No. 10-1377

In the Supreme Court of the United States

MERILYN COOK, ET AL., PETITIONERS

v.

ROCKWELL INTERNATIONAL CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a plaintiff must prove that his claims arise out of a "nuclear incident" within the meaning of 42 U.S.C. 2014(q) to prevail under the federal cause of action provided by the Price-Anderson Act, see 42 U.S.C. 2014(hh), 2210.

2. Whether radioactive contamination of real property unaccompanied by any physical harm to that property constitutes "damage to property" within the meaning of 42 U.S.C. 2014(q).

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Price-Anderson Act (Act), Pub. L. No. 85-256, 71 Stat. 576 (42 U.S.C. 2011 *et seq.*, 2210), was enacted in 1957 for the dual purpose of "protect[ing] the public and * * * encourag[ing] the development of the atomic energy industry." § 1, 71 Stat. 576 (42 U.S.C. 2012(i)). A few years earlier, Congress had determined that it would serve the national interest for the private sector to participate in the development of nuclear energy subject to federal regulation and licensing. See Atomic Energy Act of 1954, Pub. L. No. 83-703, § 2, 68 Stat. 921. Private industry, however, feared that a nuclear accident could result in cata-

strophic damage and expose it to vast liabilities far beyond the resources of the industry and private insurance. Accordingly, "the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation." *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 64 (1978).

The Price-Anderson Act addressed those concerns by limiting private industry's liability in the event of a nuclear accident, while ensuring that funds would be available to compensate victims. As originally enacted, the Act, *inter alia*, limited aggregate liability for a single "nuclear incident" to $500 million plus the amount of liability insurance available on the private market. 42 U.S.C. 2210(e) (Supp. V 1957). A "nuclear incident" is "any occurrence, including an extraordinary nuclear occurrence, within the United States causing * * * bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of" designated material. 42 U.S.C. 2014(q). The Act provided for the government to indemnify its licensees from "public liability" above the amount of required financial protection, 42 U.S.C. 2210(c) (1958), and authorized the government to indemnify its contractors similarly, 42 U.S.C. 2210(d) (1958).

b. In 1966, Congress amended the Act to establish special remedial provisions for injuries arising out of an "extraordinary nuclear occurrence." Pub. L. No. 89-645, § 1, 80 Stat. 891. An "extraordinary nuclear occurrence" is defined as "any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Com-

mission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or to property offsite." 42 U.S.C. 2014(j). The 1966 amendments authorized the pertinent government agency to require licensees or contractors entering into indemnification agreements to waive traditional tort law defenses, 42 U.S.C. 2210(n)(1) (1970), because Congress was concerned that "state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions—strict liability—was needed" in the event of an extraordinary nuclear occurrence. *Duke Power*, 438 U.S. at 65. Absent a determination that the nuclear accident rose to the level of an "extraordinary nuclear occurrence," however, Congress expected a claimant's state-law remedies to be available (subject to the Act's liability limits and indemnification requirements). See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

c. In 1988, Congress revised the Act's remedial provisions in the wake of litigation—including 150 separate cases involving more than 3000 claimants—arising out of the nuclear accident at Three Mile Island. Pub. L. No. 100-408, 102 Stat. 1066. Attorneys representing both sides had testified in congressional hearings that a process for consolidating such claims in federal court would be beneficial. See S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987).

Congress responded by amending the Act to establish a "public liability action"—a federal cause of action "asserting public liability" that is "deemed to be an action arising under section 2210 of this title." 42 U.S.C. 2014(hh). "[P]ublic liability," in turn, is defined (with exceptions not relevant here) as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. 2014(w). The amendments provided that "the

substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of" Section 2210. 42 U.S.C. 2014(hh).

Congress also vested federal courts with jurisdiction over a "public liability action" (42 U.S.C. 2210(n)(2)); provided for removal to federal court of similar actions filed in state court (*ibid.*); established broad authority for the relevant federal court to consolidate, prioritize, and manage the disposition of claims arising out of the same incident (42 U.S.C. 2210(n)(3)); and expanded the Secretary of Energy's authority to condition indemnification agreements on the waiver of tort defenses (42 U.S.C. 2210(d)(1)(B)(i)(II)).

