No. 10-1377

IN THE

Supreme Court of the United States

MERLIYN COOK, *ET AL.*

Petitioners,

v.

ROCKWELL INTERNATIONAL CORPORATION AND THE DOW CHEMICAL COMPANY,

Respondents.

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

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state as follows:

Respondent Rockwell International Corporation merged with Boeing, NA, Inc., was renamed Boeing North American, Inc., and then merged into The Boeing Company. State Street Bank & Trust Company beneficially owns 10% or more of The Boeing Company's stock.

Respondent The Dow Chemical Company has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The petition asks this Court not to resolve circuit conflicts but to invent them. The Tenth Circuit reversed a judgment of nearly $1 billion entered on behalf of a plaintiff class that was not required to prove any present physical injury to, or loss of use of, property. The Tenth Circuit's decision is consistent with that of every other circuit to address the issues presented, and rests on multiple independent grounds in addition to those raised in the petition. Because petitioners essentially seek an advisory opinion on issues on which there is no circuit conflict, the petition does not warrant this Court's review.

The district court here certified a class consisting of the owners of more than 15,000 parcels of property covering 30 square miles east of the Federal Government's former Rocky Flats nuclear weapons facility near Denver, Colorado. Petitioners, the named plaintiffs, allege that respondents, who operated the facility under contract with the Government, are responsible for plutonium emissions that diminished their property values. But petitioners did not prove any present physical injury to person or property, or loss of use of property, on a classwide basis. Rather, they vigorously—and successfully—urged the district court to dispense with any such injury requirement. The district court thereby allowed petitioners to recover based solely on a *risk* of injury to person or property, even if unverifiable or scientifically unfounded. As the Tenth Circuit recognized, neither federal nor state law allows that result. The Tenth Circuit thus vacated the almost $1 billion judgment in favor of the class on *both* federal and state law

grounds, reversed the class certification order, and remanded the case to the district court for further proceedings.

The petition proceeds from the erroneous premise that petitioners lost *only* on the federal grounds identified in the petition. But even a cursory glance at the opinion below confirms that petitioners lost on a multiplicity of federal and state grounds. Accordingly, the petition presents an unsuitable vehicle for addressing the questions presented, because—wholly apart from the interlocutory posture of the case—resolution of those questions by this Court would not change the fact that the classwide judgment cannot stand, and the case must return to the district court for further proceedings.

Moreover, the petition fails on its own terms, because both of the circuit splits alleged are contrived. Indeed, in their voluminous Tenth Circuit briefing, petitioners never even *cited* either of the cases on the other side of the alleged splits. As every circuit to have considered the issue has concluded, the Price-Anderson Act (PAA), 42 U.S.C. § 2210 *et seq*., as amended in 1988, creates an exclusive federal cause of action for nuclear-related injuries that is a hybrid of federal and state law. Accordingly, a PAA plaintiff must satisfy the requirements of *both* federal *and* state law to recover. Contrary to petitioners' suggestion, no circuit has held that a plaintiff may bring a PAA claim without satisfying the Act's *federal* injury requirement, just as no circuit has held that a plaintiff may bring such a claim without satisfying an underlying *state* injury requirement. Nor has any circuit held that the mere presence of a single

radioactive atom on property satisfies the Act's *federal* injury requirement.

It is no accident that petitioners fought hard to relieve themselves of the burden of proving injury to person or property, or loss of use of property, on a classwide basis. Both federal and state authorities have studied the off-site health risks from Rocky Flats at great length, and have found "no apparent public health hazard for past, current and future exposures." C.A. App. 3450.85 (Study by the federal Agency for Toxic Substances and Disease Registry); *see also id.* ("[E]stimated total exposures to radiation from the soil are far lower than levels associated with adverse health effects and are 3,000 times lower than the average exposure to ionizing radiation experienced by United States residents."); C.A. App. 3472-74 (Colorado Department of Public Health and Environment Study) (explaining that health risks from off-site plutonium emissions at Rocky Flats are the same as the health risks to all Americans from plutonium fallout caused by nuclear testing, and far less than the risk of dying from a lightning strike). Notwithstanding petitioners' alarmist rhetoric, their own experts conceded at trial that "some of these are very, very small exposures," C.A. App. 2914, and that "regulatory agencies would not have been concerned with such exposures," *id.*, which are indistinguishable from worldwide fallout caused by atmospheric nuclear weapons tests, Trial Tr. 3335-37.

At the end of the day, petitioners are the victims of their own success in the district court. They were able to secure a judgment of almost $1 billion in the first place only by persuading that court to certify a

sprawling class and then to dilute the substantive requirements of both federal and state law to allow a classwide recovery. When that judgment finally reached the court of appeals, it collapsed like a house of cards. Petitioners' efforts to conjure up federal-law circuit splits that would alter the Tenth Circuit's disposition of the case are unavailing. Accordingly, this Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

The Federal Government established the Rocky Flats facility in the early 1950s, at the height of the Cold War, to produce nuclear weapons. Pet. App. 2a. Rather than operate the facility itself, the Government turned to private contractors to handle the job. *Id.* Respondent The Dow Chemical Company operated the facility from 1952 to 1975, and respondent Rockwell International Corporation operated it from 1975 to 1989. *Id.*

Beginning in the late 1960s and early 1970s, a series of public and private studies found plutonium above background levels on certain properties adjacent to the facility. *See* C.A. App. 2899-2904. These studies were immediately and widely publicized, and spawned both regulation and litigation by off-site landowners seeking damages for trespass and nuisance. *See, e.g.*, *Good Fund Ltd.-1972 v. Church*, 540 F. Supp. 519 (D. Colo. 1982), *rev'd sub nom. McKay v. United States*, 703 F.2d 464 (10th Cir. 1983). Virtually all of the properties at issue in this litigation were developed *after* this publicity, with the approval of the state and local governments. *See*, *e.g.*, C.A. App. 3490.1.

