No. 08-745

In The Supreme Court of the United States

RON J. DUMONTIER, JOHN FUGLE, ANDREW HARVIE, DAVID D. HARVIE, DARREN HUGHSON, JOHN HARPER, TORY KJELSTRUP, GERALD LAMB, TODD LOBREAU, ELBERT LOOMIS, ALLAN LUNGAL, WILLIAM ROBBINS, WILLIAM J. SCOFIELD, RON L. SMATHERS,

Petitioners,

VS.

SCHLUMBERGER TECHNOLOGY CORP.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Ninth Circuit create a conflict in the Circuits by ruling that Petitioners alleged "sub-cellular injuries," which have no present medical significance, are not a compensable "bodily injury" under the statutory terms of the Price-Anderson Act?

2. Is there a conflict in the Circuits on whether or not a claim for an alleged radiological injury due to exposure to "source, special nuclear or byproduct material" can be brought outside of the Price-Anderson Act?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The parent company to Respondent Schlumberger Technology Corporation is Schlumberger Limited, which is a publicly traded corporation. Schlumberger Limited owns 100% of the stock of Schlumberger Technology Corporation. Schlumberger Technology Corporation has the following non-wholly owned subsidiaries:

- H2Gen Innovations, Inc.
- Kyrogen USA LLC
- M-I L.L.C.
- Network of Excellence in Training (NExT)
- WesternGeco L.L.C.
- Camco LLC (UAE company)
- OpenSpirit Corporation
- Baker Jardine Mexicana, S.A. de C.V.
- Camco de Mexico, S.A. de C.V.

None of these subsidiaries are publicly traded.

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OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals is reported at 543 F.3d 567 (9th Cir. 2008). Both opinions are reproduced in Petitioners' Appendix.

STATUTORY PROVISIONS INVOLVED

The controlling statutory text, "bodily injury, sickness, disease or death," is found in 42 U.S.C. § 2014(q) as a limitation on the federal cause of action applicable to this case pursuant to the Price-Anderson Act. The full text of Section 2014(q) is set forth in Respondent's Appendix at App. 1.

STATEMENT OF THE CASE

A. THE NATURE OF THE PRESENT LITIGATION.

This is a public liability action ("PLA") arising under the Price-Anderson Act as amended by Pub.L.No. 100-408, 102 Stat. 1066 (1988) (the "Amendments Act") (codified in scattered sections of 42 U.S.C.), an integral part of the Atomic Energy Act. 42 U.S.C. § 2011, *et seq.* The Amendments Act creates original federal jurisdiction over any "public liability action," which is "any suit asserting public liability." 42 U.S.C. § 2014(hh). "'Public liability' means any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). A "nuclear

incident" is "any occurrence . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive . . . properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(hh). Therefore, any claim for "bodily injury, sickness, disease or death" due to radiation emanating from "source, special nuclear or byproduct material" is governed by the provisions of the Amendments Act.

Petitioners were exposed to radiation from Cesium 137, a "byproduct material" under 42 U.S.C. § 2014(e). Aff. of John R. Frazier ¶ 4 (May 2, 2005) (Respondent's expert); Dep. of Carl Schumaker 8:17-20 (April 11, 2005) (Petitioners' expert). Consequently, Petitioners' sole cause of action for their claimed injury from Cesium 137 exposure is a Price-Anderson "public liability action" ("PLA").

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

This action was commenced in federal court on February 13, 2004. After discovery, Respondent moved for summary judgment because no Petitioner had a real bodily injury, only anxiety that their exposure might cause a future injury. The District Court agreed and granted Summary Judgment on September 22, 2005. Petitioners appealed to the United States Court of Appeals for the Ninth Circuit,

which affirmed the decision below on September 11, 2008.

