No. 98-6

In the Supreme Court of the United States

OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, ET AL.,
PETITIONERS

v.

LAURA NEZTSOSIE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether the tribal exhaustion doctrine bars prompt federal court consideration of whether claims initially brought under tribal law in tribal court fall within the completely preemptive scope of the Price-Anderson Act.

2. Whether the court of appeals erred when it vacated the district court's preliminary injunction barring respondents from "seek[ing] relief under the Price-Anderson Act in tribal court" (J.A. 73a), even though respondents had filed no cross-appeal challenging that injunction.

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INTEREST OF THE UNITED STATES

The Secretary of Energy and the Nuclear Regulatory Commission (NRC) have responsibility for implementation of the Atomic Energy Act of 1954, of which the Price-Anderson Act is a part, and the United States has an interest in the efficient and equitable adjudication of nuclear liability claims. The United States also has an interest in the effectiveness of Indian tribal courts. See note 4, *infra*.

STATEMENT

1. The Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, comprehensively regulates "the possession, use, and production of atomic energy and special nuclear material" for a range of military and commercial purposes, including the provision of nuclear power. 42 U.S.C. 2013(c).[1] In 1957, Con-

[1] Congress initially gave the Atomic Energy Commission (AEC) "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Elec. Co.* v. *State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 207 (1983); see 42 U.S.C. 2011 *et seq.* Congress has since transferred the responsibilities of that agency to the newly formed Nuclear Regulatory Commission and Department of Energy. 42 U.S.C. 2011 note.

gress passed the Price-Anderson Act (Act), Pub. L. No. 85-256, 71 Stat. 576, as an amendment to the Atomic Energy Act. A major purpose of the Price-Anderson Act is to regulate the terms on which private industry may be held liable to members of the public for its role in the development of the Nation's atomic energy program. See 42 U.S.C. 2012(i); see generally *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63-67 (1978).

As amended over the years, the Price-Anderson Act establishes a system of private insurance, industry-wide financial support, and government indemnity to satisfy potential claims of "public liability," defined (with certain exceptions inapplicable here) as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. 2014(w). The Act expansively defines "nuclear incident" to include "any occurrence, including an extraordinary nuclear occurrence, * * * causing bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. 2014(q). "Source material" includes uranium and uranium ore. 42 U.S.C. 2014(z).

The Atomic Energy Act establishes a comprehensive licensing and contracting scheme for industrial and other uses of nuclear materials. See, *e.g.*, 42 U.S.C. 2073, 2093, 2111, 2131 *et seq.*, 2210(a)-(d). In turn, the Price-Anderson Act requires certain licensees (mainly those operating nuclear reactors), and authorizes the NRC to require other licensees, to maintain a specified amount of insurance from private sources. 42 U.S.C. 2210(a) and (b). The Act provides that the government will enter into indemnification agreements with certain licensees, both to ensure compensation for claims in the event that liability awards exceed the amount made available by private means, 42 U.S.C. 2210(c), and to channel all financial liability to the licensees, 42 U.S.C.

2014(t). The Act further establishes an aggregate limit on liability arising from a single "nuclear incident" in contexts where indemnification agreements are required, 42 U.S.C. 2210(e); bans any award of punitive damages in those contexts, 42 U.S.C. 2210(s); and, if aggregate liability exceeds the statutory limit for a particular nuclear incident, provides mechanisms to obtain additional funding and distribute it equitably, 42 U.S.C. 2210(e)(2), (i), and (*o*). The Act provides special liability rules for cases involving an "extraordinary nuclear occurrence," see 42 U.S.C. 2014(j), generally requiring defendants to waive certain defenses relating, *inter alia*, to fault and statutes of limitation. 42 U.S.C. 2210(n)(1).

In the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066, Congress responded to serious litigation problems arising from the 1979 accident at the Three Mile Island nuclear power plant. See pp. 17-18, *infra*. The 1988 amendments provide, among other things, that "any suit asserting public liability" under any source of law "shall be deemed to be an action arising under" the Price-Anderson Act itself. 42 U.S.C. 2014(hh). They establish original and removal jurisdiction over such causes of action in the federal district courts, 42 U.S.C. 2210(n) and (*o*); provide mechanisms for consolidating claims arising from a single incident and for coordinating the orderly distribution of compensatory funds, 42 U.S.C. 2210(n)(2) and (3); and otherwise enable the federal courts to "encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident," 42 U.S.C. 2210(n)(3)(C)(vi).

2. Respondents are members of the Navajo Nation who have filed separate suits in Navajo tribal court alleging that, between the mid-1940s and the 1960s, petitioners (or their corporate affiliates) conducted tortious uranium mining activities on tribal lands leased from the Tribe. J.A. 76a-77a;

87a-88a n.5.[2] Respondents based their suits on theories of liability under tribal law. See Pet. 2-3; J.A. 81a. Petitioners moved in Navajo trial court to have the suits dismissed on jurisdictional grounds, and the motions were denied. See, *e.g.*, J.A. 63a-64a. Petitioners then filed these actions against respondents in the United States District Court for the District of Arizona, seeking declaratory and injunctive relief against further proceedings in tribal court. Pet. 2-4.

In November 1996, the district court entered separate orders providing essentially the same relief in each case. See J.A. 68a-73a. The court denied petitioners' application for a preliminary injunction, "except to the extent that [respondents] seek[] relief under the Price-Anderson Act in tribal court." J.A. 73a; see also J.A. 69a ("The Court does grant [El Paso's] requested relief to the extent that it enjoins [respondents] from pursuing a Price-Anderson Act complaint in tribal Court."), 71a (similar). The district court expressed no view concerning "whether or not the provisions of the [Act] have any application to the claims asserted by [respondents] in tribal court." J.A. 71a, 73a.