In response to a series of complaints about *on-site* contamination, agents from the Federal Bureau of Investigation, the Department of Justice, and the Environmental Protection Agency raided the Rocky Flats facility on June 6, 1989. *See* C.A. App. 1707-09, 3153-54, 3428, 3541-44. Respondent Rockwell, which operated the facility at that time, was subsequently charged with federal regulatory violations, pleaded guilty, and paid an $18.5 million fine in 1992. *See* C.A. App. 1154-90, 2577. Those charges had nothing to do with any *off-site* contamination. *See id.*

With the end of the Cold War, the Rocky Flats facility closed in 1992. The approximately 6,500-acre plant site was extensively remediated, and is now a wildlife refuge. Following years of careful study, the federal Agency for Toxic Substances and Disease Registry (ATSDR) issued a report in 2005 finding that "the levels of off-site surface soil contamination [around Rocky Flats] are no apparent public health hazard for past, current and future exposures." C.A. App. 3450.85.

B. Procedural History

Petitioners filed this lawsuit against respondents under the PAA on January 30, 1990, alleging that plutonium emissions from Rocky Flats contaminated, and diminished the value of, all properties within a 30-square-mile area east of the facility. *See* Pet. App. 3a; C.A. App. 289-320. Petitioners sought certification of a class of all property owners within that area as of the day after the FBI raid, *i.e.*, June 7, 1989.

In October 1993, the district court (Kane, J.) granted the motion for class certification, and

certified a class consisting of "[a]ll persons and entities owning an interest (including mortgagee and other security interests) in real property situated within the Property Class Area, exclusive of governmental entities, defendants, and defendants' affiliates, parents, and subsidiaries," as of June 7, 1989. *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 382, 388-89 (D. Colo. 1993); *see also Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473, 476 n.3 (D. Colo. 1998) (reaffirming class certification and definition). The Property Class Area was delineated on a map provided by petitioners, *see* C.A. App. 2279, and consisted of approximately 15,370 different parcels of property, *see* 181 F.R.D. at 476 n.3.

Much of the 1990s was taken up with fact discovery and summary judgment briefing. For present purposes, it suffices to say that the district court denied respondents' motions for summary judgment, and the case proceeded to trial on the property-damage claims of the certified class. In particular, petitioners pursued two distinct claims under the PAA, one based on Colorado trespass law and the other based on Colorado nuisance law.

In July 2003, the district court issued an important ruling distilling many of its previous orders and "clarif[ying] the scope of trial." *Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d 1175, 1179 (D. Colo. 2003). In particular, the court held that petitioners could prevail without establishing any present physical injury to person or property, and could even recover based solely on an unverifiable or scientifically unfounded risk of adverse health effects. *See id.* at 1199-1209 (citing, *inter alia*, *Restatement (Second) of Torts* § 821F cmt. f (1965)).

"Plaintiffs need not demonstrate that plutonium and other Plant-derived contaminants are present on their properties at levels of toxicological concern or are otherwise causing damage to their properties." *Id.* at 1201.

The jury trial began in October 2005, and ended in January 2006. As relevant here, the court instructed the jury that the plaintiff class could recover on both trespass and nuisance theories without proving any present physical injury to person or property. With respect to trespass, the court instructed the jury that "Plaintiffs are not required to show that plutonium is present on the Class Properties at any particular level or concentration, that they suffered any bodily harm because of the plutonium or that the presence of plutonium on the Class Properties damaged these properties in some other way." Jury Instruction No. 3.3, Pet. App. 132a (emphasis in original). And with respect to nuisance, the court instructed the jury that the plaintiff class could recover if respondents "caus[ed] Class members to be exposed to plutonium and placing them at *some increased risk* of health problems as a result of this exposure." Jury Instruction No. 3.6, Pet. App. 134a (emphasis added); *see also* Jury Instruction No. 3.7, Pet. App. 136a ("It is enough to find … that the Class members … incurred *some increment* of increased health risk.") (emphasis added); Jury Instruction No. 3.28, C.A. App. 1719 ("Plaintiffs do not need to show that any actual or threatened future contamination from Rocky Flats poses an actual or verifiable health risk.").

After three weeks of deliberations, the jury returned a verdict in favor of the plaintiff class on February 14, 2006. *See* C.A. App. 1606-35. The jury found both respondents liable for both nuisance and trespass. *See* C.A. App. 1606-18. As relief, the jury awarded the plaintiff class (1) an aggregate total of $176,850,340 in compensatory damages from both respondents, (2) an aggregate total of $110,800,000 in punitive damages from respondent Dow, and (3) an aggregate total of $89,400,000 in punitive damages from respondent Rockwell. *See* Pet. App. 5a, 115-17a; C.A. App. 1620, 1629, 1631-32.

The district court denied respondents' post-trial motions. *See* Pet. App. 44-112a. After awarding petitioners prejudgment interest dating back to 1990, *see* Pet. App. 97-107a, the district court entered a final judgment in favor of the plaintiff class in the amount of $926,104,087, Pet. App. 5a, 113-18a.

