No. 101377 MAY 6 - 2011

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

MERILYN COOK, *et al.*,
Petitioners,

v.

ROCKWELL INTERNATIONAL CORPORATION AND THE DOW CHEMICAL COMPANY,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), establishes a compensation regime for any "nuclear incident," a term that includes radioactive discharges causing "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property." 42 U.S.C. §2014(q). Congress provided that, in suits covered by the Act, "the substantive rules for decision * * * shall be derived from the law of the State in which the nuclear incident involved occurs," unless state law is inconsistent with certain provisions of the Act. *Id.* §2014(hh).

The questions presented are:

1. Whether state substantive law controls the standard of compensable harm in suits under the Price-Anderson Act, or whether the Act instead imposes a federal standard.

2. Whether, even assuming a federal standard applies, a property owner whose land has been contaminated by radioactive plutonium, resulting in lost property value, must show some "physical injury" to the property beyond the contamination itself in order to recover for "damage to property."

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Merilyn Cook, Lorren and Gertrude Babb, Richard and Sally Bartlett, and William and Delores Schierkolk were plaintiffs in the district court and appellees and cross-appellants in the court of appeals.

Respondents Rockwell International Corporation and The Dow Chemical Company were defendants in the district court and appellants and cross-appellees in the court of appeals.

Michael Dean Rice, Thomas and Rhonda Deimer, Stephen and Peggy Sandoval, and Bank Western were plaintiffs in the district court and are listed as parties in the caption in the court of appeals, but are not parties to the district court judgment under review.

The Boeing Company is identified in the district court judgment as a party bound by the judgment, as successor-in-interest to Rockwell International Corporation.

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Merilyn Cook, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-43a) is reported at 618 F.3d 1127. The district court's post-trial opinion (App., *infra*, 44a-112a) is reported at 564 F. Supp. 2d 1189.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on September 3, 2010, App., *infra*, 1a-43a, and denied rehearing on December 9, 2010, *id.* at 125a-126a. On March 1, 2011, Justice Sotomayor extended the time to file a petition for a

writ of certiorari to April 8, 2011. No. 10A845. On March 30, Justice Sotomayor further extended that time to May 6, 2011. *Ibid.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919, as amended by the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. §§ 2011 *et seq.*), are set forth in the Appendix (App., *infra*, 151a-183a).

INTRODUCTION

Congress passed the Price-Anderson Act in 1957 to promote development of the nuclear industry while preserving traditional state-law remedies for any resulting injuries. "Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). The courts of appeals, however, are now divided over whether the standard for compensable harm in suits subject to the Act is governed by state or federal law—and, if the latter, what that standard is.

In the decision below, the Tenth Circuit held that federal law establishes a minimum threshold of harm under which a property owner cannot recover for plutonium contamination that reduces his property's value absent proof of some additional "physical injury" to the property beyond the contamination itself. That decision deepens a conflict between the Sixth and Ninth Circuits over whether state or federal law determines the standard for compensable harm—a conflict in which a divided Fifth Circuit panel has also recently taken sides. It also conflicts with a Third Circuit decision holding that, even under federal law, no such "physical harm" is required. The

issues, moreover, are important: The decision below flouts Congress's intent to preserve a dominant role for state law. And it threatens to deny any remedy to landowners who have suffered "damage" to their property in any meaningful sense of the term.

In this case, for example, petitioners' property was repeatedly contaminated by radioactive plutonium from a nuclear weapons plant. Because of reckless safety violations, fires released plutonium into the air, and barrels leaked plutonium into the ground, which was then dispersed onto neighboring properties. After FBI and EPA agents raided the plant, its operator pled guilty to criminal charges. Following 15 years of litigation and a four-month trial, a jury found that petitioners had suffered $177 million in property damage from plutonium contamination. The Tenth Circuit, however, held that federal law precludes any redress absent some "physical injury" to the properties beyond the contamination itself.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Price-Anderson Act

Congress initially thought nuclear power would be a government monopoly. *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63 (1978). But it soon concluded that "the national interest would be best served if the Government encouraged the private sector to become involved * * * under a program of federal regulation and licensing." *Ibid.* Accordingly, in 1957, Congress enacted the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), "to protect the public and to encourage the development of the atomic energy industry," 42 U.S.C. § 2012(i).

To those ends, the Act establishes a compensation system that includes mandatory insurance, government indemnification, and caps on liability. That regime applies to any "nuclear incident," a term defined as "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, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. §2014(q). Plutonium—a toxic, radioactive carcinogen with a half-life of 24,000 years, Tr. 3633, 5747-5754—is explicitly defined to be "special nuclear material." 42 U.S.C. §2014(aa).[1]

To ensure compensation for those injured by nuclear incidents, the Act requires private nuclear facility operators to have specified amounts of insurance coverage. 42 U.S.C. §2210(a)-(b). It further provides for government indemnification up to other limits. *Id.* §2210(c)-(d). A defendant's liability, however, is limited to those insurance and indemnification amounts. *Id.* §2210(e).

Apart from that liability limit, the substantive rights of injured persons were to be governed by state law. Congress intended "no interference with * * * State law" unless "damages exceed the amount of financial responsibility required together with the amount of the indemnity." S. Rep. No. 85-296, at 9 (1957).

B. The 1966 Amendments

As originally enacted, Price-Anderson contained no provision for federal-court jurisdiction. In 1966, how-

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[1] Citations to "Tr. __" are to the trial transcript, filed without separate pagination as volume 6 of the supplemental appendix in the court of appeals. Citations to "PX__" are to plaintiffs' trial exhibits, filed as volume 7.

ever, Congress amended the Act to provide for concurrent federal jurisdiction over "any public liability action arising out of or resulting from an extraordinary nuclear occurrence." Pub. L. No. 89-645, § 3, 80 Stat. 891, 892 (1966). "Public liability" was defined as "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). But the term "extraordinary nuclear occurrence" was limited to nuclear incidents "the [Atomic Energy] Commission determines to be substantial, and which the Commission determines ha[ve] resulted or will probably result in substantial damages to persons offsite or property offsite." Pub. L. No. 89-645, § 1(a)(2), 80 Stat. at 891.