2. This action arises from operation of the Rocky Flats Nuclear Weapons Plant, a nuclear weapons manufacturing facility located near Denver, Colorado. Throughout the relevant period, the United States owned the facility, and private parties operated it under contract with the government. Respondent Dow Chemical Company operated the plant from 1952 to 1975; respondent Rockwell International Corporation operated the plant from 1975 until 1989, when the facility's manufacturing operations were halted. Pet. App. 2a.

Petitioners are individuals and businesses who owned property or interests in property near Rocky Flats. In 1990, they filed a class action complaint under the Price-Anderson Act against respondents. In relevant part, petitioners alleged that the facility's emissions of plutonium and other hazardous substances contaminated their property and that such contamination was actionable based on Colorado tort law. Pet. App. 3a. In 1993, the district court certified a class comprising owners of more than 15,000 parcels located in an approximately 30-square-mile area east of the facility. *Ibid.*

In 2003, the district court issued an opinion resolving several key legal issues in the case. 273 F. Supp. 2d 1175. First, it held that federal nuclear safety regulations did not preempt state-law standards of care in a "public liability action" and that the Act therefore did not require petitioners to prove respondents violated federal standards. *Id.* at 1187-1199.

Second, the district court held that Colorado's law of trespass did not require petitioners to prove that the plutonium contamination on their property posed an actual health risk or otherwise caused actual or substantial damages. Rather, the court stated, the mere deposition of pollutants on property constitutes an actionable trespass, even if the contaminant is present only at levels or in forms imperceptible to the human senses. 273 F. Supp. 2d at 1199-1201.

Third, the district court held that Colorado's law of nuisance did not require petitioners to prove that the plutonium contamination posed an actual or verifiable health risk. Rather, the court stated, an actionable nuisance may be established by demonstrating that the contamination would cause a normal member of the community to suffer fear, anxiety, discomfort, or some other condition that substantially interferes with the use and enjoyment of the property. 273 F. Supp. 2d at 1201-1209.

Those rulings provided the framework for a four-month trial, after which the jury found respondents liable for both trespass and nuisance. Pet. App. 5a. Based on its determination that the "trespass and nuisance caused the same damages: a reduction in the aggregate value of the Class Properties" (*id.* at 49a), the jury awarded a single amount of compensatory damages (approximately $177 million) for both claims. The jury also awarded approximately $200 million in punitive damages. *Id.* at 5a. The district court

thereafter granted petitioners' motions for an award of prejudgment interest (*id.* at 97a-107a); approval of a plan for allocating damages among class members (*id.* at 93a-97a); and entry of a final judgment under Fed. R. Civ. Proc. 54(b), notwithstanding the pending allocation of individual damages (Pet. App. 108a-111a).

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-43a.

The court held that the Price-Anderson Act requires petitioners to establish that they have suffered one of the injuries set forth in the statutory definition of a "nuclear incident." Pet. App. 15a-16a. The court explained that the Act limits a federal "public liability action" to occurrences that cause "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property." *Ibid.* (quoting 42 U.S.C. 2014(q)). The court further concluded that petitioners must prove, not merely allege, that one of those injuries had occurred, noting that petitioners "provide no reason why we should render the statute's nuclear incident requirement superfluous outside of the pleading stage." *Id.* at 16a (citing 42 U.S.C. 2014(w)).

The court of appeals then held that petitioners had not established the requisite injury for maintaining a public liability action. Pet. App. 16a-19a. It reasoned that there must be a physical injury to establish "damage to property" and that plutonium contamination does not itself amount to the physical damage to property necessary to maintain a cause of action. *Id.* at 17a-18a.

The court also determined that petitioners had not established a "loss of use" of their property. Pet. App. 19a-21a. The court observed that "when the presence of radioactive materials creates a sufficiently high risk to health, a loss of use may in fact occur." *Id.* at 20a. The court explained that the jury instructions, however, had required

petitioners to show only that plutonium contamination had caused some increased risk of health problems or future harm. *Id.* at 19a-21a.

The court also addressed respondents' challenge to the ruling that federal nuclear safety standards do not preempt more restrictive state tort standards of care under the Act. Pet. App. 21a-26a. It ordered the district court on remand to "consider whether the federal standards [respondents] identify carry the force of law or controlled [respondents'] conduct with respect to the off-site contamination that occurred here" and "determine whether any such federal standards actually conflict with the relevant state tort standards of care." *Id.* at 25a-26a.

