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 Reply Brief

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INTRODUCTION

A "Catch 22" is as a paradoxical dilemma from which an individual cannot escape because of contradictory rules or limitations.[1] In other words, a maze with no exit. That is precisely what the Nuclear Regulatory Commission ("NRC") and its commercial partners, Southern California Edison ("SCE"), San Diego Gas & Electric, Sempra Energy, and Holtec International ("Holtec") (hereinafter collectively referred to as the "Commercial Defendants"), have attempted to construct to shield from judicial scrutiny their bungled fuel transfer activities at San Onofre Nuclear Generating Stations ("SONGS").

First, by erroneously characterizing Public Watchdogs' core claims as challenging a "license amendment" and "certificate of compliance," the NRC and Commercial Defendants hope to insulate their negligent activities from timely judicial scrutiny. But neither the Hobbs Act nor the Price-Anderson Act limited the District Court's ability to review the activities at SONGS.

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[1] Joseph Heller, *Catch-22* (1961).

Second, Commercial Defendants seek to sidestep California state law by invoking NRC primacy in the context of anything and everything nuclear, and then by misstating California law. This Court has expressly held that federal law does not preempt all state tort claims arising from the operation of a nuclear power plant, Commercial Defendants are mistaken regarding the requirements for stating a cognizable public nuisance claim under California law. Simply put, the NRC's professed oversight of Commercial Defendants' activities does not automatically shield them from state law tort claims.

While boasting a robust and "extensive ongoing oversight" of Commercial Defendants at SONGS, the reality is to the contrary. The NRC has all but abdicated its legislatively mandated regulatory mission in deference to Commercial Defendants. The only discernable NRC oversight at SONGS in the face of demonstrable negligence by Commercial Defendants has been a combination of benign neglect and blind deference. For their part, Commercial Defendants have systematically bungled the fuel transfer operation and seek to hide beneath the NRC's regulatory

nuclear umbrella. From the delivery of unapproved and negligently redesigned canisters, continuing through the negligent burial of damaged canisters, and culminating with nearly dropping two fully-loaded canisters, Commercial Defendants have exposed Southern California to an unacceptable risk of a nuclear disaster.

The NRC and Commercial Defendants have attempted to forestall independent judicial review of their actions until they can bury tons of deadly spent nuclear fuel alongside the Pacific Ocean in damaged and defective canisters that are currently irretrievable. Notwithstanding the protective paradox the NRC and Commercial Defendants attempt to weave around their activities, Public Watchdogs' claims warrant full review before a neutral and objective judiciary.

LEGAL DISCUSSION

I. The Hobbs Act neither precludes district court review of claims against Commercial Defendants, nor forecloses review of arbitrary and capricious actions by the NRC.

As in the district court, Appellees continue to advance faulty arguments unsupported by the text of the Hobbs Act, all in an

effort to prevent the District Court from reviewing what it acknowledged were "alarming" allegations about nuclear fuel transfer activities at SONGS. By precluding district court review of certain agency actions, combined with a strict 60-day filing deadline, the Hobbs Act marks a significant departure from time-tested precepts of federal jurisdiction that have enhanced the credibility and accuracy of its adjudicatory processes. This severe limitation on federal jurisdiction should be narrowly applied to only those cases covered by the statute's text, which cannot support the weight Appellees try to place upon it.

The Hobbs Act plainly does not implicate suits brought against private parties, but only covers certain challenges to particular proceedings involving some federal agencies. Nothing in the text of the Hobbs Act suggests that it deprives district courts of jurisdiction to adjudicate any and all future cases involving nuclear power, including those that the public could not have foreseen. The District Court erred when it expanded the Hobbs Act beyond its plain text, and used it to deprive Public Watchdogs of its day in court.