The 1966 amendments preserved the primary role of state law. As in the original Act, "the claimant's right to recover * * * [wa]s left to the tort law of the various States." S. Rep. No. 89-1605, at 6 (1966). Congress thus "assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). While "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," Congress "intended to stand by both concepts and to tolerate whatever tension there was between them." *Ibid.*

C. The 1988 Amendments

For more than 20 years, no nuclear incident was ever declared an "extraordinary nuclear occurrence" sufficient to confer federal jurisdiction—not even the Three Mile Island partial core meltdown. See S. Rep. No. 100-218, at 13 (1987). In 1988, Congress responded by eliminating the "extraordinary nuclear occurrence" limitation and expanding the Act's jurisdictional provision to cover "any

public liability action arising out of or resulting from a *nuclear incident*." 42 U.S.C. §2210(n)(2) (emphasis added). Congress also clarified that it was sufficient merely to *allege* a nuclear incident: It defined "public liability action" as "any suit *asserting* public liability" (*i.e.*, asserting "legal liability arising out of or resulting from a nuclear incident"). *Id.* §2014(w), (hh) (emphasis added). The definition of "nuclear incident" remained unchanged—"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, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." *Id.* §2014(q). Congress clarified that such actions would be deemed to arise under federal law, providing that "[a] public liability action shall be deemed to be an action arising under section 2210 of this title." *Id.* §2014(hh).

Congress, however, expressly codified the primacy of substantive state law: "[T]he substantive rules for decision in [a public liability] action," it provided, "shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [Section 2210]." 42 U.S.C. §2014(hh). The legislative history explains that, "[r]ather than designing a new body of substantive law," Congress left liability to be "determined under applicable state tort law." H.R. Rep. No. 100-104, at 5, 18 (1987); see also S. Rep. No. 100-218, at 13. Thus, even after the 1988 amendments, "it is still accurate to state that '[s]ince its enactment by Congress in 1957, one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with state law.'" John F. McNett, *Nuclear Indemnity for Government Contractors Under the*

Price-Anderson Act: 1988 Amendments, 19 Pub. Cont. L.J. 1, 7 (1989).

II. PROCEEDINGS BELOW

A. Background

Located near Denver, Colorado, the Rocky Flats nuclear weapons plant was once the "focal point" of the government's plutonium operations. PX1609, at 12 (Gen. Accounting Office, *DOE's Award Fees at Rocky Flats Do Not Adequately Reflect ES&H Problems* (Oct. 1989)). Respondent Dow Chemical Company operated the plant from 1952 to 1975, and respondent Rockwell International Corporation operated it from 1975 to 1989. App., *infra*, 2a.

Throughout that time, Rocky Flats was riddled with safety failures. There were "numerous problems in the plant's radiological protection program" and "a lack of commitment by the plant's management to improve overall safety and health conditions." PX1609, at 2-3 (GAO report). In 1957, a major plutonium fire erupted because an improperly designed building contained "several times" the amount of plutonium it was supposed to handle. PX1290, at 23. A second major plutonium fire occurred in 1969 in a building containing 8,000 pounds of plutonium. Tr. 3176, 3198. From 1966 to 1969 alone, there were 30 other reported plutonium fires. PX321, at 2. Thousands of barrels of plutonium-contaminated oil, many of them rusting and leaking, were left outside at the plant for almost a decade. PX64, at 74,879-80, 74,889, 74,928; PX223; Tr. 1530-1534. And over 2,600 pounds of weapons-grade plutonium and 680 pounds of enriched uranium went unaccounted for. PX1132, at 107-108; Tr. 5337. See generally Bryan Abas, *Rocky Flats: A Big Mistake from Day One*, Bull. Atomic Scientists, Dec. 1989, at 19.

By the mid-1980s, "serious environmental problems began to surface." PX1609, at 16 (GAO report). On June 6, 1989, FBI and EPA agents—in a joint action dubbed "Operation Desert Glow"—raided the plant. See App., *infra*, 2a; Abas, *supra*, at 19. Rockwell was charged with, and pled guilty to, environmental crimes. App., *infra*, 2a. By 1989, when Rockwell ceased operating the plant, the government faced "one of the most significant and challenging environmental clean-ups in the history of the United States." U.S. Dep't of Energy, *Rocky Flats Site, Colorado: Fact Sheet* 2-3 (Dec. 2010). The government identified some 178 "individual hazardous substance sites" left at the plant. PX1279, at ES-1 to -2. Kilograms of plutonium remained in the plant's exhaust ducts. Tr. 3243-3245. The EPA included the plant on its Superfund list in 1989, see *National Priorities List for Uncontrolled Hazardous Waste Sites*, 54 Fed. Reg. 41,015, 41,021 (Oct. 4, 1989), and identified contamination sources as "leaking storage drums, unlined disposal trenches, surface water impoundments, leaking pipelines and underground storage tanks, two landfills, and contaminated buildings," EPA, *Superfund Program: Rocky Flats Plant*, http://www.epa.gov/region8/superfund/co/rkyflatsplant/.

B. Proceedings Before the District Court

1. In 1990, several owners of property within the "plume" of plutonium released from Rocky Flats—including the former mayors of Golden and Arvada, Colorado—filed this class action for nuisance and trespass against Rockwell and Dow. App., *infra*, 3a; C.A. Supp. App. 1382; Tr. 1007-1008, 1949. They asserted federal jurisdiction under the Price-Anderson Act and 28 U.S.C. §§1331 and 1332. App., *infra*, 3a, 11a n.8. The operative complaint expressly asserts public liability by alleging

damage to or loss of use of property due to Rockwell and Dow's plutonium discharges. C.A. App. 310.

After more than 15 years of litigation, a four-month jury trial began in October 2005. App., *infra*, 4a. Petitioners presented substantial evidence of contamination. "[V]arious soil sampling studies had concluded that plutonium from Rocky Flats was deposited throughout the Class Area and beyond." C.A. Supp. App. 1386. Indeed, Rockwell and Dow admitted that "plutonium from Rocky Flats is present in the Class Area." C.A. App. 1646. A government study found "[e]levated levels of plutonium both on and off site * * *, in some places, more than 50 times background levels." PX1620, at 23. And plutonium left at the plant continued to migrate onto neighboring properties. Tr. 3998-4001, 4121-4126.

Petitioners proved that the plutonium contamination diminished their property values. Tr. 2654-2732, 4209-4273, 6329-6351, 6399-6496, 6509-6635. Experts analyzed real estate market research, reviewed analogous case studies, examined market sales data, and conducted regression analyses and public opinion surveys to measure the diminution in value. *Id.* at 2716-2718, 6406, 6416-6417. An expert also testified that the contamination posed a health hazard because "[e]ven small amounts of inhaled plutonium put people at risk of lung cancer." *Id.* at 3659-3663. Indeed, there were elevated cancer rates near the plant. *Id.* at 4812-4843. The district court rejected Rockwell and Dow's *Daubert* challenges to all that evidence, C.A. App. 1732-1871, and none of those rulings was challenged on appeal.