Petitioners filed a notice of appeal, but respondents did not, despite the preliminary injunction entered against them. A divided panel of the Ninth Circuit held that the tribal court exhaustion rule announced in *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), compelled the district court to stay its hand until after the Navajo court system had completed its inquiry into its ju-

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[2] Petitioners claim, and respondents appear not to dispute, that those activities were conducted under a license and contract with the AEC to supply uranium to the government. Pet. 2. Petitioners had entered into no indemnification agreements with the government. Pet. 10 n.9. In 1990, Congress created a federally administered fund to compensate, *inter alia*, certain persons employed in uranium mining in the Southwest between 1947 and 1971. Radiation Exposure Compensation Act, Pub. L. No. 101-426, § 5, 104 Stat. 922, 42 U.S.C. 2210 note. That legislation has no bearing on the questions presented here.

risdiction over respondents' claims. See J.A. 92a. As relief, the majority not only affirmed the district court's refusal to enjoin respondents' prosecution of tribal law claims in tribal court, but also dissolved the injunction prohibiting them from pursuing Price-Anderson claims in that court, despite respondents' failure to challenge that injunction. *Ibid.* Judge Kleinfeld dissented, reasoning: "Because (1) it is law of the case, not appealed, that the tribal court lacks jurisdiction over Price-Anderson claims, and (2) there are no claims that can be made that are not Price-Anderson claims, it necessarily follows that (3) there are no claims that can be made in tribal court." J.A. 95a.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates three separate issues. *First*, may the federal courts promptly resolve the parties' threshold dispute about whether respondents' tort claims fall within the preemptive scope of the Price-Anderson Act, even though that same dispute is currently presented in the tribal court proceedings (see J.A. 63a-64a)? *Second*, if the federal courts may conduct that threshold inquiry, do respondents' claims in fact fall within the Act's preemptive scope, such that they are "deemed to be [claims] arising under" the Act itself (42 U.S.C. 2014(hh))? *Third*, if respondents' claims do fall within that scope and are thus deemed to arise under the Act, should the federal courts enjoin the tribal court proceedings on the ground that tribal courts may not adjudicate *Price-Anderson claims* over the objection of the defendant? Only the first of those questions is properly before this Court.

1. The tribal exhaustion requirement of *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985), does not bar prompt federal court review of whether a claim brought initially under tribal law in tribal court falls within the preemptive scope of the Price-Anderson Act. The reason is specific to the Act itself. Tribal courts retain broad jurisdiction over cases involving "nonmember conduct on

tribal land," *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997), as distinguished from cases involving nonmember conduct on reservation lands alienated to non-Indians. The uranium mining at issue here occurred on tribal lands and thus falls within the heartland of tribal jurisdiction over "nonmember conduct." *Ibid.* The proper focus of this case, therefore, is not on the non-Indian identity of petitioners, but on the peculiar subject matter of respondents' claims.

Ordinarily, the plaintiff is master of what jurisdiction he will appeal to. A plaintiff is entitled to a state forum for the adjudication of most claims arising under state law, even where the defendant contends that federal law preempts those claims. A similar approach is warranted when a plaintiff chooses a tribal forum for the adjudication of claims arising under tribal law. A tribal court is competent to decide standard preemption *defenses*, and the exhaustion doctrine protects the federal courts from premature involvement in many ordinary disputes pending in tribal court.

The general rule making a plaintiff the master of his claim is, however, subject to an important exception, known as "complete preemption." Congress occasionally deems a defined class of common-law claims to be claims arising under federal law and entitles the *defendant* to choose a federal forum—not just for the ultimate adjudication of such claims on the merits, but also for the threshold inquiry into whether particular claims fall within the preempted class. The Price-Anderson Act is such a scheme. If respondents had sued in state court, therefore, petitioners would have been entitled to a federal forum for immediate resolution of whether respondents' tort claims fall within the class of claims "deemed to * * * aris[e] under" the Act. 42 U.S.C. 2014(hh). The specific and important statutory objectives underlying that guarantee of immediate federal court review take precedence over the usual exhaustion requirement and entitle a defendant to similarly prompt access to a federal forum when suit is brought in tribal court.

2. Because they mistakenly believed that the tribal exhaustion rule barred their consideration of the issue, neither the district court nor the court of appeals determined whether respondents' claims do, in fact, fall within the preemptive scope of the Price-Anderson Act. This Court need not itself resolve that issue on the merits; rather, if it agrees that the exhaustion requirement does not bar such review, it may remand to the lower federal courts for consideration of the issue in the first instance. In any event, the torts alleged here do constitute "nuclear incident[s]" as that term is broadly defined in 42 U.S.C. 2014(q), and respondents' claims are thus properly "deemed to * * * aris[e] under" the Act. 42 U.S.C. 2014(hh); see 42 U.S.C. 2014(w).

3. The final question potentially at issue is whether tribal courts may adjudicate claims deemed to arise under the Price-Anderson Act. That question is not properly before the Court. Respondents did not appeal the district court's preliminary injunction barring them from "seek[ing] relief under the Price-Anderson Act in tribal court." J.A. 73a. That default divests any reviewing court of jurisdiction to revisit whether respondents may now seek that very relief in tribal court. In any event, a basic purpose of the Price-Anderson Act is to ensure simplicity and efficiency in the litigation of nuclear tort claims by entitling defendants, upon their motion, to a single federal forum for the adjudication of all claims arising from any nuclear incident. That purpose would be thwarted if tribal courts, unlike state courts, could adjudicate such claims over the objection of the defendant.

ARGUMENT

A. The Tribal Exhaustion Doctrine Bars Premature Federal Intervention In Tribal Court Adjudication Of Ordinary Preemption Defenses

The issue in this case antecedent to all others is this: Does the usual tribal exhaustion requirement of *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845

(1985), bar prompt federal court resolution of the parties' threshold dispute concerning whether respondents' claims fall within the preemptive scope of the Price-Anderson Act? The answer is no, and the reason relates to the extraordinary character of the Act's preemption provision, not to any general principle concerning tribal court jurisdiction over cases involving non-Indians.

1. A fundamental principle of federal Indian law is that tribal courts may exercise jurisdiction in cases involving non-Indians who "avail themselves of the substantial privilege of carrying on business on the reservation." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (internal quotation marks omitted).[3] Although this Court recently limited tribal jurisdiction over suits between non-Indians for events arising on reservation lands that have been alienated to non-Indians or to a State, see *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), the Court "readily agree[d]" that "tribes retain considerable control over nonmember conduct on tribal land": *i.e.*, land owned by, or held in trust for, a Tribe or its members. *Id.* at 454. Here, petitioners conducted their mining activities on tribal lands (J.A. 87a-88a n.5), and the petition for certiorari presents no claim that this case raises the kind of territorial concerns at issue in *Strate*. See also *Merrion*, *supra* (Tribes retain sovereign authority to tax non-Indians doing business on leased tribal lands); *Kerr-*

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[3] See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 222-223 (1959) (tribal court had exclusive jurisdiction to adjudicate contract dispute brought by non-Indian against Indian, even though non-Indian had sued in state court; "[i]t is immaterial that respondent is not an Indian," because "[h]e was on the Reservation and the transaction with an Indian took place there"); *Kennerly* v. *District Court*, 400 U.S. 423 (1971) (per curiam) (following *Williams*); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (tribal courts are "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987) ("[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty").