C. THE PUBLIC LIABILITY ACTION (PLA) UNDER THE ATOMIC ENERGY ACT, AS AMENDED BY THE PRICE-ANDERSON ACT (PAA).

The federal regulation of the production and utilization of nuclear energy and its associated activities is one of the most comprehensive frameworks of federal regulation ever promulgated. *See Northern States Power Co. v. Minnesota,* 447 F.2d 1143, 1153-1154 (8th Cir. 1971), *aff'd,* 405 U.S. 1035 (1972). States are precluded from regulating the safety aspects of nuclear technology. *See Silkwood v. Kerr-McGee,* 464 U.S. 238, 249 (1984) (federal government occupies entire field of nuclear safety); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 208 (1983) ("the safety of nuclear technology [is] the exclusive business of the federal government.").

Although nuclear technology was originally a government monopoly during World War II, within ten years of passing the Atomic Energy Act of 1946 ("AEA"), Congress concluded: "[T]he national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." *Id.* at 207 (*citing* H.R. Rep. No. 2181, 83d Cong., 2d Sess. 1-11 (1954)). Thus, the 1954 AEA ended the federal

monopoly and encouraged private sector involvement under federal licensing regulation. *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 852 (3d Cir. 1991), *cert. denied,* 503 U.S. 906 (1992); *see* 42 U.S.C. §§ 2211-2281.

The federal government "*erected a complex scheme to promote* the civilian development of nuclear energy, while seeking *to safeguard the public* and the environment from the unpredictable risks of a new technology." *Pacific Gas,* 461 U.S. at 194 (emphasis added). The Atomic Energy Commission ("AEC") (NRC's predecessor) "was given *exclusive jurisdiction* to license the transfer, delivery, receipt, *acquisition, possession, and use of nuclear materials.*" *Id.* at 207 (*citing* 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114 (1976 ed. and Supp. IV)) (emphasis added). "Upon these subjects, *no role was left for the States.*" *Id.* at 207 (emphasis added).

As a result of private industry's reluctance to participate in nuclear energy and its associated activities because of the potential risk of "vast liability," *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 64 (1978), Congress enacted the Price-Anderson Act of 1957, 42 U.S.C. § 2210, amending the AEA of 1954. Price-Anderson's dual purpose is to protect the public by ensuring a reliable source of funds for public compensation in the event of a nuclear incident and to encourage development of the nuclear energy industry by setting limits on the liability of private industry. *See* 42 U.S.C. § 2012; *In re TMI,* 940 F.2d at 852; *O'Conner v. Commonwealth*

Edison Co., 13 F.3d 1090, 1096 (7th Cir. 1994), *cert. denied,* 512 U.S. 1222 (1994).

This case involves one of those limits Congress established when it specifically defined the term "nuclear incident" to be "any occurrence . . . causing . . . bodily injury, sickness, disease, or death." 42 U.S.C. § 2014(q). Issues of nuclear safety are completely preempted. *Pacific Gas,* 461 U.S. at 208. The "purpose of Congress is the ultimate touchstone" in preemption. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) (*quoting Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103 (1963)). The scope of preemption must rest primarily "'on a fair understanding of *congressional purpose*'" which may be discerned from both the language of the statute and "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (*quoting Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 530 n.27 (1992)) (emphasis in original). The common meaning of the phrase "bodily injury, sickness, disease or death" does not include a mere exposure to a *potentially* harmful substance unaccompanied by any medically observable present harm to the body.

Building on preemption of the entire field of nuclear safety, Congress in 1988 passed the Amendments Act, expressly delineating the scope of existing field preemption by creating a new and exclusive federal cause of action, the PLA. The Amendments Act dramatically transformed the Price-Anderson landscape in at least three ways.