2. The district court instructed the jury that, to recover for nuisance under Colorado law, the property owners had to prove Rockwell or Dow interfered with their "use and enjoyment of their properties" either by "caus-

ing [them] to be exposed to plutonium and placing them at some increased risk of health problems" or by "causing objective conditions that pose a demonstrable risk of future harm." App., *infra*, 134a. The interference had to be "unreasonable" and "substantial." *Ibid.* "Evidence that the value of Class members' properties has diminished," the instructions explained, "is evidence that the interference is substantial." *Id.* at 139a.

With respect to trespass, the court instructed the jury that the property owners had to prove (1) plutonium from Rocky Flats was present on their properties; (2) Rockwell or Dow "intentionally undertook an activity or activities that in the usual course of events caused plutonium" to be present; and (3) the plutonium would likely continue to be present indefinitely. App., *infra*, 131a. The instructions elaborated on each element. *Id.* at 132a, 147a.

For both claims, the district court instructed the jury to calculate damages based on diminution in property value. App., *infra*, 147a-149a. The court made clear, however, that the jury could not "award any diminution in value caused solely by the proximity of the Class Area to Rocky Flats." *Id.* at 150a. Rather, damages had to be measured by "the difference between the actual value of the Class Properties and the value these Properties would have had if Dow or Rockwell or both of them had not committed the trespass and/or nuisance proved by Plaintiffs." *Id.* at 147a. At no time in the district court did Rockwell or Dow contend that Price-Anderson imposed a federal standard of compensable harm in addition to those state-law requirements.

3. The jury returned a verdict in favor of the property owners. App., *infra*, 44a. It found that Rockwell and Dow had caused "a reduction in the aggregate value of the Class Properties of $176,850,340"—approximately

$12,000 per residential property. *Id.* at 49a; C.A. App. 1620; Tr. 6422. It also awarded $200.2 million in punitive damages. App., *infra*, 54a. Rockwell and Dow moved for judgment as a matter of law or a new trial, but the district court denied those motions. *Id.* at 45a-81a. On June 2, 2008, the court entered a final judgment (including 18 years of prejudgment interest) of $926 million. *Id.* at 106a-107a, 113a-117a.

C. The Tenth Circuit's Decision

The Tenth Circuit reversed in relevant part. App., *infra*, 1a-43a.

1. On appeal, Rockwell and Dow claimed for the first time that Price-Anderson's definition of "nuclear incident" imposes a federal standard of compensable harm. See App., *infra*, 13a-21a. That definition's reference to "loss of or damage to property, or loss of use of property," they contended, imposes a federal threshold of harm, regardless of what state law requires. See *id.* at 13a, 15a. Rockwell and Dow urged that the district court had erred by not instructing the jury on that newfound federal element. *Id.* at 13a.

Because Rockwell and Dow had not requested such an instruction below, the court of appeals acknowledged that they may have "forfeited this argument." App., *infra*, 13a; cf. Fed. R. Civ. P. 51(d). But the court held that petitioners had "forfeited any forfeiture argument" by not adequately challenging Rockwell and Dow's preservation of the issue. App., *infra*, 13a-14a. The court conceded that petitioners had urged that Rockwell and Dow "fail[ed] to 'identify with clarity * * * the locations in the record where [their] points were raised.'" *Ibid.*; see also C.A. Supp. Br. 8 n.5; C.A. Supp. Reply 7-8. But it deemed that reference too "generic" to amount to a "forfeiture challenge." App., *infra*, 14a.

Turning to the merits, the court of appeals held that federal law imposes a threshold standard of compensable harm. "[T]he occurrence of a nuclear incident, and thus a sufficient injury under §2014(q)," the court held, "constitutes a threshold element of any [Price-Anderson] claim." App., *infra*, 16a. Relying on the fact that the Act defines "nuclear incident" to include "loss of or damage to property, or loss of use of property," 42 U.S.C. §2014(q), the court concluded that, "[i]n creating a federal cause of action under the [Act], * * * Congress made clear its intention to limit recovery to the discrete group of injuries enumerated in §2014(q)," App., *infra*, 16a. Accordingly, it held, "a plaintiff must establish an injury sufficient to constitute a nuclear incident as a threshold, substantive element of any [Price-Anderson] claim." *Ibid.*

The court of appeals rejected the argument that the relevant provisions established only the pleading requirements for federal jurisdiction and did not alter the substantive requirements for recovery under state law. See App., *infra*, 16a. Those provisions define "public liability action" as "any suit *asserting*" liability from a nuclear incident, 42 U.S.C. §2014(hh) (emphasis added), and the court acknowledged that the complaint *asserted* such liability here, App., *infra*, 3a. But the court did not believe Congress meant to "render the statute's nuclear incident requirement superfluous outside of the pleading stage." *Id.* at 16a. "Were a plaintiff only required to plead the presence of a nuclear incident, but never establish one," it opined, "a 'public liability action' would be completely indistinguishable from whichever state tort claim a particular [Price-Anderson] action incorporates." *Ibid.*

The court tried to reconcile its holding with the Act's express provision that "the substantive rules for decision in [a public liability] action shall be derived from the law

of the State in which the nuclear incident involved occurs." 42 U.S.C. §2014(hh). "Congress," the court acknowledged, "made clear its intention to * * * utiliz[e] state law to frame the 'substantive rules for decision.'" App., *infra*, 16a. But the court held that Congress "simultaneously" sought "to limit recovery to the discrete group of injuries enumerated" in Section 2014(q)'s "nuclear incident" definition. *Ibid.* Moreover, Section 2014(hh) by its terms does not apply if state law is "inconsistent with the provisions of [Section 2210]." 42 U.S.C. §2014(hh). Permitting recovery for injuries that do not satisfy some federal threshold of harm, the court claimed, would be "inconsistent" with the "nuclear incident" definition. App., *infra*, 16a n.10. The court thus held that "a plaintiff must establish an injury sufficient to constitute a nuclear incident as a threshold, substantive element of any [Price-Anderson] claim." *Id.* at 16a.