A unanimous panel of the Tenth Circuit reversed, and remanded the case for "further proceedings not inconsistent with this opinion." Pet. App. 2a; *see also id.* at 43a. As relevant here, the court of appeals recognized—as has every other circuit to address the issue—that a PAA plaintiff must satisfy the substantive requirements of *both* the PAA *and* underlying state law to recover. *See*, *e.g.*, Pet. App. 3a n.1, 4a, 16a & n.10, 26-27a & n.29, 32a, 35a. That is so, the court explained, because the "public liability action" created by the PAA is limited to claims arising from a "nuclear incident," which in turn is 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." Pet. App. 14-15a (quoting 42 U.S.C. § 2014(q), (w), (hh)). Thus, while the Act "utiliz[es] state law to frame the 'substantive rules for decision'" for a PAA claim, Congress also "made clear its intention to limit recovery to the discrete group of injuries enumerated in § 2014(q)." Pet. App. 16a (quoting 42 U.S.C. § 2014(hh)).

The Tenth Circuit held that the judgment in petitioners' favor failed under both federal and state law. With respect to the trespass claim, the court noted that the district court had instructed the jury that the plaintiff class could prevail on that claim without proving physical damage to *any* (much less *every*) property in the class area. *See* Pet. App. 19a. That instruction was incorrect as a matter of federal law, the Tenth Circuit explained, because it allowed the plaintiff class to recover under the PAA without proving any of the injuries enumerated in the statute. Pet. App. 16-19a. And that instruction was incorrect as a matter of state law, the court of appeals further explained, because it allowed the plaintiff class to recover for a concededly intangible trespass without any proof of actual physical damage to property. Pet. App. 31-35a (citing *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 387-90 (Colo. 2001)).

With respect to the nuisance claim, the Tenth Circuit noted that the district court had not instructed the jury that plaintiffs must establish one of the injuries enumerated in 42 U.S.C. § 2014(q), and thus the judgment in their favor could not stand

as a matter of federal law. *See* Pet. App. 20-21a. And that judgment could not stand as a matter of state law, the court of appeals further held, because the district court had erred by allowing plaintiffs to try their nuisance claim on the theory that even an unverifiable or scientifically unfounded health risk could give rise to a "substantial" and "unreasonable" interference with the use and enjoyment of property. Pet. App. 26-29a (citing *Boughton v. Cotter Corp.*, 65 F.3d 823, 832 n.13 (10th Cir. 1995) (applying Colorado law)).

The Tenth Circuit also held that the district court had erred by rejecting respondents' preemption argument out of hand. *See* Pet. App. 21-26a. According to the district court, the PAA incorporates state-law standards of care *even if* those standards conflict with federal nuclear safety standards. *See Cook*, 273 F. Supp. 2d at 1179. As the Tenth Circuit explained, the district court focused its preemption analysis too narrowly on the PAA itself, and ignored the independent preemptive force of *other* federal law. "There are other possible sources of federal law that might preempt state law"—including federal nuclear safety standards—"and the PAA does not expressly make these standards irrelevant to resolving a plaintiff's PAA action." Pet. App. 25a. The court of appeals thus directed the district court on remand to entertain respondents' preemption argument. *See id.* & n.18.

In light of its substantive rulings under both federal and state law, the Tenth Circuit reversed not only the judgment but also the class certification order. "As the district court's class certification analysis failed to consider whether [petitioners]

could establish various elements of their PAA claims, supplied by both federal and state law, this court must reverse the district court's class certification ruling." Pet. App. 35a. The court of appeals directed the district court to revisit class certification on remand "to determine whether [petitioners] can establish the elements of their claims, including the PAA threshold requirements, on a class-wide basis." Pet. App. 35-36a.

Petitioners sought rehearing *en banc*, but their petition was denied over the lone dissent of Judge Lucero. Pet. App. 127-29a.

REASONS FOR DENYING THE WRIT

This Court should deny the writ because (1) the Tenth Circuit's unanimous decision is correct, (2) the circuit conflicts alleged by petitioners are illusory, and (3) this case presents an unsuitable vehicle to address the questions presented. Each of these points is addressed below.

I. The Decision Below Is Correct.

What is truly remarkable about this case is not that the Tenth Circuit reversed, but that petitioners were able to obtain a classwide judgment of almost $1 billion without ever having to prove injury to person or property, or loss of use of property, in the first place. Although the petition darkly refers to "elevated cancer rates near the plant," and contamination "more than 50 times background levels," Pet. 9 (internal quotation omitted), petitioners were never required to prove any adverse effects to the health or property of even a *single* class member (much less *every* class member) to recover.

That was no oversight. Before trial, the parties vigorously disputed whether petitioners could prevail on either their trespass or nuisance theories without proving, on a classwide basis, actual physical damage to property or a verifiable and scientifically founded increased health risk. Petitioners succeeded in persuading the district court that no such proof was necessary. Thus, the court held that the plaintiff class could recover on a trespass theory even if the trespass did not damage the property in any way. *See Cook*, 273 F. Supp. 2d at 1199-1201. And the court held that the plaintiff class could recover on a nuisance theory even if any increased health risk was unverifiable or scientifically unfounded. *See id.* at 1201-08.