First, the Amendments Act expressly created the PLA as the *exclusive remedy* for all injury or property damage claims arising from a "nuclear incident." 42 U.S.C. § 2014(hh); *In re TMI,* 940 F.2d at 837. Prior to the 1988 Amendments Act, there was no federal cause of action, and no federal subject matter jurisdiction, for a nuclear incident that had not officially been declared to be an "extraordinary nuclear occurrence" by the NRC or DOE.[1] *In re TMI,* 67 F.3d 1103, 1105 (3d Cir. 1995), *cert. denied,* 516 U.S. 1154 (1996). Prior to the Amendments Act, persons claiming radiation-related injuries could file state law causes of action in state or federal courts, and recover under any liability theory available under state law. *Id.; Bohrmann v. Maine Yankee Atomic Power Co.,* 926 F. Supp. 211, 216-217 (D. Me. 1996). However, after the Amendments Act "*no state cause of action based upon public liability exists.* A claim growing out of any nuclear incident is compensable under the terms

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[1] Price-Anderson addresses two types of nuclear accidents: an ENO (extraordinary nuclear occurrence) and a nuclear incident (or non-ENO). Both are defined by the Act. An ENO is an accident "which the Nuclear Regulatory Commission or the Secretary of Energy . . . determines has resulted or will probably result in substantial damages," (42 U.S.C. § 2014(j)), while a nuclear incident (or non-ENO) is "any occurrence" not rising to the level of an ENO, (42 U.S.C. § 2014(q)). Only the NRC or DOE can declare an event to be an ENO, and their determination shall "be final and conclusive." 42 U.S.C. § 2014(j). They have not declared the event in this case to be an ENO and could not do so because it did not meet the required criteria; thus this case involves a nuclear incident and ENO specific provisions of Price-Anderson do not apply.

of the Amendments Act or *it is not compensable at all.*" *In re TMI,* 940 F.2d at 854 (emphasis added). *See also Roberts v. Florida Power & Light Co.,* 146 F.3d 1305, 1308 (11th Cir. 1998), *cert. denied,* 525 U.S. 1139 (1999); *Nieman v. NLO, Inc.,* 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner,* 13 F.3d at 1099-1100; 141 Cong. Rec. 510,185-01, 510,185-86 (daily ed. July 18, 1995).[2]

Second, the Amendments Act guaranteed the defendant a federal forum by providing the United States District Courts with original jurisdiction, and empowering the PLA defendant to remove the action to Federal District Court. 42 U.S.C. § 2210(n)(2).[3]

Third, Congress also mandated that the rules for decision in a PLA shall be consistent with the NRC, DOE, or AEC regulations through which the federal preemption of nuclear safety is effected, by preempting all state law rules of decision "*inconsistent*" with

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[2] The Ninth Circuit did err in its opinion below when it stated that state law causes of action constitute a limitation on the 6. That comment was prefatory language, not a holding because it was not an issue on appeal or briefed or argued. Moreover, the Petition for Writ of Certiorari does not raise that issue, which is therefore not before this Court. State law causes of action were extinguished by the 1988 Amendments Act and thus play no role in analyzing the limitations Congress created by the statutory text of the Price-Anderson Act.

[3] 42 U.S.C. § 2210(n)(2) states: "With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the incident takes place . . . shall have original jurisdiction."

the Price-Anderson Act.[4] 42 U.S.C. § 2014(hh) (emphasis added); *In re TMI,* 67 F.3d 1119, 1122 (3rd Cir. 1995); *In re TMI,* 940 F.2d at 857; *O'Conner,* 13 F.3d at 1101. After creating the exclusive PLA, Congress provided no "complete and self-sufficient body of federal law" to be applied in a PLA, but Congress rarely does so. *In re TMI Litig. Cases Consol. II,* 940 F.2d at 854. Instead, the "Price-Anderson system, by design, alters state tort law to forward the goals of that act." *Nieman,* 108 F.3d at 1552 (*quoting O'Conner,* 13 F.3d at 1100). In amending the Act, "Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law." *O'Conner,* 13 F.3d at 1100; *id.* at 1105 (Price-Anderson