2. The court of appeals next turned to whether the jury had been adequately instructed on its new, federally defined "loss of or damage to property, or loss of use of property" element. 42 U.S.C. §2014(q). The court did not dispute that Rockwell and Dow had contaminated petitioners' property with plutonium, a hazardous radioactive carcinogen. See pp. 4, 9, *supra*. Nor did it dispute that property values were lower as a result. See p. 9, *supra*. Nonetheless, the court held that the jury had to find more.

The court explained that, in its earlier decision in *June* v. *Union Carbide Corp.*, 577 F.3d 1234 (10th Cir. 2009), it had held that subcellular damage from radiation exposure, absent any medical symptoms, does not qualify as "bodily injury" (a term that also appears in the "nuclear incident" definition). App., *infra*, 17a. "Just as an existing physical injury to one's body is necessary to establish

'bodily injury,'" the court reasoned, "so too is an existing physical injury to property necessary to establish 'damage to property.'" *Ibid.*

While the court did not elaborate on the sort of "physical injury" its new standard required, it did hold that plutonium contamination resulting in lost property value was not enough. Under the court's threshold requirement, "[d]iminution of value * * * cannot establish the fact of injury or damage." App., *infra*, 18a n.12. "Otherwise," the court reasoned, "reduced value stemming from factors unrelated to any actual property injury, such as unfounded public fear regarding the effects of minor radiation exposure, could establish 'damage to property' and 'loss of use of property.'" *Ibid.* Price-Anderson, the court held, "requires a showing of actual physical injury to the properties themselves rather than a mere decline in the properties' value." *Id.* at 19a n.12.

The court noted that petitioners "did present evidence relevant to a *loss of use*" of their property by showing "an increased risk of health problems." App., *infra*, 19a-20a (emphasis added). "[W]hen the presence of radioactive materials creates a sufficiently high risk to health," it conceded, "a loss of use may in fact occur." *Id.* at 20a. The court gave as examples "an increased risk to health so high that no reasonable person would freely choose to live on or work at the property" or contamination so severe that "the soil can no longer produce crops that are safe for consumption." *Ibid.* Because the jury was not instructed on the new threshold Price-Anderson element, however, the court set aside the verdict and remanded. *Id.* at 21a.[2]

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[2] The court also addressed several other issues. It held that, whether or not Price-Anderson's jurisdictional provision applied, the district

3. The court of appeals denied rehearing en banc, with Judge Lucero dissenting. App., *infra*, 125a-129a. Judge Lucero urged that the panel had erred by requiring petitioners to "prove a 'nuclear incident' as an element of a [Price-Anderson] claim." *Id.* at 128a. The panel, he noted, "confuse[d] the [Act's] jurisdictional requirements with its substantive elements": While the Act "requires a showing of a 'nuclear incident' for jurisdictional purposes," "*state* law determines liability." *Id.* at 128a-129a (emphasis added). He urged the court to rehear the case "to undo the panel's damaging alchemy." *Id.* at 129a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision in this case interpreted the Price-Anderson Act to impose a federal standard of compensable harm notwithstanding the Act's express declaration that "the substantive rules for decision * * * shall be derived from the law of the State in which the nuclear incident involved occurs." 42 U.S.C. §2014(hh). It then construed that federal standard to require "physical injury" to property beyond the fact that the property is contaminated with radioactive plutonium and

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court had federal-question jurisdiction. App., *infra*, 6a-11a. It held that the district court's Rule 54(b) ruling was proper. *Id.* at 11a-13a. On remand, the court of appeals added, Rockwell and Dow should be given another opportunity to show that state standards conflict with specific federal statutes or regulations. *Id.* at 21a-26a. Moreover, although "[t]he jury was properly instructed on the elements of a nuisance claim as well as the definitions of 'substantial' and 'unreasonable,'" the court stated that a scientifically unfounded risk cannot rise to the level of an unreasonable and substantial interference. *Id.* at 26a-29a. The court held that petitioners had to show "actual physical damage" on their trespass claim. *Id.* at 31a-35a. It vacated the class certification order. *Id.* at 35a-36a. And it addressed the punitive damages instruction. *Id.* at 36a-42a.

diminished in value as a result. Those important holdings conflict with decisions of other circuits.

Like the court below, the Ninth Circuit has deemed the Act's "nuclear incident" definition to impose a federal standard of harm. But the Sixth Circuit has adopted the opposite view, holding that the Act imposes only a state-law standard. The Fifth Circuit recently sided with the Ninth and Tenth Circuits in a divided decision that reflects the broader circuit conflict.

Similarly, the Tenth Circuit's holding that federal law imposes a "physical injury" requirement conflicts with a Third Circuit decision holding that no such "physical harm" is required. It conflicts with half a century of administrative practice. And it conflicts with common sense: Any sensible definition of "damage to property" would include contaminating property with radioactive plutonium that impairs its value.

Both issues, moreover, are important. The Tenth Circuit's federalization of the compensable-harm standard flouts Congress's decision to respect traditional state authority. And the court's unreasonably stringent federal standard denies thousands of property owners compensation that any rational regime would afford. The Act does not require a disaster of Chernobylesque proportions before a property owner can recover proven losses from a convicted environmental criminal. The Court should grant review.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER STATE OR FEDERAL LAW DETERMINES THE STANDARD FOR COMPENSABLE HARM IN A PRICE-ANDERSON SUIT

The Tenth Circuit's decision deepens a circuit conflict over whether the minimum standard for compensable harm in suits under the Price-Anderson Act derives from

state or federal law. The Sixth Circuit has held that state law controls. But the Ninth Circuit, like the court below, has held that the Act imposes a threshold federal standard. And the Fifth Circuit, in a divided decision, has agreed.

A. The Courts Are Squarely Divided

1. In *Rainer* v. *Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), the Sixth Circuit addressed whether workers exposed to plutonium and neptunium could recover under Price-Anderson. The workers claimed they had suffered compensable harm, even though no symptoms had surfaced, because subcellular damage itself was a "bodily injury" under the Act. *Id.* at 618.

