No. 10-1377

IN THE

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

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Respondents do not dispute that the Tenth Circuit construed Price-Anderson's reference to "damage to property" to impose a federal standard of compensable harm—one that bars recovery for radioactive contamination that reduces a property's value unless there is some "physical injury" to the property beyond the contamination itself. Respondents' efforts to deny the resulting circuit conflicts fail. They dismiss the Sixth Circuit's contrary holding as "semantic imprecision," Br. in Opp. 20, but ignore that the circuits themselves acknowledge the conflict. They try to distinguish Third Circuit precedent, but rely on an irrelevant statutory amendment and an equally irrelevant difference in procedural posture. And

they nowhere deny the conflict with the government's contemporaneous and longstanding construction.

Attempting to downplay the conflicts, respondents caricature this case as a dispute over "a single plutonium atom, which presented no scientifically founded health risk." Br. in Opp. 30. But they ignore the actual jury instructions, which required the jury to find *proven* increases in health risk and *proven* losses in property value from *proven* contamination. See Pet. App. 134a-138a, 147a-149a. And they ignore the wealth of evidence at trial that plutonium levels were far above normal and caused elevated cancer rates—evidence the jury was entitled to, and did, believe. See Pet. 9; p. 9 & n.4, *infra*. Besides, under the Tenth Circuit's holding, it does not matter whether property is contaminated by one radioactive atom or one ton of them, or whether property values go down 1% or 99%. Unless the owner can show some further "physical injury" to his property—a crater, perhaps—he has not suffered "damage to property" as the Tenth Circuit defined that term. That holding attributes to Congress both a blatant disregard for property rights and a striking indifference to traditional state authority. The Court should grant review.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER FEDERAL LAW IMPOSES A STANDARD OF COMPENSABLE HARM

A. In *Rainer* v. *Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), the Sixth Circuit squarely held that the standard for compensable harm under Price-Anderson's "nuclear incident" definition is determined by state rather than federal law. The "key question," the court held, was "whether *Kentucky caselaw*" deems an injury sufficient to fall within one of the "nuclear incident" definition's categories of harm. *Id.* at 618 (emphasis added).

By contrast, the court below—like the Ninth Circuit—construed that definition to impose a *federal* standard. Pet. App. 13a-21a.

Unable to reconcile the Sixth Circuit's holding, respondents seek to rewrite it. They urge that "a PAA claim is a hybrid of *both* federal and state law" because a plaintiff must satisfy both the "underlying requirements of a state cause of action" and the purported "federal requirements for a 'nuclear incident.'" Br. in Opp. 17-18. The Sixth Circuit, they insist, ruled against the plaintiffs only "on the state-law part of their PAA claim," not on the "nuclear incident" requirement. *Id.* at 18.

That assertion defies *Rainer*'s express rationale. *Rainer* did *not* merely reject the plaintiffs' underlying state-law claim. It held that the "nuclear incident" definition *itself*—specifically, the "bodily injury" category at issue there—must be construed according to state law. 402 F.3d at 618. In a section of its opinion entitled "*'Bodily injury'* under the Price-Anderson Act," the court framed the "key question" as "whether Kentucky caselaw equates 'subcellular damage' *with 'bodily injury.'*" *Ibid.* (emphasis added). The court thus construed the "nuclear incident" definition according to state rather than federal law. It did so because, under Price-Anderson, "[c]ourts are required to look to state law for the substantive rules to apply." *Ibid.*

For that reason, when the Ninth Circuit confronted the issue in *Dumontier* v. *Schlumberger Technology Corp.*, 543 F.3d 567 (9th Cir. 2008), it recognized that the Sixth Circuit had construed the "nuclear incident" definition according to state rather than federal law. *Id.* at 570. The Ninth Circuit expressly rejected that approach: "Unlike the Sixth Circuit," it held, "we have never relied on state law to interpret bodily injury." *Ibid.*

Respondents try to marginalize *Rainer*'s holding as mere "semantic imprecision"—a ruling that "[c]ould have been more precise" and inadvertently "blend[ed] the state and federal law elements." Br. in Opp. 20. But there is nothing "imprecis[e]" about what *Rainer* said. Nor was this a stray comment. The statement that the "key question" was "whether Kentucky caselaw equates 'subcellular damage' with 'bodily injury'" was the case's central holding; it underpinned the next four pages of analysis. See 402 F.3d at 618-622.