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[4] The exact language, "such section" in § 2014(hh) (referring back to § 2210) is an artifact from the 1988 Amendments Act, which was primarily contained in § 2210. 42 U.S.C. § 2014(hh) (A PLA "shall be deemed to be an action arising under section 2210, . . ."); *O'Conner,* 13 F.3d at 1100. Both the legislative history and well established subsequent case law interpret the phrase "such section" as referring to the entire Price-Anderson Act. *See, e.g., id.* and *In re TMI Litig. Cases Consol. II,* 940 F.2d at 856 (both *citing* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 18 ("unless such law is inconsistent with the Price-Anderson Act.")); *In re TMI,* 67 F.3d at 1119, 1123 (interpreting "such section" as the "Price-Anderson Act"); *Nieman,* 108 F.3d at 1552 (considering whether plaintiff's claim was inconsistent with "the Price-Anderson Act" in section of opinion entitled "Consistency with Price-Anderson Act."); *O'Conner,* 13 F.3d at 1101 ("courts will be required to determine whether state law principles conflict with other parts of the Price-Anderson scheme."). Also, § 2210 explicitly and implicitly incorporates and defers to the existing federal regulatory framework.

operates within "a stringent regulatory background.").

By directing federal courts to "derive" federal rules for decision only from state law *consistent* with existing federal regulatory and statutory law, Congress delineated the scope of field preemption, and set its preexisting federal framework as the polestar for guiding the federal judiciary in applying this new body of federal law interpreting the PLA. *In re TMI Litig. Cases Consol. II,* 940 F.2d at 854; *O'Conner,* 13 F.3d at 1105; *Nieman,* 108 F.3d at 1552; *O'Conner v. Commonwealth Edison Co.,* 748 F. Supp. 672, 678 (C.D. Ill. 1990), *aff'd,* 13 F.3d 1090 (7th Cir. 1994), *cert. denied,* 512 U.S. 1222 (1994). In *O'Conner,* the Seventh Circuit confirmed the existing federal framework as the standard by which the consistency of state rules for decision must be measured: "[W]e must look at the Amendments Act *in the context of the entire federal statutory scheme* on nuclear power." *O'Conner,* 13 F.3d at 1095-1097 (emphasis added).

Through these important changes, the Amendments Act established an efficient, nationally uniform system in which valid claims are quickly compensated and invalid claims are denied. *See generally, id.* at 1100-1101, 1105.

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

Petitioners' petition fails to present any split in the Circuits or any "compelling reasons" for granting certiorari as required by Supreme Court Rule 10.

First, no conflict among the Circuits exists as to whether or not "sub-cellular injuries"[5] are compensable in a PLA. Petitioners assert that the Ninth Circuit's interpretation of Price-Anderson's statutory text conflicts with the Sixth Circuit and this Court's *Silkwood* opinion. In reality, the Ninth and Sixth Circuits both agree sub-cellular injuries are not compensable under Price-Anderson and *Silkwood* never commented on the issue as will be detailed *infra*. While the Ninth Circuit's analysis focused on the expression of Congressional intent as evidenced by specific statutory text and the Sixth Circuit's analysis focused on state law, both reached the same

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[5] So called "sub-cellular injuries" are no more than a loaded misnomer coined by plaintiffs' attorneys and plaintiffs' oriented experts in an attempt to manufacture an injury when none exists. It refers to the minute and often temporary changes which occur inside one single cell. Normal metabolism inside a living cell would be an example of such a sub-cellular change. No doctor or objective scientist would label a change inside a cell an "injury" if it produced no harm to the body as a whole. After all, millions of our cells normally and routinely die every day and those millions of "cell deaths" are entirely normal; causing no damage to the body. The Ninth Circuit properly recognized this phrase for what it is: hyperbole used in an attempt to claim a damage when no medical illness exists.

conclusion of no coverage. Neither court had to proceed to the third test: an analysis of whether or not a state law allowing recovery for sub-cellular injuries would be inconsistent with Price-Anderson and the complete federal preemption of nuclear safety.

