioactive waste” “must be isolated from humans for long periods of time, often for hundreds of years”); *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission*, 685 F.2d 459, 467-68 n.14, 469 (D.C. Cir. 1982) (noting long-term hazards from radioactive wastes).

ity,” including through “channeling of liability” provisions that indemnify “any person who might be held liable for public liability resulting from a nuclear incident”).

The breadth of the foregoing terms, apparent from their definitions, is emphasized by the evident contrast of key definitions with immediately neighboring standards. In particular, as recited above, in 1962 Congress amended the definitions of “person indemnified” and “nuclear incident” to retain the 1957 language for domestic occurrences while pointedly narrowing the scope for foreign occurrences. *See supra* Part I.A. For the latter, “person indemnified” reached a person other than the contractor only if that person’s exposure to public liability was “*by reason of his activities under any contract with the [AEC] or certain other “project[s]” (including under subcontracts or the like). PAA-amended AEA § 11(r) (after 1962 amendment) (emphasis added).* In a similar way, for “nuclear incident,” Congress retained the pre-existing scope for domestic occurrences (with a clarification that stressed breadth), while adopting a narrow scope for most foreign occurrences—applying to a foreign occurrence only if it “involves a facility or device *owned by, and used by or under contract with, the United States.*” PAA-amended AEA § 11(o) (after 1962 amendment) (emphasis added). The adoption of those narrower standards for foreign occurrences (where the harm will typically fall on another country’s “public”), combined with their conspicuous absence from the adjacent domestic-occurrence language, confirms the breadth of the domestic-occurrence language. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (stating that “when Congress includes particular language in one section of a statute but omits it in an-

other section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (same); *Collins v. Yellen*, 594 U.S. 220, 248 (2021) (same).

Here, as the case is presented to us, Cotter incurred liability through its settlement with the *McClurg* plaintiffs based on allegations that it injured members of the public in the St. Louis area by releasing, between 1969 and 1973, radioactive materials and residues originally produced by Mallinckrodt for the government under the AEC-Mallinckrodt contract. McClurg Second Amended Compl. at 3-4 ¶¶ 6-12, 4-5 ¶¶ 16-20, 25-26 ¶¶ 70-72; Public Redacted Compl. at 9-13 ¶¶ 36-52; *see supra* Parts I.B.2, I.C. Taking all well-pleaded factual allegations before us as true, we conclude that Cotter is a “person indemnified” seeking indemnity for a “public liability.”

## 4

We also answer the remaining question under § 170(d) in Cotter’s favor. We conclude that Cotter has pleaded enough to proceed past the dismissal stage on the question of whether the public liability Cotter incurred was one “arising out of or in connection with the contractual activity” of performance of the AEC-Mallinckrodt contract, a contract that (as we have noted) undisputedly included an indemnity agreement. The parties read the phrase as meaning “arising out of” or “in connection with,” but it might be understood as meaning “arising out of” or “arising in connection with.” For present purposes, we do not see that the precise parsing makes a difference, including because “arising in connection with” would encompass “arising out of.”

The “arising out of” phrase alone clearly requires that what follows the phrase (here, the contractual activity) was the cause (sometimes, just one of the causes) of what precedes the phrase (here, the public liability of the indemnity claimant). *See, e.g., Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351, 361-62 (2021); *United States v. Shearer*, 473 U.S. 52, 54-55 (1985). The concept of causation often combines but-for causation and an additional limit often called “proximate” causation, which prevents attribution to a “remote cause.” *Bank of America Corp. v. City of Miami*, 581 U.S. 189, 201 (2017) (citation omitted); *Lexmark International Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132-33 (2014); *see also Burrage v. United States*, 571 U.S. 204, 210 (2014) (explaining that “[t]he law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause,” which is “often called the ‘proximate cause’”) (citations omitted); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1546 (Fed. Cir. 1995) (en banc). We have explained, in the patent-damages setting, that “‘reasonable, objective foreseeability’ is ‘generally’ sufficient for proximate causation, while indicating that a different conclusion might be justified if there is ‘a persuasive reason to the contrary.’” *Brumfield, Trustee for Ascent Trust v. IBG LLC*, 97 F.4th 854, 877 (Fed. Cir. 2024) (quoting *Rite-Hite*, 56 F.3d at 1546); *see also CSX Transportation, Inc. v. McBride*, 564 U.S. 685, 702-04 (2011) (discussing reasonable foreseeability’s role in proximate-cause analysis). As reflected in that formulation, a particular statutory context may alter the general standard for proximate causation. *See Bank of America*, 581 U.S. at 201-04; *see also Husted v. A. Philip Randolph Institute*, 584 U.S. 756, 769 (2018).

The “in connection with” phrase (alone or viewed as part of “arising . . . in connection with”) undoubtedly broadens the reach of the overall clause at issue here. The phrase, we have repeatedly recognized in another context, is on its face “very sweeping in scope.” *RAMCOR Services Group, Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999); see *Acetris Health, LLC v. United States*, 949 F.3d 719, 728 (Fed. Cir. 2020); *Diaz v. United States*, 853 F.3d 1355, 1357-58 (Fed. Cir. 2017); *Palladian Partners, Inc. v. United States*, 783 F.3d 1243, 1254 (Fed. Cir. 2015); *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008). Relatedly, in the AEA context, Congress in 1961 changed the language of AEA § 152, 42 U.S.C. § 2082, to delete “in connection with” from a list that included “in the course of” and “under” and also to delete “or other relationships with the [AEC]” from a list that included “any contract,” “subcontract,” and “arrangement.” Pub. L. 87-208, 75 Stat. 475, 477 (Sept. 6, 1961). Congress did so, we have recognized, because the deleted language was “unclear and possibly too sweeping.” *Fitch v. Atomic Energy Commission*, 491 F.2d 1392, 1395-96 (CCPA 1974) (quoting H.R. REP. 87-963, at 8 (1961), 1961 U.S.C.C.A.N. 2591, 2597). In contrast, Congress did not change the “arising out of or in connection with” language of § 170(d) when it enacted the 1962 amendments introducing the domestic/foreign distinction. See 42 U.S.C. § 2210(d) (where this language remains); *supra* Part I.A.

The Supreme Court has stated that “[t]he phrase ‘in connection with’ is essentially ‘indeterminat[e]’ because connections, like relations, ‘stop nowhere.’” *Maracich v. Spears*, 570 U.S. 48, 59-60 (2013) (quoting *New York State Conference of Blue Cross & Blue Shield Plans v.*

*Travelers Insurance Co.*, 514 U.S. 645, 655 (1995)) (second alteration in original); *cf. Ford Motor*, 592 U.S. at 361-62. As a result, the phrase, when used in any given statutory setting, needs to be, and has been, construed to respect not only its breadth but also the particular statute’s structure, other provisions, and objectives. *Maracich*, 570 U.S. at 59-60; *see New York State Conference*, 514 U.S. at 656; *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 324-25 (1997); *cf. Ford Motor*, 592 U.S. at 361-62 (noting that the phrase “arise out of or relate to” in precedent goes beyond a “strict causal relationship” but “does not mean that anything goes”).

Under those standards, which obviously do not create a bright-line rule, the materials proper for consideration on the motion to dismiss, including the complaint’s allegations (which we must take as true at this stage), suffice to preclude dismissal here. The AEC-Mallinckrodt contractual activity of creating the nuclear material at issue was a but-for cause of the public liability, because that material, which was inherently dangerous, was the source of the nuclear incident giving rise to Cotter’s public liability. That is so even though there were other but-for causes, such as Cotter’s own actions (or omissions) involving that material. *See Bostock v. Clayton County*, 590 U.S. 644, 656 (2020) (“Often, events have multiple but-for causes.”).

