NO. 19-56531

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Public Watchdogs,

Plaintiff-Appellant,

v.

Southern California Edison Company, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of California
Hon. Janis L. Sammartino, District Judge
Case No. 3:19-cv-01635

Appellant's Opening Brief

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Public Watchdogs is a non-stock, nonprofit California corporation with tax exempt status pursuant to IRS Code § 501(c)(3). As of this date, it does not have a parent corporation and no person or entity owns it or any part of it.

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the federal questions presented below pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the state law questions involving the same case or controversy pursuant 28 U.S.C. § 1367. Because the claims raised below did not challenge a final order of the U.S. Nuclear Regulatory Commission that granted, suspended, revoked, or amended a license, the District Court was not deprived of jurisdiction by the Hobbs Act, 28 U.S.C. § 2342(4).

On December 3, 2019, the District Court entered a final order granting Defendants' motions to dismiss, denying the amended motion for preliminary injunction, and dismissing the Amended Complaint. This Court has jurisdiction over this order pursuant to 28 U.S.C. § 1291. Public Watchdogs filed a timely notice of appeal on December 31, 2019. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

INTRODUCTION

This appeal involves an ongoing threat to public safety and the environment posed by Defendants' negligent decommissioning activities at San Onofre Nuclear Generating Station ("SONGS") in Southern California. In February 2018, Defendants Southern California Edison ("Edison") and Holtec International ("Holtec"),

with the approval of Defendant U.S. Nuclear Regulatory Commission ("NRC"), began transferring deadly spent nuclear fuel from "wet" storage at SONGS—where it has been safely held since 1983—to dry canisters manufactured by Holtec. The canisters were then lowered into underground silos (also manufactured by Holtec) located just above the beach in San Onofre. This storage location lies near multiple active earthquake fault lines, within a tsunami inundation zone, approximately 100 feet from the Pacific Ocean. [ER 225.][1]

[1] "ER" refers to Public Watchdogs' Excerpt of Record.

In March 2018, workers discovered a broken bolt inside the fifth canister to be loaded with spent nuclear fuel and buried in a silo. The broken bolt was part of a "new and improved" design for the canisters, although Holtec had not notified the NRC of this design change or obtained its approval. Despite this warning sign, the transfer and burial operations continued.

In July and August 2018, just a few months after Edison and Holtec began their nuclear fuel transfer program, they nearly dropped two canisters, fully loaded with tons of spent nuclear fuel, into their underground silos. In response to these two "near-miss" events, the NRC issued a "special inspection" resulting in Edison and Holtec voluntarily suspending the fuel transfer program at SONGS for over 11 months. The NRC subsequently concluded that the July and August events constituted Severity Level II

Nuclear Incidents[2] and cited Edison and Holtec for a number of serious violations.

Despite this remonstrance, in July 2019, Edison and Holtec resumed the movement, transfer, and burial of spent nuclear fuel from wet storage to the damaged and defective Holtec canisters being buried at the beach. No location in the United States has been approved to accept this spent nuclear fuel, and there is no proposal or plan pending before the NRC to construct long-term storage for the nation's growing inventory of spent nuclear fuel.

Public Watchdogs' prayer for relief in the District Court was modest: a temporary halt to the transfer and movement of deadly spent nuclear fuel until an independent and objective risk assessment of Defendants' proposed activities is conducted, and a realistic plan for the safe transfer and long-term storage of spent

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[2] Severity Level II "violations are those that resulted in or could have resulted in significant safety or security consequences (e.g., violations that created the potential for substantial safety or security consequences or violations that involved systems not being capable, for an extended period, of preventing or mitigating a serious safety or security event)." Nuclear Regulatory Commission, *NRC Enforcement Policy* at 11 (Jan. 15, 2020), available at https://www.nrc.gov/docs/ML1935/ML19352E921.pdf.

nuclear fuel is proposed. In contrast to the current plan, any objective risk assessment must recognize the reality that the ultimate transportation of spent fuel to a designated and licensed federal storage facility will not occur this century, if not for several generations. Because SONGS is essentially being operated as a long-term nuclear waste storage facility—but with temporary accommodations—an independent and objective assessment of the attendant risks is imperative. And it cannot be that Congress, in passing federal laws providing for a private cause of action involving nuclear safety, was more interested in paying for the results of a nuclear disaster than preventing one.

STATEMENT OF ISSUES

1) Whether the Hobbs Act, 28 USC §§ 2341–2351, precludes federal district courts from considering all federal or state law claims arising from the mishandling of nuclear material?

2) Whether a plaintiff must establish a radiation leak above the federal "dose limits" to bring a claim for equitable relief under the Price Anderson Act, 42 USC § 2210(n)(2)?

3) Whether Congress intended the Price Anderson Act, 42 USC § 2210(n)(2), to preempt the entire field of nuclear radiation and preclude all state law claims that arise from the hazards of radiation and the disposal of radioactive materials?

4) Whether Public Watchdogs sufficiently alleged the elements of a claim under California's public nuisance law?

ADDENDUM

Pursuant to Local Circuit Rule 28-2.7, a separately bound Addendum is being filed contemporaneously with this brief.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. STATEMENT OF FACTS

A. History of danger and dysfunction at SONGS.

Defendant NRC regulates the activities of Holtec, Edison, and San Diego Gas & Electric Company (collectively referred to as "SONGS Defendants") at SONGS. [ER 206.] The NRC is statutorily obligated to authorize only those actions at SONGS that are consistent with "the protection of the public health and safety, and the environment," and to act consistently with "the views of the population surrounding such reactor." 42 U.S.C. § 10152(1) and (5). [ER 209.] As part of fulfilling those obligations, the NRC must obtain information about the safety of operations at SONGS through:

> [D]irect observation and verification of licensee activities to determine whether the facility or site is being decommissioned safely, that radioactive material is safely stored onsite prior to removal from the site, and that decommissioning activities are in conformance with applicable regulatory requirements, licensee and non-licensee commitments, and management control.

Id. [ER 209–10.]

Unfortunately, there is a long history of the NRC deferring to the purported expertise of the SONGS Defendants. The NRC

encourages generators to self-monitor and self-mitigate, thus the agency has failed to directly observe or verify the safety of operations at SONGS. [ER 216–231.] The SONGS Defendant's ongoing transportation and burial of highly radioactive spent nuclear fuel at the beach in San Onofre is yet another example of the NRC not complying with these legal requirements, and abdicating its regulatory and statutory obligations. [ER 216–217, 237, 279–336.]

While SONGS was operational, the SONGS Defendants kept spent nuclear fuel in water-cooled wet storage that was encased in hardened structures. [ER 223.] Both the SONGS Defendants and the NRC have repeatedly claimed that these wet storage pools were safe and effective at storing the large amount of spent nuclear fuel generated at SONGS. For years, however, the communities adjacent to SONGS and various advocacy groups (including Public Watchdogs) have demanded that the SONGS Defendants devise a plan to remove the spent nuclear fuel from the wet pools, and transport it to another location outside of the area for long-term storage. Such an outcome is essential if the

SONGS site is to be fully decommissioned and returned to use. Unfortunately, no such plan exists, and there is presently no location (or any viable proposed location) where the spent nuclear fuel can be transported and stored. [ER 229, 1063–77.] Thus, the SONGS Defendants have been decommissioning SONGS without addressing the question of how to transport spent nuclear fuel from the relative safety of the wet pools to a long-term storage facility. [ER 229, 1063–77.]

B. The flawed and unsafe movement, transfer, and burial of spent nuclear fuel at SONGS.

Despite the lack of any plan for long-term storage, the SONGS Defendants hired Holtec to design and manufacture canisters for the purported purpose of storing spent nuclear fuel at SONGS until a permanent repository can be created. [ER 226–33.] Although Holtec claims that its thin metal canisters will suffice, neither Holtec nor the SONGS Defendants have disclosed an independent, third-party risk assessment of the design, manufacture, or transfer process that Holtec uses to move spent nuclear fuel from wet storage into canisters, or to bury the canisters in silos. [*Id.*] The SONGS Defendants claim this storage

will be "temporary," but in fact, the spent nuclear fuel will be indefinitely interred a mere 108 feet from the Pacific Ocean. [ER 242–43.]