Allowing PLA recovery under a state law definition of "bodily injury" for a mere exposure of no medical significance is surely inconsistent with the Price-Anderson Act's limiting language and would allow states to control an issue of nuclear safety – which is contrary to this Court's repeated and specific direction. *Pacific Gas,* 461 U.S. at 212-213 ("the federal government has occupied the entire field of nuclear safety concerns"); *Silkwood,* 464 U.S. at 240-241 ("states are precluded from regulating the safety aspects of nuclear energy"); *English v. General Elec. Co.,* 469 U.S. 72, 82 (1990) ("Congress intended that only 'the Federal Government should regulate the radiological safety aspects'") *quoting Pacific Gas,* 461 U.S. at 2050. There is no conflict on the first issue raised by Petitioners. Instead, two Circuits have reached the same result (no such damage allowed in a Price-Anderson PLA) for the same substantive reason (a so-called sub-cellular injury is not a bodily injury, sickness, disease or death) through different, but not conflicting, analytical paths.

Second, no conflict exists among the Circuits as to whether the PLA is the exclusive remedy for alleged radiological injury from a nuclear incident. Moreover, in an attempt to now escape from the Price-Anderson Act's preemption of their claim,

Petitioners make a circular argument. They argue that they are free to pursue their claims in state court since there can be no "nuclear incident" if they have no "bodily injury." Implicit in this argument is an admission that Price-Anderson applies if Petitioners do have any bodily injury from this nuclear incident. The District Court noted that "Plaintiffs concede that if the physical injuries and impacts alleged by Plaintiffs qualify as 'bodily injuries' under the Act, then the incident was a 'nuclear incident' and the PLA applies." Petitioners' Appendix B, 10a. By now arguing for relief from Price-Anderson coverage, they necessarily also concede that their alleged "sub-cellular injuries" do not rise to the level of a "bodily injury, sickness, or disease." Additionally, Petitioners' second argument is irrelevant because Petitioners have misread the statute in an attempt to eviscerate the liability limits it imposes. Price-Anderson coverage for any possible liability is triggered by the type of substance emitting the radiation which caused the "nuclear incident," not by the type of damage alleged. 42 U.S.C. § 2014(q) ("arising out of or resulting from the radioactive . . . properties of source, special nuclear or byproduct material"). Price-Anderson governs *any and all* potential liability, whether ultimately compensable or not. 42 U.S.C. § 2014(w) ("any legal liability").

Finally, evidencing their misunderstanding of the 1988 Amendments to Price-Anderson, Petitioners falsely claim "the 1988 amendments have not diminished the substantive role that state law plays in public liability actions." Petition, at 13. In fact, the

case law is to the contrary. *In re TMI Litig. Cases Consol. II,* 940 F.2d at 854 ("After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable *under the* ***terms*** *of the Amendments Act or it is not compensable at all.*") (emphasis added).

A. THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER OR NOT A "SUB-CELLULAR INJURY" IS A COMPENSABLE "BODILY INJURY" UNDER PRICE-ANDERSON.

Two Circuits have addressed this issue and have come to the same conclusion: the Price-Anderson PLA is the sole cause of action for alleged "sub-cellular injuries" from a nuclear incident and the PLA does not allow such a claim.

1. The Decision Below Applied Traditional Principles Of Statutory Interpretation, And No Court Has Interpreted The Same Statutory Text In A Conflicting Way.

Congressional intent, as expressed in the text of the Price-Anderson Act, is the issue here rather than an application of state law, as Petitioners erroneously assert. Congressional intent is best found through a reasonable interpretation of the specific statutory text limiting the types of damages Price-Anderson allows. *Rainer v. Union Carbide Corp.,* 402 F.3d 608

(6th Cir. 2005), *cert. denied,* 546 U.S. 978 (2005), failed to focus on the Congressional intent of the controlling statutory text, 42 U.S.C. § 2014(q) ("bodily injury, sickness, disease or death"), and instead delved into considerations of state law and public policy. Yet, *Rainer* arrived at the same conclusion as the decision below. The court below found that Congress expressed its intent to exclude other types of damages by specifically listing the types of damage allowed and omitting other vague types of damages. As a matter of traditional statutory construction such vague "damages" are excluded because the text does not list them and instead includes words which in their ordinary use refer to a medically observable and diagnosable bodily injury. Once a court has determined that the statutory text is sufficient to determine the Congressional intent to exclude "sub-cellular injuries" as an allowable type of damage, the court need proceed no further with any additional state law analysis or examination of public policy. The Ninth Circuit did not need to reach an examination of state law. Since *Rainer* failed to first consider the congressional intent evidenced in the statutory text relied upon by the Ninth Circuit, its holding is not in conflict with the Ninth Circuit's holding in this case. Both Circuits' opinions exist in harmony: Congressional intent excludes "sub-cellular injuries" and so do considerations of state law and public policy.

