No. 06-466

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*,

Respondents

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This is one of those rare cases in which a lower court, as the Government puts (at 6,12), has simply "refused" to follow binding precedent of this Court—in this case the "proximate causation" standard mandated by *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), and *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). Indeed, although respondent Mothers for Peace ("MFP") repeatedly characterizes the panel's decision as having "applied" or "followed" these decisions, the panel itself never bothered to *cite Public Citizen,* which, as the Government points out (at 13), rendered untenable the panel's attempt to distinguish *Metropolitan Edison*. As we show in Section I, such a blatant refusal to follow controlling precedents is sufficient to warrant plenary review or summary reversal, without more.

Here, however, there is much more. As the Government points out (at 16), "the Ninth Circuit's decision has the potential to be highly disruptive for NRC … and perhaps other federal agencies." As we show in Section II, and as explained in briefs by the Nuclear Energy Institute (NEI) and the United States Chamber of Commerce (Chamber), the panel's decision creates, not only risks to national security, but enormous uncertainty in the nuclear power industry and other capital-intensive businesses that must make large investments in facilities subject to NEPA review. That uncertainty and risk of "disruption" will deter the multi-billion-dollar investments necessary to meet, among other needs, the Nation's ever-growing energy requirements. None of the respondents disputes this. And, as we show in Section III, this problem is compounded by the very real and serious circuit conflicts created by the panel's decision.

I. The Ninth Circuit's Refusal To Follow Controlling Precedent Warrants Review Or Summary Reversal.

1. The Government correctly notes (at 11) that the

panel's decision "conflicts with this Court's decisions in *Metropolitan Edison* and *Public Citizen* because it refuses to apply the 'reasonably close causal relationship' standard mandated by those decisions." Indeed, the panel squarely held that "*Metropolitan Edison* and its proximate cause analogy are *inapplicable* here." Pet. App. 20a (emphasis added). This express holding—which mirrors MFP's own argument to the Ninth Circuit (see, *e.g.*, Reply Br. at 5-11)—refutes MFP's contention that the decision below merely "appli[ed] basic principles of proximate causation" established in *Metropolitan Edison* and *Public Citizen*. Opp. at 1; *accord id.* at 9.

The panel's statement in the next paragraph (Pet. App. 20a) likewise refutes MFP's attempt to treat the Ninth Circuit's "remote and highly speculative" standard as merely one variant of the *Metropolitan Edison* standard. Opp. at 8. There the panel stated that, rather than the proximate cause standard of *Metropolitan Edison*, "[t]he appropriate analysis is *instead* that developed by this court in *No Gwen Alliance* v. *Aldridge*, 855 F.2d 1380 (9th Cir. 1988)." Pet. App. 20a (emphasis added). As explained in the petition (at 13-18), this standard is much broader than the proximate cause standard. Under the *No Gwen* standard, a risk must automatically be included in an agency's NEPA analysis, not just when it could be considered the proximate result of the agency's action, but whenever the risk is anything more than "remote and highly speculative." See Pet. 13-14.

2. The panel's rejection of this Court's precedents provides sufficient and compelling grounds for plenary review or summary reversal. According to this Court's rules, one basis for review is that the lower court "has decided an important question of federal law in a way that conflicts with relevant decisions of this Court." S.Ct. R. 10. Accordingly, this Court has often granted plenary review or summary reversal when a lower court has expressly declined to follow a controlling legal standard articulated in this Court's deci-

sions.[1] The Court has also granted relief when the lower court has simply ignored a controlling precedent.[2]

Here the Court faces the unusual situation in which the Ninth Circuit did *both* of these things. As the Government notes (at 6, 12), the panel expressly "refused" to follow *Metropolitan Edison's* proximate cause standard. And, as noted, the panel failed even to acknowledge *Public Citizen,* which, as the petition explained (at 11-14) and the Government notes (at 13) made clear that the *Metropolitan Edison* standard applies to all NEPA reviews, not just to the narrow subset identified in the decision below.[3] The combination of these factors makes this case a particularly compelling candidate for plenary review or summary reversal.