The path from the contractual activity to the nuclear incident was not a long or tortuous one. Indeed, the AEC-Mallinckrodt contract itself had not yet terminated when the material was sold to Cotter. *See supra* Part I.B; J.A. 814 (1966 SA No. 129, stating that contract work continued through June 30, 1967); J.A. 1114 (Cot-

ter's purchase agreement entered into on June 9, 1967). The path involved the February 1966 transfer of the materials by the government—as owner, seeking to avoid having to dispose of the material itself—to a company that quickly folded, causing the materials to pass to the foreclosing (financing) company for a brief time before, in June 1967, the materials were put into the hands of Cotter, which was in the relevant line of work and which secured an AEC license for that work in December 1969, as legally required. *See supra* Part I.B.2. On the facts alleged, the contractual activity need not be deemed “remote” from the nuclear incident, *Bank of America*, 581 U.S. at 201, that is alleged by the *McClurg* plaintiffs (regarding Cotter) to have begun in 1969. The relevant record lays out extensive facts or alleged facts about the nature of the material, the statutory requirement of obtaining a license, the contract provisions and government actions recognizing a need for careful long-term management of the materials, and even the government's awareness that an initial transferee might default (hence that a subsequent transfer might be needed). *See, e.g.*, Public Redacted Compl. at 5-6 ¶¶ 16-23; J.A. 45 (1943 contract Article 4), 62 (1943 contract Article 33), 288-300 (1950 SA No. 45), 662 (1955 SA No. 110), 773 (1961 SA No. 122), 789-90 (1962 SA No 126); *see generally supra* Parts I.B, II.A.3. On this record, we have been given no basis for ruling that it is implausible that the eventual exposure of the public in the asserted nuclear incident meets a standard of “reasonable, objective foreseeability.” *Rite-Hite*, 56 F.3d at 1546. This is not a case, on the record presented and considering the Rule 12(b)(6) standard, where we can say that the connection at issue is so “thin” that it goes beyond a “cutoff” point

of the statutory phrase. *See Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 149 (2009).

This conclusion readily serves, rather than undermines, the declared and evident purpose of the statutory provision at issue, which is relevant to confirming that “in connection with” can apply here. The purpose of § 170(d) was a broad one—to indemnify private-sector participants involved in the nuclear-energy industry for risks of nuclear incidents, and hence of liability, that were high enough that Congress recognized that the risk was significantly deterring private investment. The aim of the government indemnification was a dual one: to guarantee the (domestic) public compensation for harm if such an incident occurred; and to induce private-sector investment in work Congress deemed of great value to the country. *See supra* Parts I.A., II.A.3. Applying the “arising out of or in connection with” phrase on the record here furthers the declared purpose of the statutory provision of indemnification.

For the foregoing reasons, we reverse the dismissal of the claim for indemnity under § 170(d).

## B

We also reverse the dismissal—for lack of jurisdiction (because of lack of standing) and, in the alternative, for failure to state a claim—of Cotter’s claim for contractual indemnification.

## 1

The jurisdictional (standing) dismissal rested solely on the Claims Court’s determination that Cotter failed to establish, in response to the government’s Rule 12(b)(1) facial challenge, that it was a third-party beneficiary of the Indemnification Agreement—and therefore did not

come within the Tucker Act provision providing jurisdiction to hear a damages claim founded “upon any express or implied contract with the United States,” 28 U.S.C. § 1491(a)(1). *Claims Court Opinion*, at 151-52. There is no dispute, and it is clear, that Cotter had constitutional and Tucker Act standing if it did allege enough to make it a third-party beneficiary under motion-to-dismiss standards. To defeat the government’s motion to dismiss under Rule 12(b)(1), Cotter was “merely required to set forth a non-frivolous allegation of breach of a contract with the government.” *Columbus Regional Hospital v. United States*, 990 F.3d 1330, 1341 (Fed. Cir. 2021). The complaint readily meets that low standard, as its allegation that it is among the class of intended beneficiaries of the contractual provision promising indemnity (using “persons indemnified” language like that of PAA-amended AEA § 170(d)) is not frivolous. The Claims Court erroneously applied what amounts to the higher Rule 12(b)(6) standard of plausible allegations supporting relief. *Claims Court Opinion*, at 151-52. It was improper to dismiss this claim for lack of jurisdiction. We may and do, however, convert the government’s argument against Cotter having the status of a third-party beneficiary into an argument for dismissal under Rule 12(b)(6). *Columbus Regional Hospital*, 990 F.3d at 1342.

## 2

With that conversion, we address the two grounds for dismissal for failure to state a claim—that, under the pleading standard applicable under Rule 12(b)(6), Cotter was not an “intended third-party beneficiary” of the AEC-Mallinckrodt Indemnification Agreement; and that Cotter had failed sufficiently to allege breach by

the government of the indemnity obligation because it failed to give the government assertedly required notice. *Claims Court Opinion*, at 151-52. We reject both grounds for dismissal.

a

Cotter has alleged sufficient facts to make plausible its claim that it is an intended third-party beneficiary of the Indemnification Agreement. That agreement, quoted in significant part *supra* Part I.B.1, used language substantially the same as the language we have discussed in rejecting the dismissal of the claim for indemnification under PAA-amended AEA § 170(d). J.A. 780-82 (1962 SA No. 124). The Indemnification Agreement incorporated the relevant statutory definitions, of “person[s] indemnified,” “public liability,” and “nuclear incident.” J.A. 780; Public Redacted Compl. at 7 ¶ 27. It also stated that “the Commission will and does hereby indemnify the Contractor, *and other persons indemnified*, against (i) claims for public liability as described . . . and (ii) the reasonable costs of investigating and settling claims, and defending suits for damage for such public liability.” J.A. 781 (emphasis added); Public Redacted Compl. at 7-8 ¶ 28. The “public liability” had two requirements—that it “arises out of or in connection with the contractual activity” and that it “arises out of or results from” one of four specified “nuclear incidents,” including a “nuclear incident which involves items (such as equipment, *material*, facilities, or design or other data) produced or delivered under this contract.” J.A. 781-82 (emphasis added); Public Redacted Compl. at 8 ¶ 29.

On the well-pleaded allegations discussed above, as we have concluded *supra* Part II.A, Cotter was a “person indemnified” against the liability at issue here. Our

conclusion about Cotter's coverage by statutory language that is materially identical to the contract language means that Cotter was a person expressly stated by the contract to be a direct beneficiary, as among the indemnitee class, of the contract's indemnity obligation. That is sufficient for Cotter to pass the test for third-party-beneficiary status at the Rule 12(b)(6) stage. *See Columbus Regional Hospital*, 990 F.3d at 1345 ("The test for third-party beneficiary status is whether the contract reflects the intent of the contracting parties to benefit a third party. . . . The intended benefit must be direct.") (citation omitted).

In rejecting Cotter's entitlement to such status, the Claims Court principally relied on its rejection of the statutory analysis we have adopted. It also pointed to provisions in the bill of sale between AEC and Continental and in the purchase agreement between Commercial (Continental's transferee upon foreclosure) and Cotter. *Claims Court Opinion*, at 149-50. The AEC-Continental bill of sale passed title of the material to Continental and stated that the material was sold "as is" and that the government did not warrant that the material would "not result in injury or damage." J.A. 1107-08. The Commercial-Cotter purchase agreement passed title of the material to Cotter and included provisions for Cotter and Commercial to indemnify each other for liability resulting from certain activities. J.A. 1114-15; J.A. 1132-34. But those documents do not end the government's indemnification duties or otherwise make Cot-

ter's allegation of third-party-beneficiary status implausible.<sup>7</sup>

The Indemnification Agreement provided for indemnification of public liability arising out of a nuclear incident that involves materials “produced or delivered under this contract,” without requiring that such materials continue to be owned or under the control of the government or Mallinckrodt. J.A. 782 (1962 SA No. 124). It also did not limit indemnification to the period of the Mallinckrodt contract; to the contrary, it stated that “[t]he obligations of the Commission . . . shall be unaffected . . . by the completion, termination or expiration of this contract.” J.A. 783 (1962 SA No. 124). And the government made that drafting choice even while it was actively trying to sell the nuclear materials to private companies and had included provisions in the Mallinckrodt contract that explicitly contemplated sale of materials to third parties. Public Redacted Compl. at 7 ¶ 25; *see, e.g.*, J.A. 708 (1955 SA No. 115, Article X ¶ 4), 733 (1955 SA No. 115, Schedule D ¶ 2(a)-(b)).

In these circumstances, the Claims Court erred in denying Cotter third-party-beneficiary status in ruling on the motion to dismiss.

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<sup>7</sup> The government also points to the AEC-Continental bill of sale's provision stating that “there are no prior agreements, understandings, or covenants between the Government and the Purchaser . . . which are not set forth herein.” J.A. 1108-09; Government Response Br. at 11, 37. That language, effectively an integration clause, merely precludes either party from relying on prior bids (detailed in the sentence immediately preceding the one quoted). J.A. 1108; *see* Public Redacted Compl. at 5 ¶ 17, 6 ¶ 21.