The Court of Appeals for the Sixth Circuit agreed that "sub-cellular damages" ***are not*** a "bodily injury" under Price-Anderson. *Rainer,* 402 F.3d at 618-622.

The *Rainer* holding creates no conflict with the Ninth Circuit's holding in this case. While the Sixth Circuit came to its conclusion through a different primary route, comparing state law and considering public policy,[6] both Circuits arrived at the same conclusion. Their use of different perspectives in reaching the same conclusion creates no conflict warranting review by this Court. When two Circuits came to the same holding, even though they examined different aspects in their analyses, there is no conflict in the Circuits justifying this Court's review. The Circuits are in complete agreement: sub-cellular injuries are not compensable under the Price-Anderson Act.

In *Silkwood* this Court never analyzed the statutory text upon which the Ninth Circuit relied here, much less came to any conclusion which is contrary or

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[6] The *Rainer* opinion keys its analysis to phrases, "rules for decision . . . derived from the law of the state . . . unless such law is inconsistent with," in 42 U.S.C. § 2014(hh) which applies only when the Act is silent on a "substantive rule for decision"; such as which statute of limitations applies. Since the Act is not silent and congressional intent is expressed in the phrases chosen for inclusion and other phrases not included in 42 U.S.C. § 2014(q), the issue is resolved by subpart (q) long before reaching subpart (hh) phrases along with their associated consistency test. Congress chose not to include "sub-cellular" damages, pure emotional distress, mere exposure, "over" exposure or "excessive" exposure in the specific statutory text in subsection (q) limiting the types of damages Price-Anderson allows. Unfortunately, it appears the *Rainer* panel was not well served by the briefs submitted causing the panel to miss the simple statutory expression of congressional intent argument which completely resolves this issue and requires no further analysis.

inconsistent with the decision below. In fact, *Silkwood* resolved *no* issues involving a PLA and cannot even be read as *dicta* on PLAs since it was a diversity action, not a Price-Anderson PLA, and the PLA did not even exist until Congress created it four years *after* the 1984 *Silkwood* decision. *Silkwood,* 464 U.S. at 245, 251.

Congress extensively modified Price-Anderson four years later through the 1988 Amendments Act. Those Amendments obviated the *Silkwood* references to Price-Anderson. This Court's *Silkwood* opinion commented upon Price-Anderson *as it existed four years prior to the extensive changes made in the 1988 Amendments Act,* which Petitioners' Petition completely disregards. In 1984, four years before a PLA even existed, this Court held:

> No doubt there is *tension* between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But . . . *Congress intended to stand by both concepts and to tolerate whatever tension there was between them.* We can do no less.

Silkwood, 464 U.S. at 256 (emphasis added). In two dissenting opinions, which provided the road map for Congressional legislation four years later, the Chief Justice and Justices Powell, Marshall and Blackmun strongly disagreed with the majority's analysis that tolerated the "tension" between the preemption of nuclear safety and state punitive damages awards. At

the time of *Silkwood,* non-ENO Price-Anderson cases used state law causes of action, and there was no PLA federal cause of action, which is what created the tension. Essentially, concurring with the logic of the dissents, Congress dramatically transformed the Price-Anderson landscape and resolved that "tension." *See O'Conner,* 13 F.3d at 1105 n.13. ***Congress created the precise federal remedy for persons injured by radiation that the Silkwood majority found absent.*** Beyond the punitive damages issue, the 1988 Amendments Act essentially limits *Silkwood*'s precedential value to its own facts. *See In re TMI Litig. Cases Consol. II*, 940 F.2d at 857-858; *In re TMI*, 67 F.3d at 1125 (Congress partially limited *Silkwood*'s holding in 1988).