The Tenth Circuit recognized that the district court thereby erred as a matter of both federal and state law. As the court of appeals explained, the PAA, as amended in 1988, creates a federal-law "public liability action," defined as "'any suit asserting public liability,'" defined in turn as "'any legal liability arising out of or resulting from a nuclear incident,'" defined in turn 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.'" Pet. App. 14-15a (quoting 42 U.S.C. § 2014(hh), (q), (w)). Thus, while "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 of the PAA]," 42 U.S.C. § 2014(hh), there can be no

such action in the absence of a "nuclear incident" in the first place.

The PAA, in other words, creates a *hybrid* cause of action. The statute looks primarily to state law to provide "the substantive rules for decision" for a federal claim, *id.*, as long as those rules are consistent with the PAA, and do not allow recovery in the absence of a "nuclear incident," *i.e.*, an occurrence causing nuclear-related "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property," *id.* § 2014(q). This approach reflects Congress' overall objective of striking a balance between providing compensation for nuclear-related injuries, on the one hand, and fostering the development of nuclear energy, on the other. 42 U.S.C. § 2012(i); *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 64-65 (1978); *June v. Union Carbide Corp.*, 577 F.3d 1234, 1248 (10th Cir. 2009). If the PAA allowed recovery in the absence of a nuclear-related injury, the statute would open the floodgates to potentially vast and open-ended liability, and permit persons who have not been injured to divert resources reserved for persons who have. *See, e.g.*, *Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186, 196 (5th Cir. 2011), *petition for cert. filed*, __ S. Ct. __, 2011 WL 2790727 (U.S. July 13, 2011) (No. 11-71); *Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 570 (9th Cir. 2008) (citing *In re Berg Litig.*, 293 F.3d 1127, 1133 (9th Cir. 2002)). This is not a hypothetical concern, as underscored by the nearly $1 billion judgment in this no-injury case.

The Tenth Circuit readily rejected petitioners' argument that they satisfied the PAA's "nuclear

incident" requirement by merely *alleging*, but never *proving*, a nuclear-related injury. Pet. App. 16a. That argument (which has never been adopted by any court) would effectively read the "nuclear incident" requirement out of the statute altogether, in manifest conflict with PAA section 2210, which presupposes the occurrence of a "nuclear incident." *See*, *e.g.*, *Cotroneo*, 639 F.3d at 195-96 & n.10. "[R]ecovery on a state law cause of action without a showing that a nuclear incident has occurred would circumvent the entire scheme governing public liability actions, which is clearly inconsistent with [PAA] section 2210." *Id.* at 197. Put differently, it is "perfectly logical" that "the success or failure of a plaintiff's public liability action depends upon whether the plaintiff can prove what he asserts—public liability." *Id.* at 196. Petitioners never explain why Congress would have bothered to include a federal "nuclear incident" requirement in the statute that need only be *alleged* at the pleading stage, but never *proved* on the merits.

The Tenth Circuit just as readily rejected petitioners' alternative argument that they necessarily proved a "nuclear incident" under the PAA by proving the presence of plutonium at *any* level on their properties. While contamination *may* damage property, or cause a loss of use of property, it does not *invariably* do so. Pet. App. 18-21a;[1] *see also*

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[1] Indeed, the record in this case shows that trace levels of plutonium are present on property throughout the United States and around the world as a result of nuclear testing during the Cold War. *See* Trial Tr. 7047 ("[T]he background plutonium that is found in the soil, all over the world, has come from atmospheric nuclear testing which occurred in the earlier

Cotroneo, 639 F.3d at 195-97 (mere exposure of persons to radiation at any level does not necessarily cause "bodily injury" cognizable under the PAA); *June*, 577 F.3d at 1248-49 (same); *Dumontier*, 543 F.3d at 570-71 (same); *In re Hanford Nuclear Reserv. Litig.*, 534 F.3d 986, 1009-10 (9th Cir. 2007) (same). Thus, petitioners prove nothing by insisting that contamination *may* cause actual damage to property. *See* Pet. 27-29. As the Tenth Circuit explained, "[i]f mere contamination without actual damage were enough, Congress could have easily listed 'contamination' as an injury falling within [the PAA's] definition of 'nuclear incident.'" Pet. App. 18a.

But Congress did not do so, because the nuclear energy industry could not survive if the presence of a single radioactive atom could give rise to a property-diminution claim under the PAA. Indeed, federal safety regulations specify permissible levels of radioactive emissions, *see, e.g.*, 10 C.F.R. § 20, and it is fanciful to think that Congress authorized liability for such emissions under the PAA.[2]

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years of the Cold War."). Petitioners and their expert conceded at trial that plutonium levels throughout the class area do not exceed these background levels. *See* C.A. App. 2852-54, 2857-58; Trial Tr. 3335-37.

[2] Petitioners have apparently abandoned their additional alternative argument that they proved a "nuclear incident" merely by proving a diminution of property value. That decision is wise. As the Court of Appeals explained, a diminution in property value establishes a measure of *damages*, not a predicate *injury*. *See* Pet. App. 18-19a n.12.

Just as petitioners failed to prove a "nuclear incident" under the PAA, the Tenth Circuit held, they independently failed to prove an underlying trespass or nuisance claim under state law. *See* Pet. App. 26-29a, 31-35a. They failed to prove a trespass claim, the court of appeals explained, because plutonium particles are concededly "impalpable and imperceptible by the senses," and thus give rise to a trespass claim under Colorado law *only* upon proof of "actual physical damage" to property. Pet. App. 34a (citing *Van Wyk*, 27 P.3d 377). And they failed to prove a nuisance claim under Colorado law, the court of appeals further explained, because such a claim requires a "substantial" and "unreasonable" interference with the use and enjoyment of property, and fear or anxiety about an unverifiable or scientifically unfounded health risk does not meet that standard. Pet. App. 28-29a (citing *Boughton*, 65 F.3d at 832 n.13) (applying Colorado law).