Turning to state law, the court of appeals addressed respondents' challenge to the jury instructions on nuisance on the ground that they erroneously permitted a risk-based theory lacking scientific foundation. Pet. App. 26a-31a. The court held that Colorado law does "not permit recovery premised on a finding that an interference, in the form of anxiety or fear of health risks, is 'substantial' or 'unreasonable' unless that anxiety is supported by some scientific evidence. The district court erred in concluding otherwise." *Id.* at 29a.

As to the trespass claim, the court of appeals determined that petitioners were required to prove "actual physical damage to their properties" as a matter of Colorado law for the "intangible trespass" alleged in this case. Pet. App. 34a. Deeming erroneous the jury instruction directing that petitioners were "*not* required to show * * * that the presence of plutonium on the Class Properties damaged these properties in some other way," the court ordered that petitioners on remand "shall be required to prove the plutonium contamination caused 'physical damage to the property' in order to prevail on their trespass claims." *Id.* at 35a

(quoting *Public Serv. Co.* v. *Van Wyk*, 27 P.3d 377, 390 (Colo. 2001)).

As a result of its various federal and state law holdings, the court of appeals reversed the class certification ruling and ordered the district court on remand to "determine whether [petitioners] can establish the elements of their claims, including the [Act's] threshold requirements, on a class-wide basis." Pet. App. 35a-36a.

DISCUSSION

Petitioners contend (Pet. 16-25) that the Price-Anderson Act's "nuclear incident" requirement is merely a pleading obligation that should be construed pursuant to state law. The court of appeals, however, correctly determined that a "nuclear incident" is a substantive element imposed by the Act, and correctly construed it pursuant to federal law. Petitioners allege no conflict with any decision of another court of appeals or this Court on the former ruling, and the one court of appeals decision looking to state law to interpret the "damage to property" requirement does not give rise to a conflict warranting further review.

Petitioners alternatively contend (Pet. 25-31) that even *de minimis* contamination resulting in a diminution of property value is sufficient to constitute "damage to property" under a federal standard. The court of appeals, however, correctly interpreted "damage to property" to require something more. Petitioners' reliance on a single court of appeals decision (predating the 1988 amendments) that lacks both a definitive construction of "damage to property" and any allegation of lost property value does not furnish a basis for further review.

In any event, the court of appeals also found legal errors on other federal and state law grounds. Because further proceedings on remand consistent with the court of appeals'

guidance on those other issues may provide an independent bar to petitioners' claims, this case would not be an appropriate vehicle to resolve the questions presented.

1. a. The court of appeals correctly held that the Act requires a plaintiff to prove that a "nuclear incident" has occurred to maintain a federal cause of action for damages arising out of the release of radioactive materials.

The cause of action created by the Act is limited to those suits that meet the definition of a "public liability action." 42 U.S.C. 2014(hh). A "public liability action" is defined as "any suit asserting public liability," *ibid.*, and "public liability" is defined (as relevant here) as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation," 42 U.S.C. 2014(w). A "nuclear incident," in turn, is an occurrence that causes a specific type of injury: "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property." 42 U.S.C. 2014(q). Accordingly, the plain language requires a plaintiff to establish, as an element of the Act's federal cause of action, that he has suffered a specified harm—one of which is "damage to property."

Petitioners appear to make three arguments in support of their contention that the Act does not impose a federal element of harm. *First*, petitioners argue (Pet. 20-22) that a "public liability action" is governed solely by substantive state law. That contention, however, is at odds with the text, structure, and purpose of the Act.

As an initial matter, Section 2014(hh) does not provide for wholesale incorporation of state law; rather, it states that "the substantive rules for decision in such actions shall be *derived from* the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with [Section 2210]." 42 U.S.C. 2014(hh) (emphasis added). That 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. See *O'Conner* v. *Commonwealth Edison Co.*, 13 F.3d 1090, 1100 (7th Cir.) ("Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law."), cert. denied, 512 U.S. 1222 (1994).

Moreover, the text's command that certain substantive rules for the Act's "public liability action" be derived from state law does not foreclose interpreting the Act to impose federal-law requirements as well. That is precisely what the Act does through the limitation in Section 2014(w) (via Section 2014(hh)) that the action arise out of a "nuclear incident." See *Dumontier* v. *Schlumberger Tech. Corp.*, 543 F.3d 567, 570 (9th Cir. 2008) ("The Act isn't an invitation to survey state jurisprudence on the meaning of [the injuries specified in Section 2014(q)]. Quite the opposite: It's a bar to claims that would otherwise be actionable under state law, a bar imposed by federal law and therefore interpreted as a matter of federal law."), cert. denied, 555 U.S. 1172 (2009).