Evaluating that claim, the Sixth Circuit noted that the Act "creates a private right of action for claims arising out of 'nuclear incidents,'" defined as "'any occurrence * * * causing * * * bodily injury, sickness, disease, or death, or loss of or damage to property'" due to radioactive discharges. 402 F.3d at 618 (quoting 42 U.S.C. § 2014(q)). Whether a plaintiff has shown sufficient harm to meet that standard, the court held, depends on *state*, not federal, law. *Ibid.*

Under Price-Anderson, the Sixth Circuit observed, "[c]ourts are required to look to state law for the substantive rules to apply in deciding claims." 402 F.3d at 618. Because "the Act specifically calls for state law to provide the substantive foundations," plaintiffs "necessarily had to argue *on the basis of Kentucky law* in order to demonstrate the legitimacy of their 'bodily injury' claim." *Id.* at 617 (emphasis added). Thus, the "key question" was "whether *Kentucky caselaw* equates 'subcellular damage' with 'bodily injury.'" *Id.* at 618 (emphasis added). Reviewing state precedents, the court held that Kentucky law did not. *Id.* at 618-622.

2. The Ninth Circuit expressly rejected that approach in *Dumontier* v. *Schlumberger Technology Corp.*, 543 F.3d 567 (9th Cir. 2008). *Dumontier* likewise addressed whether subcellular damage from radiation exposure was "bodily injury" under Section 2014(q). *Id.* at 569. The plaintiffs claimed that, "under Montana law," it was. *Ibid.* State law governed, they urged, because the Act provides that "'substantive rules for decision * * * shall be derived from the law of the State in which the nuclear incident involved occurs.'" *Id.* at 569-570.

The Ninth Circuit acknowledged that, in *Rainer*, "the Sixth Circuit held that '[t]he key question * * * is whether *[state] caselaw* equates "sub-cellular damage" with "bodily injury."'" 543 F.3d at 570 (emphasis added; brackets in original). But the court rejected that approach: "Unlike the Sixth Circuit," it held, "we have never relied on state law to interpret bodily injury." *Ibid.*

The Ninth Circuit attempted to reconcile its view with the Act's directive that *state-law* "'substantive rules for decision'" govern. 543 F.3d at 570. That provision, the Ninth Circuit asserted, merely meant that "plaintiffs can bring such claims only if the state where the exposure occurred provides a cause of action." *Ibid.* "For example, if a state doesn't provide a cause of action for emotional distress, a plaintiff wouldn't have a cause of action for emotional distress under the Act." *Ibid.* But the court saw Section 2014(q)'s "nuclear incident" definition as imposing a separate *federal* threshold: "[T]he Act prohibits recovery when plaintiffs haven't suffered 'bodily injury, sickness, disease, or death'—even when the state cause of action doesn't have that limitation." *Ibid.* Section 2014(q), the court opined, is "a bar to claims that would otherwise be actionable under state law, *a bar im-*

posed by federal law and therefore interpreted as a matter of federal law." *Ibid.* (emphasis added).

3. The Tenth Circuit's decision in this case widens that conflict. Like the Ninth Circuit, but in conflict with the Sixth, the Tenth Circuit construed Price-Anderson to impose a federal standard for compensable harm. It held that, as a matter of *federal* law, "a plaintiff must establish an injury sufficient to constitute a nuclear incident as a threshold, substantive element." App., *infra*, 16a. Like the Ninth Circuit, the court tried to reconcile that federal mandate with the Act's explicit preservation of state law. Although "Congress made clear its intention to * * * utiliz[e] state law to frame the 'substantive rules for decision,'" the court posited, Congress "simultaneously" sought "to limit recovery to the discrete group of injuries enumerated in §2014(q)." *Ibid.* The Tenth Circuit invoked its earlier decision in *June* v. *Union Carbide Corp.*, 577 F.3d 1234 (10th Cir. 2009), see App., *infra*, 15a-16a, which had itself invoked the Ninth Circuit's decision in *Dumontier* for support, see 577 F.3d at 1250 (citing 543 F.3d at 570). As the Ninth Circuit had recognized, that federal-law approach is irreconcilable with the Sixth Circuit's holding in *Rainer*. *Dumontier*, 543 F.3d at 570 ("Unlike the Sixth Circuit, we have never relied on state law * * * ."). The Tenth Circuit's holding here is similarly irreconcilable.

4. The Fifth Circuit recently joined issue in a divided opinion that reflects the broader disagreement. In *Cotroneo* v. *Shaw Environment & Infrastructure, Inc.*, — F.3d —, 2011 WL 1420994 (5th Cir. Apr. 14, 2011), the Fifth Circuit held that workers exposed to radiation could not sue for battery, a tort that does not require "physical injury." *Id.* at *7. "[E]ven if [the claim] is actionable under state law," the majority concluded, the

"cause of action would be inconsistent with section 2210 because it would allow plaintiffs to recover on their public liability action without establishing 'public liability'"—*i.e.*, "an injury sufficient to make the occurrence a 'nuclear incident.'" *Id.* at *7-10. The majority repeatedly cited the Tenth Circuit's decision here as support. *Ibid.*

Judge Dennis dissented. "Had Congress intended to limit recovery to these categories of personal injury claims" in the "nuclear incident" definition, he explained, "it easily could have * * * said so." 2011 WL 1420994, at *10. "Instead, however, §2014 of the [Act] clearly uses the bodily injury and property damage terms only for a specific federal *jurisdictional* purpose * * * ." *Ibid.* (emphasis added). Congress did not "intend[] for these jurisdictional terms to serve the additional purpose of limiting the types of claims that may be brought in a public liability action." *Ibid.* Besides, "§2014(hh) provides that 'the substantive rules for decision' in a public liability action 'shall be derived from the law of the State' in which a nuclear incident occurs." *Ibid.* While the Act qualifies that rule with an exception for state laws "'inconsistent with the provisions of' 42 U.S.C. §2210," "[n]othing in §2210 expressly excludes, abrogates or modifies any particular kind of claim." *Id.* at *10-11. Judge Dennis urged that the battery claims should have been "adjudicated in accordance with the substantive rules for decision derived from state law." *Id.* at *15.

B. The Tenth Circuit Erred in Holding That Price-Anderson Imposes a Federal Standard of Compensable Harm

The decision below does not merely exacerbate a circuit conflict. It also disregards Congress's plain intent.

1. Price-Anderson expressly states that "the substantive rules for decision in [a public liability] action

shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [Section 2210]." 42 U.S.C. §2014(hh) (emphasis added). Nothing in Section 2210 dictates the quantum of property damage a plaintiff must sustain to recover. The statute thus could not be more clear: State, not federal, law determines the substantive rule governing the compensable-harm standard. Nowhere does the Act impose a federal requirement of "physical injury" to property beyond contamination with hazardous plutonium that reduces the property's value.