In January 2018, Defendant Holtec began its process of moving spent nuclear fuel from wet storage to the thin, dry storage canisters, and burying the canisters just a few dozen yards away in structures adjacent to the beach. [ER 228.] Almost immediately, it became apparent that Holtec had designed, manufactured, and delivered defective canisters to SONGS. [ER 230–31.] According to Holtec, its improved canisters incorporated "stand-off shims" that enabled helium to circulate throughout the canister and cool the hot fuel assemblies. [ER 232.] Holtec did not notify the NRC of this design change, and to this day, Holtec has no underground monitoring system to detect whether a shim has failed after spent nuclear fuel is inserted into the canister and buried. [ER 232–33.]

On March 5, 2018—after at least four canisters with this "new and improved" design had already been interred—the SONGS Defendants discovered a broken bolt inside the fifth

canister, impairing this critical component's ability to cool spent nuclear fuel. [ER 233–34.] Importantly, this failure occurred inside the canister before any spent nuclear fuel had been loaded. [ER 233.]

Holtec and Edison have admitted that four canisters with the defective shim design have already been filled with spent nuclear fuel and buried at SONGS. [ER 233.] They have also admitted that there is no existing method for safely retrieving the canisters and opening them to see if the stand-off shims are broken, or if the fuel assemblies and cooling systems have been compromised. [ER 233.] Rather than enforcing its own regulations requiring prior notice of design changes, or requiring additional testing of the defective canisters that have already been buried, the NRC permitted Holtec and Edison to continue the movement and burial of spent nuclear fuel at SONGS. [ER 234.]

On July 22, 2018, Holtec and Edison nearly dropped a 49-ton canister full of spent nuclear fuel more than 18 feet to the concrete floor of a silo. [ER 236.] Defendants have referred to this event as an "unsecured load event" or "near miss." [ER 236–37.] In

actuality, it was nearly a nuclear disaster, because the rupturing of this one canister could have led to a deadly release of toxic and radioactive waste. [ER 236–38.] Neither the NRC nor the public were immediately notified of this near nuclear disaster, despite NRC regulations requiring that such events be reported within 24 hours. [ER 236.] Indeed, Holtec and Edison have never submitted a written notification to the NRC or the public concerning this dangerous event. [ER 236.]

Less than two weeks later, on August 3, 2018, Holtec and Edison had another near nuclear disaster with a Holtec canister. [ER 237.] While moving the canister, their employees snagged the 49-ton canister on the same steel flange that captured the canister during the July 22 event. Personnel did not realize that the equipment holding the canister had been caught on the flange, so for nearly an hour, the canister was perched precariously almost 20 feet in the air above the silo floor. Had it shifted ever so slightly off of the flange, the canister would have crashed to the silo floor below, certainly causing serious damage to the canister

and potentially exposing Southern California to a catastrophic discharge of nuclear material. [ER 237–38, 254.]

As with the July 22 event, however, Holtec and Edison did not immediately notify the NRC or the public. Instead, it took Edison until August 6 to place an informal telephone call to the NRC and advise the agency that a "near miss" incident had occurred on August 3. [ER 238.] Edison notified the NRC that it was voluntarily suspending the movement and dry storage of spent nuclear fuel at SONGS, and would continue to maintain spent nuclear fuel in the same wet storage it had used for decades. [ER 239, 242.]

Plaintiff and the public were kept in the dark about these near nuclear disasters until a whistleblower came forward at a public hearing on August 9, 2018. [ER 237–38.] Immediately before the disclosure, Edison's Chief Nuclear Officer represented that the work stoppage at SONGS was a planned event to perform necessary maintenance, provide employees with time off, and analyze the overall efficiency and effectiveness of the decommissioning process at that point. [ER 237.] At the same

public meeting, however, during a public comment period, a safety professional employed at SONGS bravely disclosed the near nuclear disaster as the actual cause for the work stoppage, and directly contradicted Edison's public statements that the work stoppage was a "planned event." [ER 237.] Faced with this embarrassing public disclosure of such a serious nuclear incident by a whistleblower, Edison and Holtec maintained their voluntary suspension of spent nuclear fuel transfers through the remainder of 2018, and into mid-2019. [ER 242.]

C. Recent renewal of the dangerous movement, transfer, and burial of spent nuclear fuel.

On July 15, 2019—eleven months after voluntarily suspending the transfer of spent nuclear fuel—SONGS Defendants notified the NRC and the public that they were again moving spent nuclear fuel from wet storage to dry canisters, and burying the canisters near the San Onofre beach. [ER 242.] But no independent risk assessment has ever been performed on (1) Holtec's canisters, (2) the process used to remove spent nuclear fuel from wet storage and transfer it to dry canisters, (3) the process employed to move these defective canisters around the

SONGS site and bury them in structures, or (4) the viability of indefinitely maintaining spent nuclear fuel in structures a mere 108 feet from the Pacific Ocean, located between major earthquake fault lines in a tsunami inundation zone. [ER 242–43.]

Due to the history of serious safety violations and lack of transparency at SONGS, Public Watchdogs—a non-profit corporation that operates as a public safety advocate—investigated whether the recent activities of the SONGS Defendants and NRC ran afoul of federal or state law. [ER 243–45.] Public Watchdogs has repeatedly requested that Defendants again suspend these "downloading" activities—just as they did voluntarily for eleven (11) months between 2018 and 2019—but all such requests have been rejected or ignored. [*See, e.g.*, ER 762–66; Dkt. 6 at 6.][3]

[3] "Dkt." refers to the pleadings docketed in this appeal.

II. PROCEDURAL HISTORY

A. Public Watchdogs' complaint and motion for preliminary injunction and temporary restraining order.

On August 28, 2019, Public Watchdogs filed a Complaint against Defendants alleging violations of: (1) the Administrative Procedures Act, 5 U.S.C. § 702, *et seq*. ("APA"); (2) California's public nuisance law, Cal. Civ. Code §§ 3479–80; and (3) California's product liability law. [ER 1249–59]. Accompanying the Complaint was a Motion for Preliminary Injunction and Temporary Restraining Order, supported by a Declaration from one of Plaintiff's members. [*See* CR 2 (Motion for Injunctive Relief); ER 1207–10.][4] On August 29, 2019, Plaintiff filed an Amended Motion for Preliminary Injunction and Temporary Restraining Order, as well as a Declaration from Charles G. La Bella (and supporting exhibits). [ER 769–1206.] Public Watchdogs' request was modest: pause the freshly resumed fuel transfer and return to the status quo in place prior to July 15—

[4] "CR" refers to the Clerk's Record in the proceedings below, *Pub. Watchdogs v. NRC,* et al., Case No. 19cv1635-JLS (MSB) (S.D. Cal.).

that is, the period of time when the SONGS Defendants voluntarily refrained from removing spent nuclear fuel from wet storage, and burying it for long-term storage in potentially defective canisters. [ER 1201.]

On September 6, the District Court issued an Order setting a briefing schedule on Public Watchdogs' request for immediate injunctive relief. [ER 767–68; CR 18.] Following receipt of the Court's Order, counsel for Public Watchdogs sent a letter to opposing counsel requesting that the SONGS Defendants suspend any ongoing burial efforts while Public Watchdogs' amended motion for injunctive relief was pending before the District Court. [ER 762–63.] The SONGS Defendants declined this request, and continued transferring tons of nuclear fuel from the wet cooling pools into the Holtec canisters, moving the canisters to the precariously located silos, and burying the canisters as quickly as possible. [ER 229–30, 243–44.]

B. Amended complaint.

On September 24, 2019, Public Watchdogs filed its First Amended Complaint ("Amended Complaint"), which included

further allegations regarding steps taken (and not taken) by the NRC, and additional facts in support of its claim for immediate injunctive relief. [ER 205–58; CR 38.] The Amended Complaint included a new cause of action not contained in the Complaint: a public-liability action pursuant to the Price Anderson Act, 42 U.S.C. § 2210(n). [ER 250.] The Amended Complaint also made explicit what was implied in the Complaint: Public Watchdogs' APA claim was focused on "final action [by the NRC] on various requests by the SONGS Defendants to continue the removal of [spent nuclear fuel] from wet storage and burial in defective canisters, including by [granting] amendments to certificates of compliance and granting exemptions from other statutory and regulatory requirements . . . ." [ER 246–49.]