2. The Court Of Appeals Correctly Decided The Statutory Interpretation Issue Of Congressional Intent In Limiting The PLA.

Congressional intent is first and most accurately determined by the plain meaning of the statutory text Congress chose to use and by the text Congress could have used but chose not to use. Price-Anderson statutorily creates an exclusive cause of action for any liability arising from a nuclear incident, and also limits that liability. 42 U.S.C. § 2013(d) ("to encourage the widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety

of the public."); 42 U.S.C. § 2012(i) ("In order to protect the public and to encourage the development of atomic energy industry . . . the United States . . . may limit the liability of those persons liable . . . ").

Price-Anderson does not apply to all types of radiation exposure; only exposure to radiation from "source, special nuclear or byproduct material" 42 U.S.C. § 2014(q). Petitioners' and Respondent's experts agreed that the radioactive Cesium 137 involved here, to which Petitioners were allegedly exposed, was "byproduct material" as defined in 42 U.S.C. § 2014(e), thus invoking Price-Anderson preemption for any ***allegation*** of injury. Aff. of John R. Frazier ¶ 4 (May 2, 2005) (Respondent's expert); Dep. of Carl Schumaker 8:17-20 (April 11, 2005) (Petitioners' expert). Petitioners never contested Price-Anderson coverage in the District Court or in the United States Court of Appeals. The Act covers any liability for any allegation of "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." 42 U.S.C. § 2014(q). Any such liability asserted after the 1988 Amendments Act must be asserted as a federal PLA because all state law causes of action for such an event have been extinguished and replaced by the federal PLA as plaintiffs' sole remedy. *In re TMI Litig. Cases Consol. II,* 940 F.2d at 854. If plaintiffs cannot recover under a PLA, they cannot recover at all. *Id.* As the Ninth

Circuit recognized, to hold otherwise would remove any limitation on PLA claims by allowing Petitioners to sue in state court whenever Price-Anderson barred recovery. Petitioners here are not without remedy. They simply have to wait to see if their radiation exposure ever causes any real "bodily injury, sickness, disease or death," and if so, they can sue under Price-Anderson at that time.

One limitation Price-Anderson places on any Respondent's potential liability is the list of alleged damages compensable under the Act. For example, pure emotional distress is not compensable. Congress wisely realized that mere exposure, even at doses above the low safety standards, does not automatically cause bodily injury. *TNS, Inc. v. Natl. Labor Relations Bd.,* 296 F.3d 384, 402 (6th Cir. 2002), *cert. denied sub nom., Paper, Allied-Indus. Chem. & Energy Workers Intl. Union v. TNS, Inc.*, 537 U.S. 1106 (2003). Millions of Americans each year receive varying amounts of radiation from diagnostic and therapeutic medical x-ray and nuclear medicine procedures without developing any bodily injury. *Johnston v. U.S.,* 597 F. Supp. 374, 390 (D. Kan. 1984). Petitioners' own expert admitted that the very same effect he labels as "sub-cellular damage" occurs in every person receiving a dental or medical x-ray and that every single American receives identical "sub-cellular damage" from naturally occurring radiation each day. Dep. of Carl Schumaker, at 213. *Id.*; *see also* Donald E. Jose and Michael A. Garza, *The Complete Federal Preemption of Nuclear Safety*

Should Prevent Scientifically Irrational Jury Verdicts in Radiation Cases, 26 Temple Journal of Science, Technology & Environmental Law, 1, 1-5 (2007).

Adopting Petitioners' attempted "end run" definition of injury would establish a magical incantation of "sub-cellular injuries" for every mere exposure: allowing potential liability to persons with no known medical illness. Imposing liability for no real harm is directly contrary to Congressional intent expressed in statutory text when Congress chose to list "bodily injury" but not list "exposure" as a limitation on the types of damage allowed under Price-Anderson. 10 U.S.C. § 2014(q). Moreover, Petitioners' argument that they can sue in state court outside Price-Anderson if they have no "bodily injury" under the Act would destroy the very uniform scheme Congress established through the Price-Anderson Act as amended.