Cotter also sufficiently alleged facts that plausibly support an inference that the government breached the contract. The Claims Court and the government seem to make two different contentions about deficiencies on Cotter's part that preclude any assertion of a breach even at this stage—first, that Cotter never made a pre-suit demand for indemnity to the government, and second, that Cotter did not satisfy certain contractual notification-of-litigation requirements. *Claims Court Opinion*, at 151-52; Government Response Br. at 56-61. At least for purposes of the motion to dismiss here, we reject those arguments.

The government identifies nothing in the contract, or in any applicable statutory or decisional law, that supports its first point. The contract does not include a pre-suit-demand requirement, or a similar exhaustion requirement to request and obtain a contracting officer's decision, as a precondition to suing on (what we here must assume is) the indemnity duty owed to Cotter. *See* J.A. 780-84 (1962 SA No. 124). Nor does the government identify any applicable law that imposes such a requirement. *Compare, e.g.*, 28 U.S.C. § 2675 (Federal Tort Claims Act); 41 U.S.C. § 7103(a)(3) (Contract Disputes Act). Nor, further, does it identify a basis for dismissing a suit for breach because of a lack of such a pre-suit demand when it is clear (based on the Department of Energy's letter to the Missouri court and the government's position here) that any demand would have been futile.

The government also has not persuasively shown that any contract provision required more notice of the public-liability litigation (the *McClurg* litigation) than it received in this matter, or persuasively shown that the

indemnity obligation disappears when such notice is deficient, even when it is clear that additional notice would not have changed the government's refusal to indemnify. The record indicates that, consistent with the Indemnification Agreement, J.A. 782-83 (1962 SA No. 124, citing J.A. 711-12, 1955 SA No. 115, Article XIV on Litigation and Claims), the government received notice of the *McClurg* claims before the present action was filed. Settlement Order at 1-2; DOE Letter at 1-2; Public Redacted Compl. at 10 ¶ 38, 12 ¶¶ 46-47. Moreover, several provisions of the Indemnification Agreement and the AEC-Mallinckrodt contract affirmatively suggest that failures-of-notice formalities do not negate the indemnity obligation. J.A. 783 (1962 SA No. 124, stating: "The obligations of the [AEC] under this article shall not be affected by any failure on the part of the Contractor to fulfill any of its obligations under this contract."), 691-92 (1955 SA No. 115, Article V ¶ 2(j), stating that "failure to comply with the requirements . . . relative to the reporting of an action or claim or the furnishing of copies of papers" did not preclude reimbursement by the government of the settlements, losses, and expenses related to those claims; and stating that "the refusal of the [AEC] to authorize or approve the defense or settlement of any claim or action against the Contractor . . . shall not preclude a later determination of whether or not any settlement of such claim or action by the Contractor or the expense of defending such claim or action . . . or any final judgment, award or allowance as a result of any such action or claim" can be considered an allowable expense that the government must pay).

On the arguments and record presented to us, we conclude that Cotter adequately alleged a breach of contract.

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III

For the foregoing reasons, we reverse the Claims Court's decision and remand the case.

Costs awarded to Cotter.

**REVERSED AND REMANDED**

**APPENDIX B**

UNITED STATES COURT OF FEDERAL CLAIMS

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No. 22-414

COTTER CORPORATION, (N.S.L.), PLAINTIFF

*v.*

THE UNITED STATES, DEFENDANT

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Filed: Mar. 3, 2023

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**MEMORANDUM OPINION**  
**AND ORDER DISMISSING**

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**TAPP, Judge.**

Turning “swords into plowshares” characterized the post-World War II transformation of destructive atomic power into usable consumer energy. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 193 (1983). Fulfillment of that ambition required relaxation of the federal government’s “monopoly over fissionable materials and nuclear technology.” *Id.* at 194. However, developing nuclear energy production carries potentially enormous risk to life and property. To offset such risk, Congress passed the Price-Anderson Act (“PAA”) which “encourage[d] private investment in commercial nuclear power by placing a cap, or ceiling, on the total amount of liability” the nuclear industry faced in the event of an accident and provided a system of government indemnification. *Back-*

*grounder on Nuclear Ins. & Disaster Relief*, U.S. Nuclear Regul. Comm’n (Apr. 11, 2022), <https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.htm>. The most infamous instance of accidental injury, the Three Mile Island Nuclear Power Plant in Pennsylvania, resulted in approximately \$71 million in claims and litigation costs. *Id.*

The genesis of the present litigation involves the exposure of hundreds of St. Louis area residents to radioactive material in the years following World War II. *McClurg v. MI Holdings, Inc.*, 933 F. Supp. 2d 1179 (E.D. Mo. 2013).<sup>1</sup> Ultimately, the parties reached a settlement, though related litigation continues today. *See, e.g., Butler v. Mallinckrodt LLC*, No. 4:18-cv-01701-AGF, 2022 WL 4598531, at \*1 (E.D. Mo. Sept. 30, 2022) (plaintiffs “assert public liability actions under” the PAA).

Here, Plaintiff, Cotter Corporation (N.S.L.) (“Cotter”), seeks compensation from the United States for the costs of defending and settling the “public liability” action regarding radioactive material Cotter purchased from Mallinckrodt Chemical Works (“Mallinckrodt”). As provided in the PAA, a “public liability action” involves the assertion that another party bears the “legal liability arising out of or resulting from a nuclear incident.” 42 U.S.C. § 2014(w). Cotter’s indemnification claims implicate the PAA and a contract between the United States and Mallinckrodt. The United States asserts that (1) Cotter’s PAA claim fails to state a claim upon which re-

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<sup>1</sup> In 2012, the case was originally named *McClurg v. MI Holdings, Inc.*, 933 F. Supp. 2d 1179 (E.D. Mo. 2013). It was later consolidated to become *McClurg v. Mallinckrodt, Inc.* For purposes of this Opinion and Order, it will be “*McClurg*.”

lief can be granted because it does not implicate either potential avenue for statutory indemnification—contractual or licensing indemnification; and (2) Cotter lacks standing because it did not plausibly allege it was an intended third-party beneficiary of the Mallinckrodt agreement. The Court agrees with the United States on both counts; therefore, the United States’ Motion to Dismiss is **GRANTED**.

## I. Background

### A. *Statutory Framework of the Price-Anderson Act*

Following World War II, Congress sought to encourage private sector involvement in nuclear energy development. To do so, it established the Atomic Energy Commission (“AEC” or “Commission”) to manage programs related to nuclear energy, and later provided for the licensing of private nuclear reactors regulated by the AEC. Atomic Energy Act of 1946, Pub. L. No. 79-585, §§ 1-2, 60 Stat. 755; Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (“1954 Act”). Despite investment incentives included in the 1954 Act, the risk of liability following a nuclear disaster hindered private investment, so Congress enacted the PAA in 1957. Pub. L. No. 85-256 § 4, 71 Stat. 576 (current version at 42 U.S.C. § 2210). The PAA has a “dual purpose” of both “protecting the public and encouraging the development of the nuclear energy industry.” *Duke Power Co. v. Carolina Env’t Study Grp., Inc.*, 438 U.S. 59, 59 (1978).

The PAA contained indemnification provisions to incentivize both contractor and licensee participation. *See, e.g., id.* Importantly, these provisions distinguish between contractors and licensees. Pub. L. No. 85-256

§§ 170(a)-(d).<sup>2</sup> The PAA authorized the Commission to enter into indemnification agreements with any entity engaged in activities “under contract for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident.” § 170(d). Indemnification agreements could, but did not necessarily, include an insurance requirement. *Id.*

Further, the PAA provided that only some commercial licensees were required—by statute or the Commission’s discretion—to maintain liability insurance in the amount available from private sources. §§ 170(a)-(d). Specifically, the PAA provided licensees may have to:

[M]aintain financial protection of such type and in such amounts as the [Commission] shall require . . . to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection [170(c)].

§ 170(a). The PAA specified that the Commission<sup>3</sup> “agree[s] to indemnify and hold harmless the licensee and other persons indemnified . . . from public liability

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<sup>2</sup> Both Cotter and the United States rely on statutory language from Section 170 which was in effect during the Mallinckrodt contract. (*See e.g.*, Mot. to Dismiss at 14-15; Pl.’s Resp. at 15). For purposes of this opinion, the Court will interpret Section 170.