C. Separate administrative proceeding before the NRC.

On September 24, 2019, after commencing proceedings in the District Court, Public Watchdogs separately petitioned the NRC under 10 C.F.R. § 2.206 to (1) halt the movement and burial of spent fuel at SONGS, and (2) order the SONGS Defendants to

submit an amended decommissioning plan. [ER 133, 140, 152.][5] While this administrative petition ("Petition") and the Amended Complaint recount some of the same blunders committed by the Defendants at SONGS, the legal theories and bases for relief were separate and distinct. [*Id.*] Specifically, the Petition pointed out the falsity of a critical assumption underlying the SONGS Defendants' decommissioning plan—that is, that the Department of Energy ("DOE") will begin accepting spent nuclear fuel for long-term storage in 2024, and that all the fuel will be removed from SONGS by 2049. [*Id.*] In fact, as the DOE has reiterated, there is **no** plan or intention by the DOE to begin accepting spent nuclear fuel in 2024, or at any time in the foreseeable future. [ER 133.] This false assumption resulted in a gross understatement of the actual costs to store and monitor spent nuclear fuel at SONGS, and required the NRC to devise a new plan. [*Id.*]

One month later, on October 23, 2019, the NRC acknowledged receipt of the Petition—two days after Public

[5] The District Court erroneously stated that the Petition was filed with the NRC on October 21, 2019. [ER 9.] The Petition was actually submitted on September 24, 2019. [ER 152.]

Watchdogs had filed a mandamus petition with this Court. In re *Pub. Watchdogs*, No. 19-72670 (9th Cir. Oct. 21, 2019). [ER 152.] On December 20, 2019, this Court issued an order denying Public Watchdogs' petition for a writ of mandamus, while noting that the petition "raises serious issues about the present disposal of spent nuclear fuel" and inviting Public Watchdogs to renew the writ if the NRC failed to rule on the petition expeditiously. *Id.,* ECF 19, at 4 (9th Cir. Dec. 20, 2019). [Addendum 222.] The NRC has not issued a final decision on the Petition.

D. District Court hearing and order.

On November 25, 2019, the District Court held a hearing on motions to dismiss filed by the NRC and SONGS Defendants The District Court acknowledged that the allegations in the Amended Complaint and Motion for Preliminary Injunction were "alarming," but observed that it was "powerless to act on plaintiff's allegations no matter how serious unless this Court is assured, both that it has jurisdiction over this matter, and that plaintiff has pleaded a viable cause of action." [ER 44.] The Court tentatively indicated that it did not have subject matter

jurisdiction to resolve the dispute, and that Public Watchdogs had not sufficiently alleged a cause of action under any of the counts in the Amended Complaint. [ER 44–45.] Thus, the Court was also inclined to deny Public Watchdogs' request for a preliminary injunction, as Public Watchdogs was unable to demonstrate a likelihood of success on the merits. [ER 48–49.]

On December 3, 2019, the District Court issued an order denying the request for injunctive relief and dismissing Public Watchdogs' action with prejudice. [ER 3–40; CR 60.] In so ruling, the District Court made the dismissal with prejudice because, in its view, the Hobbs Act deprived the District Court of subject matter jurisdiction over the entire case. [*See* ER 17–25.]

The District Court also dismissed the case based on its interpretation of the Price Anderson Act, California public nuisance law, and California strict liability. [ER 29–39.] As to the Price Anderson Act claim, the District Court concluded that the failure to allege either exposure to radiation in excess of the federal permissible dose limits, or that any of Public Watchdogs' members suffered physical bodily or property harm, was fatal to

Public Watchdogs' claim. [ER 29–30.] The District Court then dismissed Public Watchdogs' remaining state-law claims, holding that the Atomic Energy Act ("AEA") preempted all "state law causes of action [that] are predicated on potential radiation hazards that may result from the disposal of nuclear material." [ER 32–33.] The Court further opined that Public Watchdogs' public nuisance claim should be dismissed for failure to allege a cognizable "special injury," and because it viewed the complained-of activity as expressly authorized by statute. [ER 34–37.][6]

Public Watchdogs filed a notice of appeal from the District Court's order on December 31, 2019. [ER 114–15; CR at 62.] On January 27, 2020, this Court granted Public Watchdogs' Motion to Expedite—over the objection of the SONGS Defendants—and directed that Public Watchdogs' opening brief be filed by February 10, 2020. [CR 66; *see also* Dkt. 9.]

[6] The District Court also dismissed the strict product liability claim against Holtec. [ER 38–39.] Public Watchdogs does not challenge this aspect of the District Court's order on appeal.

SUMMARY OF ARGUMENT

The Hobbs Act did not deprive the District Court of subject matter jurisdiction to hear this case. Although the Hobbs Act provides that certain challenges to NRC action may be brought exclusively in the courts of appeals, Public Watchdogs' claims in this case either were not against the NRC, or did not fall within the category of orders subject to the Hobbs Act.

The Price Anderson Act established a public liability claim, which is a federal cause of action to remedy "nuclear incidents" and "precautionary evacuations" in a federal forum, incorporating the substantive tort laws of the state in which the incident occurred. While deadly releases of radioactivity would surely support such a claim, the Price Anderson Act is not limited to incidents in which radiation exposures exceeds an arbitrary level.

Nor does the Price Anderson Act preclude state law causes of action arising from the hazards of radiation or the disposal of radioactive materials. The text of the statute evidences no intention by Congress to preempt all state laws relating to

radiation hazards, or to conflict with States' efforts to protect their citizens through operation of their tort laws.

Finally, Public Watchdogs sufficiently pled the elements of a public nuisance cause of action under California law. The "special injury" required under California law is met because Public Watchdogs' members are likely to suffer harm that is different, both in kind and degree, as a result of the SONGS Defendants' public nuisance. And no statute specifically authorizes the SONGS Defendants to transfer tons of highly radioactive and toxic spent nuclear fuel into damaged and defective canisters, or to do so negligently. Taken in the light most favorable to the appellant, Public Watchdogs' state law claims were sufficiently pled to survive a motion to dismiss.

LEGAL DISCUSSION

I. The Hobbs Act does not preclude federal district courts from considering all federal and state claims relating to nuclear material.

The District Court dismissed all claims for want of subject matter jurisdiction, concluding that "the causes of action Plaintiff against alleges [sic] them are premised on conduct that falls under the Hobbs Act [22 U.S.C. § 2342(4)], thereby depriving this Court

of jurisdiction." [ER 24.] This sweeping conclusion contravenes the plain language of the Hobbs Act, a jurisdiction-splitting statute that applies to a narrow category of actions taken by the NRC. Because the District Court erred in finding that it lacked subject matter jurisdiction, its decision should be reversed.

A. Standard of review.

This Court reviews *de novo* a district court's determination that it lacks subject matter jurisdiction by virtue of the Hobbs Act. *Carpenter v. Dep't of Transp.*, 13 F.3d 313, 314 (9th Cir. 1994).

B. The Hobbs Act.

Article III vests the "judicial power of the United States . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Congress has created federal district courts throughout the country, and empowered them to hear Article III disputes involving federal questions. 28 U.S.C. §§ 132, 1331. For a small subset of disputes involving certain federal agencies, Congress has provided that direct judicial review lies exclusively in the federal courts of appeals. In all other disputes involving these agencies, however, federal district courts retain their jurisdiction.