McGee Corp. v. *Navajo Tribe*, 471 U.S. 195 (1985) (applying *Merrion* to taxation of mineral production by non-Indians on leased Navajo lands). Those mining activities thus fall squarely within the class of cases in which tribal courts retain presumptive jurisdiction over "nonmember conduct."[4]

In *National Farmers Union*, this Court held that federal courts have jurisdiction under 28 U.S.C. 1331 to consider claims that federal law has "curtailed the power[] of [a] Tribe" to exercise jurisdiction over a defendant in a case pending in tribal court. 471 U.S. at 852. The Court further held, however, that a party may not obtain such relief until after it has exhausted its remedies in the tribal judicial system, a rule that the Court grounded in "a policy of supporting tribal self-government and self-determination," "the orderly administration of justice in the federal court," and the value of providing tribal courts with "the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856. The Court at the time anticipated three exceptions to the exhaustion rule: where the assertion of tribal jurisdiction is in "bad faith," where exhaustion would be "futile," and "where the action is patently violative of express jurisdictional prohibitions." *Id.* at 856 n.21. Subsequently, in *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9

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[4] Congress recently reaffirmed the United States' commitment to tribal courts by enacting the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993), which provides financial and institutional assistance to tribal justice systems throughout the United States. Congress predicated that legislation on its findings that "tribal justice systems are an essential part of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights," 25 U.S.C. 3601(5) and (6); that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals," S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993); and that "civil jurisdiction on an Indian reservation presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute," H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (internal quotation marks omitted).

(1987), the Court relied on the exhaustion doctrine in rejecting the efforts of a defendant in a pending tribal court case to use the diversity statute to secure a federal court judgment on the merits of a substantive issue pending in the tribal court.[5]

2. Like cases in state court, cases in tribal court often present issues about the preemptive effect of federal law on a plaintiff's cause of action. The assertion of a preemption *defense* is generally no basis for federal court intervention in tribal court proceedings. In the absence of a contrary congressional determination, tribal courts, no less than state courts, are presumed competent to decide questions of federal law, including preemption.[6] Indeed, in many contexts,

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[5] Although substantive federal Indian law gives tribal courts exclusive jurisdiction over a variety of claims brought against Indians for events arising on a reservation, see, *e.g.*, *Williams* v. *Lee*, *supra*; see also *Santa Clara Pueblo*, 436 U.S. at 65, in our view the exhaustion doctrine does not itself rebut the ordinary rule that a plaintiff may select the forum in which suit will be filed. But cf. *United States* v. *Plainbull*, 957 F.2d 724 (9th Cir. 1992). Where a private plaintiff challenges an exercise of taxing or regulatory authority by the Tribe itself, however, we believe that the plaintiff ordinarily must first present its objections to the tribal administrative agency and then to the tribal court. See, *e.g.*, *Middlemist* v. *Babbitt*, 19 F.3d 1318 (9th Cir.), cert. denied, 513 U.S. 691 (1994); 94-42 *Middlemist* Gov't Br. in Opp. 6-12.

[6] See, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 65-66 (with narrow exceptions, tribal courts have exclusive jurisdiction to address preemptive effect of Indian Civil Rights Act on tribal law); compare *Northern States Power Co.* v. *Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (holding that exhaustion would itself frustrate federal statutory purposes); see generally S. Rep. No. 88, *supra*, at 8-9. This Court has admonished that any concern about the competence of tribal courts to address general legal issues "is not among the exceptions to the exhaustion requirement established in *National Farmers Union*, 471 U.S., at 856, n. 21, and would be contrary to the congressional policy promoting the development of tribal courts." *Iowa Mutual*, 480 U.S. at 19; accord *id.* at 21 (opinion of Stevens, J.) ("A federal court must always show respect for the jurisdiction of other tribunals. Specifically, only in the

federal court adjudication of a preemption issue pending in tribal court could "render the exhaustion requirement virtually meaningless, allowing a tribal court to assert jurisdiction over an action only after a federal court had effectively determined the merits of the case." *Reservation Tel. Coop.* v. *Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 185 (8th Cir. 1996). Moreover, abandonment of the exhaustion requirement for cases involving standard preemption defenses would expose the federal courts to burdensome requests for premature intervention in many ordinary disputes arising in tribal courts. Cf. *National Farmer's Union*, 471 U.S. at 856-857.

Contrary to petitioners' suggestion (Pet. 13-16), tribal court adjudication of ordinary preemption defenses, in cases involving non-Indian conduct on tribal lands, is quite consistent with this Court's decision in *Strate*. That case concerned whether a tribal court had adjudicatory jurisdiction to hear a suit between non-Indians involving a traffic accident on a state highway within a reservation. The Court concluded that the state highway was jurisdictionally equivalent to land that the Tribe had alienated to non-Indians, 520 U.S. at 454-456, and it reaffirmed that, with certain important exceptions and in the absence of a contrary congressional direction, "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Id.* at 446 (citing *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981)). The Court separately addressed the argument that a tribal court's adjudicatory jurisdiction over non-Indians might exceed the Tribe's "civil authority" (or "regulatory jurisdiction") over them, just as the constitutional restrictions on a State's power to impose substantive rules of conduct on nonresidents do not themselves limit the power of state courts to adjudicate disputes

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most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or tribal court.").

between nonresidents under the laws of another State. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821-822 (1985). In rejecting that argument, the Court held that, "[a]s to nonmembers, * * * a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453.

Petitioners mistakenly cite that passage for the proposition that exhaustion of remedies in the tribal judicial system is unnecessary when a defendant in a pending tribal court action contends that federal law has preempted a tribe's "legislative jurisdiction." Pet. 13, 16. As a preliminary matter, the logical consequences of that position would extend well beyond the exhaustion doctrine: the cited passage in *Strate* deals with jurisdiction, not exhaustion, and misapplication of that passage to the preemption setting would have odd and unfortunate jurisdictional effects. If federal preemption of tribal legislative jurisdiction deprived tribal courts of jurisdiction to hear a particular claim, tribal courts would lack jurisdiction to uphold preemption defenses on the merits; upon conducting the inquiry and finding preemption, the tribal court would be compelled to dismiss the relevant claim for lack of jurisdiction.

