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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Given the government's potential responsibility for paying any judgment in this case, Pet. App. 36a n.22, its resistance to further review is not surprising. But its rationalizations do not withstand scrutiny. The government all but concedes a division of circuit authority. And it cannot deny that its position defies the clear and contemporaneous industry understanding reflected in its own form insurance policy for over 50 years.

The government, moreover, never disputes the importance of the questions presented. The Tenth Circuit construed the phrase "damage to property" in the Price-Anderson Act to exclude radioactive contamination—no

matter how much plutonium is dumped on an owner's property, no matter how grave the health risks, no matter how far property values fall—unless the landscape is physically deformed. The government's caricatures of "single molecules of plutonium" ignore the facts of the case, the jury instructions, and the dramatic sweep of the Tenth Circuit's holding. The decision below is a severe incursion on both private property rights and traditional state authority to vindicate them. Those important issues warrant review.

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

A. The government effectively concedes that the decision below conflicts with *Rainer* v. *Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005). It admits that *Rainer* "look[ed] to state (rather than federal) law in determining what constitutes 'bodily injury' for purposes of the Act." U.S. Br. 13. And it concedes that the decision below and other circuit cases take the opposite view—that federal (rather than state) law controls. See *id.* at 12-14.

While the government tries to downplay *Rainer* as "an evolutionary stepping-stone of circuit law that poses no true conflict," U.S. Br. 14, it points to no evidence that Sixth Circuit law is in flux. That court has not reconsidered or even cast doubt on *Rainer* in the seven years since the case was decided. If the suggestion is that *Rainer* was somehow incompletely reasoned, the government presents no support for that claim either. The case's reasoning is clear: "Courts are *required to look to state law* for the substantive rules to apply in deciding claims brought under the Act," and for that reason, "[t]he key question * * * [wa]s whether *Kentucky caselaw* equate[d]" the plaintiff's claimed injury with the requi-

site standard of harm. 402 F.3d at 618 (emphasis added). The government cannot make a circuit conflict disappear simply by recharacterizing a square holding as an "evolutionary stepping-stone" toward the opposite rule.

The government notes that *Rainer* construed Kentucky law to impose a "'present physical illness'" requirement, and urges that the Tenth Circuit construed federal law to impose an allegedly analogous requirement here. U.S. Br. 14. But whether federal or state law supplies the rule of decision is a critical question, even if the two laws might sometimes happen to coincide. Indeed, while the Tenth Circuit construed Colorado *trespass* law to impose a physical injury requirement like the one it read into federal law, *ibid.*, it found no such requirement in Colorado *nuisance* law, see Pet. App. 26a-29a. As is often the case, therefore, whether Congress displaced or incorporated state law is crucial.

The government's implicit plea for percolation is misguided. Nuclear incidents are inherently rare. When they do occur, the enormous stakes make it imperative that the law be settled. The competing viewpoints have been fully ventilated by *Rainer*, *Dumontier* v. *Schlumberger Technology Corp.*, 543 F.3d 567 (9th Cir. 2008), 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 sharp conflict amply justifies review.

B. The government's merits arguments likewise fail. The statute is clear: "[T]he 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). The government

claims that this provision "directs the court not to categorically import state law for all purposes, but rather to 'derive[ ]' rules of decision that remain consistent with the purposes and objectives of the Act." U.S. Br. 9-10. That claim is contrary to both the plain terms of Section 2014(hh) and the entire history of Price-Anderson. Congress enacted the 1988 amendments against decades of history reaffirming the primacy of state law. See Pet. 3-7; *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). Consistent with that history, Congress intended state law to "determine[ ]" the substantive rules of liability, not serve as a springboard for federal improvisation. H.R. Rep. No. 100-104, at 5 (1987). Congress specified the narrow circumstances where state law must yield—where it is "inconsistent with the provisions of [Section 2210]." 42 U.S.C. § 2014(hh). Plainly, Congress intended "derive[ ]" to mean "take or receive * * * from a source," *Webster's Third New International Dictionary* 608 (1993), not "bear some distant relation to a source."

The government urges that deriving substantive rules from state law "does not foreclose interpreting the Act to impose federal-law requirements as well." U.S. Br. 10. But there must be some plausible textual basis for those additional federal requirements, and the government offers none. Having provided that state law would supply the substantive rules of decision, Congress would not have covertly federalized the fundamental issue of the standard of compensable harm merely by listing "damage to property" among the types of injuries the Act addresses. The implausibility of that interpretation is clear from respondents' failure to have conceived of it for the first two decades they litigated this case: They raised it for the first time on appeal. See Pet. App. 13a-14a.