II. The Circuit Conflicts Alleged By Petitioners Are Illusory.

Petitioners duly argue that this Court's review is warranted on the ground that the federal courts of appeals are "squarely divided" on both of the questions presented by the petition. Pet. 17, 25. That argument is both incorrect and trumped-up. Indeed, petitioners never even *cited* either of the cases on the other side of the alleged circuit "conflicts" in their voluminous briefing in the Tenth Circuit—not even in their unsuccessful petition for rehearing *en banc*.

A. The Tenth Circuit's Decision That A PAA Plaintiff Must Prove A "Nuclear Incident" To Recover Is Consistent With Decisions From Other Circuits.

Petitioners first argue that the decision below "squarely conflicts" with the Sixth Circuit's decision in *Rainer v. Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), on whether a plaintiff must prove a "nuclear incident" under *federal* law, as well as an underlying claim under *state* law, to recover under the PAA. Pet. 17. Petitioners are wrong, and the alleged conflict is illusory.

The plaintiffs in *Rainer* were workers at a uranium-enrichment plant in Kentucky who alleged that they had been exposed to radioactive substances on the job, but had not developed any disease. *See* 402 F.3d at 611-13. They sued the plant's operators and uranium supplier, but lost in the district court on the ground that they could not recover in the absence of any physical injury. *See id.* at 614, 618. On appeal, the plaintiffs argued "that the district court erred in not recognizing that subcellular damage is a real, concrete bodily injury" under *state* law. *Id.* at 618. But the Sixth Circuit affirmed, concluding that, under Kentucky law, "a plaintiff must have sustained some physical injury before a cause of action can accrue," and that asymptomatic subcellular damage did not qualify as such an injury. *Id.* at 618-22 (internal quotation omitted).

Petitioners contend that *Rainer* conflicts with the decision below because *Rainer* was based on state, not federal, law. *See* Pet. 17-20. As noted above, however, a PAA claim is a hybrid of *both* federal and state law. Thus, such a claim fails if it does not

satisfy *either* the underlying requirements of a state cause of action, *or* the federal requirements for a "nuclear incident" (or, as in this case, both such requirements). As the Ninth Circuit has explained, "[t]he Act imposes *two* independent limits on claims based on exposure to radioactive materials." *Dumontier*, 543 F.3d at 570 (emphasis added). "*First*, … plaintiffs can bring such claims only if the state where the exposure occurred provides a cause of action. … *In addition*, the 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." *Id.* (emphasis added).

Courts need not address the state and federal issues in any particular order, and if they conclude that a claim fails under one body of law, they need not address the other. *See, e.g.*, *Cotroneo*, 639 F.3d at 195 (declining to decide whether plaintiffs had a claim for "offensive contact" under state law, because they could not establish a "nuclear incident" under the PAA); *June*, 577 F.3d at 1252 n.12 (declining to address whether plaintiffs had a claim for medical monitoring under state law, because they could not establish a "nuclear incident" under the PAA). Accordingly, *Rainer* is perfectly consistent with the decision below: the *Rainer* plaintiffs simply lost on the state-law part of their PAA claim, whereas petitioners here lost on *both* the federal-law and state-law parts of their PAA claim. Because the *Rainer* plaintiffs' PAA claim failed under state law, the Sixth Circuit had no occasion (and no need) to address the discrete question whether that claim also failed under federal law. The fact that *Rainer* is

not helpful to plaintiffs may explain why they never cited that case in their Tenth Circuit briefing.

Petitioners insist that there is a circuit split, however, because *Rainer* states that "'[c]ourts are required to look to state law for the substantive rules to apply in deciding claims.'" Pet. 17 (quoting *Rainer*, 402 F.3d at 618). But the Tenth Circuit made the same point below by recognizing that the PAA "utiliz[es] state law to frame the 'substantive rules for decision.'" Pet. App. 16a (quoting 42 U.S.C. § 2014(hh)). It is not surprising that the Sixth Circuit in *Rainer* focused on state law, because the plaintiffs based their (unsuccessful) challenge to the district court's decision on state law. *See* 402 F.3d at 617-18. Under those circumstances, as noted above, the Sixth Circuit had no occasion (and no need) to address whether a PAA plaintiff is independently required to establish a "nuclear incident" as a matter of *federal* law, and certainly cannot be deemed to have resolved that unaddressed question—much less to have created a "circuit conflict," Pet. 16, on it.[3]

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[3] Petitioners note that the Sixth Circuit in *Rainer* stated that the plaintiffs there "'necessarily'" had to base their PAA arguments on state law. Pet. 17 (quoting *Rainer*, 402 F.3d at 617). The *Rainer* court made that statement, however, in the context of rejecting an argument that the plaintiffs had waived their federal PAA challenge by focusing only on state law. *See* 402 F.3d at 617-18. That waiver argument, as the Sixth Circuit explained, overlooks that the PAA itself incorporates state law, so that the plaintiffs preserved their federal PAA challenge by disputing the substance of state law. *See id.* As noted in the text, because a PAA claim is a hybrid of both state and federal law, such a claim is necessarily based on *both* sources of law.