<sup>3</sup> In the 1970s Congress abolished the AEC and divided its functions between the Energy Research and Development Administration and the Nuclear Regulatory Commission. Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 104(a), 88 Stat. 1233, 1237. It went on to establish the Department of Energy (“DOE”) in 1977. The Department of Energy Organization Act, Pub. L. No. 95-91, §§ 201, 301, 703, 91 Stat. 565, 569, 577-78, 606.

arising from nuclear incidents which is in excess of the level of financial protection required of the licensee.” § 170(c). The indemnification could cover public liability arising out of or connected to the licensed activity. *Id.* Ultimately, the PAA provided federal licensees with robust layers of protection, including: (1) a system of mandatory private insurance, (2) indemnification from the government for public liability from nuclear incidents, and (3) limited liability for nuclear incidents. *El Paso Nat. Gas Co. v. Nextsosie*, 526 U.S. 473, 476 (1999).

Under the PAA today, “public liability” refers to liability resulting from any “nuclear incident” or precautionary evacuation, except for workmen’s compensation claims or claims resulting from war. 42 U.S.C. § 2014(w). A “nuclear incident” is any occurrence, injury, sickness, death, or damage to property resulting from the hazardous properties of nuclear material. § 2014(q). Taken together, these provisions provide “no fault” insurance scheme under which liability after an incident is assumed by the operator of a nuclear facility. Daniel Klein, *Litigation of Atomic Energy Act*, 42 U.S.C.A. § 2011 et seq., and *Amendments Thereto*, 156 Am. Juris. Trials 1, 3 (2022).

#### *B. Contracts and Licenses at Issue*

In 1942, the United States War Department contracted with Mallinckrodt to produce refined uranium and operate two government plants;<sup>4</sup> the United States maintained ownership over the radioactive material.

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<sup>4</sup> Mallinckrodt “[p]urified and provided all of the uranium oxide used by the Manhattan Project[.]” *Our Story*, Mallinckrodt Pharmaceuticals, <https://www.mallinckrodt.com/about/our-story/> (last visited Feb. 27, 2022).

(Compl. at 4, ECF No. 1; Mot. to Dismiss at 16-17, ECF No. 16). Initially, Mallinckrodt operated a facility in downtown St. Louis, Missouri (“St. Louis Downtown Site” or “SLDS”) but in the 1950s it began transporting residue material to the St. Louis Airport (“St. Louis Airport Site” or “SLAPS”). (Compl. at 4). This arrangement continued until 1966 through a series of supplemental agreements (“SA”). (Mot. to Dismiss at 17). Most SAs merely adjusted the price or quantity of materials, but some substantively changed the Mallinckrodt contract. (*Id.*).

For example, under SA No. 45 the United States and Mallinckrodt agreed that “[t]he Contractor shall promptly” determine whether a claim “arising out of, based on or caused by the toxicity and/or radioactivity of uranium-bearing raw materials and/or products or byproducts” is connected to the contract. (Ex. A at 248-50 at Art. III-E(1) and (3), ECF No. 16-2).<sup>5</sup> Accordingly, Mallinckrodt was required to “furnish promptly” copies of documents related to any litigation to the United States which was authorized to settle or defend the lawsuit. (*Id.* at Art. III-E(3)). Under SA No. 81, Mallinckrodt again agreed to promptly notify the United States about any impending lawsuit. (*Id.* at 495-96 at Art. III-E(3)). Further, indemnification was available “only to the extent that [Mallinckrodt] is not protected and made whole by insurance.” (*Id.* at 494 at Art. III-E(1)). As a contractor, Mallinckrodt was required to maintain insurance. (*Id.* at 494 at Art. III-E(2)).

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<sup>5</sup> The exhibits provided by the parties are consecutively paginated. Thus, the Court will cite to each as “Ex. \_ at \_.” If a specific article or provision is referenced, the Court will cite to “Ex. \_ at \_ at Art\_.”

SA No. 115 reiterated Mallinckrodt's obligation to promptly notify the contracting officer ("CO") of any pending litigation and provide "all pertinent papers" related to the action or claim. (*Id.* at 674 at Art. XIV(2)). Further, it stipulated that Mallinckrodt could not assign or transfer the contract or any interest or claim under the contract to a third party, unless to a subsidiary or first approved by the CO. (*Id.* at 667 at Art. VII). SA No. 124 added "certain provisions relative to the indemnification of the Contractor and others with respect to public liability resulting from certain nuclear incidents" pursuant to Section 170 of the Atomic Energy Act. (*Id.* at 742). Importantly, it also incorporated the PAA's updated 1962 definitions and indemnification provisions into the contract. (*Id.* at 743-44). Specifically, it provided that Mallinckrodt and "any other person indemnified" will be indemnified by the Commission against claims for public liability and "the reasonable costs of investigating and settling claims, and defending suits for damage for such public liability . . . under Section 170 of the Act." (*Id.* at 743).

In 1966, the Mallinckrodt contract ended when the AEC sold radioactive material at SLAPS to Continental Mining & Milling Company ("Continental"). (Ex. C, ECF No. 16-4). The sale stipulated that the material was sold "as is" and the United States did not warrant that the materials "will not result in injury or damage when used for any purpose[.]" (*Id.* at 2). The bill of sale also (1) required Continental to obtain a license, (2) passed title of the radioactive material to Continental, and (3) gave Continental "full responsibility for the care and custody of the material . . . after passage of title." (*Id.* at 2-3). The material was transferred from SLAPS to Latty Avenue in Hazelwood, Missouri, a small

community located to the northwest of St. Louis. (Compl. at 6).

In 1967, Continental's assets, including the material at Latty Avenue, were foreclosed by its creditor, Commercial Discount Corporation ("Commercial Discount"). (Ex. B at ¶ 43, ECF No. 16-3). Commercial Discount then sold the radioactive material to Cotter between 1967 and 1969. (Ex. D, ECF No. 16-5). As a result, Cotter acquired a license with the AEC to continue operations at Latty Avenue. (Ex. F, ECF No. 16-7 (AEC License No. SUB-1022)). In 1973, Cotter transported some of the nuclear material from the Latty Avenue location to the West Lake Landfill in Bridgeton, Missouri. (Ex. B at ¶ 45). Cotter's AEC license expired in 1974. (Ex. F).

### *C. The McClurg Litigation*

From February 2012 to 2018, Cotter was embroiled in tort litigation related to the "alleged release of radioactive source material" in St. Louis County, Missouri. (Compl. at 2, 9-13; Ex. B). Cotter notified the United States about the case in March 2012.<sup>6</sup> (Compl. at 9). In March 2013, the trial judge dismissed state law claims in the initial complaint citing federal preemption, labeled the case a "public liability action," and permitted the plaintiffs to replead under the PAA. (Compl. at 10; Ex. H at 6, ECF No. 16-9).

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<sup>6</sup> The parties dispute whether this notification was sufficient to "tender[] the litigation for DOE indemnification or representation." (Mot. to Dismiss at 23; Pl.'s Resp. at 34). For purposes of this opinion the Court assumes the government was notified no later than February 2018 when the trial judge directed DOE to send a representative to mediation. (Compl. at 11-12).

The amended *McClurg* complaint alleged that Cotter's activities between 1969 and 1973 released radioactive material into the surrounding environment, proximately causing injuries to the plaintiffs. (Compl. at 10-11). Specifically, the complaint traced the material from its original Mallinckrodt processing location at SLDS to SLAPs for storage to Latty Avenue. (*Id.* at 10). The complaint further alleged Cotter acquired the material located at Latty Avenue in 1969 and shipped most of it to Colorado; however, some "residue material remain[ed] at Latty Avenue." (*Id.*). This residue material was transported to the West Lake Landfill in 1973. (*Id.*). Regarding the PAA, the complaint claimed (1) the material qualified as a "source, special nuclear, or byproduct;" (2) each release of material into the environment constituted a "nuclear incident;" and (3) the injuries sustained from each "nuclear incident" was a "public liability action." (*Id.* at 11). Following stalled settlement discussions, the trial court directed DOE in February 2018, to send an authorized representative to mediation because the United States was a "possible indemnitor." (*Id.* at 11-12). The DOE declined to participate. (*Id.* at 12). Cotter and the *McClurg* plaintiffs reached a settlement agreement in September 2018. (*Id.*) In December 2019, the trial court determined the amount was "fair and reasonable compensation." (*Id.*).