In light of the Act's broader structure and purpose, it is not surprising that Congress would impose limitations on a federal cause of action beyond those that might otherwise exist under state tort law. By providing for the waiver of key tort defenses and authorizing federal indemnification of defendants assessed "public liability," the Act significantly facilitates a potential plaintiff's recovery—at considerable expense to the federal government. That Congress would limit the Act's "public liability action" to a finite set of certain, actual injuries to persons or property therefore is fully consistent with the overall statutory scheme. Indeed, the Act's independent limitation on actionable injuries

furthers the express purpose of "limit[ing] the liability of those persons liable for such losses" arising from nuclear incidents. 42 U.S.C. 2012(i); see *Dumontier*, 543 F.3d at 570 ("Were we to consult state law to define bodily injury, * * * [a] state could simply expand the meaning of bodily injury, sickness or disease to include emotional distress. The Act was designed to safeguard the nuclear industry from expansive liability under state law; plaintiffs' interpretation [applying state law] would permit an end run.").

Second, petitioners contend (Pet. 22-24) that because Section 2014(hh) defines a "public liability action" as a suit "asserting" public liability, the embedded "nuclear incident" requirement is (at most) a pleading requirement. Petitioners thus argue that their suit may go forward upon the mere good-faith allegation of one of the statutorily specified injuries giving rise to a "nuclear incident." Once properly alleged, in petitioners' view, the "nuclear incident" requirement drops out of the case, and recovery turns solely on whether the claim satisfies the requirements of substantive state law.

Petitioners provide no explanation, however, why Congress would have wanted to create a requirement that turns solely on artful pleading. The more sensible construction is that Section 2014(q)'s injury requirement constitutes an element of the Act's "public liability action," not merely a pleading hurdle to obtain federal-court jurisdiction. And even assuming that Section 2014(q)'s injury requirement pertains only to the court's jurisdiction, that would not relieve petitioners of the obligation to prove their jurisdictional allegations and thus to establish that they have suffered a specified injury. See *Saint Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 288 n.10 (1938) ("It is plaintiff's burden both to allege with sufficient particularity the facts creating jurisdiction * * * and, if appropriately

challenged, or if inquiry be made by the court on its own motion, to support the allegation.").[1]

Third, in the alternative, petitioners contend (Pet. 24-25) that Section 2014(q)'s "damage to property" requirement should be interpreted to incorporate applicable state law. Relying on Section 2014(hh)'s reference to state-law rules of decision, petitioners advance essentially the same arguments they make for disregarding the existence of a separate injury requirement under the Act altogether (see Pet. 20-22). But for the same reasons explained above (pp. 9-11, *supra*; see *Dumontier*, 543 F.3d at 570), Congress did not intend the limiting element in the newly created federal cause of action to be interpreted differently according to the laws of 50 different states.

b. There is no conflict among the courts of appeals warranting this Court's review on the interpretation of the Act's "nuclear incident" requirement. With respect to petitioners' argument that it constitutes a mere pleading requirement, the courts of appeals that have addressed the issue have all held (or at least presumed) that Section 2014(q) imposes an independent injury requirement as an element of the federal "public liability action," and that a plaintiff therefore must prove (not merely allege) a statutorily specified injury. Petitioners acknowledge (Pet. 18-20)

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[1] In *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), this Court held that a court may retain jurisdiction over a complaint alleging a violation of the Clean Water Act, even if the plaintiff fails subsequently to prove that a violation existed at the time suit was commenced. Contrary to petitioners' contention (Pet. 23), *Gwaltney* does not stand for the general proposition that jurisdictional facts need merely be alleged, not proven. Rather, the Court recognized that such pleading was sufficient in the limited context of the Clean Water Act, which Congress had drafted to accommodate the practical difficulties of detecting and proving chronic but episodic violations of environmental standards. 484 U.S. at 65.

that the decision below is consistent with the Ninth Circuit's decision in *Dumontier*, 543 F.3d at 570, and the Fifth Circuit's decision in *Cotroneo* v. *Shaw Environment & Infrastructure, Inc.*, 639 F.3d 186, 195-197 (2011), petition for cert. pending, No. 11-71 (filed July 13, 2011).