Precisely because the *Rainer* court did not (and did not have to) distinguish between the state and federal elements of a PAA claim, it is understandable that the court framed "[t]he key question before us" as "whether [state] caselaw equates 'subcellular damage' with 'bodily injury.'" 402 F.3d at 618. That formulation blends the state and federal law elements of a PAA claim: the need for (1) an underlying state cause of action and (2) a "nuclear incident" (which includes "bodily injury") under the PAA. It would have been more precise for the court to have framed the key question as whether state caselaw allows recovery based on subcellular damage and, if so, whether such injury qualified as a "nuclear incident" under the PAA.

The Ninth Circuit in *Dumontier* quite properly criticized *Rainer*'s semantic imprecision on this score. The plaintiffs in *Dumontier* (who, like the plaintiffs in *Rainer*, alleged that they had been exposed to radiation and had suffered asymptomatic subcellular damage) argued that they established a "nuclear incident" under the PAA because their subcellular damage qualified as a "bodily injury" under state law. The Ninth Circuit explained that the term "bodily injury" in the PAA's definition of "nuclear incident" was a federal statutory term to be interpreted as a matter of federal, not state, law. *See* 543 F.3d at 570. The Ninth Circuit then proceeded to hold—consistent with the Sixth Circuit in *Rainer*—that a plaintiff cannot recover under the PAA for alleged subcellular damage. *See id.* at 570-71. The *Dumontier* plaintiffs petitioned this Court for a writ of *certiorari* based on the same ostensible conflict with *Rainer* alleged here, but this Court

denied the petition. *See Dumontier v. Schlumberger Tech. Corp.*, 129 S. Ct. 1329 (2009).

Accordingly, there is no conflict among the circuits on whether a PAA plaintiff can recover under state substantive law without satisfying the federal requirements for a "nuclear incident": *no* circuit has allowed such recovery. Indeed, the irony is that petitioners are seeking this Court's review not because the Tenth Circuit's decision "conflict[s] with the decision of another United States court of appeals," S. Ct. R. 10(a), but because the Tenth Circuit *declined* to create such a conflict, as it would have done by ruling in petitioners' favor, *see*, *e.g.*, *Cotroneo*, 639 F.3d at 195-97; *Dumontier*, 543 F.3d at 570-71; *Hanford*, 534 F.3d at 1009; *Berg*, 293 F.3d at 1131.

B. The Tenth Circuit's Decision That The Mere Presence Of Plutonium On Property Does Not Satisfy The PAA's Definition Of A "Nuclear Incident" Is Consistent With Decisions From Other Circuits.

Petitioners next argue that the decision below "squarely conflicts" with the Third Circuit's decision in *Pennsylvania v. General Public Util. Corp.*, 710 F.2d 117 (3d Cir. 1983) (*GPUC*), on "whether contamination resulting in lost property value amounts to 'damage to property' under the [PAA's] 'nuclear incident' definition." Pet. 25. Once again, petitioners are wrong, and the alleged conflict is illusory.

As a threshold matter, *GPUC* predated the 1988 PAA amendments, which (in the Third Circuit's own words) "transformed" the "entire Price-Anderson

landscape." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991). The 1988 amendments created the exclusive federal cause of action for nuclear-related injuries at issue here. *See, e.g.*, *id.* at 837, 857. The causes of action in *GPUC*, in sharp contrast to the cause of action here, thus arose under state, not federal, law. *See id.*; *see also* 710 F.2d at 121-22. That point alone refutes petitioners' contention that the circuits are "squarely divided," Pet. 25, on whether a plaintiff can satisfy the federal substantive elements of the post-1988 PAA cause of action based on the presence of even a single radioactive atom on property. The *GPUC* court did not address that issue. Indeed, there were no federal substantive elements of a PAA cause of action before the 1988 amendments, because there was no PAA cause of action before the 1988 amendments.

Undeterred, petitioners assert that *GPUC* stands for the proposition that the presence of a single radioactive atom necessarily establishes a "nuclear incident" under the PAA. *See* Pet. 25-27. That assertion is incorrect, and completely ignores the procedural posture of that case.

The plaintiffs in *GPUC* were the Commonwealth of Pennsylvania and two townships, which brought a variety of state-law claims (*e.g.*, negligence, gross negligence, "willful misconduct," and strict liability) against the owners and operators of the Three Mile Island nuclear-powered electrical generating plant. 710 F.2d at 119-20. "Prior to the filing of any responsive pleading, the taking of any discovery or the establishing of any additional facts of record, and without filing any affidavit except as to a minor issue concerning one of the claims for damages, the

defendants filed motions for summary judgment"—effectively motions to dismiss—which the district court granted. *Id.* at 119.

Without passing on the ultimate merits of the plaintiffs' claims or the existence of a "nuclear incident," the *GPUC* court concluded that the plaintiffs had *alleged*—not *established*—sufficient facts "to defeat a motion for summary judgment or a motion to dismiss" on some of their state-law claims. *Id.* at 122-23. In particular, the court noted that the plaintiffs had alleged sufficient facts regarding "*physical* harm or injury to permit [them] to recover for damages flowing from such harm" under state law. *Id.* at 122 (emphasis added).