#### *D. Present Litigation*

In April 2022, Cotter filed its Complaint at the Court of Federal Claims. Cotter brings two counts: statutory indemnification under the PAA (Count I) and contractual indemnification as the third-party beneficiary of a PAA indemnification agreement (Count II). (Compl. at 13-15). Specifically, Cotter claims it is a "person indem-

nified” as defined in the PAA and thereby entitled to compensation for its “public liability action.” (Compl. at 13; Pl.’s Resp. at 15 (citing Section 170(d)), ECF No. 17). Cotter maintains it is “other persons indemnified” for purposes of the indemnification agreement between the AEC and Mallinckrodt. (Compl. at 14-15). Based on these allegations, Cotter believes it is entitled to judgment on its indemnification “for the costs of settling and defending the public liability action in *McClurg*[.]” (Compl. at 1, 15).

The United States moves to dismiss Cotter’s indemnification claims on two grounds. First, the United States argues Cotter failed to appropriately plead either avenue for statutory indemnification under the PAA. (Mot. to Dismiss at 25). Second, the United States argues Cotter failed to allege it was the intended third-party beneficiary of Mallinckrodt’s contract with the United States, thus it lacks standing to bring Count II. (*Id.* at 41-45). Accordingly, the United States moves to dismiss Cotter’s claims for failure to state a claim upon which relief may be granted and lack of subject-matter jurisdiction.

## II. Analysis

The Court’s jurisdiction depends on the extent to which the United States has waived sovereign immunity. *United States v. Testan*, 424 U.S. 392, 399 (1976). The Tucker Act waives sovereign immunity over claims (1) arising under federal constitutional, statutory, or regulatory law; (2) for an express or implied contract with the United States; or (3) seeking damages in cases not sounding in tort. 28 U.S.C. § 1491(a)(1). However, the Tucker Act does not provide any substantive rights. *Ont. Power Generation, Inc. v. United States*, 369 F.3d

1298, 1301 (Fed. Cir. 2004). Therefore, the plaintiff must have a money-mandating source on which to base their cause of action. *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005). A source is money-mandating if it triggers compensation for damages sustained due to a breach of the duties it imposes. *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) (internal citations omitted); see also *N.Y. & Presbyterian Hosp. v. United States*, 881 F.3d 877, 882-88 (Fed. Cir. 2018) (determining “shall be indemnified” in I.R.C. § 3102(b) was money-mandating); *Higbie v. United States*, 778 F.3d 990, 993 (Fed. Cir. 2015) (presuming damages in contract case satisfy money-mandating requirement).

When considering a motion to dismiss for lack of subject-matter jurisdiction, “a court must accept as true all undisputed facts asserted in the plaintiff’s complaint and draw all reasonable inferences in favor of the plaintiff.” *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). However, plaintiffs bear the burden of establishing subject-matter jurisdiction by a preponderance of the evidence. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Therefore, the Court must dismiss the claim if it lacks subject-matter jurisdiction. RCFC 12(h)(3). Standing is a threshold issue that involves the Court’s subject-matter jurisdiction. *Lujan*, 504 U.S. at 560-61. If a plaintiff fails to establish standing, the Court lacks jurisdiction to render a decision on the merits of a claim. *Myers Investigative & Sec. Servs. v. United States*, 275 F.3d 1366, 1369-70 (Fed. Cir. 2002). For purposes of the standing inquiry, the Court assumes well-pled allegations of error to be true. *Square One Armoring Serv., Inc. v. United States*, 123 Fed. Cl. 309, 323 (2015) (citing *Digitalis Educ. Sols.*,

*Inc. v. United States*, 97 Fed. Cl. 89, 94 (2011), *aff'd*, 664 F.3d 1380 (Fed. Cir. 2012)).

If a claim survives a jurisdictional challenge, it is still subject to dismissal under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. *See Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When deciding a motion to dismiss under RCFC 12(b)(6), the court must again assume all undisputed facts in the complaint are true and draw all reasonable inferences in the non-movant's favor. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); RCFC 12(b)(6). The court should assume the veracity of well-pleaded factual allegations and determine whether it is plausible, to find against the movant. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). As a result, "[t]o avoid dismissal under RCFC 12(b)(6), a plaintiff 'must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Am. Bankers Assc'n v. United States*, 932 F.3d 1375, 3180 (Fed. Cir. 2019) (internal citations omitted).

*A. Cotter failed to plausibly allege it qualifies for statutory indemnification under the PAA.*

The United States argues that Cotter failed to state a claim for statutory indemnification under either available avenue prescribed by the PAA. (Mot. to Dismiss 25-41). First, the United States contends Cotter failed to establish a relationship to a government contract as required by Section 170(d). (*Id.* at 25-36). The United States argues this relationship and its benefit to the government are essential to trigger this indemnification

provision. (*Id.* at 29-30, 33-36). Second, the United States argues Cotter failed to establish eligibility for the PAA’s licensee indemnification provision under Section 170(a). (*Id.* at 25, 36-41). Finally, the United States asserts that Cotter’s indemnification liability theories ignore historical bills of sale and Cotter’s purchase of the material which did not include indemnification rights. (*Id.* at 38-41). The Court addresses each argument.

i. Cotter failed to plausibly allege indemnification eligibility under Section 170(d).

As provided above, Section 170 originally laid out the indemnification and limitation of liability provision. Pub. L. No. 85-256 § 170 (1957) (current version at 42 U.S.C. § 2210). The United States argues the language of Section 170(d) limited the government’s indemnity obligations to parties engaged in “activities with a nexus to a [g]overnment contract” and that this requirement remains today. (Mot. to Dismiss at 26, 28). Cotter, however, contends that the “plain text and legislative history of the PAA” are expansive and not limited to persons with specific relationships with the government. (Pl.’s Resp. at 15). This dispute centers on specific indemnification of liability language in Section 170(d) and key PAA definitions. Therefore, the Court must begin “with the language of the statute itself.” *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019) (internal citations omitted). To do so, the Court looks at the plain language as well as “the placement and purpose of the language within the statutory scheme.” *WestRock Va. Corp. v. United States*, 136 Fed. Cl. 267, 276 (2018) (internal citation omitted); *Beecham v. United States*, 511 U.S. 368, 372 (1994) (“The plain meaning that we seek to

discern is the plain meaning of the whole statute, not of isolated sentences.”).

Section 170(d) provides for indemnification agreements between the AEC and contractors:

[T]he Commission is authorized . . . to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident. In such agreements of indemnification the Commission may require its contractor to provide and maintain financial protection of such a type and in such amounts as the Commission shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, in the amount of \$500,000,000 including the reasonable costs of investigating and settling claims and defending suits for damage in the aggregate for all persons indemnified in connection with such contract and for each nuclear incident.

§ 170(d).

First, the parties disagree whether such language limits indemnity to persons facing public liability because of their activity under or with some nexus to a government contract. (Mot. to Dismiss at 27-28; Pl.’s Resp. at 12, 17). The United States argues Cotter was not “involved in the Mallinckrodt’s contract with the [g]overnment” and that its alleged “free-floating right to indemnification” derives from a definition “beyond the strictures and limitations” of Section 170. (Mot. to Dismiss

at 25). Rather than an untethered right, the United States asserts PAA indemnification was tied to the AEC's indemnification agreements "with its contractors" who operate under "contracts for the benefit of the United States[.]" (Mot. to Dismiss at 26-27 (quoting § 170(d)) (emphasis removed)). The United States acknowledges that Mallinckrodt's contract did incorporate the indemnification provision, (*id.* at 29), but argues that Cotter's activities were unrelated to "the contractual activity of Mallinckrodt's contract with the United States." (*Id.* at 30 (emphasis removed)). For its part, Cotter emphasizes the discretionary nature of the agreements and contends that "nothing in Section 170(d) purported to limit the government's indemnity obligations to persons who have certain contracts or relationships or who perform certain contractual activities." (Pl.'s Resp. at 19). Cotter asserts the PAA does not impose such contractual requirements. (*Id.* at 17). The United States' arguments are persuasive while Cotter's are not.