An example of this jurisdiction-splitting between the district and appellate courts is the Administrative Orders Review Act, often referred to as the "Hobbs Act."[7] Pub. L. No. 81–901, 64 Stat. 1129 (1950) (*codified as amended* at 28 U.S.C. §§ 2341–51). The Hobbs Act outlines how a proceeding for direct review must be brought and conducted, and specifies what relief may be granted to a prevailing party. To obtain direct review, a "party aggrieved" by certain types of orders issued by a designated agency must file a petition against the United States within 60 days of the order's entry. 28 U.S.C. § 2344. The action must be brought in the "judicial circuit in which the petitioner resides or has its principal office," or in the D.C. Circuit. *Id.* § 2343. The record generally comprises any "proceedings before the agency," *id.* § 2347(a), and the court of appeals "has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining,

[7] This "Hobbs Act" is apparently named after its principal sponsor, Representative Samuel Hobbs (D-AL), who is also the namesake for the more frequently cited provision codified at 18 U.S.C. § 1951, commonly referred to as "Hobbs Act extortion."

setting aside, or suspending, in whole or in part, the order of the agency." *Id.* § 2349(a).

One of the agencies partially insulated from district court review by the Hobbs Act is the NRC:

> The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Atomic Energy Commission [whose authority now resides in the NRC] made reviewable by section 2239 of title 42.

28 U.S.C. § 2342(4). In turn, Section 2239 of Title 42 limits the scope of such reviewable orders to those involving:

> [T]he granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title . . . .

42 U.S.C. § 2239(a)(1)(A). Thus, by its very terms, the Hobbs Act excludes from district court review only specified actions arising out of particular proceedings before the agency. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 733 (1985) (analyzing whether petitions before the NRC pursuant to its regulations arise out of proceedings "for the granting, suspending, revoking, or amending

of any license") (citing and quoting 42 U.S.C. § 2239); *TransAm Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 808 F.3d 1205, 1211 (10th Cir. 2015) ("The Hobbs Act limits the universe of 'final orders' directly reviewable in the courts of appeals."); *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175, 180 (2d Cir. 2009) (holding that the Hobbs Act only precludes district court review of the enumerated categories of NRC action).

Given that the Hobbs Act severely limits otherwise applicable avenues of judicial review—and contains strict time-limits on the initiation of such review—it is unsurprising that the statute's scope has been hotly disputed in the courts. For example, in *Lorion* the District of Columbia Circuit *sua sponte* interpreted two provisions in 42 U.S.C. § 2239 as providing for exclusive jurisdiction in the court of appeals only if the agency had granted petitioner a hearing. *Lorion*, 470 U.S. at 733–34.[8] The

[8] The D.C. Circuit had reached this conclusion, in part, because the NRC had "urged in its brief that unless and until granted, Lorion's § 2.206 request is not a 'proceeding' where the requester has any right to present evidence." *Lorion*, 470 U.S. at 733–-34 (quotations and alterations omitted) (citing *Lorion v. U.S. Nuclear Regulatory Comm'n*, 712 F.2d 1472, 1478 (D.C. Cir. 1983)).

U.S. Supreme Court reversed, concluding that no matter the procedures actually employed by the NRC, the particular proceeding at issue was one involving "the granting, suspending, revoking, or amending of any license," and therefore Congress had manifested its intent in the Hobbs Act to consolidate judicial review exclusively in the court of appeals. *Lorion*, 470 U.S. at 736 (quoting 42 U.S.C. § 2239(a)(1)); *see also Nixon v. United States,* 506 U.S. 224, 232 (1993) (referencing "the well-established rule that the plain language of the enacted text is the best indicator of intent").[9]

Since *Lorion*, circuit courts have been faced with an increased willingness by agencies to use the Hobbs Act for a variety of challenges to their actions. For example, in *Gen. Atomics v. U.S. Nuclear Regulatory Comm'n* the NRC argued that the parent company of a licensee was not permitted to file suit in district court to challenge the agency's jurisdiction over it in an

[9] Although the Court's interpretation of the competing provisions in *Lorion* was aided by policy considerations, the Court made clear that its decision was driven by the text of the Hobbs Act, not policy preferences. *Lorion*, 470 U.S. at 743, 746.

administrative proceeding. 75 F.3d 536 (9th Cir. 1996). This Court concluded that the parent company's claims directly involved "the granting and possible amending of the license" at issue, and involved "the issuance or modification of rules and regulations dealing with activities of licensees." *Id.* at 539 (quoting text of Hobbs Act). Therefore, because the claims fell squarely within the text of the Hobbs Act, only the court of appeals could hear the dispute. *Id.*[10]

More recently, the Second Circuit in *Brodsky* rejected the NRC's attempt to invoke the Hobs Act's exclusivity provision to

[10] Although this Court stated in *General Atomics* that "the Hobbs Act is to be read broadly to encompass all final NCR [sic] decisions that are preliminary or incidental to licensing," this language is not contained in the opinion of the Supreme Court in *Lorion*. *Id.* at 539. Moreover, this dicta in *General Atomics* arguably conflicts with other statements by this Court to "strictly construe jurisdictional statutes." *See, e.g.*, *Owner-Operators Indep. Drivers Ass'n of Am., Inc. v. Skinner*, 931 F.2d 582, 590 (9th Cir. 1991). *General Atomics* also contravenes the Supreme Court's observation in *Lorion* that "[w]hether initial subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress and not by any views we may have about sound policy." *Lorion*, 470 U.S. at 746. Accordingly, this Court should continue to "strictly construe" the contours of jurisdictional statutes such as the Hobbs Act, and not expand its scope to advance an agency's policy objectives.

review an "exemption"[11] granted by the agency. *Brodsky,* 578 F.3d at 180. In analyzing the issue, the Court of Appeals observed that "[t]he Supreme Court has commanded strict fidelity to the terms of judicial review provisions that create jurisdiction, such as those contained in the Hobbs Act." *Id.* (quoting *Stone v. INS,* 514 U.S. 386, 405 (1995)). Thus, despite the cogent policy arguments raised by NRC—including judicial efficiency and a reduced need for fact-finding in such proceedings—the Second Circuit held that "policies alone are not dispositive. 'Whether initial subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress and not by any views we may have about sound policy.'" *Id.* at 181 (quoting *Lorion,* 470 U.S. at 746). Thus, rather than expanding the scope of the Hobbs Act to cover every challenge to the NRC, the court analyzed "the plain

[11] The NRC has promulgated regulations that permit it to grant "exemptions from the requirements of the regulations," so long as the exemptions are: (1) "[a]uthorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security," and (2) "special circumstances are present." *Brodsky*, 578 F.3d at 177–78 (quoting 10 C.F.R. § 50.12(a)). Significant in *Brodsky,* these regulations do not require the NRC to hold hearings. *Id.* at 178.

text of § 2239(a)" and concluded that it "does not confer appellate jurisdiction over final orders issued in [NRC] proceedings involving exemptions, irrespective of any hearing requirement." *Brodsky*, 578 F.3d at 180. *Cf. Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp. Research & Special Programs Admin.*, 457 F.3d 956, 960 (9th Cir. 2006) (finding "unambiguous" the Hobbs Act's directive that challenges to railroad safety regulations must be heard in the court of appeals, and rejecting plaintiff's attempt to use policy arguments to override this "technically sound reading").

Just last term, a plurality of the Supreme Court expressed renewed skepticism over attempts by federal agencies to rely on the Hobbs Act to limit judicial review of their activities. In *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057–67 (2019), four Justices (including Justice Gorsuch, whose views on the Price Anderson Act are discussed at Part IV, *infra*) explicitly rejected a sweeping interpretation of the Hobbs

Act similar to that adopted by the District Court below.[12] In a separate opinion concurring in the judgment to remand the case to the Fourth Circuit, Justice Kavanaugh argued that the Court should have also answered the question on which it had granted certiorari, namely: when a federal agency interprets a federal statute in a proceeding covered by the Hobbs Act, are district courts in subsequent enforcement proceedings precluded from disagreeing with that interpretation? *See id.* at 2058. In answering the question with a resounding "no," the concurring justices disposed of numerous arguments advanced by the government concerning the Hobbs Act. *Id.* at 2062–66.[13]

Particularly relevant here, the Justices explicitly rejected the government's argument that, "if the district court could

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[12] The agency at issue in *Carlton* was the Federal Communications Commission ("FCC"), since the Hobbs Act also covers orders of the FCC "made reviewable by section 402(a) of title 47." *See* 28 U.S.C. § 2342(1).