The Court of Appeals correctly interpreted Congressional intent, and no court has made a contrary interpretation of this specific statutory language expressing Congressional intent. If any other courts are on the analytical "collision course" predicted by Petitioners, and they are not, this Court must await a real conflict before it addresses the issue because a self-serving predicted "collision course" for a "likely disagreement" is not grounds for granting certiorari pursuant to Supreme Court Rule 10.

B. THERE IS NO CONFLICT IN THE CIRCUITS THAT A CLAIM FOR INJURY DUE TO "SOURCE, SPECIAL NUCLEAR OR BYPRODUCT MATERIAL" CANNOT BE BROUGHT OUTSIDE OF THE PRICE-ANDERSON ACT.

A Price-Anderson PLA is Petitioners' exclusive cause of action for any alleged harm from the incident in which they were involved. In the 1988 "Amendments Act," Congress extinguished all state law causes of action and replaced them with a federal cause of action whenever a claimant alleges harm from the radioactive materials specified in the Act. Congress broadly defined "public liability action" ("PLA") to mean "*any* suit asserting public liability," 42 U.S.C. § 2014(hh), and defined "public liability" to mean "*any legal liability* arising out of or resulting from a nuclear incident. . . ." 42 U.S.C. § 2014(w) (emphasis added). Congress broadly defined "nuclear incident" to mean:

> *[A]ny* occurrence . . . *within the United States* causing . . . *bodily injury, sickness, disease, or death, or loss of or damage to property,* or loss of use of property, arising out of or resulting from the *radioactive,* toxic, explosive, or *other hazardous properties* of *source, special nuclear, or byproduct material.*

42 U.S.C. § 2014(q) (emphasis added).

By broadly defining public liability to include "*any* legal liability," Congress preempted and extinguished all state law causes of action claiming injury

or damages arising from those nuclear materials. *In re TMI,* 940 F.2d at 854. The Third, Sixth, Seventh, and Eleventh Circuits have held: "after the Amendments Act, *no state cause of action based upon public liability exists.* A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *Id.* (emphasis added); *Roberts,* 146 F.3d at 1306 (The Amendments Act "creat[ed] an exclusive federal cause of action for radiation injury."); *Nieman,* 108 F.3d at 1553 ("state law claims cannot stand as separate causes of action. [Plaintiff] can sue under the Price-Anderson Act, as amended, or not at all."); *O'Conner,* 13 F.3d at 1099-1100 ("a new federal cause of action supplants the prior state cause of action."); *see also* 141 Cong. Rec. 510,185-01, 510,185-86 (daily ed. July 18, 1995).

Congress' broad definition of a "nuclear incident" conditions whether an action is a PLA on whether Petitioner alleges bodily harm or property damage from "*source, special nuclear, or byproduct material.*" "Byproduct material" is:

> (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

42 U.S.C. § 2014(e). No Circuit Court has ever ruled to the contrary. As noted *supra* Petitioners admit, and never contested, their claim arises from radiation emitted by "byproduct material." Thus, Petitioners' claims cannot exist outside Price-Anderson. Any other types of radiation exposure incidents not involving source, special nuclear or byproduct material and falling under state law were not before the District Court or the Court of Appeals, and such a hypothetical case cannot be the subject of certiorari in this case.

It is important to realize that Petitioners are not without a remedy if their exposure ever results in any real "bodily injury, sickness, disease or death." They can simply file their PLA ***after*** a doctor diagnoses such a condition and an expert opines that the radiation exposure event caused it. Petitioners' current claims for "sub-cellular injury" simply are premature at this time under the Price-Anderson Act.

CONCLUSION

No conflict exists among the Circuits. No important question of federal law should be decided by this Court. There is no compelling reason for this Court's review. Thus, the Petition should be denied.

Respectfully submitted,

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