Accordingly, in light of the many examples in which the Court has granted review simply to enforce its precedents, and in light of the Government's acknowledgment (at 6) that the decision below "refuses to apply" the standard "man-

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[1] See, e.g., *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (reversing state supreme court decision that was "flatly contrary to this Court's controlling precedent"); *Lambert v. Wickland*, 520 U.S. 292, 293 (1997) (per curiam) (reversing Ninth Circuit decision that was "in direct conflict with our precedents")

[2] See, e.g., *Good News Club v. Milford Central School Dist.*, 533 U.S. 98, 109 n.3 (2001) (noting "incredible" failure by Court of Appeals to cite a controlling precedent); *Newsweek Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 443 (1998) (reversing decision that "failed to consider" a controlling Supreme Court case); *Flippo v. West Virginia*, 528 U.S. 11, 14 (1999) (per curiam) (reversing where lower court made no attempt to distinguish controlling Supreme Court precedent); *United States v. Hasting*, 461 U.S. 499, 505 (1983) (reversing Ninth Circuit decision that "ignore[d"] analysis under applicable Supreme Court precedent).

[3] Although *Public Citizen* was decided after briefing was complete, that decision was brought to the Ninth Circuit's attention through a letter under FRAP 28(j) from the NRC dated July 19, 2004, and was discussed at oral argument.

dated by" this Court's decisions, the Government's conclusion that this case "does not clearly satisfy this Court's criteria for plenary review" (*id.* at 24) is incorrect. And in all events, the Government does not dispute the propriety of summary reversal. Cf. Pet. 30.

II. Action By This Court Is Urgently Needed To Avoid The Uncertainty And Increased Costs That The Decision Creates For Nuclear Power Companies And Other Businesses Seeking Or Deciding Whether To Build Expensive Facilities Subject To NEPA Review.

None of the respondents, moreover, disputes that the Ninth Circuit's decision presents "important federal issues" within the meaning of Rule 10, or that the decision will have an immediate, substantial and adverse effect on the nuclear power industry and other businesses contemplating construction of facilities subject to NEPA review. The Government reinforces this point when it notes (at 14) that the "Ninth Circuit's decision has the potential to be highly disruptive for NRC (and perhaps other federal agencies)."

1. It is precisely this potential that creates debilitating uncertainty for PG&E[4] and others who seek to build the next generation of nuclear power plants and other facilities necessary to meet the Nation's energy needs. As the Government notes (at 15), "new investment in nuclear power depends on predictability." Yet, by calling into doubt the continued vitality of *Metropolitan Edison*'s "proximate cause" standard, the Ninth Circuit's decision destroys the very predictability on which that investment depends. Potential

[4] To continue serving its electricity customers, PG&E must meet its obligations under the Nuclear Waste Policy Act to provide additional spent fuel storage at Diablo Canyon. Although, as noted by MFP (at 16, n.9), *construction* of the facility is not stayed by the Ninth Circuit decision, the NRC has not ruled out a stay in *operation*. Investing in and planning for nuclear plant operations is a complex process—one that abhors such uncertainty.

investors must now face the prospect of lengthy delays in nuclear licensing proceedings, marked by the kinds of "disruptions" (Govt. Br. 14) now sanctioned by the Ninth Circuit's decision.

As a matter of policy, the uncertainty created by the Ninth Circuit's decision runs counter to the Energy Policy Act of 2005, which, as the Government points out (at 15) established new programs and incentives to encourage construction of new nuclear plants and eliminate licensing delays. The Government correctly fears that this framework "could be jeopardized by the new and unpredictable NEPA-terrorism inquiry required by the Ninth Circuit." *Id.* at 16.

The NEI's analysis (at 16-20) makes clear that this uncertainty *will* in fact jeopardize the achievement of the Act's goals. As the NEI points out (at 16-18), the Ninth Circuit's decision has already been invoked in several NRC licensing matters on both existing and future nuclear facilities. This is a major problem because the NRC's exhaustive public hearing process magnifies any delays caused by improper regulatory requirements and creates the potential for endless litigation and large, unpredictable expenses. This prospect, in turn, creates enormous uncertainty for an industry that must finance and build the facilities that are critical to reducing our Nation's reliance on fossil fuel energy and imported oil. As NEI observes (at 19-20), the nuclear power industry is at a critical juncture in evaluating and developing new facilities. And the uncertainty created by the Ninth Circuit is *certain* to discourage "new investment in nuclear power." Govt. Br. 15.

While MFP blithely suggests (at 2) that concerns about the impacts of the decision are "premature," private entities contemplating enormous capital investments cannot afford a "wait and see" approach. Significant regulatory uncertainty is intolerable to investors in nuclear energy and other major infrastructure projects. That uncertainty can only be resolved by prompt reversal of the Ninth Circuit's decision.