[13] To dispel any doubt as to their purpose in writing separately, the concurring justices observed that their analysis "remains available to the [lower] court on remand . . . and it remains available to other courts in the future." *Id.* at 2058.

disagree with the agency's interpretation in an enforcement proceeding, the district court would be 'determin[ing] the validity' of the order in violation of the Hobbs Act's grant of exclusive jurisdiction to the court of appeals in the initial 60-day period." *Id.* at 2063 (quoting 28 U.S.C. § 2349). Instead, the justices explained, the text of the Hobbs Act should be read literally to give federal agencies only the deference and limited judicial review called for in the statute. *Id.* at 2066–67 (Kavanaugh, J., concurring in judgment) (rejecting government's expansive interpretation of Hobbs Act's provision of "'exclusive jurisdiction' to 'determine the validity'" of agency orders).

In sum, the Hobbs Act's jurisdiction-splitting only applies to instances in which the NRC—as a party to the action—is called up to "grant[], suspend[], revoke[e], or amend[] any license," and does not cover every action taken by the NRC. And **nothing** in the Hobbs Act purports to strip federal district courts of jurisdiction to hear disputes involving a **private** party allegedly involved in the dangerous mishandling of nuclear waste. Had Congress intended to preclude district courts from hearing disputes over the actions

of private parties such as the SONGS Defendants, it could have easily have included them within the purview of the Hobbs Act.

C. The District Court erroneously concluded that it was deprived of jurisdiction over all federal and state law claims related to nuclear power.

As outlined above, the Hobbs Act **only** restricts judicial review of certain decisions by the NRC. It does not, as the District Court seemed to assume, supplant all federal and state laws that relate in any way to the nuclear life cycle. Rather, it splits the federal jurisdiction for disputes involving agencies into either district courts or courts of appeal, depending upon the nature of the dispute and the agency decision being challenged. Because the instant dispute did not involve one of the enumerated proceedings covered by the Hobbs Act, the District Court had jurisdiction and should not have dismissed the case.

The Amended Complaint alleged three separate causes of action against the SONGS Defendants: a public liability action under the Price Anderson Act (Second Cause of Action), a public nuisance claim under California tort law (Third Cause of Action), and a strict product liability claim under California tort law

(Fourth Cause of Action). [ER 246–56.] Despite the fact that none of these claims were against the NRC, the District Court dismissed them all with prejudice based on its view that they should have been brought directly before the court of appeals. [ER 24–25.] No reading of the Hobbs Act can support this holding, as the statute is explicitly limited to actions seeking to "enjoin, set aside, suspend . . . or to determine the validity of . . . final orders of [the NRC]" involving the "granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties . . . ." 28 U.S.C. § 2342(4), 42 U.S.C. § 2239(a)(1)(A). Although the District Court read the Hobbs Act to cover all claims that "trace back to actions that were taken pursuant to or that were incidental" to NRC licensing proceedings [ER 24–25], this expansive language is found nowhere in the Hobbs Act. The District Court did not cite a single decision involving the dismissal of claims brought against private entities

involved in the alleged mishandling of nuclear waste, and Public Watchdogs is aware of none. Thus, at a bare minimum, this Court should reverse the District Court's decision as to the Price Anderson Act and public nuisance causes of action.

In assessing Public Watchdogs' claim against the NRC, the District Court also erroneously expanded the Hobbs Act and largely misconstrued the claim as a tardy challenge to the License Amendment issued by the NRC in 2015. [ER 21.] To be sure, the License Amendment is referenced in seven (7) of the fifty-three (53) pages of the Amended Complaint. [ER 222–23, 227, 246–49.] But any fair reading of the **entire** Amended Complaint reveals that the APA challenge was to the recent failure of the NRC to halt the SONGS Defendants' dangerous movement and burial of spent nuclear fuel. For example, the Amended Complaint describes the NRC's "blind reliance" on Holtec's testing and verification claims, its failure to require Holtec to ensure that its defective canisters are safe, and refusal to consider on-site inspectors. [ER 231, 238.] The Amended Complaint specifically identifies several decisions outside the purview of the Hobbs Act

that were taken by the NRC **well after** its approval of the License Amendment, and its approval of Holtec as the designer, manufacturer, and installer of the dry storage canisters, including:

- In 2018, the NRC exempted Holtec from the requirement of seeking prior approval for its design change to the dry storage canister shim bolts, despite Holtec's questionable history and prior violation that had resulted in defective canisters filled with radioactive waste being buried [ER 532, 234–351, 239–41.];
- In 2018, after learning that Holtec scuffed, scratched, and dented every canister holding spent nuclear fuel, the NRC relieved Holtec from complying with the certificate of compliance for these canisters [ER 235–36, 246];
- In August 2018, the NRC exempted the SONGS Defendants from having to file an event report for the July 22 near drop event [ER 238–39.];
- In 2019, the NRC the permitted Holtec—the subcontractor **directly responsible** for the nuclear incidents the prior

year—to continue moving radioactive fuel out of wet storage and burying it in silos [ER 241–42.]; and, finally

- In July 2019, the NRC permitted the SONGS Defendants to again begin moving, transferring, and burying spent nuclear fuel above the beach at San Onofre, despite the two "Severity Level II" incidents in 2018 (which only came to light because a whistleblower notified the public) [ER 126, 139, 242–43.].

Each of these failings by the NRC were incorporated by reference into the APA cause of action, and were alleged to be "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." [ER 246–47.] Although the NRC disputed these allegations, the agency's disagreement did not somehow strip the District Court of jurisdiction.

The District Court dismissed the APA claim, in part, based on the erroneous belief that the Hobbs Act required Public Watchdogs to challenge the License Amendment in 2015. [ER 21, 25.] Recent Supreme Court pronouncements confirm that the Hobbs Act's ambit is not so broad. The plurality in *PDR Network* explained that although the Hobbs Act "avoids the delays and

uncertainty that otherwise result from multiple pre-enforcement proceedings being filed and decided over time in multiple district courts and courts of appeal," it was not a mandate for "potentially affected parties to predict the future." *PDR Network*, 139 S. Ct. at 2059, 2062. This is so because "[i]t would be wholly impractical—and a huge waste of resources—to expect and require every potentially affected party to bring pre-enforcement Hobbs Act challenges against every agency order that might possibly affect them in the future." *Id.* at 2061. In such a case, like ours, where the complained of harm did not occur until four years after the final agency action (and well after the 60-day limitations period had run), the "Administrative Procedures Act creates a basic presumption of judicial review for one suffering legal wrong because of agency action." *Id.* at 2060.

In sum, the Supreme Court has "commanded strict fidelity to the terms of judicial review provisions that create jurisdiction, such as those contained in the Hobbs Act." *Brodsky*, 578 F.3d at 180 (quotations and alterations omitted) (quoting *Stone v. INS*, 514 U.S. 386, 405 (1995)); *Nuclear Info. & Res. Serv. v. U.S.*

Dep't of Transp. Res. & Special Programs Admin., 457 F.3d 956, 960 (9th Cir. 2006) ("Supreme Court and our precedent also make clear that '[j]udicial review provisions ... are jurisdictional in nature and must be construed with strict fidelity to their terms.'"); *Owner-Operators Indep. Drivers Ass'n of Am., Inc. v. Skinner*, 931 F.2d 582, 590 (9th Cir. 1991) ("Courts should strictly construe jurisdictional statutes.") The only federal claims the Hobbs Act requires plaintiffs to bring in the court of appeals are those against a federal agency arising out of proceedings "for the granting, suspending, revoking, or amending of any license." *Lorion*, 470 U.S. at 733 (citing and quoting 42 U.S.C. § 2239). Because the Amended Complaint attacks actions by the NRC and SONGS Defendants other than "the granting, suspending,

revoking, or amending of any license," the District Court should not have dismissed it for lack of jurisdiction.[14]

II. Public Watchdogs may seek equitable relief under the Price Anderson Act without establishing radiation exposure or present injury to person or property.