The Ninth Circuit saw no "semantic imprecision." It simply disagreed with *Rainer*'s holding. See *Dumontier*, 543 F.3d at 570. Struggle as respondents might to re-write *Rainer*, they cannot deny that the *circuits themselves* acknowledge the conflict. The conflict has been fully ventilated by *Rainer*, *Dumontier*, the decision and dissent from denial of rehearing below, and the majority and dissent in *Cotroneo* v. *Shaw Environment & Infrastructure, Inc.*, 639 F.3d 186 (5th Cir. 2011), petition for cert. filed, No. 11-71 (July 13, 2011). That entrenched conflict warrants review.

B. Respondents' defense of the Tenth Circuit's holding on the merits likewise fails. Respondents insist that Congress sought to avoid "open-ended liability" by creating a "*hybrid* cause of action"—one that requires plaintiffs both to prove an underlying state-law claim *and* meet a federal standard of harm. Br. in Opp. 13. But Price-Anderson says no such thing. It states that "the substantive rules for decision * * * *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). Where state law is "inconsistent with the provisions of [Section 2210]"—for example, because it imposes

damages above the liability caps—*then* it must yield. *That* is how Congress avoided "open-ended liability." But one can scour the statutory text and legislative history in vain for any sign that Congress wanted to prescribe a federal standard of harm.

The Act *lists* "damage to property" among the types of injuries to which its jurisdictional grant, liability cap, and other provisions apply. 42 U.S.C. §2014(q). But that does not mean Congress made "damage to property" a new, federally defined element of the owner's state-law cause of action—much less federalized the *types* or *degrees* of property damage that are compensable. See Pet. 20-25. Instead, as *Rainer* held, those "substantive rules for decision" are governed by state law. 42 U.S.C. §2014(hh). By overriding state standards despite Congress's mandate to preserve them, the Tenth Circuit thwarted Congress's design.[1]

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

A. Even if Price-Anderson's "nuclear incident" definition imposed a federal standard of harm, the circuits would still be divided over that standard's content—specifically, whether an owner must show "physical injury" beyond the contamination itself to recover for lost property value. In *Pennsylvania* v. *General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983), the Third Circuit al-

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[1] Respondents' suggestion that a federal standard is necessary to avoid Article III problems (Br. in Opp. 30) is meritless. Congress can provide federal-question jurisdiction over claims whose elements derive entirely from state law so long as they implicate a possible federal defense. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 492-497 (1983). The limitations in Section 2210 fulfill that requirement, with or without a federal standard of harm.

lowed a suit to proceed even though "[t]he complaints d[id] not contain any claim of damages for direct physical damage to any of plaintiffs' property." *Id.* at 122. The complaints satisfied the "statutory definition" of "nuclear incident," the court held, because they alleged "'damage to property' as a result of the intrusion of radioactive materials upon plaintiffs' properties through the ambient air, *irrespective of any causally-related permanent physical harm to property.*" *Id.* at 123 (emphasis added). That holding cannot be reconciled with the "physical injury" requirement the Tenth Circuit imposed here. Pet. App. 16a-19a.

Respondents insist there is no conflict because *Pennsylvania* predated the 1988 amendments. Br. in Opp. 21-23. Those amendments provided that suits arising out of nuclear incidents would be deemed to arise under federal law. 42 U.S.C. §2014(hh). But the only change they made to the "nuclear incident" definition was to replace "Commission" with "Nuclear Regulatory Commission" and "subsection" with "section." Pub. L. No. 100-408, §16(a)(1), (d)(1), 102 Stat. 1066, 1079-1080 (1988). The amendments thus did not redefine "damage to property" or otherwise change *what a "nuclear incident" is.* On that point, the Third Circuit was clear: Intrusion of radioactive contaminants qualifies as "damage to property," and thus a "nuclear incident," "irrespective of any causally-related permanent physical harm." 710 F.2d at 123.