Strate does not compel such an anomalous regime. In rejecting the analogy to state court jurisdiction over nonresidents involving conduct outside the forum State, *Strate* addressed an issue that, in many respects, is appropriately compared to personal jurisdiction. The *Strate* Court's equation of adjudicative and legislative jurisdiction means that when a Tribe lacks a sufficient interest in non-Indian conduct outside tribal lands to regulate the conduct directly, it also lacks adjudicatory jurisdiction over cases arising from that same conduct. That holding, however, is irrelevant where, as here, the conduct arises on tribal lands and therefore falls squarely within the heartland of tribal sovereignty, subject only to the preemptive effect of a federal statute—applicable to Indians and non-Indians alike—governing the subject matter of the suit. See *Strate*, 520 U.S. at 454 (reaffirming

Tribes' "considerable control over nonmember conduct on tribal land"). Indeed, in this setting, it is inconsequential that the defendants in tribal court happen to be non-Indians. An Indian defendant could just as easily raise a federal preemption challenge to a tribal law claim brought in tribal court, and he would have no less an interest than a non-Indian defendant in its appropriate resolution.

Thus, if a tribal court otherwise has jurisdiction to hear a case (*e.g.*, because the conduct occurred on tribal land), any qualification of the tribal court's authority to decide a pre-emption defense on the merits, and to decide that issue in the first instance, cannot logically derive from the jurisdictional concerns underlying *Strate*.[7] Any such qualification must derive instead from the particular nature of the federal statutory scheme at issue.

B. The Exhaustion Doctrine Does Not Bar A Federal Court From Determining, In The First Instance, The Effect Of The Price-Anderson Act's Complete Pre-emption Scheme On Actions Pending In Tribal Court

1. In a suit brought in state court under state law, "[f]ederal pre-emption is ordinarily a federal *defense* to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63 (1987) (emphasis added). Conse-

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[7] In a concluding footnote, the *Strate* Court added that the exhaustion requirement is inapplicable when a federal court is asked to consider the validity of "tribal-court jurisdiction over an action such as this one," because adherence to that requirement would then serve "no purpose other than delay." 520 U.S. at 459-460 n.14. That footnote does not exempt from the exhaustion requirement all circumstances in which a federal court considers the proper resolution of a substantive issue pending in tribal court to be "clear." Cf. Pet. 14 & n.17. Instead, it indicates only that exhaustion is not required when, in cases presenting the territorial jurisdictional concerns at issue in *Strate*, a tribal court plainly lacks adjudicatory jurisdiction over the conduct of non-Indians on alienated land.

quently, ordinary preemption defenses must often be decided by state courts—even when the defendant would prefer to have a federal court decide the issue, even when the preemption defense is "obvious," *id.* at 66, and "even if both parties concede that the federal defense is the only question truly at issue," *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987). As discussed, the same rule should apply to tribal court adjudication of an ordinary federal preemption defense to a cause of action arising under tribal law.

The preemption claim that petitioners raise, however, is not an ordinary preemption defense. "On occasion, the Court has concluded that the pre-emptive force of a [federal] statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at 393 (internal quotation marks and citation omitted) (addressing Section 301 of the Labor-Management Relations Act).[8]

The principal consequence of "complete preemption," as distinguished from ordinary preemption, is this: A defendant sued in state court may immediately remove the case to federal court; have the federal court resolve any dispute about whether the plaintiff's claims fall within the scope of the completely preemptive scheme; and, if they do, have the federal court adjudicate the case on the merits if the plaintiff elects to proceed (and can proceed) with claims under federal law. See *Caterpillar*, 482 U.S. at 391 n.4, 393-394; *Metropoli-*

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[8] Accord *Metropolitan Life*, 481 U.S. at 65 (Employee Retirement Income Security Act); *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983) (same); see also *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 675 (1974).

tan Life, 481 U.S. at 63-65.[9] Significantly, a defendant's right to immediate federal court resolution of a preemption claim depends not on whether that claim is "obvious[ly]" correct at the outset, see *Metropolitan Life*, 481 U.S. at 66, or even on whether it is ultimately meritorious, see, *e.g.*, *Caterpillar*, *supra*, but on whether it is a claim about complete, rather than ordinary, preemption. Where a federal statutory scheme creates a sphere of complete preemption, the federal court, upon removal, has sole authority to decide whether a state law claim falls within that sphere, and "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. 1446(d).

2. Congress has created only a few complete preemption regimes, and the Price-Anderson Act is among them. The Act provides that "*any* suit asserting public liability," as that term is defined in 42 U.S.C. 2014(w), "shall be deemed to be an action arising under" the Price-Anderson Act itself (42 U.S.C. 2014(hh)); 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," but only if that law is consistent with the Act (*ibid.*); and that, "[u]pon motion of the defendant" or the NRC or the Secretary of Energy, "any such action pending in any State court * * * shall be removed or transferred to the United States district court" for "the district where the nuclear incident t[ook] place" (42 U.S.C. 2210(n)(2)).

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[9] Some federal statutory schemes have that jurisdictional effect because they completely occupy the relevant field and create an alternative federal cause of action, even though they lack a provision explicitly deeming common law claims to be claims arising under federal law for purposes of the well-pleaded complaint rule. See generally *Caterpillar*, 482 U.S. at 393-394; 14A C. Wright *et al.*, *Federal Practice and Procedure* § 3722, at 86-87 (1998 Supp.). As discussed below, however, the Price-Anderson Act does have an explicit "deeming" provision, and it has completely preemptive effect for that reason alone.

For the moment, we leave to one side our answer as to whether this case in fact falls within the preemptive scope of Section 2014(hh). See pp. 26-30, *infra*. For present purposes, the important point is that for *some* class of claims brought initially under state law, the Price-Anderson Act converts those claims into "action[s] arising under" federal law. See pp. 17-18 & n.10, *infra*. As a result, if this suit had initially been brought in state court, petitioners would have been entitled (by removing the case) to an immediate determination by a federal court, rather than by the state court, of whether the suit falls within the preemptive scope of the Price-Anderson regime. That fact is highly relevant to the first question presented here: Does the rule announced in *National Farmers Union* foreclose prompt federal court resolution of the parties' dispute concerning whether respondents' claims fall within the Act's scope, even though the federal courts would immediately resolve that dispute if the case had been filed in state court?