A. The Hobbs Act does not apply to tort and nuisance claims against Commercial Defendants.

Commercial Defendants do not claim that the text of the Hobbs Act actually supports their position, nor could they. The statute only requires challenges to NRC proceedings "for the granting, suspending, revoking, or amending of any license" to be brought in the Court of Appeals within 60 days of the NRC's decision. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 733 (1985) (citing and quoting 42 U.S.C. § 2239). Despite the statute's clear language, Commercial Defendants ask this Court to adopt a sweeping interpretation that would strip federal district courts of jurisdiction to hear any and all state law claims against **private parties** if they somehow "trace back to actions that were taken pursuant to or that were incidental" to NRC licensing proceedings. CD Ans. Br. at 25.[2] But Commercial Defendants are not federal agencies, and their tortious actions are distinct from the NRC's

[2] "CD Ans. Br." refers to Commercial Defendants' Answering Brief (Dkt. # 27).

flawed licensing proceedings. The Hobbs Act is inapplicable to Counts Two through Four.[3]

In the face of the clear language of the Hobbs Act, Commercial Defendants make the startling claim that "[f]or purposes of jurisdiction under the Hobbs Act, it makes no difference that appellant sued the [Commercial Defendants]." CD Ans. Br. at 30. Obviously, from a textual perspective, the fact that Commercial Defendants are not federal agencies makes all the difference in the world. This is because **nothing** in the Hobbs Act purports to strip federal district courts of jurisdiction over claims against private parties. Commercial Defendants do not even attempt to interpret the actual language of the Hobbs Act, but instead, selectively quote from inapplicable cases to give the appearance of settled law. Close inspection of these cases reveals otherwise.

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[3] Commercial Defendants incorrectly contend that this argument was not raised below. CD Ans. Br. at 29-30. In discussing Commercial Defendants' reliance on the Hobbs Act, Public Watchdogs' also referred to arguments raised in a separate pleading—that is, its Opposition to the NRC's Motion to Dismiss. [ER 155.] That Opposition included the same arguments made here. [ER 136.]

For example, Commercial Defendants rely heavily on *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985), CD Ans. Br. 27-28, but fail to acknowledge that the case involved a review of actions by the NRC, not private parties. In *Lorion*, the Supreme Court construed the Hobbs Act as covering the "review of [agency] orders resolving issues preliminary or ancillary to the core issue in [an agency] proceeding." 470 U.S. at 743. The Court's decision was animated by the concern that "numerous ancillary or preliminary orders denying requests for intervention [in the agency proceeding] or a hearing by persons who purport to be affected by the issues in the [agency] proceeding" would be reviewed in different courts, leading to a "bifurcation of review of orders issued in the same proceeding." *Id.* Notably, the Court expressed no concern over allowing state law causes of action

against private parties to proceed according to well-established principles of federal jurisdiction.[4]

Similarly, Commercial Defendants rely on this Court's decision in *Gen. Atomics v. U.S. Nuclear Regulatory Comm'n*, 75 F.3d 536, 539 (9th Cir. 1996), CD Ans. Br. at 28-29, but gloss over the fact that the case involved a declaratory relief action against the NRC, not a private defendant. Significantly, the plaintiff's action sought "to determine whether General Atomics [was], in fact, a licensee," a question of administrative law squarely within the purview of the Hobbs Act. *Gen. Atomics*, 75 F.3d at 539. Nothing in this case indicates that Congress, *sub silentio*, intended to deprive federal district courts of the authority to decide disputes involving private parties negligently transferring spent nuclear fuel. And here, the District Court's assessment of

[4] *Lorion* also did not expand the Hobbs Act to cover **all** agency decisions, but only the review of "orders resolving issues preliminary or ancillary to" a proceeding covered by the Act. At most, this gloss on the Hobbs Act would only cover agency orders issued prior to, or auxiliary to, orders actually implicated by the Hobbs Act. *See Brodsky v. U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175, 182 (2d Cir. 2009).

Commercial Defendants' negligence will not hamper the review of any orders actually covered by the Hobbs Act.

Commercial Defendants' attempt to draw parallels between the instant case and other lower court decisions falls flat. CD Ans. Br. at 30-32. Most cases involve direct challenges to an agency's granting or amending of a license—the type of action that comes within the heartland of the Hobbs Act. *See, e.g., City of W. Chi. v. U.S. Nuclear Regulatory Comm'n*, 542 F. Supp. 13, 15 (N.D. Ill. 1982) (dismissing challenge to NRC license amendment); *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 910-11 (9th Cir. 1989) (directing dismissal of case against Forrest Service because plaintiff sought to challenge "conditions of the FERC license"); *Nader v. Ray*, 363 F. Supp. 946, 949 (D.D.C. 1973) (dismissing challenge the Atomic Energy Commission's decision to "license[] and continue[] to permit the operation of the nuclear plants"); *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232, 1252 (D. Utah 2002) (dismissing claims challenging NRC's authority to issue license). Other cases predated the 1988 amendments to the Price-Anderson Act, which