The Third Circuit also observed that the *GPUC* plaintiffs "*allege* that the events at Three Mile Island constituted a 'nuclear incident'" within the meaning of the PAA. *Id.* at 123 (emphasis added). Without elaborating on the legal relevance of that observation—again, *GPUC* predated the 1988 amendments that made a "nuclear incident" an element of the new PAA cause of action—the *GPUC* court noted that the plaintiffs "clearly *claim* temporary loss of use of property and '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).[4]

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[4] It is misleading for petitioners to highlight the Third Circuit's observation that "'the *complaints* do not contain any claim of damages for direct physical damage to any of plaintiffs' property, such as physical damage to public buildings, parks,

That observation at most establishes the case-specific proposition that the *GPUC* plaintiffs *alleged* sufficient facts to surmount their initial pleading hurdle. *Id.* at 123. That proposition has no bearing on whether the plaintiffs in that case—much less the plaintiff class in this case—ultimately *proved* a "nuclear incident." Indeed, the *GPUC* court emphasized that "we express no opinion as to whether [the plaintiffs'] theory of damages may ultimately prevail"; rather, the court held only that "plaintiffs should be permitted to develop the facts upon which these contentions may be tested." *Id.*

Contrary to petitioners' suggestion, moreover, the Tenth Circuit did not hold below that "plutonium contamination resulting in diminished property value" can *never* amount to a "nuclear incident" under the PAA as a matter of law. Pet. 26. Rather, the Tenth Circuit merely held that a PAA plaintiff must establish that such contamination caused "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property." Pet. App. 15a (quoting 42 U.S.C. § 2014(q)). Indeed, the Tenth Circuit specifically recognized that a PAA plaintiff could recover for a "loss of use" of property regardless of any present physical injury to the property. *See* Pet. App. 19-21a.

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vehicles and equipment.'" Pet. 25-26 (quoting *GPUC*, 710 F.2d at 122; emphasis modified). Petitioners omit the Third Circuit's immediate qualification that the *GPUC* plaintiffs had *expanded* on the complaints' allegations regarding damage to, and loss of use of, property "[b]oth in the briefs and oral arguments." *GPUC*, 710 F.2d at 122.

Accordingly, there is no conflict among the circuits on whether a plaintiff can satisfy the PAA's substantive federal requirements by merely establishing contamination or exposure to imperceptible radioactive atoms at *any* level. Once again, the irony is that petitioners are seeking this Court's review not because the Tenth Circuit's decision "conflict[s] with the decision of another United States court of appeals," S. Ct. R. 10(a), but because the Tenth Circuit *declined* to create such a conflict, as it would have done by ruling in petitioners' favor, *see, e.g.*, *Cotroneo*, 639 F.3d at 195-97; *Dumontier*, 543 F.3d at 570-71; *Hanford*, 534 F.3d at 1009; *Berg*, 293 F.3d at 1131.

III. This Case Presents An Unsuitable Vehicle For Addressing The Questions Presented By The Petition.

Putting aside the fact that the decision below is correct and neither creates nor deepens any circuit conflict, the petition in any event presents an unsuitable vehicle for this Court to address the questions presented. The Tenth Circuit held that the district court erred on myriad federal and state grounds, and remanded the case for further proceedings. Because the decision below is interlocutory, and the questions presented are not outcome-determinative, the case would have to return to the district court even if petitioners were to prevail in this Court. In essence, the petition seeks an advisory opinion.

Both questions presented in the petition involve the Tenth Circuit's conclusion that the district court erred by failing to require petitioners to satisfy the PAA's substantive federal "nuclear incident"

requirement. *See* Pet. i. But that was far from the district court's only error. To the contrary, the Tenth Circuit explained that "[w]hile this Court's ruling that [petitioners] must establish the existence of a nuclear incident as a threshold element of their claims *independently* warrants remand," Pet. App. 21a n.16 (emphasis added), the district court committed a host of other errors.

In particular, the Tenth Circuit held that the district court misconstrued the *state* trespass and nuisance law underlying petitioners' PAA claims. With respect to Colorado trespass law, the district court erred by allowing petitioners to recover for an intangible trespass without requiring them to establish any actual physical injury to property. *See* Pet. App. 34a (citing *Van Wyk*, 27 P.3d 377). And with respect to Colorado nuisance law, the district court erred by allowing petitioners to recover for an increased health risk without being required to prove that such increased risk was scientifically founded or verifiable. *See* Pet. App. 28-29a (citing *Boughton*, 65 F.3d at 832 n.13) (applying Colorado law). It is not true, in other words, that the decision below denied petitioners "any recovery on *otherwise valid* state-law claims." Pet. 30 (emphasis added). Given the hybrid nature of PAA claims, petitioners could not recover without satisfying the substantive requirements of *both* federal and state law, and the Tenth Circuit concluded that the district court had erred under *both* bodies of law.

Petitioners attempt to anticipate this point in a footnote, suggesting that the state-law errors provide no barrier to this Court's review because the court of appeals "never addressed whether those state-law

issues independently required reversal." Pet. 25 n.3. But it is far-fetched for petitioners to dismiss the state-law errors identified by the Tenth Circuit as harmless.[5] Indeed, petitioners devoted an entire section of their petition for rehearing *en banc* to arguing that "the panel opinion seriously misapplied Colorado trespass law." Pls.' Pet. for Rehr'g *En Banc* (Oct. 1, 2010), at 11 (capitalization modified). And,