The answer is no. Unlike the well-pleaded complaint rule governing the respective roles of state and federal courts, the tribal exhaustion doctrine arises "as a matter of comity, not as a jurisdictional prerequisite." *Iowa Mutual*, 480 U.S. at 16 n.8. That doctrine is rooted largely in a long-standing congressional "policy of supporting tribal self-government and self-determination," *National Farmers Union*, 471 U.S. at 856; see also *Iowa Mutual*, 480 U.S. at 16-17, and it is subject to complete defeasance by Congress. Although the jurisdictional roles of tribal and state courts may diverge in other contexts (see note 5, *supra*; note 13, *infra*), the role of state courts is an appropriate point of reference for determining the dimensions of the congressional policy favoring tribal sovereignty in the complete preemption setting. Where some particularized federal interest has prompted Congress to single out a subject matter for complete preemption, the courts should not lightly presume that Congress intended to make federal court review of the threshold

preemption question *less* available to tribal court defendants than to state court defendants. That, however, would be the peculiar consequence of applying the exhaustion doctrine here to bar prompt federal court review of that question. Forcing a federal court to "stay its hand" (*Iowa Mutual*, 480 U.S. at 16) when asked to decide a Price-Anderson preemption challenge would frustrate the core purposes of the Act, as we next discuss.

3. Until the 1988 amendments to the Price-Anderson Act, claims of injury due to "nuclear incidents" were brought under state law, although federal law preempted state law in important respects. See *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991) (*TMI II*), cert. denied, 503 U.S. 906 (1992); see also *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251-256 (1984). Absent complete diversity, therefore, the federal courts lacked original jurisdiction to hear most such claims. See, *e.g.*, *Stibitz* v. *General Pub. Util. Corp.*, 746 F.2d 993 (3d Cir. 1984), cert. denied, 469 U.S. 1214 (1985); *Kiick* v. *Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986).

That jurisdictional impediment assumed particular importance after the nuclear incident at Three Mile Island in 1979, which gave rise to "150 separate cases against TMI defendants, with over 3,000 claimants, in various state and Federal courts." See S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987). There was then no mechanism for removing those cases to a single federal court. The then-existing removal and consolidation provisions of the Price-Anderson Act were confined to "extraordinary nuclear occurrences" (see 42 U.S.C. 2014(j)), and the NRC had not declared the Three Mile Island incident to be such an occurrence. The resulting proliferation of uncoordinated lawsuits led Congress to amend the removal and consolidation provisions to encompass cases arising out of any "nuclear incident." See 42 U.S.C. 2014(hh), 2210(n)(2). To ensure removability, Congress converted "*any* suit asserting public liability" for a

nuclear incident into "an action arising under" the Price-Anderson Act. 42 U.S.C. 2014(hh) (emphasis added).[10]

"By creating this federal program which requires the application of federal law," Congress sought to achieve "equity[] and efficiency in the disposition of public liability claims." *TMI II*, 940 F.2d at 857; accord 42 U.S.C. 2210(n)(3)(C)(vi) (encouraging "the equitable, prompt, and efficient resolution of cases arising out of [a] nuclear incident"). In particular, "[t]he availability of the provisions for consolidation of claims in the event of any nuclear incident, not just an [extraordinary nuclear occurrence], would avoid

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[10] See *O'Conner* v. *Commonwealth Edison Co.*, 13 F.3d 1090, 1099-1100 (7th Cir.) (given "Congress' manifest intent to create a new and entirely federal cause of action," "a state cause of action is not merely transferred to federal court; instead, a new federal cause of action supplants the prior state cause of action"), cert. denied, 512 U.S. 1222 (1994); *TMI II*, 940 F.2d at 856 ("The Amendments Act [of 1988] creates a federal cause of action which did not exist prior to the Act."). Congress specifically intended to "mak[e] suits asserting public liability '[c]ases arising under the [l]aws of the United States' within the meaning of Article III," and it did so to ensure the adjudication of such suits in federal court. H.R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 1, at 18 (1987) (House Report) (internal ellipsis omitted); accord S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987). In so doing, it followed aspects of the well-established jurisdictional model of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1333(a)(2), 1349(b)(1). House Report at 18; see generally *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) (discussing OCSLA jurisdictional scheme). The courts of appeals that have considered the issue have uniformly held that the Price-Anderson Act's conversion of nonfederal causes of action into removable federal causes of action is consistent with Article III, even though those federal causes of action incorporate substantive state law to the extent that it is consistent with federal law. See *O'Conner*, 13 F.3d at 1094-1101; *TMI II*, 940 F.2d at 848-860; *Nieman* v. *NLO, Inc.*, 108 F.3d 1546, 1548-1549 (6th Cir. 1997). (In addition to the provisions of the Price-Anderson Act itself, federal law often conflicts with, and takes precedence over, state law on such substantive issues as standard of care. See, *e.g.*, *Roberts* v. *Florida Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998), petition for cert. pending, No. 98-640 (filed Oct. 16, 1998); *O'Conner*, 13 F.3d at 1103-1105; *TMI II*, 940 F.2d at 859-860.) Respondents raised no Article III challenge in the court of appeals.

the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation." S. Rep. No. 218, *supra*, at 13. Moreover, by creating centralized control over compensation funds, those same provisions also "ensur[e] the equitable and uniform treatment of all victims." H.R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 3, at 30 (1987).

The statutory emphasis on "equity[] and efficiency" (*TMI II*, 940 F.2d at 857) would be compromised if tribal courts, unlike state courts, were immune from immediate federal court review of any threshold dispute concerning whether a plaintiff's claims fall within the completely preemptive scope of the Price-Anderson Act. Such review serves two principal objectives. First, in many contexts, prompt federal court resolution of the preemption question will foreclose uncoordinated litigation in disparate forums concerning whether the claims fall within the scope of the Act and its substantive rules, such as (where an indemnification agreement makes them applicable) the limits on compensatory liability or the ban on punitive damages. See 42 U.S.C. 2210(e) and (s); see also 42 U.S.C. 2210(n)(1) (foreclosing certain defenses in case of "extraordinary nuclear occurrence"); pp. 28-30, *infra*. Second, Congress anticipated that, upon finding that the Act applies, the federal court would itself promptly adjudicate the case on the merits. See pp. 22-25, *infra*.

Below, we address whether, unlike a state court, a tribal court may adjudicate claims "deemed to * * * aris[e] under" the Price-Anderson Act (42 U.S.C. 2014(hh)), even when the defendant would prefer a federal forum. Our central point here is simply that Congress had important, efficiency-based policy reasons for assigning to the federal courts the task of immediately resolving, in the first instance, whether a particular case falls within the scope of the Act's complete preemption provisions. Those efficiency concerns are applicable to suits filed in any non-federal court, not just those filed in state courts. This is therefore

one of those unusual circumstances, like the three anticipated in *National Farmers Union* itself (see 471 U.S. at 856 n.21), in which the ordinary exhaustion rule must yield to a supervening federal interest. It would make little sense to apply that "prudential rule" (*Strate*, 520 U.S. at 453) to foreclose the immediate federal court preemption review that, for highly specific reasons, Congress made available to any defendant sued in similar circumstances in state court.