C. The government focuses largely on petitioners' secondary contention that the "nuclear incident" standard is only a pleading requirement. But it falters there too. Citing *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288 n.10 (1938), the government insists that a plaintiff must both "'allege with sufficient particularity the facts creating jurisdiction * * * and, if appropriately challenged, * * * support the allegation.'" U.S. Br. 11. But *St. Paul* involved the diversity statute, which makes jurisdiction turn on the *existence* of certain facts. See 28 U.S.C. §1332. Congress instead can make jurisdiction turn on what a plaintiff *alleges*, as *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64-66 (1987), makes clear. The government claims it cannot fathom why Congress would do so. U.S. Br. 11. Because the definition here determines federal *jurisdiction*, however, Congress could reasonably want courts and parties to know from the pleadings where a case should be heard. See Pet. 22-23.

In any event, petitioners' principal position is that the standard of compensable harm for property damage is neither a federal element *nor* a federal pleading standard. Rather, it is precisely the sort of "substantive rule[] for decision" that Congress left to state law. 42 U.S.C. §2014(hh). Courts should not strain to find federal preemption of traditional state authority. Much less should they contort statutory text to reach that result.

II. The Circuits Are Divided Over Whether Contamination That Diminishes Property Value Constitutes "Damage To Property"

Even those courts that look to federal law are divided over whether radioactive contamination that reduces property value is sufficient to support a claim. The government's position—that "damage to property" requires

some physical deformation like a blast crater—contravenes both settled industry understanding and common sense.

A. The government claims that *Pennsylvania* v. *General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983), is irrelevant because it predated the 1988 amendments and thus construed "nuclear incident" in a "materially different statutory context." U.S. Br. 18. But the government concedes that "the definition of 'nuclear incident' remained unchanged." *Ibid.* It cannot explain how Congress's decision in 1988 to clarify that certain claims would be deemed to arise under federal law somehow amended what "damage to property" *means*.

Noting that Price-Anderson addresses two distinct categories of harm—"damage to property" and "loss of use of property," 42 U.S.C. §2014(q)—the government urges that *Pennsylvania* is irrelevant because it involved, in addition to a damage-to-property claim, an alleged loss of use. U.S. Br. 18-19. But *Pennsylvania* clearly held that the plaintiffs there had sufficiently alleged a nuclear incident from *both* "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." 710 F.2d at 123. The government speculates that the court might have deemed both allegations "*taken together*" sufficient, U.S. Br. 19, but that makes no sense. There is no way to read the Act to require a plaintiff to allege loss of use *plus* damage to property. The only reason the court would have mentioned both is that the plaintiffs had alleged two distinct compensable harms.

B. The meaning of "damage to property" is clear from the government's own form insurance policy, in use

for over five decades. Pet. 28-29. That policy explicitly defines "property damage" to include "physical injury to or destruction *or radioactive contamination* of property." 25 Fed. Reg. 2948, 2949 (Apr. 7, 1960) (emphasis added); 10 C.F.R. § 140.91, app. A. The government contends that the policy is not "the agency's interpretation of the Act itself." U.S. Br. 17. But whether the agency was interpreting "the Act itself" or merely approving a form policy designed to *comply* with the Act, it defies credulity to suggest that the agency would have directed licensees to procure coverage from a risk the Act did not make their responsibility.

Besides, the form policy was expressly modeled on industry-standard policies in use at the time. See 25 Fed. Reg. at 2948. Its definition of "property damage" is thus powerful evidence of what everyone, including Congress, understood that term to mean when Price-Anderson was enacted. Nowhere does the government explain how "property damage" could encompass radioactive contamination when used in insurance policies throughout the industry while the equivalent statutory term "damage to property" excludes radioactive contamination.[1]

C. The government insists that the Act must require "something more than *de minimis* contamination," and that contractors and licensees should not be indemnified for "a single molecule of plutonium—no matter how harmless." U.S. Br. 16-17. But this case is not about *de*

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[1] The government contends that petitioners' argument "undermines" their claim that state law determines the compensable standard of harm. U.S. Br. 17. But petitioners' logic is not hard to follow. The compensable standard of harm is a "substantive rule[ ] for decision" governed by state law. 42 U.S.C. § 2014(hh). *In the alternative, if federal law governs*, the term should be given the meaning the industry and federal regulators have accorded it for the past 50 years.

minimis contamination by a "single molecule of plutonium." Plutonium levels near Rocky Flats were hundreds of times background levels, causing elevated risks and rates of cancer. Pet. 9; Pet. Reply 9 n.4. Those facts were proved by expert testimony that survived a *Daubert* challenge—rulings respondents did not appeal. Pet. 9. The jury was expressly required to find that the interference with property rights was "substantial" and "unreasonable." See Pet. App. 138a-144a; pp. 10-11, *infra*. The Tenth Circuit thus overturned the judgment, not because plaintiffs had shown only *de minimis* contamination, but because Rockwell and Dow's radioactive emissions did not result in *physical deformation* of the landscape. Pet. App. 16a-19a.