The Court addresses the plain language of Section 170(d) to determine whether indemnification requires a nexus to contractual activity. *See Republic of Sudan*, 139 S. Ct. at 1056. The first sentence of Section 170(d) plainly emphasizes the importance of government contractors and a contractual relationship. For example, it states that the Commission may enter into indemnification agreements "with its contractors" who are engaged in activities that risk nuclear incidents. § 170(d). It further provides that agreements also include "other activities under contracts for the benefit of the United States[.]" *Id.* Such language is consistent with the United States' interpretation that agreements require some nexus or connection to a government contract. (Mot. to Dismiss at 26-27). The inclusion of "activities"

is always couched in relation to the AEC's contractors or those operating "under contract." *See* § 170(d). The Commission's authority to enter into indemnification agreements is presented within the context of a contractual activity that benefits the government's nuclear program. Accordingly, the United States does not, as Cotter asserts, "overread" this sentence to limit government liability by emphasizing a relationship with the government itself or an indemnified contractor. (Pl.'s Resp. at 18). Rather, the statutory language itself explicitly underscores the importance of a contractual relationship.

The second sentence of Section 170(d) specifies that "[i]n such [indemnification] agreements" contractors may be required to have financial protection. § 170(d). This language indicates that contractors (and other eligible parties) who may seek indemnification are subject to specific requirements—here, financial protection or insurance. The sentence goes on to provide that the government "shall indemnify the *persons indemnified* against such [public liability claims] above the amount of the financial protection required . . . for all persons indemnified *in connection with such contract* and each nuclear incident." § 170(d) (emphasis added). Such language again indicates some required nexus to contract activity as well as financial protections required by the AEC.

Cotter contests this interpretation of Section 170(d) by emphasizing the inclusion of "persons indemnified" in the second sentence. (Pl.'s Resp. at 16-17, 19). In 1962, the PAA defined "persons indemnified" as "the person with whom an indemnity agreement is executed and *any other person* who may be liable for public liabil-

ity” for incidents within the United States. Pub. L. No. 87-615, § 5 (1962) (emphasis added). Cotter latches onto “any other person” in this definition to argue certain contracts or relationships were not required to obligate government indemnification. (Pl.’s Resp. at 21). Cotter argues that such language means “an unaffiliated third party” may qualify for federal indemnification based on their activities and liability, not because of their privity to the government. (*Id.* at 11, 18-22). Cotter further argues if Congress wanted to limit the scope of “persons indemnified” it could have used more qualified language such as “any person who may be liable for public liability due to their activities under an AEC contract.” (*Id.* at 19-20). These arguments are unavailing.

The Court concedes that as an isolated term, “persons indemnified” appears to be untethered to a nexus to contractual activity. But the Supreme Court has held that “[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989). Therefore, the Court looks to broader statutory context of PAA indemnity. For example, Cotter’s interpretation would ignore the “financial protection required” under the agreements that qualify the government’s obligation to indemnify. § 170(d). Similarly, “in connection with such contract” would be rendered superfluous by Cotter’s interpretation, (Pl.’s Resp. at 11); it would disregard the proverbial forest for the tree. *See Sullivan v. McDonald*, 815 F.3d 786, 790 (Fed. Cir. 2016) (“[W]e attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible.”) (internal citations

omitted). The Court will not disregard other clauses in Section 170(d) in favor of one cherry-picked term. *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (“we must give effect, if possible, to every clause and word of a statute.”) (internal citations and quotations omitted).

Second, the Court addresses the incorporation of PAA indemnification in the Mallinckrodt contract. The United States argues the contractual language itself helps shed light on the “intended linkage between contractual activity undertaken for the United States’ benefit and the [g]overnment’s [indemnification provision].” (Mot. to Dismiss at 29). Specifically, the United States cites SA No. 124 wherein the government agreed to indemnify Mallinckrodt and “other persons indemnified” for claims of “public liability.” (*Id.*; Ex. A at 742-46). “[P]ublic liability” is defined as that which “arises out of or in connection with the contractual activity” and “arises out of or results from” four types of nuclear incidents. (Ex. A at 42-43). Such language mirrors the language used in Section 170(d).

Specifically, mirrored indemnification obligations under Section 170(d) apply to public liability “arising out of or in connection with the contractual activity[.]” § 170(d). Cotter correctly points out that the Court should analyze the ordinary meaning of those terms. (Pl.’s Resp. at 15 (citing *Nicely v. United States*, 23 F.4th 1364, 1369 (Fed. Cir. 2022) (“When terms used in a statute are undefined, we give them their ordinary meaning.”) (internal citations omitted)). Therefore, the Court examines the phrases “arising out of” and “in connection with.” Merriam-Webster defines “arise” as “to originate from a source.” *Arise*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/arise> (last

visited Jan. 26, 2023). The Federal Circuit recently stated that “arising out of” is narrower than “relating to” because it “usually indicates a causal connection.” *Kannuu Pty Ltd. v. Samsung Elecs. Co., Ltd.*, 15 F.4th 1101, 1106 (Fed. Cir. 2021) (interpreting contractual terms in patent case). As such, the Court understands “arising out of” to indicate a relationship to the contractual activity. Further, Merriam-Webster defines “connection” as a “causal or logical relation or sequence.” *Connection*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/connection> (last visited Jan. 26, 2023). This definition also evokes a tie or relationship between two things. In Section 170(d) and in SA No. 124 these terms precede “the contractual activity.” § 170(d). As such, there must be a relationship to contractual activity because “Congress’ choice of words is presumed to be deliberate.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013).

Third, the Court declines to analyze the PAA’s legislative history and subsequent reports to Congress to determine congressional intent. It is the Court’s role to interpret statutory language enacted by Congress. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461 (2002). If the Court determines that statutory language is clear and unambiguous, “the inquiry ends with the plain meaning.” *Myore v. Nicholson*, 489 F. 3d 1207, 1211 (Fed. Cir. 2007) (internal citation omitted); *Barnhart*, 534 U.S. at 462 (“When the words of a statute are unambiguous, then [the] first canon is also the last: ‘judicial inquiry is complete.’”). The language of Section 170(d) is clear and unambiguous. The Court determines that Section 170(d) required some nexus to a contractual relationship for the benefit of the government. It further

determines that such language limits who may be party to or benefit from an indemnification agreement.

Even if the Court engaged with the PAA's legislative history, it does little to "shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). Here, the United States and Cotter are both able to select language supporting their arguments. For example, the United States quotes a 1965 Joint Committee on Atomic Energy report that stated the PAA was "designed to protect organizations participating in the atomic energy program" and that indemnification extends to organizations that "assist the [g]overnment in carrying out the atomic energy program[.]" (Mot. to Dismiss at 31 (quoting Ex. J at 1-2, 42, ECF No. 16-11)). Conversely, Cotter highlights a 1957 report from that same committee stating "persons indemnified" included "any person who might be found liable, regardless of the contractual relation [to the prime contractor.]" (Pl.'s Resp. at 22 (quoting Ex. 1 at 18, ECF No. 17-2)). This language highlighted by Cotter is absent from the PAA itself. Although legislative history may be used in judicial analysis, such history does not "trump[] clear text." *Bartels Tr. For the Benefit of Cornell Univ. ex rel. Bartels v. United States*, 617 F.3d 1357, 1361 (Fed. Cir. 2010). Ultimately, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Accordingly, the Court adheres to the plain meaning of the statute and declines to wade through the mire of the PAA's legislative history.

Finally, the Court addresses whether Cotter satisfies the nexus required to implicate the PAA's indemnification obligations. The United States argues that Cotter's activities were unconnected to Mallinckrodt's contractual activity performed for the benefit of the government, thus it is not entitled to indemnification. (Mot. to Dismiss at 29-30, 33-36). The United States emphasizes it "did not sell the radioactive material to Cotter" but instead to other third parties and it did not benefit from Cotter's activities with the radioactive material. (*Id.* at 34). The United States reasons the PAA indemnification provision should be read within the context of the Act and, not turn on the "uncontextualized definition of 'person indemnified.'" (*Id.* at 36). Cotter argues *McClurg* was based on its handling of "legacy nuclear material," therefore, it falls within the scope of "public liability" under the PAA. (Pl.'s Resp. at 12, 25). Cotter further argues it "actually handled and possessed" the material so it is reasonable to infer entitlement to relief. (*Id.* at 25). The Court agrees with the United States that Cotter's ownership over the radioactive material was too far "downstream" from Mallinckrodt, rendering it outside the Section 170(d) indemnification obligation. (Mot. to Dismiss at 26-27).