The Tenth Circuit derived a contrary rule from the Act's definition of "nuclear incident." App., *infra*, 15a-16a. As already explained, see pp. 5-6, *supra*, the Act's jurisdictional provision covers "any public liability action arising out of or resulting from a nuclear incident," 42 U.S.C. §2210(n)(2), and the Act deems such actions to arise under federal law, *id.* §2014(hh). A "public liability action" is "any suit asserting public liability"—*i.e.*, "legal liability arising out of or resulting from a nuclear incident," *id.* §2014(w), (hh); and a "nuclear incident" includes, among other things, a radioactive discharge causing "damage to property," *id.* §2014(q). But the fact that the Act *lists* "damage to property" among the types of injuries to which the Act's jurisdictional grant, liability cap, indemnity clauses, insurance requirements, and other provisions apply does not mean Congress intended a newly minted federal standard to govern the *degree* of property damage necessary to support a claim. To the contrary, that is precisely the sort of "substantive rule[] for decision" governed by "the law of the State in which the nuclear incident involved occurs." *Id.* §2014(hh). Where Congress intends to displace state law, it must make that intent clear. See *Medtronic, Inc.* v. *Lohr*, 518

U.S. 470, 485 (1996). Here, it did the opposite, incorporating rather than supplanting state-law standards.

Nor are state-law standards superseded on the ground that they are "inconsistent with the provisions of [Section 2210]." 42 U.S.C. §2014(hh). Nothing in Section 2210 remotely addresses the degree or type of property damage an owner must suffer in order to recover. The reference to "damage to property," the definitions of "nuclear incident" and "public liability action," and the clause deeming such actions to arise under federal law are all found in Section 2014, not Section 2210. See 42 U.S.C. §2014(q), (hh). And even assuming those provisions are somehow "incorporate[d]" into Section 2210, as the court of appeals believed, App., *infra*, 16a n.10, a state law specifying a *standard* for compensable property damage is not "inconsistent" with a provision that merely *lists* "damage to property" as a type of injury to which other provisions of the Act apply.

The exception for state laws "inconsistent" with Section 2210 was obviously intended to refer to the substantive restrictions actually set forth in Section 2210 itself, such as the overall limits on liability, 42 U.S.C. §2210(e); the (post-August 20, 1988) limitation on punitive damages, *id.* §2210(s); the restriction on recovery of evacuation costs, *id.* §2210(q); and the limitation on lessor liability, *id.* §2210(r). Had Congress wanted to establish a federal minimum threshold of property damage, it would have included such a limit—along with the other restrictions—in Section 2210. The absence of any such provision speaks volumes.

2. The Tenth Circuit, moreover, ignored the fact that no provision of the Act requires a plaintiff to *prove* a "nuclear incident" as a substantive element of its claim. Instead, the Act merely defines "public liability action" as

a "suit *asserting* public liability" (*i.e.*, a suit asserting "legal liability arising out of or resulting from a nuclear incident") for purposes of its provision conferring concurrent federal *jurisdiction*. 42 U.S.C. §§2014(w), (hh), 2210(n)(2) (emphasis added). The Act likewise deems "suit[s] *asserting* public liability" to arise under federal law. *Id.* §2014(hh) (emphasis added). Petitioners' complaint undeniably "assert[ed]" public liability. See App., *infra*, 3a.

The court of appeals effectively rewrote the statute because it did not believe Congress intended to "render the statute's nuclear incident requirement superfluous outside of the pleading stage." App., *infra*, 16a. But it was hardly anomalous for Congress to define jurisdiction in terms of what a complaint "assert[s]," even though doing so renders the condition "superfluous outside of the pleading stage." See, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987) (plaintiffs need not "prove their allegations of ongoing noncompliance before jurisdiction attaches" where a statute requires only that "a defendant be '*alleged* to be in violation'"). Nor is it anomalous that a claim's substantive elements differ from the jurisdictional requirements: Price-Anderson's jurisdictional and substantive provisions have diverged throughout the Act's history. See pp. 3-7, *supra*; *e.g.*, *Stibitz* v. *Gen. Pub. Utils. Corp.*, 746 F.2d 993, 995-996 (3d Cir. 1984). Congress did not "intend[] for these jurisdictional terms to serve the additional purpose of limiting the types of claims that may be brought in a public liability action." *Cotroneo*, 2011 WL 1420994, at *10 (Dennis, J., dissenting).

The court below was troubled that, "[w]ere a plaintiff only required to plead the presence of a nuclear incident, but never establish one, a 'public liability action' would be

completely indistinguishable from whichever state tort claim a particular [Price-Anderson] action incorporates." App., *infra*, 16a. But that is exactly what Congress intended when it directed that "substantive rules for decision" derive from state, not federal, law. 42 U.S.C. §2014(hh).

3. Finally, even if Section 2014(q)'s reference to "damage to property" could somehow be read as a substantive element rather than a mere category of claims covered by the Act's jurisdictional provision, that element should be interpreted—as the Sixth Circuit did in *Rainer*—to incorporate applicable state law. See 402 F.3d at 618. "Congress sometimes intends that a statutory term be given content by the application of state law." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989). While courts generally assume that Congress intends a federal definition, they look to state law when a statute's text, history, and purposes indicate Congress intended that result. See *id.* at 43-47.

That is the case here. Section 2014(hh) *expressly requires* courts to apply state-law substantive rules. 42 U.S.C. §2014(hh). The legislative history confirms Congress's intent. See pp. 3-7, *supra*. And the standard of compensable harm in a tort suit is a matter at the core of traditional state authority—an area where Congress should be particularly loath to tread. Cf. *Reconstruction Fin. Corp.* v. *Beaver County*, 328 U.S. 204, 209-210 (1946) (defining "real property" in a federal statute to incorporate state law because the subject was "deeply rooted in state traditions, customs, habits, and laws"). All those

considerations refute the notion that Congress intended to impose a federal standard of harm.[3]

II. THE CIRCUITS ARE DIVIDED OVER WHETHER CONTAMINATION THAT DIMINISHES PROPERTY VALUE CONSTITUTES "DAMAGE TO PROPERTY"

The courts of appeals also disagree over whether contamination resulting in lost property value amounts to "damage to property" under the Act's "nuclear incident" definition. The Third Circuit has correctly answered that question in the affirmative. The decision below, by contrast, answered it in the negative—and in doing so defied decades of settled administrative practice.