4. In seeking an injunction in the district court against further tribal court proceedings, petitioners claimed not just that the Price-Anderson Act preempted respondents' tribal law claims and converted them into claims arising under the Act, but also that the tribal court lacks jurisdiction to adjudicate claims that *are* brought under the Price-Anderson Act (including claims that are brought under tribal law but are "deemed" to be claims arising under the Act). Our analysis to this point has not addressed the latter issue. We have detached that issue from the rest of our analysis not so much because it is analytically natural to do so as because this case arrives here in a very peculiar procedural posture. Respondents did not cross-appeal from the district court's preliminary injunction barring them from "seek[ing] relief under the Price-Anderson Act in tribal court." J.A. 73a; see also J.A. 69a, 71a. That default bars current appellate consideration of whether the injunction was proper.

a. When one party files a notice of appeal from a district court's judgment and the opposing party files no cross-appeal, "the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (Brandeis, J.). Although language in one early opinion suggested that this was a "rule of practice" rather than a strict jurisdictional prerequisite, see *Langnes* v. *Green*, 282 U.S. 531, 538 (1931), this Court has subsequently stated that the rule is "inveterate and certain," *Massachusetts Mut. Life Ins. Co.* v. *Ludwig*,

426 U.S. 479, 480 (1976), and that it defines "[t]he *power* of an appellate court to modify a decree," *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 187 (1937) (emphasis added). Indeed, permitting an appellee to challenge a district court judgment without having filed its own notice of appeal under Rule 4(a)(3) of the Federal Rules of Appellate Procedure would be "equivalent to permitting courts to extend the time for filing a notice of appeal" and would therefore contradict "the mandatory nature of the time limits contained in Rule 4." *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); see also *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) ("the taking of an appeal within the prescribed time is mandatory and jurisdictional").[11]

For those reasons, the court of appeals lacked jurisdiction to vacate the district court's injunction barring respondents from "seek[ing] relief under the Price-Anderson Act in tribal court" (J.A. 73a), and any dispute about the validity of that injunction on the merits is not properly presented in this Court. Significantly, the question of the tribal court's authority to adjudicate Price-Anderson claims on the merits is not logically antecedent to (even though it is obviously

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[11] In *Torres*, the Court held that, despite the "harshness" of the result (487 U.S. at 317), a failure to identify all parties in a notice of appeal is a "jurisdictional bar" to appellate relief for any omitted party (*id.* at 314). Most courts that have considered the issue in light of *Torres* have held that noncompliance with the cross-appeal requirement presents a jurisdictional bar to modification of the district court's judgment to the benefit of an appellee. See, *e.g.*, *Johnson* v. *Teamsters Local 559*, 102 F.3d 21, 29 (1st Cir. 1996); *Young Radiator Co.* v. *Celotex Corp.*, 881 F.2d 1408, 1416 (7th Cir. 1989). But see, *e.g.*, *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C. Cir 1990) (R.B. Ginsburg, J.), cert. denied, 498 U.S. 980, 1046 (1990). To support its contrary position, the court of appeals in this case relied on precedent holding that a court may consider *issues* of comity not raised by the parties. J.A. 82a. But a court's power to address unraised issues in support of a judgment is distinct from, and has always exceeded, its power to grant unrequested relief. See generally *American Ry. Express*, 265 U.S. at 435; see also *Iowa Mutual*, 480 U.S. at 16 n.8 (tribal exhaustion doctrine is not "jurisdictional").

related to) the separate question that *is* presented here: the appropriateness of a prompt federal court inquiry into whether the purportedly tribal claims now pending in tribal court fall within the Act's complete preemption scheme to begin with. Indeed, the latter question may be antecedent to the former, for only if the federal court determines that these are in fact Price-Anderson Act claims would it become necessary to decide whether a tribal court may properly adjudicate them as such.

The procedural peculiarities of this case present an unfortunate jurisdictional barrier to full consideration of the issues that would otherwise be presented. But the court of appeals' most basic error was to act without jurisdiction. Correction of that error should take precedence over correction of any mistakes the court may have made after erroneously assuming jurisdiction.

b. The question on which respondents have defaulted is important. On the one hand, the Price-Anderson Act does not explicitly address tribal court jurisdiction over claims arising under the Act, nor does it provide for removal of Price-Anderson claims from tribal court to federal court. Compare 42 U.S.C. 2014(hh) (converting "any suit asserting public liability" into suit arising under Act) with 42 U.S.C. 2210(n)(2) (providing for removal only from "any * * * action pending in any State court"). As a general matter, "the proper inference from silence is that [a Tribe's] sovereign power remains intact." *Iowa Mutual*, 480 U.S. at 18 (internal ellipses omitted) (quoting *Merrion*, 455 U.S. at 149 n.14). Like state courts, tribal courts are courts of general subject-matter jurisdiction, and, where they have jurisdiction over the parties, they are presumed competent to adjudicate claims arising under any source of law, including federal law, in the absence of a contrary congressional determination. See generally S. Rep. No. 88, *supra*, at 8-9.

On the other hand, Congress's desire for "equity[] and efficiency in the disposition of public liability claims" (*TMI*

II, 940 F.2d at 857), and its creation of a complete preemption scheme to achieve those objectives, underscore an obvious intent to ensure, at the election of the defendant or the government, expeditious federal court review on the merits of *any* suit falling within the scope of the Price-Anderson Act. Evidence of that intent abounds throughout the Act. As we have discussed, Congress created a complete preemption regime in this context to expedite litigation concerning nuclear torts, to "avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation," S. Rep. No. 218, *supra*, at 13, and to give the federal courts centralized control over compensation funds to "ensur[e] the equitable and uniform treatment of all victims," H.R. Rep. No. 104, *supra*, Pt. 3, at 30. Without any mechanism for transfer from tribal to federal court, tribal court adjudication of claims arising from nuclear incidents would threaten to cause the very litigation problems that Congress sought to rectify: delay, uncoordinated litigation in disparate forums concerning the same underlying nuclear incident, and dispersal of related compensation claims. Indeed, a pervasive premise of the Act is that defendants may avoid such problems simply by seeking consolidated federal court review of all cases arising from a single incident. See, *e.g.*, 42 U.S.C. 2210(n) and (*o*).