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[5] Petitioners assert, without elaboration, that "[w]ith 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." Pet. 25 n.3. Petitioners apparently base that assertion on the Tenth Circuit's observation that "[t]he jury was properly instructed on the *elements* of a nuisance claim as well as the definitions of 'substantial' and 'unreasonable.'" Pet. App. 28a (emphasis added). But that observation hardly means that the district court's erroneous interpretation of Colorado nuisance law was harmless. As noted in the text, the district court held that petitioners could recover regardless of whether concern over contamination was *irrational or scientifically unfounded*, *see Cook*, 273 F. Supp. 2d at 1201-08, and allowed them to present their case accordingly at trial, *see generally* C.A. App. 2924.2-.3 (petitioners' expert testimony regarding perception of risk, as opposed to actual risk); Trial Tr. 4263, 4270 (same); C.A. App. 3348-49 (petitioners' closing argument) ("I want to make a point right here. It's not substantial increased risk. It's the interference that has to be substantial. The risk does not have to be substantial. Some increased risk."). Indeed, the district court erroneously instructed the jury that "[p]laintiffs do *not* need to show that any actual or threatened future contamination from Rocky Flats poses an actual or verifiable health risk." Jury Instruction No. 3.28, C.A. App. 1719 (emphasis added). The fact that the district court properly instructed the jury on the "elements" of a nuisance claim in the abstract, Pet. App. 28a, does not remotely vitiate the court's error regarding how petitioners could satisfy those elements in this case.

in his solo dissent from the denial of that petition, Judge Lucero challenged each of the panel's "*three* declarations of error," Pet. App. 127a (emphasis added), the first two of which involved the *state* law of nuisance and trespass respectively, Pet. App. 127-28a.

The Tenth Circuit also recognized that the judgment in favor of the plaintiff class could not stand because "the district court's class certification analysis failed to consider whether Plaintiffs could establish various elements of their PAA claims, supplied by both federal *and state* law." Pet. App. 35a (emphasis added). Accordingly, the Tenth Circuit "reverse[d] the district court's class certification ruling," and remanded for the district court to "revisit the class certification question" in light of the Tenth Circuit's substantive rulings. Pet. App. 35-36a. Because petitioners have not challenged the Tenth Circuit's decision to reverse the class certification order, or the substantive state-law rulings on which that decision was based in part, it follows that they are in no position to defend the original judgment in favor of the plaintiff class. That class is now history, and nothing set forth in the petition can change that fact.

In addition, the Tenth Circuit held that the district court erred by categorically rejecting respondents' argument that federal nuclear safety standards preempt inconsistent state law. *See* Pet. App. 21-26a. The Tenth Circuit thereby joined every other federal court of appeals to have addressed this issue. *See Hanford*, 534 F.3d at 1003; *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998); *Nieman v. NLO Inc.*, 108 F.3d 1546,

1552-53 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1100 (7th Cir. 1994); *TMI*, 940 F.2d at 859-60. As a result of this preemption ruling, the Tenth Circuit directed the district court on remand to determine whether any federal nuclear safety standards governed respondents' conduct at Rocky Flats. Thus, the Tenth Circuit held, "[i]f [respondents] are able to identify federal statutes, regulations, or other binding safety standards that controlled their conduct with respect to the class properties during the relevant time period, the district court must determine whether those particular standards are in conflict with any applicable state tort standard of care." Pet. App. 25a; *see also id.* at 25-26a ("On remand, the district court shall permit [respondents] to identify the particular federal regulations or statutes they believe preempt state law. … [T]he district court must determine whether any such federal standards actually conflict with the relevant state tort standards of care."). The petition does not challenge the Tenth Circuit's federal-law preemption holding, which is yet another reason why it provides an unsuitable vehicle to review the decision below.

Petitioners' final arguments about the "importance" of the questions presented are unavailing. Petitioners first invoke "federalism concerns," and assert that the Tenth Circuit's ruling "undermines the federal-state balance Congress intended." Pet. 31. If there is any area where "federalism" concerns ring hollow, however, it is this one. As noted above, Congress "federalized" the entire area of nuclear-related claims by creating an exclusive *federal* cause of action. While that cause of action incorporates state substantive law, it molds

that law to reflect overriding federal imperatives. The PAA's hybrid cause of action is a prime example of federalism in action, and there is no merit to petitioners' suggestion that federalism values would be compromised unless the federal PAA cause of action were construed *exclusively* by reference to state law. Indeed, it would raise Article III concerns of the first order if Congress were to create an ostensible federal cause of action that did no more than incorporate state law. *See, e.g.*, *O'Conner*, 13 F.3d at 1094-1101; *TMI*, 940 F.2d at 850-60.

Petitioners finally argue that this case warrants this Court's review because the decision below "abrogates important property rights." Pet. 32. According to petitioners, the Tenth Circuit interpreted the PAA "to grant immunity for anything short of atomic blasts that level the countryside." Pet. 33. But that is a crude caricature of the decision below. The Tenth Circuit held only that the judgment in favor of the plaintiff class could not stand where, among other things, petitioners were not required to show *any* damage to, or loss of use of, the class property, but instead were allowed to recover if only a single plutonium atom, which presented no scientifically founded health risk, was present on their properties. By holding that the damages award in favor of the plaintiff class could not stand, the Tenth Circuit hardly suggested that only a "disaster of Chernobylesque proportions," Pet. 16, could support a property-based PAA claim.

If petitioners are right that their properties have been damaged, or that they have lost the use of those properties, then they can try to prove that point in the district court on remand. They cannot, however,

rely on the results of a trial in which they were not required to establish any such damage or loss of use. While petitioners are right to note that the PAA "sought to create a balanced compensation regime," Pet. 33, they are the ones who seek to overturn that balance by seeking compensation in the absence of injury.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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