Petitioners nonetheless argue (Pet. 17-19) that those decisions are in conflict with the Sixth Circuit's decision in *Rainer* v. *Union Carbide Corp.*, 402 F.3d 608, cert. denied, 546 U.S. 978 (2005), with respect to their other argument —that "nuclear incident" is a state, not federal, standard. Any conflict, however, is both narrow and irrelevant here. *Rainer* involved a suit by workers at a uranium enrichment plant who were exposed over many years to dangerous radioactive substances. The plaintiffs in that case asserted that their exposure to radiation had caused subcellular damage to their DNA but did not allege other bodily injury. *Id.* at 611-613. The Sixth Circuit explained that the Act creates a private right of action for claims arising out of "nuclear incidents." *Id.* at 618. It therefore framed the issue on appeal as whether the district court had correctly granted summary judgment against plaintiffs because they "had failed to meet the Price-Anderson Act's 'bodily injury' requirement," *i.e.*, whether subcellular damage constitutes "bodily injury" under Section 2014(q). *Ibid.* To that extent, the Sixth Circuit's opinion, which necessarily presumes that Section 2014(q)'s injury requirement is an element of the Act's federal cause of action, is consistent with the decisions of the other courts of appeals cited above (including the decision below).

As petitioners note, however, the Sixth Circuit did look to state (rather than federal) law in determining what constitutes "bodily injury" for purposes of the Act. See *Rainer*, 402 F.3d at 618-622. In that limited respect, the Sixth Circuit appears to be an outlier. Even if the Sixth

Circuit accorded undue weight to state tort law in construing the meaning of "bodily injury," it clearly treated the existence of an injury specified in Section 2014(q) as a federally prescribed element of a plaintiff's suit.

Moreover, the Sixth Circuit in *Rainer* concluded that state law required some "present physical illness," not just undetectable subcellular damage increasing the risk of future harm (402 F.3d at 622)—analogous to the result reached by the decision below under federal law with respect to contamination of land and Section 2014(q)'s related "damage to property" requirement (Pet. App. 17a-18a). Had *Rainer* concluded that state law made the claim compensable by trumping limitations in the Act's definitions, a clear conflict would exist. It did not. *Rainer* is thus best understood as an evolutionary stepping-stone of circuit law that poses no true conflict. In any event, the Tenth Circuit's analysis of Colorado trespass law (see *id.* at 34a-35a)—which petitioners do not contest before this Court (see pp. 7-8, *supra*)—suggests that the alleged contamination, without a showing of actual physical damage, would not constitute actionable "damage to property." In this case, as in *Rainer*, the absence of liability under state law may bar liability under the Price-Anderson Act, irrespective of whether the Act's "damage to property" requirement imposes an independent federal element for the cause of action. Accordingly, *Rainer* does not present a conflict warranting further review.

2. a. The court of appeals correctly held that where a "public liability action" is based on alleged "damage to property," the plaintiff must establish at least some physical injury to the property.

Petitioners equate (Pet. 25, 27-31) any radioactive contamination resulting in diminished property value with "damage to property" under the Act. The Act's plain lan-

guage, however, does not support petitioners' construction. Section 2014(q) refers to specific injuries—including "damage to property" and "loss of use of property"—"arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties" of designated materials. Had Congress meant to make contamination of property—without accompanying physical damage or loss of use—a sufficient basis for suit under the Act, it would have included contamination in the list of actionable harms set forth in Section 2014(q).

The most natural interpretation based on Section 2014(q)'s text, read as a whole, is that Congress intended to address the effect of radioactive contamination on property by making actionable the "loss of use of property." While contamination does not (without more) amount to actionable "damage to property," it may still result in a "loss of use" of that property under the Act. As the court of appeals reasoned, "where the evidence indicates the property has been affected by radioactive material to such an extent that an otherwise appropriate use of the property is lost, a plaintiff has established the threshold element of his [Section 2014(hh)] claim." Pet. App. 20a. (The court of appeals thus remanded the case to afford petitioners an opportunity to make such a showing. *Id.* at 21a.) Congress's choice to make the "loss of use of property" separately actionable indicates that Congress reserved "damage to property" for actual physical damage.[2]

Citing cases such as *Stevenson* v. *E.I. DuPont de Nemours & Co.*, 327 F.3d 400 (5th Cir. 2003), and *Aetna*

[2] The court of appeals' holding that radioactive contamination giving rise to substantial interference with the use of property is actionable under the Act defeats petitioners' passing contention (Pet. 30-31) that Congress has unconstitutionally deprived them of an appropriate remedy.