A. The Courts Are Squarely Divided

1. In *Pennsylvania* v. *General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983), the Commonwealth of Pennsylvania and two townships sued the owners, operators, designers, and builders of the Three Mile Island nuclear plant. They sought damages for economic losses, including personnel costs incurred responding to the accident and lost real estate taxes due to "'diminution of real estate values.'" *Id.* at 120-121; but cf. *id.* at 121 (rejecting tax claim on unrelated grounds). As the Third Circuit noted, "[t]he complaints *do not* contain any claim of damages for direct *physical damage* to any of plain-

[3] The court of appeals, offering guidance for remand, stated that the district court's state-law trespass instruction was erroneous and clarified the law of nuisance. See pp. 14-15 n.2, *supra*. Because the court had already vacated the verdict for failure to instruct on the purported federal-law element, however, it never addressed whether those state-law issues independently required reversal. Jury instructions are grounds for a new trial only if prejudicial. See *Staub* v. *Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011); Fed. R. Civ. P. 61. With respect to the nuisance claim in particular, it is highly unlikely that the issue clarified by the court of appeals had any effect on the verdict.

tiffs' property, such as *physical damage* to public buildings, parks, vehicles and equipment." *Id.* at 122 (emphasis added). Instead, the plaintiffs alleged only that "radioactive materials emitted during the nuclear incident permeated the entire area, and this rendered the public buildings unsafe for a temporary period of time, *and constituted a physical intrusion upon the plaintiffs' properties.*" *Ibid.* (emphasis added).

Those allegations, the Third Circuit held, were sufficient to establish that "the events at Three Mile Island constituted a 'nuclear incident.'" 710 F.2d at 123. "By statutory definition," the court noted, a nuclear incident "must cause 'bodily injury, sickness, disease or death, or loss of or damage to property, or loss of use of property.'" *Ibid.* The plaintiffs "clearly claim[ed] temporary loss of use of property." *Ibid.* And, in addition, they adequately claimed "'damage to property' *as a result of the intrusion of radioactive materials upon plaintiffs' properties through the ambient air.*" *Ibid.* (emphasis added). That contamination was sufficient to show "damage to property," the court held, "*irrespective* of any causally-related permanent *physical* harm to property." *Ibid.* (emphasis added). The court thus reinstated the claims. *Ibid.*[4]

2. By contrast, the decision below rejected the claim that plutonium contamination resulting in diminished property value qualifies as "damage to property" under Section 2014(q). Plaintiffs, it held, must "present evidence of *actual physical damage*" beyond the contamina-

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[4] In *In re TMI Litigation*, 940 F.2d 832 (3d Cir. 1991), the Third Circuit held that other aspects of *Pennsylvania*'s reasoning did not survive the 1988 amendments. *Id.* at 857. But the court did not cast any doubt on the "nuclear incident" holding. Indeed, the definition of "nuclear incident" remained unchanged. See pp. 3-7, *supra*.

tion itself. App., *infra*, 19a (emphasis added). Proving "[d]iminution of value" is not enough. *Id.* at 18a n.12. Thus, while the Third Circuit has held that contamination can amount to "damage to property" "irrespective of any causally-related permanent physical harm" and despite the absence of any further "physical damage," 710 F.2d at 122-123, the Tenth Circuit held that Price-Anderson "requires a showing of actual physical injury * * * rather than a mere decline in the properties' value," App., *infra*, 19a n.12. Consequently, even if Section 2014(q)'s reference to "damage to property" did establish a federal standard for compensable harm, the circuits are squarely divided over what sort of harm is required.

B. The Tenth Circuit Erred in Requiring "Physical Injury" Beyond Contamination Resulting in Lost Property Value

The Tenth Circuit's decision does not merely create a circuit conflict. It also imposes an erroneous requirement that has no statutory basis and defies half a century of precedent and administrative construction.

1. Driving down property values by strewing radioactive plutonium across someone's land constitutes "damage to property" within any commonsense meaning of the term. See, *e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 796 (3d Cir. 1994) (contamination constitutes "damage to property" that allows owners to "recover for the diminution of value of their land"). Indeed, "[d]epreciation in the value" of land is the classic measure of recovery in suits for property damage. See *Restatement (Second) of Torts* § 930(3)(b) & cmt. d (1979).

The Tenth Circuit claimed that courts treat reduction in property value *solely* "as a measurement of damages rather than proof of the fact of damage." App., *infra*, 19a n.12. But numerous courts have held that lost property

value is recoverable when caused by physical intrusion of dangerous particles onto another's land. See, *e.g.*, *Stevenson* v. *E.I. DuPont de Nemours & Co.*, 327 F.3d 400, 408-409 (5th Cir. 2003); *Scribner* v. *Summers*, 84 F.3d 554, 555-558 (2d Cir. 1996); *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1212-1213 (6th Cir. 1988); *Borland* v. *Sanders Lead Co.*, 369 So. 2d 523, 527-531 (Ala. 1979); *Sheppard Envelope Co.* v. *Arcade Malleable Iron Co.*, 138 N.E.2d 777, 779-782 (Mass. 1956); *Md. Heights Leasing, Inc.* v. *Mallinckrodt, Inc.*, 706 S.W.2d 218, 221-226 (Mo. App. 1985); see also *Aetna Cas. & Sur. Co.* v. *Commonwealth*, 179 S.W.3d 830, 838-839 (Ky. 2006) (radioactive contamination is "property damage" for insurance purposes); *Whittaker Corp.* v. *Am. Nuclear Insurers*, 671 F. Supp. 2d 242, 249 (D. Mass. 2009) (same); *Towns* v. *N. Sec. Ins. Co.*, 964 A.2d 1150, 1161 (Vt. 2008); *Reese* v. *Travelers Ins. Co.*, 129 F.3d 1056, 1060 n.2 (9th Cir. 1997). And the one prior circuit case to address this issue under Price-Anderson held that "physical harm" beyond the contamination itself was *not* required. See pp. 25-26, *supra*.

2. Any doubt is erased by longstanding administrative practice. The "contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new," is entitled to "peculiar weight." *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933); see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Here, that agency has long understood radioactive contamination to qualify as "property damage."

Shortly after Price-Anderson was enacted, the Atomic Energy Commission issued a form insurance policy,

modeled on policies already widely used in the industry, designed to satisfy the Act's insurance requirements. See *Financial Protection Requirements and Indemnity Agreements*, 25 Fed. Reg. 2948 (Apr. 7, 1960); see also 23 Fed. Reg. 6681 (Aug. 28, 1958) (proposed rule). That policy explicitly defined "property damage" to include "physical injury to or destruction *or radioactive contamination* of property." 25 Fed. Reg. at 2949 (emphasis added). That definition is still in use today. See 10 C.F.R. §140.91, app. A ("Property damage means physical injury to or destruction *or radioactive contamination* of property * * * ." (emphasis added)).