Respondents also assert there is no conflict because *Pennsylvania* arose on motions to dismiss or for summary judgment while this case was tried to a jury. Br. in Opp. 22-24. But that too is irrelevant. Regardless of the posture, the *legal* question is the same: Does radioactive contamination, without further "physical harm," qualify as "damage to property"? The Third Circuit did not

deem the complaints' allegations sufficient because the plaintiffs might prove a different, "physical" injury at trial. It held the *radioactive contamination itself* sufficient to establish "damage to property." 710 F.2d at 123. The Tenth Circuit held the opposite below.[2]

B. The decision below also squarely conflicts with the federal government's longstanding interpretation. Shortly after Price-Anderson was enacted, the Atomic Energy Commission explicitly defined "property damage" to include "*physical injury* to or destruction *or radioactive contamination* of property," 25 Fed. Reg. 2948, 2949 (Apr. 7, 1960) (emphasis added)—a definition still in use today, 10 C.F.R. §140.91, app. A. By defining "physical injury" and "radioactive contamination" as two *alternative* types of "property damage," the government made clear that contamination amounts to "damage to property" even absent any further "physical injury."

Although the petition discussed that longstanding interpretation at length, Pet. 28-29, the brief in opposition ignores it. That omission is glaring. For decades, the government has been directing nuclear facility operators to obtain insurance against a risk that, according to the Tenth Circuit, they never have to pay. That conflict likewise warrants review.[3]

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[2] Respondents fault petitioners for focusing on the *complaints* in *Pennsylvania* even though the plaintiffs "*expanded* on the complaints' allegations" in briefing and argument. Br. in Opp. 23-24 n.4. But those expanded allegations did not claim any further physical injury to property either—only that the intrusion of contaminants itself was sufficient. See 710 F.2d at 122-123.

[3] Given the undisputed conflict with the government's longstanding interpretation, the Court may wish to call for the views of the Solicitor General.

C. Finally, respondents nowhere explain why it makes sense to define "damage to property" to exclude radioactive contamination that reduces property values. Respondents repeatedly trivialize the issue by mischaracterizing this as a "no-injury case." Br. in Opp. 13. It is nothing of the sort. Respondents contaminated petitioners' land with carcinogenic plutonium, driving down property values by threatening grave medical risks to inhabitants. See Pet. 9; p. 9 & n.4, *infra*. Numerous States would have found that sufficient "damage to property" to warrant redress, whether or not the landscape was physically deformed. See Pet. 27-28. There is no reason to interpret Price-Anderson any differently.

III. THE TENTH CIRCUIT'S STATE-LAW RULINGS ARE NO BASIS FOR DENYING REVIEW

Respondents urge the Court to deny review because the court of appeals' state-law rulings make further proceedings inevitable. Br. in Opp. 25-29. That is both incorrect and irrelevant.

A. The court of appeals addressed the state-law issues to offer guidance for remand, not because they independently required reversal. Pet. 25 n.3. For example, addressing a ruling issued two years before trial, Br. in Opp. 6, the court clarified that Colorado nuisance law does not permit recovery for anxiety or fear of health risks unless the risks are "supported by some scientific evidence." Pet. App. 29a. Crucially, however, the instructions given at trial *never* told the jury they could award damages for unsubstantiated anxiety or fears. See *id.* at 134a-138a. To the contrary, they repeatedly required the jury to find "some increased risk of health problems" or "some increment of increased health risk," *ibid.*—as respondents concede, Br. in Opp. 7.

Petitioners presented extensive expert testimony that plutonium levels near the plant were far above normal and that class members suffered increased risks and rates of cancer as a result—testimony that withstood a *Daubert* challenge. Pet. 9.[4] To find prejudicial error sufficient to warrant retrial based on the state-law scientific-evidence requirement, one would have to assume that, even though petitioners offered scientific testimony of increased health risks, even though the court instructed the jury it had to find increased health risks, and even though the court *never* told the jury it could rely on unfounded fears, the jury might have ignored the scientific evidence and relied on unfounded fears anyway. That is inconceivable.