2. The Ninth Circuit's decision will also have an enormous, immediate impact on other industries. As the Chamber explains (at 8-10), NEPA has often been used to delay and deter projects disliked by various interest groups in a wide range of industries, and the Ninth Circuit's decision exacerbates this problem.

Specifically, extending NEPA into the realms of terrorism threat assessment and security creates a blueprint for further litigation and delay for every business seeking to build a facility subject to NEPA review. Indeed, as NEI notes (at 17), the Ninth Circuit's decision has already been applied to delay operation of a biological research facility at Lawrence Livermore Laboratories (see *Tri-Valley Cares v. Department of Energy*, No. 04-17232 (9th Cir. Oct. 16, 2006)). Many other delays are sure to follows.

Because of the uncertainties and potential expense the decision below creates, that decision can only deter development of, and investment in, major projects in every industry that builds facilities subject to NEPA review. Action by this Court is urgently needed to redress that uncertainty.[5]

3. Respondents also do not seriously dispute the national security risks created by the Ninth Circuit's requirement that agencies give additional attention under NEPA to speculative terrorist threats. While those concerns can be mitigated to some extent by such things as security clearances, closed hearings and protective orders, such reviews

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[5] This disruption is particularly problematic given that the area within the Ninth Circuit accounts for more than 20 percent of the Nation's GNP. See United States Dep't of Commerce, Bureau of Economic Analysis, *Gross Domestic Product By State*, available at http:// www.bea.gov/regional/asp.htm (visited on December 21, 2006). The Ninth Circuit's decision also creates uncertainty in every region where the courts have not already addressed the applicability of this Court's proximate cause standard to environmental risks allegedly created by terrorism or other illegal acts.

will necessarily expand access to sensitive information and create opportunities for security breaches. Here again, as a matter of policy, it makes no sense to wait for the Ninth Circuit itself to fix the problem, or to await an *additional* circuit conflict beyond those described in the petition.

III. The Need For Reversal Is Heightened By The Circuit Conflicts Created By The Ninth Circuit's Decision.

In that regard, respondents also fail to undermine our demonstration that the decision below conflicts sharply with decisions of at least three federal courts of appeals.

1. As explained in the petition (at 14-18), the Ninth Circuit's decision on causation conflicts with decisions of the D.C. and Second Circuits and is in substantial tension with a decision of the Eighth Circuit. MFP argues, first, that each of the conflicting cases is "distinct from *Mothers for Peac*e with respect to its circumstances, and thus in no case does the holding apply to the circumstances of *Mothers for Peace* or conflict with the Ninth Circuit's ruling." MFP Opp. at 9; see Govt Br. 13-14. But this argument is little more than a truism: *all* cases by definition present "distinct circumstances." The question is whether the holdings are sufficiently different to threaten the coherence and consistency of federal law, and as such warrant resolution by this Court. As demonstrated in the petition (at 15-18), the Ninth Circuit's holding is sufficiently different from the holdings of the D.C. and Second Circuits that the Ninth Circuit, applying to the facts of *this* case the analysis employed by the other Circuits, could not honestly reach the decision reached below. No respondent contests this dispositive conclusion.

Moreover, their attempts to distinguish the conflicting decisions are wholly unconvincing. With respect to the D.C. Circuit's decision in *Glass Packaging Institute v. Regan*, 737 F.2d 1083 (D.C. Cir. 1984), for example, MFP argues (at 10) that the case "involved circumstances in which the alleged impact (the possibility that drinkers might be poisoned) was

not causally related to any physical effect in the environment," and that in this case, by contrast, MFP "is concerned about the potentially grave physical environmental impacts that would flow directly from the operation of the Diablo Canyon spent fuel storage facility if the spent fuel storage containers were breached in a terrorist attack." *Accord* Govt. Br. 14. But the chains of causation hypothesized in *Glass Packaging* and this case are exactly the same: a federal agency approves an activity; a third party maliciously intervenes and sabotages the activity; and harm in the human environment results.