The Price Anderson Act, as amended, governs liability and remedies in the event of—or likelihood of—a "nuclear incident" arising from activities of NRC licensees and DOE contractors. The coverage for NRC licensees encompasses the activities of commercial nuclear power plants like SONGS. The Act sets forth procedures and substantive standards for determining remedies

[14] The District Court also dismissed the APA claim because it believed the decisions being challenged were "committed to agency discretion by law." [ER 22 (quoting 5 U.S.C. § 702(a)(2)).] Yet the Amended Complaint repeatedly asserted that the NRC had "abdicated its regulatory and supervisory responsibilities" over the SONGS Defendants, and supported these allegations with details factual allegations. [*E.g.* ER 206, 210, 216–17, 280–336.] Given this specificity, the District Court erred by not allowing the case to proceed under the theory that the NRC had "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985) (citing and quoting *Adams v. Richardson,* 480 F.2d 1159 (1973) (en banc)).

attendant upon a completed or threatened nuclear incident flowing from those activities.

The District Court held that "physical harm to persons or property is . . . a jurisdictional prerequisite to a cause of action under the Price Anderson Act," and that an "essential element" of any such claim is that the plaintiff has been exposed to radiation in excess of "federal permissible dose limits." [ER 30.]

While the District Court's formulation may be true with respect to most Price Anderson Act claims for monetary damages, it is not true across the board. Indeed, the statutory text and legislative history of the Price Anderson Act make clear that Congress intended to permit injunctive claims for relief **before** the public suffers dangerous doses of radiation.

A. Standard of review.

The District Court's interpretation of the elements of a Price Anderson Act claim is a legal question reviewed de novo. *See* In re *Hanford Nuclear Reserv. Litig.*, 534 F.3d 986, 1000 (9th Cir. 2008) (citing *United States v. Griffin*, 440 F.3d 1138, 1143 (9th Cir. 2006)).

B. Equitable relief under the Price Anderson Act does not require present personal injury.

In concluding that a plaintiff cannot maintain a claim under the Price Anderson Act without showing physical harm to persons or property, the District Court relied solely on cases in which plaintiffs sought to recover monetary damages caused by a **past** nuclear incident. [ER 29–30 (citing In re *Berg Litig.*, 293 F.3d 1127 (9th Cir. 2002); *O'Connor v. Boeing N. Am.*, Nos. CV-97-1554-DT (RCx), 2005 WL 6035255 (C.D. Cal. Aug. 18, 2005)).] Here, by contrast, Public Watchdogs seeks equitable relief under the Price Anderson Act to enjoin activities that threaten an imminent nuclear incident. This is precisely the sort of harm that Congress sought to address with the most recent amendments to the Price Anderson Act.

It is well established that "a court generally has the power to preserve the status quo by equitable means and a preliminary injunction is such a means." *Reebok Intern., Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552 (9th Cir. 1992) (quotations omitted); *see also Armstrong v. Exceptional Child Cntr., Inc.*, 575 U.S. 320, 326—27 (2015) (explaining that federal courts generally have

authority to grant prospective injunctive relief against state and federal officers who are planning to violate federal law). "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1094 (9th Cir. 2010) (same).

Although the Price Anderson Act is silent with respect to equitable remedies, it facially allows recovery for precautionary evacuation claims, which are framed in the familiar terms of equitable relief. That is, this type of claim by definition results from an "event that is not classified as a nuclear incident but *that* **poses imminent danger** of bodily injury or property damage from the radiological properties of . . . spent nuclear fuel . . . ." 42 U.S.C. § 2014(gg) (emphasis added). Thus, the text of the Price Anderson Act does not constrain federal courts' inherent equitable authority to enjoin activities that pose an imminent threat of a future nuclear incident. Quite the contrary, it suggests that Congress intended for federal courts to have the power to grant

such prophylactic relief. The District Court erred in holding otherwise. [ER 29–30.][15]

C. The history of the Price Anderson Act confirms that present personal injury is not required to obtain equitable relief.

A look through multiple historical lenses shows why the Price Anderson Act is not cabined in the way the District Court held. In the early post-WWII years, the federal government maintained a monopoly over the ownership of nuclear materials and facilities. But in 1954, Congress made the decision to eliminate this monopoly and engage private capital in developing what was then seen as a critical source of future energy. There was a problem, though: "those in the private sector who were interested in participating in the atomic power industry were reluctant to risk significant financial resources on the new, and as yet untested, enterprise, given the potential for catastrophic accidents involving such materials or facilities and the

[15] Injunctive relief is often awarded in Price Anderson Act actions. *See, e.g., Dailey v. Bridgeton Landfill, LLC*, 299 F. Supp. 3d 1090 (E.D. Mo. 2017); *Cook v. Rockwell Intern. Corp.*, 273 F. Supp. 2d 1175 (D. Colo. 2003).

unavailability of private insurance to cover public liability arising out of such a catastrophic accident." S. Rep. No. 100-218, at 2 (1987) *reprinted in* 1988 U.S.C.C.A.N. 1476, 1476–77. So, "[i]n response to these concerns, Congress enacted the Price-Anderson Act in 1957, in order to remove the deterrent of potentially catastrophic liability." *Id.*

The legislative story doesn't end there, but continues through the 1988 amendments to the Price Anderson Act, which "deliberately increased the scope of the Act's coverage." *Ware v. Hosp. of the Univ. of Penn.*, 871 F.3d 273, 279–80 (3rd Cir. 2017), *cert. denied sub nom. Boyer v. Hosp. of the Univ. of Penn.*, 138 S. Ct. 2018 (2018). This "scope" issue existed across two dimensions. First, the original Price Anderson Act, as amended in 1966, somewhat streamlined the process for a plaintiff to recover for "an event resulting in substantial offsite release of radiation and likely to result in significant personal injury or damage to property." S. Rep. No. 99-310, at 4 (1986). But this version of the Price Anderson Act did not create an independent basis of federal jurisdiction, meaning that many such claims could not proceed in

federal court. *Ware*, 871 F.3d at 1135–36. All this is to say that the contours of Price Anderson Act litigation had not been staked out by the 1980s. Nonetheless, even before the time *Silkwood* was decided in 1984, it was "clear that that in enacting and amending the Price Anderson Act, Congress assumed that state-law remedies, **in whatever form they might take**, were available to those injured by nuclear incidents." *Silkwood v. Kerr-McGee Corp.*, 464 US 238, 256 (1984) (emphasis added).

Second, it was unclear what magnitude of nuclear accident would trigger Price Anderson Act coverage. The March 1979 accident at Three Mile Island was the first to test the interpretive boundaries of the Price Anderson Act. There:

> Although the accident . . . caused extensive damage to the reactor, there is no evidence that any person living near the plant received a radiation dose from the accident as large as the Federal occupational radiation exposure limits for nuclear industry workers. In fact, the technical investigations of the accident have demonstrated that each of the 2 million people living near the TMI site received an average radiation dose, as a result of the accident, that is between 70 and 100 times less than what he receives in 1 year from naturally occurring radiation in the Harrisburg area.

S. Rep. No. 99-310, at 5. Despite the lack of physical injury resulting from an above-threshold dose of radiation, public payments resulted, including "$1.3 million for emergency assistance, consisting of reimbursement for lost wages and evacuation and relocation expenses, and 14.3 million for settlement of approximately 276 personal injury claims." *Id.* at 6.

Against this backdrop, Congress set about to further amend the Price Anderson Act. For present purposes, the most important amendment is the above-noted provision permitting pecuniary recovery for a "precautionary evacuation," even if there is no radiation release at all. In other words, coverage for situations below the nuclear incident threshold was an already existing feature of the Price Anderson Act. *See also Price-Anderson Act Amendments Act of 1985: Hearing on S. 1225, Subcomm. on Energy Research and Dev. of the S. Energy and Natural Res. Comm.,* 99th Cong. 644 (1985) ("It would appear that there can be 'public liability' for a 'nuclear incident' even though the anticipated release of radioactive materials in excess of license or

regulatory limits never occurs."). Even more to the point was the NRC's subsequent position:

> The Commission believes that two policy principles apply here. First, even if a precautionary evacuation does not constitute a "nuclear incident" it bears a sufficiently close relation to the hazardous properties of nuclear materials that Price-Anderson coverage should be not denied. Second, in debates on the Price-Anderson Act, Congress has repeatedly stated, and the Commission has repeatedly voiced its concurrence with, the following principle: "Since its enactment in (sic) by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recover from the fund established by the act is left to the tort law of the various states . . . ."