Respondents urge that Instruction No. 3.28 in fact did allow the jury to award damages for nuisance without finding "'actual or verifiable health risk.'" Br. in Opp. 7,

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[4] While respondents suggest that petitioners' own experts conceded that exposures were small, Br. in Opp. 3, 14-15 n.1, the quoted expert actually testified that there was "quite a range of exposures and quite a range of risks," and that, although "*some of these* are very, very small" and "regulatory agencies would not have been concerned" about *those*, other exposures were much higher and were "sufficient to cause latent diseases among members of the exposed group," Tr. 3658-3662 (emphasis added); see also Tr. 3108-3109 (off-site radiation levels up to "100 to 1,000 times what the normal background should be"); Tr. 3118-3120 (radiation "way in excess" of background levels); Tr. 3331-3337. Respondents cite studies downplaying the health risks, Br. in Opp. 3, but they ignore evidence contradicting those studies and showing elevated cancer rates near the plant, see Tr. 4800-4843, 4862, 4947, 5891-5893. Respondents also deride the extensive evidence of *on-site* contamination as irrelevant, Br. in Opp. 5, but ignore evidence that plutonium continued to migrate off-site, Pet. 9. In short, the jury had ample basis to conclude that plutonium levels near the plant were far above normal and posed significant health risks. This case does not remotely involve irrational fears about a single plutonium atom.

27 n.5. That is false. That instruction—reproduced in whole as an appendix, *infra*—expressly stated that it applied *only* to certain unrelated findings the jury had to make (potentially relevant if certain class members later asserted claims not decided at trial). App., *infra*, 1a; see C.A. Supp. App. 1336. The instruction specifically directed the jury "*not* to consider * * * this form of interference in deciding whether Plaintiffs had proved their class-wide nuisance claim." App., *infra*, 2a; see also Pet. App. 137a. That respondents' assertion of prejudicial error from the nuisance instructions rests on an instruction the jury was told *not* to apply to the nuisance claim speaks volumes. The court of appeals deemed it desirable to clarify for remand that health risks must be well-founded. But that issue plainly had no effect on the verdict, and the court of appeals never suggested it did.

B. Respondents also point to the Tenth Circuit's ruling that Colorado *trespass* law imposes a "physical injury" requirement. Br. in Opp. 26; see Pet. App. 31a-35a. But the jury awarded "identical compensatory damages for the trespass and nuisance claims," finding that "Defendants' proven trespass and nuisance caused the same damages." Pet. App. 49a. Upholding the award on *either* claim would thus end the case.[5]

Respondents' reliance (at 28) on the court's vacatur of class certification fares no better. The court decertified the class only "[i]n light of its substantive rulings." Br. in Opp. 10; see Pet. App. 35a-36a. Absent some other basis for reversal, the class could not have been decertified.

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[5] The allocations of fault between the two defendants differed on the two claims. Pet. App. 50a-51a. But total damages are the same and both defendants are fully indemnified. *Id.* at 36a n.22, 49a. Affirmance on either claim thus would allow petitioners to obtain payment of the entire compensatory judgment without any retrial.

The same is true of the court's preemption ruling. Br. in Opp. 28-29. Having already ordered a remand, the court stated that respondents should be given another chance to try to identify regulations that might preempt state law. Pet. App. 23a-26a. As the court noted, however, respondents never identified "particular federal regulations or statutes [they] believe actually conflict with any applicable state tort standards." *Id.* at 24a. The court could hardly have found prejudicial error sufficient to reverse an otherwise valid judgment based on regulations respondents never even identified. And even if this ruling did require further proceedings on those *legal* issues, it does not mandate a *retrial.*

C. In any event, this Court has "unquestioned jurisdiction to review interlocutory judgments of federal courts." E. Gressman, *et al.*, *Supreme Court Practice* 280 (9th ed. 2007). It routinely does so where a case presents an important legal issue that is "fundamental to the further conduct of the case"—particularly where review "may serve to hasten or finally resolve the litigation." *Id.* at 281-282.

The existence and scope of any federal standard of harm under Price-Anderson is precisely such an issue. There is no point in conducting further proceedings on whether petitioners can meet the Tenth Circuit's ill-defined new "physical injury" requirement if the Act does not impose it. The questions presented thus would fundamentally alter the course of any further proceedings. Resolving those questions now would hardly make review "advisory." Cf. Br. in Opp. 25. This case has already been pending for two decades; the trial alone lasted four months. Pet. App. 4a. Deferring review would only threaten years more litigation, another appeal, and potentially a *third* trial in this long-running case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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