Any difference in the nature of the intervening cause—deliberate poisoning in *Glass Packaging*, terrorist sabotage in this case—cannot justify the different results reached by the two Circuits on the core legal question: whether the possibility of a malicious intervening act is sufficient to require environmental assessment under NEPA. The D.C. Circuit held it was not under *Metropolitan Edison*. The Ninth Circuit held that *Metropolitan Edison* "does not apply," and therefore, that the possibility of such an act *was* sufficient to require its inclusion in the agency's NEPA analysis. The conflict in analysis and holding could hardly be more sharp.[6]

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[6] MFP also attempts to distinguish *Glass Packaging* on the ground that the agency there "had evaluated the risk of tampering . . . and found it to be insignificant," whereas here "the NRC has acknowledged the risks of terrorist attacks on licensed nuclear facilities." Opp. at 10. But while the NRC has "acknowledged" the *general* risk terrorist attacks, it has also concluded as a matter of agency expertise that the specific risk MFP raised for review—a terrorist *air* attack on a *particular* storage facility—is "minuscule." See Private Fuel Storage L.L.C., CLI-02-25, 56 NRC 340, 351 (2002). And even if the NRC were to concede that the risk of an air attack on the Diablo Canyon facility is "foreseeable"—and it has not—in *Glass Packaging* the D.C. Circuit squarely rejected the notion that "mere foreseeability" can "trigger a duty to consider an alleged environmental effect." *Glass Packaging*, 737 F.2d at 1091.

Efforts to distinguish *City of New York v. Dep't of Transportation*, 715 F.2d 732 (2d Cir. 1983), and *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), are similarly ill-founded. Contrary to MFP (at 11, 12), both decisions addressed the issue of causation. A determination that "the risks of sabotage [are] too far afield" (*City of New York*) or insufficiently specific (*Mid States Coalition*) to warrant consideration of their environmental impacts is necessarily a determination about the causal relationship among the federal action, the risk of terrorism, and the claimed environmental effect. Those decisions cannot be reconciled with *Mothers for Peace* on this basis.[7]

The Government effectively concedes the existence of a circuit conflict on the first issue presented, referring repeatedly to "tension in the case law" and the difficulty of "squar[ing]" the Ninth Circuit's decision with those of the D.C., Second, and Eighth Circuits. See Gov't Brief at 14, 15 n.3, 16. While the Government maintains (at 7, 14, 20) that "there is not a *square* circuit split" on the first question presented, we respectfully suggest that the Government has taken an unduly narrow view of the kind of "conflict" that warrants this Court's review. The point of resolving conflicts is to ensure that similar cases are adjudicated in similar ways from circuit to circuit. Where, as here, different circuits, addressing different factual scenarios, have employed

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[7] Nor can the decisions be reconciled on the basis that they relied on particularized "fact-based conclusions" about the risk of terrorism. Compare Opp. at 11, 12; Gov't Brief at 14-15. As noted, both *City of New York* and *Mid States Coalition* applied a proximate causation standard to *reject* the need for further NEPA review, whereas the Ninth Circuit applied a *stricter* legal standard to *require* such review. Moreover, as the Government notes (at 15 n.3), "NRC specifically assessed the risks of a terrorist attack, and concluded that 'the possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.'"

materially different *legal standards, i.e.,* standards that can reasonably be expected to produce different outcomes in similar cases, that conflict requires resolution. Again, no respondent disputes that the Ninth Circuit's causation standard would likely lead to different results than the standard employed by the D.C., Second and Eighth Circuits.[8]

2. Although the Government does not dispute the existence of a conflict on the second question presented, MFP attempts to reconcile the decision below with *Limerick Ecology Action, Inc.* v. *U.S. Nuclear Regulatory Commission,* 869 F.2d 719 (3rd Cir. 1989), through a misleading account of the Third Circuit's decision there. Yes, that court did "not hold that the mere *assertion* of unquantifiability immunizes the NRC from consideration of the issue under NEPA." But it also held that where the NRC has "claim[ed] that it cannot meaningfully consider the issue," the challenging party bears the 'burden to rebut the NRC's claim." *Id*. at 744 n.31. In this case, as in *Limerick*, the challenging party—MFP—has "proposed no meaningful method by which the NRC could either assess or predict sabotage risks." *Id.* at 743. Thus, as the Government puts it (at 23 n.5), relying upon *Limerick,* "[t]he Ninth Circuit erred in imposing the burden on NRC to show that the risk could not be quantified or meaningfully analyzed." That error also puts the Ninth Circuit's decision squarely in conflict with *Limerick*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Although the conflicts here are clear, the leading treatise on Court practice states, "a clear, square, or irreconcilable conflict among courts of appeals" is not necessary to warrant review. Robert L. Stern et al, *Supreme Court Practice* at 232 (8th ed. 2002). This is illustrated by numerous decisions in which the Court has granted certiorari because a decision was merely "in tension with" decisions in other circuits. *E.g., Sutton v. United Airlines*, 527 U.S. 471 (1999); *Darby v. Cisneros*, 509 U.S. 137, 143 n.8 (1993).

Respectfully submitted,

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