Of course, not every case falling within the Act's preemptive scope will ultimately present each of those problems, because not every nuclear incident will give rise to multiple tort suits. Congress legislated with a broad brush, however, because it is often difficult to know in advance how many plaintiffs will eventually seek relief for radiation-related illnesses caused by a single nuclear incident. See *TMI II*, 940 F.2d at 856. Congress's decision to include *all* "nuclear incidents" within the Act's preemptive scope, and to guarantee a federal forum to any defendant sued within that scope, represents a considered preference for bright-line

rules in this area. That preference would be defeated if important jurisdictional decisions were to turn on litigation-intensive, case-by-case predictions in disparate forums about the potential for a particular nuclear incident to give rise to multiple tort suits.[12]

In sum, Congress anticipated only two forums for the adjudication of Price-Anderson claims, and they are the two forums that the Act explicitly addresses: federal courts and, subject to an absolute right of removal, state courts. See 42 U.S.C. 2210(n)(2). Tribal court adjudication of Price-Anderson claims, over the objection of the defendant and without any mechanism for removal, would contradict the structure and purposes of the Act. And application of the exhaustion rule to delay federal-court adjudication of the proper forum for Price-Anderson claims would itself contradict the Act's emphasis on efficiency and simplicity in nuclear tort litigation. Cf. *National Farmers' Union*, 471 U.S. at 856 n.21.

Because the Act is intended to ensure automatic adjudication of nuclear liability claims by the federal courts "[u]pon motion of the defendant" or the government (42 U.S.C. 2210(n)(2)), the Act might be read to confine jurisdiction over such claims to the federal and state courts. In our view, however, the rule favoring retained tribal sovereignty to the extent consistent with federal law (see *Merrion*, 455 U.S. at 149 n.14) supports a slightly different approach. The Act

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[12] Although Congress created an exclusively federal cause of action for "any suit asserting public liability," it 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," except where inconsistent with the Price-Anderson Act. 42 U.S.C. 2014(hh); see also note 10, *supra* (noting role of federal law in setting standard of care). Under one natural interpretation of that provision, tribal courts adjudicating Price-Anderson claims might need to apply state law in important respects. Cf. *Richards* v. *United States*, 369 U.S. 1 (1962). Because the statutory scheme provides for automatically divesting the state courts themselves of their role in applying state law, it would be somewhat anomalous to preserve for tribal courts a much larger role in applying that same state law.

preserves state court jurisdiction over Price-Anderson claims in the absence of any request for removal. Similarly, the exercise of tribal court jurisdiction over such claims comes into clear conflict with federal law when, and only when, the defendant (or the government) seeks, but cannot obtain, a federal forum. In those circumstances, just as a defendant resisting state court jurisdiction may obtain immediate removal to a federal forum for adjudication of the case on the merits, a defendant resisting tribal court jurisdiction over Price-Anderson claims should be entitled, upon serving notice in the tribal court, cf. 28 U.S.C. 1446(d), to seek prompt injunctive relief in federal court, if necessary, on the ground that further proceedings in tribal court would be inconsistent with the Act. Cf. *National Farmers Union*, 471 U.S. at 850-853. The plaintiffs who had brought the claims would be free to refile them in federal court.[13]

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[13] Our conclusions concerning the role of tribal courts in adjudicating Price-Anderson claims derive from the strength and specificity of the policy objectives underlying Congress's decision to ensure the availability of federal court review in the nuclear tort context. Adoption of our analysis would not require the Court to address the role of tribal courts in deciding federal causes of action generally, even though, if brought in state court, virtually any federal cause of action may be removed to federal court. See 28 U.S.C. 1441. Particularly when compared to the compelling purposes underlying the removal provisions of the Price-Anderson Act, "the underlying purposes of Congress in providing for federal question removal jurisdiction remain somewhat obscure." *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 246 (1970). Similarly, as this Court has recognized, general principles of federal court diversity jurisdiction have little bearing on tribal court adjudicatory authority. See *Iowa Mutual*, 480 U.S. at 16-18. Suits against federal officers in tribal court raise a separate set of concerns involving not just interpretation of the provision specifically providing for the removal of suits in state court against such officers (28 U.S.C. 1442(a)(1) (Supp. II 1996)), but also principles of comity between the national and dependent sovereigns. Compare *United States* v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987), with *Becenti* v. *Vigil*, 902 F.2d 777, 779-780 (10th Cir. 1990).

C. Respondents' Tribal Law Claims Fall Within The Preemptive Scope Of The Price-Anderson Act.

Respondents argued below that the Price-Anderson Act "has no application whatsoever to the case at bar." Appellees' Joint C.A. Br. 23. They reasoned that petitioners had entered into no relevant indemnification agreement with the Atomic Energy Commission when conducting the mining activities at issue; that the term "nuclear incident," as defined in 42 U.S.C. 2014(q), encompasses only those "incidents" that implicate such indemnification agreements; that the claims here are therefore not claims for "public liability," as that term is defined in 42 U.S.C. 2014(w); and that these are therefore not "public liability action[s]" to which the Act's preemption provisions apply, see 42 U.S.C. 2014(hh), 2210(n)(2) and (3). We disagree.

1. As an initial matter, we do not believe that resolution of this case compels this Court to decide, on the merits, whether the absence of an indemnification agreement removes respondents' claims from the scope of the Price-Anderson Act—an issue that the court of appeals did not reach (see J.A. 92a n.7) and, notably, does not appear in respondents' brief in opposition to the petition for certiorari. Cf. Sup. Ct. R. 15.2. The question presented in this case is whether the tribal exhaustion doctrine bars immediate federal court review of the Act's preemptive effect (if any) on respondents' claims under tribal law. The reason the answer to that question is no is *not* that petitioners' preemption argument is correct on the merits (although we believe it is), but because it is an argument about complete preemption under the Price-Anderson Act, rather than an ordinary preemption defense under some other federal statute.

When a state court defendant cites federal preemption as a basis for removal, a federal court may decide the preemption question in the first instance if the question concerns whether a claim falls within the scope of a completely preemptive scheme (whether or not the answer is obvious), and

may not do so if the question concerns whether the claim falls within the scope of an ordinary preemption defense (again, whether or not the answer is obvious). See *Metropolitan Life*, 481 U.S. at 66. If the issue is one of complete preemption, the court simply conducts the inquiry and then, depending on the outcome, either does or does not remand the case to state court. A similar approach is appropriate when the suit is initially brought in tribal court. The special features of the Price-Anderson Act that make the ordinary exhaustion rules inapplicable do not turn on whether, in a particular case, the federal court ultimately finds that the tribal claims at issue fall within the preemptive scope of that Act. If the court is uncertain at the outset whether the claims do fall within that scope, the proper and efficient course is not to abstain from making the inquiry, but to conduct the inquiry and, if complete preemption is found, to enjoin the proceedings in tribal court.