Price-Anderson Act Amendments of 1987: Hearing on S. 44 and S. 843 Before the Subcomm. on Nuclear Regulation of the S. Env't and Pub. Works Comm., 100th Cong. 84 (1987) (statement of Lando W. Zech, Jr., Nuclear Regulatory Commission) (internal citations omitted). And, when asked to "[i]dentify the circumstances indicating the need for broadening the scope of Price-Anderson to include coverage for state tort liabilities incurred as a result of events other than a nuclear incident," the NRC pushed further afield and unequivocally responded that "we

believe that there should be coverage for events other than those nuclear incidents where the event bears such a close relation to the hazardous properties of nuclear materials that that lack of coverage seems arbitrary and unjust." *Id.* at 85.

Thus, the text of the statute and its legislative history make clear that the District Court erred in hewing to a "bodily injury" requirement in a non-damages case. Whether by analogy to "precautionary evacuations," or a careful reading of the Price Anderson Act's definitions, equitable relief is available. On the definitional issue, all a plaintiff must do to state a claim is allege public liability for a "nuclear incident," which, for our purposes, "means any occurrence…causing…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) [Addendum 65, 168.] And "occurrence" is to be given its ordinary dictionary meaning: "something that takes place; esp. something that happens unexpectedly and without design; or **the action or process of happening or taking place**." *Ware*, 871

F.3d at 281 (emphasis added). This means that—by its plain statutory language—the Price Anderson Act does not require a completed nuclear catastrophe before public intervention becomes appropriate.

Other principles confirm this sensible reading. For instance, the Price Anderson Act is, in part, an insurance statute. And insurance law has a ready answer to the question of when injury to property occurs in the context of a defective product: it happens at the time of installation, not the time at which the latent becomes actual. *Eljer Manufacturing, Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 814 (7th Cir. 1992). The cogent rationale standing behind this injury-accrual rule is that a defective product is like a "ticking time bomb." So, there's a social good in tying injury to installation because when the product "starts to leak is too late." *Id.* at 809.

The Price Anderson Act is also a federal tort statute, and tort law, too, permits intervention before the proverbial time bomb—which, as such, is completely dormant before it explodes—explodes. When originally enacted in 1957, the Price Anderson

Act amended the AEA to "permit[] tort recovery under traditional state causes of action." *Cook v. Rockwell Intern. Corp.*, 618 F.3d 1127, 1135 (10th Cir. 2010). But this version of the Price Anderson Act did not create an independent basis of federal jurisdiction, meaning that many such claims could not proceed in federal court. *Id.* at 1135–36. So when Congress later amended the Price Anderson Act to provide for concurrent federal jurisdiction over any "public liability action arising out of or resulting from a nuclear incident," it also dictated 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); *see also Ware*, 871 F.3d at 280 ("The Act provides federal jurisdiction over claims asserting legal liability for 'any occurrence' causing physical harm or property damage resulting from the radioactive properties of nuclear material.") (citing 42 U.S.C. §§ 2014(q), (w), (hh) & 2210(n)(2)).

Accordingly, courts have found that various state law theories of recovery are cognizable as Price Anderson Act claims

and may be adjudicated in federal district court. *See, e.g.*, *Rockwell*, 618 F.3d at 1137 (trespass and nuisance); *Ware*, 871 F.3d at 285 (negligent exposure to radioactive material).

D. Public Watchdogs has stated a claim for equitable relief under the Price Anderson Act.

Here, the Amended Complaint asserts both a Price Anderson Act claim and a state-law public nuisance claim. [ER 250–55.] The Price Anderson Act claim must—statutorily—be considered in light of this theory of recovery, which affords a basis for injunctive relief. So considered, the District Court erred in holding that the SONGS Defendants are insulated from all public responsibility until their defective products actually result in an epic cataclysm. [ER 30.]

Federal and state common law recognize the anticipatory nuisance doctrine, which, as the District Court concedes, *id.*, allows a court to step in and prevent a prospective nuisance. For over a century, the Supreme Court has held that a court sitting in equity may act prospectively to squelch an inchoate nuisance. *See Mulger v. Kan.*, 123 U.S. 623 (1887). And it has remarked that such relief is appropriate where, as here, a legal remedy like

damages "will not adequately protect the public interests in the future." *Coosaw Mining Co. v. S.C.*, 144 U.S. 550, 567 (1892). This is especially the case when the prospective nuisance threatens the environment and public health. *Mo. v. Ill.*, 180 U.S. 208, 248 (1900) ("What is sought is relief against the pouring of sewage and filth through [a government-sanctioned canal], by artificial arrangements, into the Mississippi River, to the detriment of the State of Missouri and her inhabitants, and the acts are not merely those that have been done, or which when done cease to operate, but acts contemplated as continually repeated from day to day."); *Cal. Tahoe Reg. Planning Agency v. Jennings*, 594 F.2d 181, 193 (9th Cir. 1979) ("And the equitable powers of the federal courts are not limited to stopping nuisances already in operation"); *Texas v. Pankey*, 441 F.2d 236, 242 (10th Cir. 1971) (holding injunctive relief appropriate to protect against future damage).

In short, it cannot be that Congress, in passing the Price Anderson Act, was more interested in paying for the results of a nuclear disaster than preventing one. Because the District

Court's sole basis for rejecting the Price Anderson Act claim was the perceived requirement of "bodily injury," [ER 29–30], the decision below should be reversed.

III. The Price Anderson Act does not to occupy the field of nuclear regulation or otherwise preclude all state law claims that relate to the hazards of radiation.

The District Court grounded its dismissal of state law claims against the SONGS Defendants on the erroneous premise that "Plaintiff's state law claims are preempted by the AEA, which occupies the field for protection against hazards of radiation and the disposal of radioactive materials." [ER 31.] The notion that the Price Anderson Act "occupies the field" is unsupported by the text of the Price Anderson Act, the case law interpreting the statute, and the congressional purposes behind its passage. The District Court's decision was error.

A. Standard of review.

The Ninth Circuit reviews de novo a district court's decision preempting state law claims. *Radici v. Assoc. Ins. Co.*, 217 F.3d 737, 740 (9th Cir. 2000).

B. The doctrine of field preemption.

Preemption is a complicated and often pedantic legal theory. Having a common understanding of the operative terms is a prerequisite to effective analysis—and essential to understanding the errors below. Generally speaking, preemption holds that wherever federal and state laws come into conflict, the Supremacy clause of the Constitution mandates that federal displaces state. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019). Preemption is commonly thought of as coming in two stripes: express preemption and implied preemption.

Express preemption is found "where Congress explicitly indicates its intent to supplant state law," as it does with the regulation of ERISA employee benefit plans. *See Cook v. Rockwell Inter. Corp.*, 790 F.3d 1088, 1092 (10th Cir. 2015); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 96-97 (1983) (finding express preemption in 29 U.S.C. § 1144(a), which precludes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

The second variety of preemption is implied preemption, which is present where "some other aspect of a statute is said to suggest such an intent" to supplant state law. *Cook*, 790 F.3d at 1092. Field preemption is the most expansive type of implied preemption, and it is said to be found only where "Congress leaves no room for state regulation in an entire area." *See id.* Finally, conflict preemption is a less ambitious form of implied preemption, where "Congress has expressed a more modest wish to displace individual state laws standing in the way of federal law." *Id.*

Furthermore, in cases involving preemption of historic police powers of the States (namely, regulation of public health and safety), the analysis "start[s] with the assumption that the historic police powers . . . were not to be superseded . . . unless that was the **clear and manifest purpose** of Congress." *Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). This is sometimes referred to as the "presumption against preemption," which is "heightened" when a state law governing public health and safety is in danger of being preempted. *See, e.g.*, *Cook*, 790

F.3d at 1094 (holding that Price Anderson Act did not preempt nuisance claims stemming from the handling of radioactive materials); *Va. Uranium*, 139 S. Ct. at 1903–05 (2019).

C. The Price Anderson Act leaves untouched state law causes of action for persons impacted by nuclear generation activities.