It is undisputed that Cotter was not in privity of contract with Mallinckrodt. As detailed above, Mallinckrodt's contract with the AEC ended in 1966 when the government transferred the material's title to Continental. (Mot. to Dismiss at 19). At that time, Mallinckrodt was no longer producing refined uranium and operating the plants under contract with the government. (Compl. at 4; Mot. to Dismiss at 16-17, 19). Accordingly, the benefit to the government's nuclear program ended. Further, Cotter only became linked to the material in 1969 after

it had changed hands several times. (Mot. to Dismiss at 19-21). Title transfers between 1967 and 1969 only involved private entities, not the government. (Mot. to Dismiss at 16-17, 19). The question then becomes, is it plausible to infer the United States is liable for damages related to activity after the conclusion of the Mallinckrodt contract and once Cotter was responsible for the material.

Here again, Cotter's argument relies on issues addressed above, namely, that it qualifies as a "persons indemnified" and its activities "ar[ose] out of or in connection with the contractual activity." § 170(d). However, Cotter's handling of the material did not "originate from" Mallinckrodt's contractual activity, but rather possession by third parties. The Court finds handling material that was once under Mallinckrodt's contract is an insufficient causal sequence to trigger indemnification obligations, particularly considering Section 170(d)'s limiting language analyzed above. For the stated reasons, Cotter failed to plausibly claim it qualifies for statutory indemnification under Section 170(d).

ii. Bills of Sale and Government Disavowal of Responsibility

The Court analyzes whether disavowal of the government's responsibility for the radioactive material applies to this case. The United States argues that the "chain of sales transactions" for the material demonstrates the government "did not intend" to extend indemnification rights to those purchasers. (Mot. to Dismiss at 38). Specifically, the United States highlights the "as is" clause in the Continental sale as well as the Residue Purchase Agreement between Commercial Discount and Cotter to show they contained no promises for

government indemnity. (*Id.* at 38-39). The United States also reiterates that Cotter “cannot claim that it is entitled to PAA indemnification as ‘a person indemnified.’” (*Id.* at 39).

For its part, Cotter argues the sale and licensing documents are irrelevant to its indemnity claims under the PAA. (Pl.’s Resp. at 28). Specifically, Cotter argues Count I only addresses statutory indemnity, rendering such contractual documents irrelevant. (*Id.*) Cotter further asserts that congressional intent and “broad terms” like “person indemnified” support its position that government liability extends to commercial entities. (*Id.* at 28-29). Cotter also argues if the government wanted to disavow responsibility, it should have explicitly done so in the Mallinckrodt indemnity agreement. (*Id.* at 29-30). This argument fails to acknowledge that the government cannot disavow a statutory obligation through contract interpretation. *See Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1365 (Fed. Cir. 2010) (discussing order “prohibit[ing] the government from using contract interpretation as a means of avoiding its statutory obligations”). Cotter concludes that the existence of an indemnification agreement between Mallinckrodt and the AEC was sufficient to support both Counts I and II. (*Id.* at 30).

Cotter is merely rehashing earlier arguments that the Court found unpersuasive. Furthermore, the documents at issue are relevant to the chain of title for the radioactive material as explored above. They also shed light on whether Cotter was an intended third-party beneficiary of the Mallinckrodt contract. Accordingly, the bills of sale are considered by the Court. As explained above, the Court determines that Cotter failed

to allege facts “‘plausibly suggesting (not merely consistent with)’ a showing of entitlement to relief” under Sections 170(a) and (d).<sup>7</sup> *Am. Bankers Assc’n*, 932 F.3d at 3180. Accordingly, Cotter failed to state a claim for PAA statutory indemnification for which relief can be granted and Count I must be dismissed.

*B. Cotter cannot prevail on its contractual indemnification theory.*

The United States argues Cotter lacks standing to bring Count II because Cotter failed to plausibly allege it was the intended third-party beneficiary of Mallinckrodt’s contract with the United States. (Mot. to Dismiss at 41-45). The United States first contends that Cotter’s claims rely on its overbroad reading of “persons indemnified” and that the contracting parties did not have the authority to “extend any such indemnification[]” to Cotter. (*Id.* at 43-44). Second, the United States argues Cotter failed to allege that the government breached its contract with Mallinckrodt so it cannot bring a third-party beneficiary claim before this Court. (*Id.* at 44).

Cotter disagrees. (Pl.’s Resp. at 30). First, Cotter argues the facts alleged in the Complaint were sufficient to state a claim because it is within “a class clearly intended to be benefited” by the indemnity agreement. (*Id.* at 31). Cotter also contends the Mallinckrodt con-

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<sup>7</sup> The United States also argues Cotter fails to plausibly plead indemnification under Section 170(a) as a licensee. (Mot. to Dismiss at 36). Section 107(a) addresses the indemnification and limitation of liability for licensees. *See* § 170(a). For its part, Cotter does not argue its AEC license provided for indemnification under Section 170(a). (Compl. at 6; Pl.’s Resp at 26-28). Accordingly, the Court does not engage in an analysis of Section 170(a) because Cotter does not claim eligibility under its indemnification provision.

tract incorporated the PAA, qualifying it for indemnification. (*Id.* at 32-33). Second, Cotter argues it sufficiently supported the assertion that the government breached the indemnification agreement when it rejected indemnity claims in *McClurg*. (*Id.* at 33-36). Specifically, Cotter argues it did not have a duty to present indemnity claims to the government but that the United States was aware of *McClurg*. (*Id.* at 34). Finally, Cotter concludes that it has standing to pursue Count II because it was the intended third-party beneficiary under the PAA indemnification agreement and the government breached its contractual duty. (*Id.* at 36). The Court again agrees with the United States and finds Cotter's arguments unavailing.

Standing is a threshold jurisdictional issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). Typically, standing in a contract claim against the government requires the plaintiff to be in privity of contract with the United States. *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1350 (Fed. Cir. 2016). However, the Federal Circuit permits an exception for intended third-party beneficiaries. *See id.* at 1361. "In order to prove third-party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." *Flexfab, LLC v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005) (citing *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001)). Importantly, "[t]he intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby." *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). To find intent, the Court looks at:

(1) [W]hether the language of the contract demonstrates that the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, (2) the governing statute and its purpose, to the extent that the contract implements a statutory enactment, or (3) other objective evidence.

*Boye v. United States*, 90 Fed. Cl. 392, 409 (2009) (internal citations omitted). If Cotter cannot establish standing, the Court must dismiss Count II for lack of subject-matter jurisdiction. *Myers Investigative & Sec. Servs.*, 275 F.3d at 1369-70.

Against this backdrop, the Court must evaluate whether the AEC and Mallinckrodt intended for Cotter to directly benefit from their contract. See *Flexfab, LLC*, 424 F.3d at 1529; see also *Montana*, 124 F.3d at 1273. First, the Court looks to the terms of Mallinckrodt's contract with the United States, including the SAs described above, to determine if it would be reasonable for Cotter to rely on the promise to indemnify. See *Dewakuku v. Martinez*, 271 F.3d 1031, 1041 (Fed. Cir. 2001). Here, the United States argues the contract "does not identify Cotter as an intended beneficiary." (Mot. to Dismiss at 41). The United States explains the contract is silent regarding Cotter because it was a "downstream purchaser" of the material, its activities "were not undertaken for the benefit of the United States' contract with Mallinckrodt," and its license did not require financial protection. (*Id.* at 43). As such, the United States maintains that no contractual language indicates the AEC or Mallinckrodt intended to extend indemnification rights to Cotter, who was not even considered when the contract was in effect. (*Id.*). The United States' arguments

regarding contractual silence towards Cotter are unconvincing.

To show standing, Cotter need only demonstrate it falls within the class intended to benefit from the contract; it does not need to be “specifically or individually identified” in the Mallinckrodt contract as the United States seems to suggest. *Montana*, 124 F.3d at 1273. For its part, Cotter fails to engage with specific language in the Mallinckrodt contract and SAs. (Pl.’s Resp. at 30-33). Instead, Cotter relies on terms like “persons indemnified” and “arising out of” and “in connection with” in the PAA. (*Id.*). As the Federal Circuit recently stated, parties “are responsible for advancing the facts and arguments entitling them to relief.” *Baude v. United States*, 955 F.3d 1290, 1304-05 (Fed. Cir. 2020) (internal citations). Accordingly, the Court turns its attention from language of the contract and SAs to the PAA. *See id.*; *see also Boye*, 90 Fed. Cl. at 409.