Casualty & Surety Co. v. *Commonwealth*, 179 S.W. 3d 830 (Ky. 2006), petitioners assert that "lost property value is recoverable when caused by physical intrusion of dangerous particles onto another's land." Pet. 27-28. But the question whether such contamination is actionable under state law of trespass (*e.g.*, *Stevenson*), or whether it constitutes "property damage" under a private insurance policy (*e.g.*, *Aetna)*, does not resolve whether contamination constitutes "damage to property" within the meaning of the Act. The Act must be construed in light of its own text and purpose, which, for the reasons explained above, require something more than *de minimis* contamination that lowers property value.

Petitioners' reliance (Pet. 28-29) on a federal regulation relating to insurance coverage for property damage arising from nuclear activity is also misplaced. The regulation at issue approved a form policy that defined the scope of coverage as "[a]ll sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage caused by the nuclear hazard," 25 Fed. Reg. 2948 (Apr. 7, 1960), and defined "[p]roperty damage" (in pertinent part) as "physical injury to or destruction or radioactive contamination of property, and loss of use of property so injured, destroyed, or contaminated," *id.* at 2949.[3] Petitioners contend that the regulation reflects a "longstanding administrative practice" (Pet. 28) and demonstrates that "damage to property" extends to radioactive contamination even absent other physical injury.

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[3] The Nuclear Regulatory Commission continues to employ those definitions in setting forth the amount and scope of private insurance its licensees must obtain. 10 C.F.R. 140.91. The Department of Energy, however, does not require its contractors to maintain such financial protection and thus does not have an analogous regulatory definition of property damage. 48 C.F.R. 952.250-70(c).

As an initial matter, petitioners' insistence on construing "damage to property" pursuant to a *federal* regulation wholly undermines their earlier argument (see p. 12, *supra*) that the term should be construed solely by reference to *state* law. In any event, contrary to petitioners' characterization, the Atomic Energy Commission did not "issue[]" (Pet. 28-29) a form policy co-terminous with the Act's financial-protection requirement (42 U.S.C. 2210(a) and (d)(2)(A))—let alone an interpretation of the statutory phrase "damage to property" (42 U.S.C. 2014(q)). Rather, the agency issued a rule that merely "approves, as proof of financial protection, the revised form of nuclear energy liability insurance policy" then currently available to licensees from two private insurance consortiums. 25 Fed. Reg. at 2948. Because the terms of the form policy are not the agency's interpretation of the Act itself, the rule does not govern the definition of "damage to property" in Section 2014(q).

Under petitioners' view, the insurance policy dictates that any contamination—regardless of accompanying physical injury to property—constitutes "damage to property" under the Act. But it is implausible to believe that the government would have agreed to indemnify its contractors and licensees for liability for the presence of a single molecule of plutonium—no matter how harmless. And to the extent petitioners might urge a narrower definition of contamination, see *Webster's Third New International Dictionary of the English Language* 491 (1993) (second definition: "contaminate" is "to render unfit for use by the introduction of unwholesome or undesirable elements"), that effectively would collapse the distinction they attempt to draw between contamination on the one hand, and physical injury to property or the loss of use of that property on the other.

b. Contrary to petitioners' contention (Pet. 25-27), the court of appeals' construction of "damage to property" does not clearly conflict with the Third Circuit's decision in *Pennsylvania* v. *Public Utilities Corp.*, 710 F.2d 117 (1983) —and certainly not to a degree warranting this Court's review. As an initial matter, that decision construed the term "nuclear incident" before the 1988 amendments made the existence of such an incident an element of a federal cause of action. As petitioners note (Pet. 26 n.4), the definition of "nuclear incident" remained unchanged. But the term's role in the statutory scheme changed dramatically into one that defines an element of the Act's "public liability action." See *In re TMI Litig. Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991) (noting that "the entire Price-Anderson landscape was transformed" by the 1988 amendments), cert. denied, 503 U.S. 906 (1992). In contrast to the Tenth Circuit below, the Third Circuit in *Public Utilities Corp.* did not construe the meaning of "nuclear incident" (including "damage to property") in the current, materially different statutory context.