In this case, *no* federal court has yet addressed whether respondents' tribal law claims fall within the preemptive scope of the Act. Like the district court (J.A. 71a, 73a), the court of appeals mistakenly held that the tribal exhaustion doctrine foreclosed any consideration of that substantive preemption question. J.A. 92a n.7. If this Court reverses on the threshold exhaustion issue, one appropriate disposition is thus simply to remand the case to the lower courts for consideration, in the first instance, of the parties' dispute about whether these claims fall within the Act's preemptive scope.

2. In any event, we disagree with the position, advanced by respondents below, that the Act's preemption provisions are inapplicable in the absence of an indemnification agreement. The Act preempts, and "deem[s] to be an action arising under" federal law, any "public liability action," which the Act defines as "any suit asserting public liability." 42

U.S.C. 2014(hh).[14] "Public liability"—so named because it involves liability to (not of) the public[15]—is broadly defined to include "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. 2014(w). In turn, "nuclear incident" is defined to include "any occurrence, including an extraordinary nuclear occurrence, * * * causing * * * bodily injury, sickness, disease, or death * * * arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. 2014(q); see also 42 U.S.C. 2014(z) (defining "source material" to include "uranium"). Nowhere does the Act make the existence or nonexistence of an indemnification agreement relevant to whether a nonfederal claim falls within the scope of a "public liability action" for purposes of the removal and preemption provisions.[16]

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[14] Section 2014(hh) defines the term "public liability action" "as used in section 2210." The term appears in only two places in Section 2210. First, it appears in the removal and consolidation provision of Section 2210(n)(2), which makes no reference to indemnification agreements at all. The term also appears, by cross-reference to Section 2210(n)(2), in Section 2210(n)(3). That provision cites certain circumstances involving indemnification agreements as included within a larger class of circumstances in which a district court is authorized to appoint a "special caseload management panel." See 42 U.S.C. 2210(n)(3)(A)(i) and (ii). Nothing in Section 2210(n)(2) or Section 2210(n)(3) suggests that the removal and consolidation provisions are applicable only where there is an underlying indemnification agreement.

[15] See, *e.g.*, S. Rep. No. 296, 85th Cong., 1st Sess. 8 (1957) (discussing efforts to "determine the amount of financial protection which the licensee for reactors must have to protect the public against nuclear incidents"); *id.* at 15 (term "financial protection" is "defined to mean the ability to respond in damages for public liability"); *id.* at 17 (term "public liability" means "a legal liability arising out of, or resulting from, a nuclear incident"); *id.* at 18 (discussing "damage to the public").

[16] The Act defines "person indemnified" to include, *inter alia*, the following: "with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, * * * the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other

In contrast, many of the Act's other important provisions —such as the damages cap (42 U.S.C. 2210(e)) and the ban on punitive damages (42 U.S.C. 2210(s))—specifically provide, on their face, that they apply only in contexts involving indemnification agreements.[17] That is further reason not to read a similar limitation into the provisions at issue here. It is true that, when Congress originally passed the Price-Anderson Act in 1957, it was chiefly concerned with nuclear liability in the particular contexts in which defendants would have entered into indemnification agreements with the government. See, *e.g.*, S. Rep. No. 296, 85th Cong., 1st Sess. 16-18 (1957). And it is also true that, before the 1988 amendments, the Act itself (as distinguished from federal regulation generally (see note 10, *supra*)) had little substantive significance for cases in which the defendant had no such

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person who may be liable for public liability." 42 U.S.C. 2014(t). That definition is written broadly to "protect[] the public" in case a third party, rather than "the person with whom the indemnity agreement is executed," causes a nuclear incident at a regulated facility: *e.g.*, where "some unusual incident, such as negligence in maintaining an airplane motor, should cause an airplane to crash into a reactor." See, *e.g.*, S. Rep. No. 296, *supra*, at 17. Under any reasonable definition, however, the term does not embrace contexts in which *no one* has an indemnification agreement with the government. The term itself, and its use elsewhere in the Act, presuppose the existence of some relevant person appropriately identified as "the person with whom an indemnity agreement is executed." 42 U.S.C. 2014(t); see, *e.g.*, 42 U.S.C. 2210(c). Here, petitioners have no indemnity agreement with the government, and therefore, as they have acknowledged, "El Paso's and Cyprus' claims are not subject to federal indemnification." Pet. 10 n.9; see also *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) ("a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign").

[17] In so providing, those provisions use language confirming that the term "nuclear incident" is *not* confined to cases involving indemnification agreements. See, *e.g.*, 42 U.S.C. 2210(s) ("No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.").

agreement. By their terms, however, the preemption, removal, and consolidation provisions resulting from the 1988 amendments extend to all cases involving "nuclear incidents," as broadly defined by the Act, whether or not the defendant has an indemnification agreement with the government.[18] The plain language of those provisions is dispositive, even though it embraces a larger class of nuclear liability cases than the particular subclass with which Congress was most acutely concerned. See *Brogan* v. *United States*, 118 S. Ct. 805, 809 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy.").

CONCLUSION

The judgment of the court of appeals should be reversed.

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[18] See *Kerr-McGee Corp.* v. *Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), cert. denied, 118 S. Ct. 880 (1998); see also *Gassie* v. *SMH Swiss Corp.*, No. Civ. A. 97-3557, 1998 WL 71647 (E.D. La. Feb. 17, 1998) (unreported); *Northeast Ohio Reg'l Sewer Dist.* v. *Advanced Med. Sys., Inc.*, 666 N.E.2d 612 (Ohio Ct. App. 1995); cf. *In re Cincinnati Radiation Lit.*, 874 F. Supp. 796, 832 (S.D. Ohio 1995). But see *Gilberg* v. *Stepan Co.*, No. Civ. A. 98-139, 1998 WL 565978 (D.N.J. Aug. 20, 1998) (magistrate judge decision). Respondents contended below that, in a footnote in *Silkwood*, 464 U.S. at 252 n.12, this Court suggested that the Act does not "apply" in the absence of an indemnification agreement. As the Tenth Circuit observed in *Kerr-McGee* (115 F.3d at 1504), however, that footnote holds only that the Act's *liability limitation* provisions were inapplicable in *Silkwood* because the defendant had no indemnification agreement. The applicability of the Act's new preemption and removal provisions was, of course, not at issue, because *Silkwood* was decided before the 1988 amendments.

Respectfully submitted.

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