Here, both the United States and Cotter rehash previous arguments regarding the language and purpose of the PAA. Specifically, the United States argues Cotter was “a downstream purchaser of the radioactive material” and thus subject to the “express disavowal of [g]overnment responsibility for the material;” Cotter’s activities did not benefit the government contract with Mallinckrodt, and it was not a “persons indemnified” for purposes of public liability. (Mot. to Dismiss at 43). Cotter contends belonging to the class of “other persons indemnified” under Section 170(d) sufficiently states intent. (Pl.’s Resp. at 31). Cotter again highlights the language “arising out of or in connection with” the contract. (*Id.* at 32). Again, the Court finds the United States’ arguments persuasive while Cotter’s are not. Therefore,

Cotter does not fall within the class “clearly intended to be benefited” by the PAA’s indemnification under Section 170(d).<sup>8</sup> Accordingly, Cotter failed to establish it has standing as an intended third-party beneficiary of the Mallinckrodt contract and indemnification agreement. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1296 (Fed. Cir. 2022).

Even if Cotter had standing, it failed to state a contractual claim upon which relief could be granted. “If a plaintiff can establish . . . third party beneficiary status, a plaintiff must also be able to establish ‘an obligation or duty arising out of the contract, a breach of that duty, and damages cause by the breach.’” *Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). The United States argues that Cotter cannot show the government breached the Mallinckrodt contract because it never submitted a PAA indemnity claim. (Mot. to Dismiss at 44-45; Def.’s Reply at 23-25). The United States asserts that Cotter presented “a claim for its costs in this Court as a third-party beneficiary” rather than directly presenting it to the government as required. (Mot. to Dismiss at 44; Def.’s Reply at 24-25). The United States concludes that because Cotter does not and cannot allege the government rejected the indemnification claim, Cotter cannot plausibly allege an “actual breach” of contract. (Mot. to Dismiss at 44-45).

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<sup>8</sup> The United States does not cite “other objective evidence” to further its argument that Cotter was not an intended third-party beneficiary. (See Mot. to Dismiss at 41-46). Therefore, the Court will not further analyze “other objective evidence.” *Baude*, 955 F.3d at 1304-05.

Cotter argues it “had no duty to present an indemnity claim to the government.” (Pl.’s Resp. at 33). To support this assertion, Cotter cites SA No. 124 arguing that “at most” only Mallinckrodt was required to present a claim. (*Id.* at 34). However, Cotter does not expand on this point nor address the language used in multiple SAs that required Mallinckrodt as the contractor to promptly notify the AEC about pending claims and submit “pertinent papers” to the Commission. (*See, e.g.*, Ex. A at 495 at Art. III-E(3)).

Cotter further contends that even if it did have a duty to submit a claim, SA No. 124 provided that any government obligations “shall not be affected by any failure on the part of the Contractor to fulfill any of its obligations under this contract.” (Pl.’s Resp. at 34 (citing Ex. A at 745)). Cotter continues that because the United States was aware of the *McClurg* litigation, it breached its indemnification agreement by failing to participate in mediation and fulfill its legal obligations. (*Id.* at 34-35). However, Cotter is unconvincing. Cotter’s arguments boil down to the assertion that the government should indemnify Cotter simply because it was a defendant in *McClurg*. Cotter does not allege the United States was aware that it was seeking indemnification before this suit was filed. Cotter also does not allege that the United States ever refused indemnification before this Motion. Therefore, Cotter did not provide sufficient factual detail to put the United States on notice for its breach of contract claim. *See Dobyys v. United States*, 91 Fed. Cl. 412, 422-30 (2010).

### III. Conclusion

For the stated reasons, Cotter failed to allege facts plausibly suggesting entitlement to relief on its statu-

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tory and contractual claims. Accordingly, the Court finds that Cotter failed to state a claim upon which relief can be granted for Count I. Further, Cotter failed to establish standing, therefore this Court does not possess subject-matter jurisdiction to render a decision on the merits of Count II. Therefore, the Court **GRANTS** the United States' Motion to Dismiss pursuant to RCFC 12(b)(1) and (6).

The Clerk is directed to enter judgment accordingly.

**IT IS SO ORDERED.**

/s/



DAVID A. TAPP  
DAVID A. TAPP, Judge

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**APPENDIX C**

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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2023-1826

COTTER CORP., N.S.L., PLAINTIFF-APPELLANT

*v.*

UNITED STATES, DEFENDANT-APPELLEE

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Filed: Oct. 24, 2025

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Appeal from the United States Court of Federal  
Claims in No. 1:22-cv-00414-DAT,  
Judge David A. Tapp.

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**ON PETITION FOR REHEARING EN BANC**

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Before MOORE, *Chief Judge*, LOURIE, DYK, PROST,  
REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNING-  
HAM, and STARK, *Circuit Judges*,<sup>1</sup> and SCHROEDER,  
*District Judge*.<sup>2</sup>

PER CURIAM.

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<sup>1</sup> Circuit Judge Newman did not participate.

<sup>2</sup> Honorable Robert W. Schroeder III, District Judge, United States District Court for the Eastern District of Texas, sitting by designation, participated only in the decision on the petition for panel rehearing.

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**ORDER**

The United States filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by Cotter Corp., N.S.L.

The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied

FOR THE COURT

October 24, 2025

Date



Jarrett B. Perlow  
Clerk of Court

**APPENDIX D**

1. 42 U.S.C. 2012(i) (1964) provided:

**Congressional findings.**

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

\* \* \* \* \*

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses. (Aug. 1, 1946, ch. 724, § 2, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 921, and amended Sept. 2, 1957, Pub. L. 85-256, § 1, 71 Stat. 576; Aug. 26, 1964, Pub. L. 88-489, § 1, 2, 78 Stat. 602.)

2. 42 U.S.C. 2014 (1964) provided in pertinent part:

**Definitions.**

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

\* \* \* \* \*

(o) The term “nuclear incident” means any occurrence within the United States causing, within or outside the United States, 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 other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside of the United States: *And provided further,* That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves a facility or device owned by, and used by or under contract with, the United States.

\* \* \* \* \*

(r) The term “person indemnified” means (1) with respect to a nuclear incident occurring within the United States and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with who an indemnity agreement is executed and any other person who may be liable for public liability; or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Commission or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order or other agreement, of any tier, under any such contract or project.

\* \* \* \* \*

(u) The term “public liability” means any legal liability arising out of or resulting from a nuclear incident, except: (i) claims under State or Federal workmen’s

compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in section 2210(a), (c), and (k) of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. “Public liability” also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

\* \* \* \* \*

3. 42 U.S.C. 2210(a)-(d) (1964) provided:

**Indemnification and limitation of liability.**

**(a) Financial protection for public liability claims; indemnification agreement; waiver of immunity.**

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Commission shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it shall be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this

section. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

**(b) Amount and types of financial protection.**

The amount of financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (1) the cost and terms of private insurance, (2) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (3) the nature and purpose of the licensed activity: *Provided*, That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of financial protection required shall be the maximum amount available from private sources. Such financial protection may include private insurance, private contractual indemnities, self insurance, other proof of financial responsibility, or a combination of such measures.

**(c) Indemnification from public liability in excess of level of financial protection; aggregate indemnity.**

The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 1967, for which it requires financial protection, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in con-

nection with each nuclear incident shall not exceed \$500,000,000 including the reasonable costs of investigating and settling claims and defending suits for damage. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 1967, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 1967.

**(d) Indemnification agreements for construction or operation of production or utilization facilities, or other activities; applicability to contracts; sovereign immunity.**

In addition to any other authority the Commission may have, the Commission is authorized until August 1, 1967, to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident. In such agreements of indemnification the Commission may require its contractor to provide and maintain financial protection of such a type and in such amounts as the Commission shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, in the amount of \$500,000,000 including the reasonable costs of investigating and settling claims and defending suits for damage in the aggregate for all persons indemnified in connection with such contract and for each nu-

clear incident: *Provided*, That in the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Commission shall not exceed \$100,000,000. The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Commission. A contractor with whom an agreement of indemnification has been executed and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this section, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

\* \* \* \* \*