In any event, the Third Circuit did not hold that "contamination resulting in lost property value amounts to 'damage to property' under the Act's 'nuclear incident' definition." Pet. 25. The plaintiffs in *Public Utilities Corp.* did not even assert lost property value; rather, plaintiffs there sought damages for wages paid to employees who did not or could not report for work in buildings affected by the alleged nuclear release. See 710 F.2d at 123. Specifically, plaintiffs alleged that "radioactive materials emitted during the nuclear incident" rendered their buildings and properties "unsafe for a temporary period of time" and "at least temporarily less usable." *Id.* at 122-123. Those claims clearly fell within Section 2014(q)'s definition of "nuclear

incident" as a result of the alleged "loss of use of property"—irrespective of any "damage to property."

To be sure, the Third Circuit concluded that the plaintiffs adequately alleged a "nuclear incident" because "they clearly claim[ed] 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." *Public Utils. Corp.*, 710 F.2d at 123. But that statement—which is unaccompanied by any explanation—may simply indicate that plaintiffs' allegations *taken together* were sufficient to state a claim for a "nuclear incident," not that contamination absent any loss of use of property suffices without the presence of physical harm to property. Accordingly, *Public Utilities Corp.* cannot bear the weight that petitioners place upon it.

3. The court of appeals also found legal errors pertaining to the district court's judgment on other federal and state law grounds. See pp. 7-8, *supra*. Because further proceedings on remand consistent with the court of appeals' guidance on those other issues may result in rejection of petitioners' claims, this case would not be a proper vehicle for resolving the questions presented.

First, addressing respondents' challenge to the district court's ruling that federal nuclear safety standards do not preempt state tort standards of care under the Act, the court of appeals accepted the possibility of conflict preemption. Pet. App. 21a-26a. As a result, it ordered the district court on remand to "permit [respondents] to identify the particular federal regulations or statutes they believe preempt state law" and to "determine whether any such federal standards actually conflict with the relevant state tort standards of care." *Id.* at 25a-26a. If the district court an-

swers that inquiry affirmatively, presumably petitioners' claims under the Act would be preempted.

Second, addressing respondents' state-law nuisance challenge, the court of appeals held that Colorado law does "not permit recovery premised on a finding that an interference, in the form of anxiety or fear of health risks, is 'substantial' or 'unreasonable' unless that anxiety is supported by some scientific evidence." Pet. App. 29a. Because the court of appeals held that "[t]he district court erred in concluding otherwise" (*ibid.*), it will be an open question on remand whether a sufficient scientific foundation exists for supporting the finding of a "substantial" and "unreasonable" interference. If the district court (or jury) answers that question negatively, presumably petitioners' nuisance-based claims would fail as a matter of Colorado law.

Third, as to the trespass theory, the court of appeals determined that petitioners were required to prove "actual physical damage to their properties" as a matter of Colorado law for the "intangible trespass" alleged in this case. Pet. App. 34a. Deeming erroneous the jury instruction directing that petitioners were "*not* required to show * * * that the presence of plutonium on the Class Properties damaged these properties in some other way," the court ordered that petitioners on remand "shall be required to prove the plutonium contamination caused 'physical damage to the property' in order to prevail on their trespass claims." *Id.* at 35a (quoting *Public Serv. Co.* v. *Van Wyk*, 27 P.3d 377, 390 (Colo. 2001)). Even petitioners do not dispute that the jury's award can no longer be sustained on that ground. See Reply Br. 10.

Although the court of appeals did not state that the additional federal and state law errors it identified independently warranted reversal and remand, the application of its opinion on remand could preclude petitioners' recovery

regardless of the Act's "nuclear incident" requirement. The court contemplated as much when it justified its resolution of the other federal and state law issues on the ground that they "are certain to arise again in the event of a re-trial." Pet. App. 21a-22a n.15. Although petitioners are correct that failure of the trespass theory under Colorado law is not itself sufficient to warrant reversal of the verdict because the nuisance theory supports the same damages award (Reply Br. 10), it is by no means clear that the nuisance verdict is unassailable on remand notwithstanding petitioners' record-specific contentions (*id.* at 8-10). Because the substantive standards for petitioners' federal cause of action under the Act are "derived from" state law, that action would fail if neither state-law theory were viable. And respondents' success on the federal preemption theory—the reopening of which petitioners apparently disagree with (*id.* at 11) but do not challenge in their petition—alone would end the case. Accordingly, this Court's resolution of the questions presented in petitioners' favor might not alter the ultimate outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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