The agency thus made clear that—consistent with widespread industry understanding—the term "property damage" includes not only "physical injury" but also "radioactive contamination of property." 25 Fed. Reg. at 2949. And the whole point of those form policies was to satisfy the Act's requirements by tracking the statutory definition. See 10 C.F.R. §140.15(a). It would make no sense to define "property damage" one way in the statute but another way in the insurance contracts designed to comply with the statute. Congress has revisited the Act multiple times without altering that provision. It has thus acquiesced in the agency's longstanding, reasonable construction. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986).

3. The Tenth Circuit compared contamination resulting in lost property value to the asymptomatic subcellular damage it had previously held not to qualify as "bodily injury." App., *infra*, 17a. But that analogy fails. A person cannot sell himself, so it may well be that there is no present bodily "injury" from cell damage apart from its medical manifestations. But a landowner whose property is devalued because of plutonium contamination has suf-

fered both an invasion of his property and genuine, immediate economic harm.

The court of appeals also deemed lost property value insufficient because the "reduced value [could] stem[] from * * * unfounded public fear regarding the effects of minor radiation exposure." App., *infra*, 18a n.12. Under the *Restatement*, however, lost market value is the proper measure of damages whether or not the public's fear is justified. See *Restatement (Second) of Torts* § 821F cmt. f (1979); but cf. App., *infra*, 26a-29a. Besides, the mere possibility that a decline in market value *might* reflect irrational fears does not justify a rule that such declines are never recoverable *whether rational or not.* And the fears here were hardly irrational, given the expert evidence that the property owners suffered increased risks and rates of cancer. See p. 9, *supra.*

4. Finally, by denying property owners any recovery on otherwise valid state-law claims—even if the claims accrued before the 1988 amendments—the Tenth Circuit's decision raises serious constitutional concerns under the Due Process and Takings Clauses. See *Fein* v. *Permanente Med. Group*, 474 U.S. 892, 894-895 (1985) (White, J., dissenting); *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 (9th Cir. 1982). In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), this Court upheld the prior version of Price-Anderson against a due process challenge but expressly left open whether a "legislatively enacted compensation scheme" must "provide a reasonable substitute remedy." *Id.* at 88. The decision below threatens to deny large numbers of landowners any remedy at all. That does not merely aggravate the intrusion on state law. It creates profound constitutional issues that weigh dispositively against the Tenth Circuit's construction. See *Edward J.*

DeBartolo Corp. v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

III. THE QUESTIONS PRESENTED ARE MATTERS OF NATIONAL IMPORTANCE

The Tenth Circuit's holdings are also important—both to state sovereigns and to injured landowners.

A. The Tenth Circuit's Decision Undermines the Federal-State Balance Congress Intended

As this Court has cautioned, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). That principle reflects the profound federalism values at stake when a federal statute is construed to undermine traditional state authority. The Tenth Circuit's holding that Price-Anderson imposes a federal standard of compensable harm—displacing States' authority to determine remedies for injured property owners—strikes at the heart of those federalism concerns.

Congress has repeatedly reaffirmed its purpose to preserve state law under the Act. In 1957, it made clear that the rights of injured persons would be "established by State law" and avowed "no interference with * * * State law" unless damages exceeded the liability cap. S. Rep. No. 85-296, at 9 (1957). In 1966, it observed that "one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law" and confirmed it would "interfer[e] with State law to the minimum extent necessary." S. Rep. No. 89-1605, at 6, 9 (1966). The Atomic Energy Commission's general counsel explained: "It would appear eminently reasonable to avoid disturbing ordinary tort law remedies with respect to damage claims where the circumstances are not substantially different from those encountered in many ac-

tivities of life which cause damage to persons and property * * * ." *Proposed Amendments to Price-Anderson Act Relating to Waiver of Defenses: Hearings Before the Joint Comm. on Atomic Energy*, 89th Cong. 35 (1966). In 1988, Congress embedded that principle in the statutory text: "[T]he substantive rules for decision in [a public liability] action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [Section 2210]." 42 U.S.C. §2014(hh). Congress thus "assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

The Tenth Circuit's ruling that *federal* law determines the threshold standard for compensable harm does not merely flout that design. It also invades a core attribute of traditional state authority, denying States the ability to make important policy decisions about the sorts of injuries that should be redressed. It does so, moreover, not on the basis of any express congressional command, but on the implausible theory that Congress—merely by listing "damage to property" among the types of injuries covered by the Act—federalized the substantive rules for determining what *sorts* of property damage are compensable. That gratuitous intrusion on traditional state authority warrants this Court's review.

B. The Tenth Circuit's Decision Abrogates Important Property Rights

The questions presented are also inordinately important to property owners. Nuclear incidents can affect large numbers of individuals—this case alone involves thousands. App., *infra*, 75a. The decision below threat-

ens to foreclose any redress except in the most extreme circumstances.

This case, for example, arises out of reckless safety violations that not only strewed radioactive particles across landowners' properties for decades but also left plutonium at the plant site that continues to threaten those properties. See pp. 7-9, *supra*. The violations were so egregious that FBI and EPA agents raided the plant (in an operation dubbed "Desert Glow") and Rockwell pled guilty to criminal charges. See p. 8, *supra*. Rockwell and Dow admitted that plutonium from Rocky Flats had contaminated the neighboring properties. C.A. App. 1646. And the property owners suffered concrete economic harm that the jury found to be in the hundreds of millions of dollars, as well as increased risks and rates of cancer. See pp. 9-11, *supra*.

The Tenth Circuit nonetheless reversed the judgment because the jury had not been asked whether the contamination was severe enough to qualify as "damage to property" under the court's new federal standard. It cannot be that Price-Anderson affords relief only for cataclysms such as "an increased risk to health so high that no reasonable person would freely choose to live on or work at the property," or contamination so severe that "the soil can no longer produce crops that are safe for consumption." App., *infra*, 20a. Such an extreme interpretation ignores the fact that Congress sought to create a balanced compensation regime grounded in state law—not to grant immunity for anything short of atomic blasts that level the countryside. The Tenth Circuit's decision abrogating those traditional state-law remedies warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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