Existing law already amply addresses concerns about *de minimis* claims. "[T]he venerable maxim *de minimis non curat lex* * * * is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wis. Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). If a plaintiff ever sued over a "single molecule of plutonium," that legal principle would provide a complete response. But the Tenth Circuit's holding forecloses relief even where substantial contamination causes serious harm.

D. The government contends that the "most natural" interpretation of the Act is that contamination is relevant only to "loss of use," not "damage to property." U.S. Br. 15. But that interpretation is hardly "natural." To the contrary, it reads "damage to property" out of the statute. The vast majority of nuclear incidents—even serious ones like Three Mile Island—do not result in blast craters. They result in *radioactive contamination*. And if some super-disaster ever *did* result in physical deforma-

tion, it would surely result in loss of use as well. By including both "damage to property" and "loss of use of property" in the "nuclear incident" definition, Congress plainly intended to address both types of injuries as separate and distinct harms. The government's interpretation, however, would divest the phrase "damage to property" of any independent force. It thereby violates "one of the most basic interpretive canons": that a statute should be construed so that no part is rendered "superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (quotation marks omitted).

By engrafting an atextual "physical injury" requirement onto the "damage to property" clause and requiring any claim for contamination that does not deform the landscape to proceed under the "loss of use" clause, the Tenth Circuit's holding forecloses recovery in all but the most extreme cases. According to that court, a plaintiff can recover for "loss of use" only for such things 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." Pet. App. 20a. The Tenth Circuit's holding thus precludes recovery for contamination unless a nuclear disaster leaves the land either physically deformed, uninhabitable, or unusable—as if nothing short of such cataclysmic outcomes could possibly justify compensating property owners or indemnifying licensees.

The government's mockery of contrived *de minimis* hypotheticals that would not support recovery under *anyone's* standard cannot alter the fact that the decision below forecloses recovery for serious harm. Congress enacted Price-Anderson, not just "to encourage the development of the atomic energy industry," but also "to

protect the public." 42 U.S.C. § 2012(i). The Tenth Circuit's interpretation eviscerates that latter goal.

III. The Tenth Circuit's Additional Rulings Are Irrelevant

Finally, although the government invokes the Tenth Circuit's other rulings, it does not contend that they independently support the judgment below. It asserts only that "resolution of the questions presented in petitioners' favor *might* not alter the ultimate outcome." U.S. Br. 21 (emphasis added). Having already reversed, however, the Tenth Circuit addressed those other issues only "to guide the district court on remand"—not because they independently required reversal. Pet. App. 21a-22a n.15.

For example, while the government claims "it is by no means clear that the nuisance verdict is unassailable on remand," it offers no supporting explanation beyond characterizing petitioners' otherwise unanswerable responses as "record-specific." U.S. Br. 21. The government invokes the district court's pretrial ruling that a plaintiff could recover for nuisance based on "fear, anxiety, [or] discomfort" without a verifiable health risk, asserting that the ruling "provided the framework for a four-month trial." *Id.* at 5. But that is false for reasons already explained: The fear and anxiety claims were *not* tried below, because they were not amenable to classwide treatment; they were mentioned only in an instruction telling the jury *not* to consider them because they would come into play only in potential future proceedings. See Pet. Reply 8-10 & App. 2a. For the claims that were actually tried, the jury was expressly told it had to find "some increased risk of health problems" or "demonstrable risk of future harm," and that "fear, anxiety or mental discomfort" were *not enough*. Pet. App. 135a-137a; Pet. Reply App. 2a. Neither respondents nor the

government offers any answer. They do not identify a single jury instruction, evidentiary ruling, or other order *at trial* suggesting that the jury could award damages based on scientifically unfounded fears.

Nor is the Tenth Circuit's preemption ruling relevant. U.S. Br. 19-20. The government does not dispute that respondents never identified the regulations or statutes that supposedly preempt state law. Pet. App. 24a. The Tenth Circuit's gratuitous decision to give respondents another bite at that apple on remand obviously could not have been a basis for reversing an otherwise valid judgment. And the government does not deny that any preemption issues would be resolved by the *court* on remand—they would not require a retrial.

In any event, this Court routinely reviews interlocutory decisions presenting important federal questions "fundamental to the further conduct of the case," particularly where review "may serve to hasten or finally resolve the litigation." E. Gressman, *et al.*, *Supreme Court Practice* 281-282 (9th ed. 2007). That is the proper course here. Even if a remand were inevitable, this Court's resolution of the questions presented would dictate the standard for any retrial. This case has been litigated for more than 22 years, and the four-month trial ended over six years ago. Pet. App. 3a-4a. Plaintiffs and witnesses have died. *See, e.g.*, Tr. 1953, 5899, 7641. It makes no sense to remand for another trial under the Tenth Circuit's dubious and draconian standard on the theory that the proper standard can then be addressed later still, and a *third* trial conducted sometime in the distant future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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