The District Court erroneously relied upon an incorrect notion of field preemption to justify its holding that state tort law claims are preempted by the AEA. [ER 31.] Using this erroneous framework, the District Court effectively concluded that the Price Anderson Act leaves "no room for state regulation" of public health and safety resulting from radiation or radioactive materials. [ER 31–32.] The District Court's analysis does not withstand close scrutiny.

Somewhat surprisingly, the District Court anchored its finding of "field preemption" in *Silkwood* and its progeny. But *Silkwood* held there is "ample evidence" that, in passing the AEA, "Congress had no intention of forbidding the states to provide" remedies for persons injured by nuclear activities. *Silkwood*, 464 U.S. at 251. In fact, the U.S. Supreme Court in *Silkwood* found

confirmation in the Price Anderson Act, "which indicates that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies." *Id.* at 252. And this was so even though Congress:

> Was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something Congress was quite will to accept.

Id. at 256. Accordingly, the Court held that punitive damages, which—like injunctions—"have long been a part of traditional state tort law," are "not pre-empted by federal law" and that "insofar as damages for radiation injuries are concerned, pre-emption should not be judged on the basis the Federal

Government has so completely occupied the field of safety that state remedies are foreclosed." *Id.*

As already discussed, the Price Anderson Act applies to "any suit asserting public liability," deems any such suit as arising under federal law, and stipulates that state law supplies the "substantive rules for decision." As now-Justice Gorsuch queried in *Cook*, "Where does any of this language—expressly—preempt and preclude all state law tort recoveries for plaintiffs who plead but do not prove nuclear incidents? We just don't see it. Congress knows well how to preempt a field expressly when it wishes." *Cook*, 790 F.3d at 1095; *see generally Va. Uranium,* 139 S. Ct. at 1903–05 (discussing preemption).

By its ruling below, the District Court has placed the SONGS Defendants on the horns of a dilemma. It cannot be that Public Watchdogs has no Price Anderson Act claim, and at the same time the Price Anderson Act preempts Public Watchdogs' state-law claims *qua* state-law claims. Indeed, the District Court's "reading of the law (no recovery absent a full-blown nuclear incident) would have the surprising effect of barring recovery 'in

the event of a future accident exactly like Three Mile Island,'" which was the animating force behind the 1988 amendments to the Price Anderson Act, "because 'Three Mile Island does not appear to have caused' the sort of grave injuries required to establish a nuclear incident under § 2014(q)." *Cook*, 790 F.3d at 1097. Accordingly, "there's nothing inconsistent about a statutory scheme that provides federal jurisdiction over certain claims to ensure their streamlined processing…while permitting claims involving lesser occurrences to proceed to decision under preexisting state law principles." *Id.* at 1099.

Silkwood and legislative history buttress the conclusion that a claim falling outside or below the Price Anderson Act is nonetheless actionable under state law: "Absent . . . a determination [that the incident is an "extraordinary nuclear occurrence"], a claimant would have exactly the same rights that he has today under existing law—including, perhaps, benefit of a rule of strict liability if applicable State law provides." *Silkwood*, 464 U.S. at 254 (quoting S. Rep. No. 89-1605, at 12 (1996)).

So, ultimately, Public Watchdogs is entitled to relief either under the Price Anderson Act (using California tort law to supply the rules of decision) or directly under California tort law.

IV. Public Watchdogs' public nuisance claim is sufficient to survive a motion to dismiss.

The District Court failed to apply the proper standard for a motion to dismiss, and improperly concluded that Public Watchdogs did not allege a plausible "special injury" in its public nuisance claim. The District Court further erred by holding that Cal. Civ. Code § 3482 permits the negligent burial of defective canisters carrying toxic and radioactive waste.

A. Standard of review.

The Ninth Circuit reviews de novo a dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199 (9th Cir. 2003). "Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint, must be read in conjunction with [Fed. R. Civ. P.] 8, which requires a short and plain statement showing that the pleader is entitled to relief and contains a powerful presumption against rejecting pleadings

for failure to state a claim." *Id.* at 1199–1200 (internal quotations and citations omitted).

B. Public Watchdogs alleged facts sufficient to establish a plausible special injury in support of its nuisance claim.

A public nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." *See Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116, 123 (citing Cal. Civ. Code § 3480). The District Court erred in holding that Public Watchdogs' allegations (interpreted in the light most favorable to the plaintiff) failed to state a public nuisance claim that is plausible[16] on its face. [ER 34–35.]

The District Court concluded that an "organizational injury" (drawing directly from the SONGS Defendants' characterization of Public Watchdogs' special injury) cannot plausibly constitute a special injury under California law, because there is no case law

[16] Plausible is defined as "conceivably true or successful; possibly correct or even likely; reasonable." *See* BLACK'S LAW DICTIONARY 1337 (10th ed. 2014).

explicitly stating that an "organizational injury" is a special injury. [ER 33–35.] Without any legal authority, the District Court reached the sweeping conclusion that Public Watchdogs' "concerns are shared by the entire community of the Southern District of California." *Id.* In other words, the District Court held as a matter of law that every resident in Southern California suffered an injury that was of the same **kind** as Public Watchdogs (whose primary purpose is frustrated by the SONGS Defendants' public nuisance) and its members. Such a conclusion is not invariably true, and certainly not "in the light most favorable" to Public Watchdogs.

Furthermore, the District Court's determination that a special injury must be "different in kind, rather than in degree, from that shared by the general public" has been called into question by recent California jurisprudence. *Compare Brown v. Petrolane, Inc.*, 102 Cal. App. 3d 720, 725 (1980), *with Trujilo v. Ametek, Inc.*, No. 3:15-cv-1394, 2015 WL 7313408, at *8-9 (S.D. Cal. Nov. 18, 2015) (collecting cases casting doubt on the viability of the rule set forth in *Brown v. Petrolane*). A 2009 California

Court of Appeal case suggested that the "different in kind" approach might be an "incorrect statement of the law," before permitting a plaintiff to proceed with a public nuisance claim that merely differed in degree. *See Birke v. Oakwaood Worldwide*, 169 Cal. App. 4th 1540, 1548 (2009); *see also Greenfield MHP Associates, L.P. v. Ametek, Inc.*, 145 F. Supp. 3d 1000, 1016 (S.D. Cal. 2015) (collecting cases in accord with *Birke*).

Public Watchdogs' allegations in the instant case establish that the SONGS Defendants' conduct creates a credible risk of probabilistic harm to itself and its members that are different in **kind** and **degree** from the harm suffered by the general public. [ER 207, 254–55.] Public Watchdogs was created "to ensure that government agencies and special interests comply with all applicable laws, including public-safety and environmental-protection laws." [*Id.*] The SONGS Defendants' conduct constitutes a public nuisance of the precise type that Public Watchdogs was created to prevent. Viewed in the light most favorable, that is sufficiently different than any "injury" shared by the general public, both in terms of kind and degree.

C. Public nuisance claim is not barred by California Civil Code § 3482.

Cal. Civ, Code § 3482 bars public nuisance claims when a defendant's acts are made "under the express authority of a statute," which requires an "unequivocal legislative intent to sanction a nuisance." *Wilson v. Southern California Edison Co.*, 234 Cal. App. 4th 123, 157 (2015). Thus, a regulatory scheme that "impose[s] the design, siting, operation and safety requirements" will not do. *Id.* at 157—58. Here, there is no statute that expressly permits the Private Defendants to defectively design canisters and negligently install them. Moreover, Public Watchdogs alleged that Holtec redesigned the defective canisters without obtaining prior approval from the NRC, in violation of NRC regulations, and that Private Defendants failed to comply with NRC regulations and policies in negligently burying the defective canisters. Accordingly, Section 3482 cannot bar Public Watchdogs' nuisance claim.

CONCLUSION

This Court should reverse the District Court's order dismissing the APA, Price Anderson Act, and public nuisance claims for lack of subject matter jurisdiction, and for failing to state claims upon which relief could be granted. The case should be remanded to the District Court for further proceedings, including a prompt evidentiary hearing on Public Watchdogs' Motion for Preliminary Injunction.

Dated: February 10, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) 19-56531

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/ Eric J. Beste **Date** February 10, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s): 19-56531

I am the attorney or self-represented party.

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