provided a federal cause of action. *See, e.g. Simmons v. Ark. Power & Light Co.*, 655 F.2d 131, 134 (8th Cir. 1981) (dismissing suit seeking "private judicial enforcement of the [Atomic Energy] Act");[5] *Liesen v. La. Power & Light Co.*, 636 F.2d 94, 95 (5th Cir. 1981) (same). And some cases do not involve private defendants at all. *See, e.g., Am. Bird Conservancy v. F.C.C.*, 545 F.3d 1190 (9th Cir. 2008) (affirming dismissal of suit against the FCC).

Tellingly, Commercial Defendants ignore the persuasive arguments raised in the concurring opinion in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057–67 (2019), and have no response to the plurality's view that disagreement with an agency interpretation does not transform a case into one that falls under the Hobbs Act. *Compare* CD Ans. Br. 28-29 *with* Opening Br. at 33-34 (quoting *PDR Network, LLC*, 139 S. Ct. at 2063).

[5] Notably, the state claims in this case were **not** bared by the Hobbs Act, but dismissed pursuant to the court's discretionary jurisdiction over pendent state claims. *Simmons*, 655 F.2d at 135.

Commercial Defendants have raised nothing that overcomes the plain language of the Hobbs Act. This Court should reverse the District Court's dismissal of Counts Two through Four.

B. The NRC's decision to allow the Commercial Defendants to negligently transfer and bury spent nuclear fuel is not shielded from scrutiny in federal district court.

The Hobbs Act does not, as the District Court concluded, supplant all federal and state laws that relate in any way to nuclear energy. Rather, it splits the federal jurisdiction for disputes with 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 NRC disputes this straight-forward application of the Hobbs Act, and instead continues to mischaracterize Public Watchdogs' complaint as one that solely challenges the 2015

License Amendment. NRC Ans. Br. at 19, 21.[6] The NRC seizes on the allegations in the Amended Complaint that reference the agency's improper grant of the License Amendment, but ignores the fact that this decision and several other regulatory failures were "just a sampling of NRC's abdication of its regulatory enforcement mandate, and the prioritization of the needs of the SONGS Defendants over public safety." [ER 217, 223.] The Amended Complaint later connects this history of regulatory failure to the allegation that in July 2019, the NRC improperly approved Commercial Defendants' decision to continue the dangerous transfer and burial of spent nuclear fuel at SONGS. [ER 243.] This allegation does not transmogrify the entire complaint into a "direct challenge to the agency's decision to issue the License Amendment." NRC Ans. Br. at 22. Public Watchdogs was entitled to rely on this history—including the NRC's ill-fated license amendment—to support its allegation that the NRC's

[6] "NRC Ans. Br." refers to the NRC's Answering Brief (Dkt. # 26).

other actions were "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." [ER 246–47.]

As for the other agency failures alleged in the Amended Complaint, the NRC misbrands them as "belated attempts to challenge the License Amendment and Certificate of Compliance in the wrong court." Ans. Br. at 32-33. These included (1) exempting Holtec from the requirement of seeking prior approval for its design change to the canister shim bolts, (2) exempting Holtec from the certificate of compliance, (3) not requiring Commercial Defendants to file a public event report for the near-nuclear disaster on July 22, 2018, and (4) allowing Commercial Defendants to continue with their dangerous transfer and burial project without correcting for their design defects and negligence. *See* Opening Br. at 38-39. Rather than attempting to explain its inexplicable responses to Commercial Defendants' negligence, the NRC attempts to transform each of its decisions into something that does not fall within the strict holding of *Brodsky v. U.S. NRC*,

578 F.3d 175, 182 (2d Cir. 2009).[7] In other words, according to the NRC, because it did not issue a formal "exemption" when it exempted Commercial Defendants, its responses do not qualify as "exemptions." NRC Ans. Br. 28-31.

On a motion to dismiss, this is not the proper analysis. Without the benefit of discovery, the District Court should not have disregarded the allegations in the Amended Complaint challenging recent, dangerous activities by Commercial Defendants or recent failures by the NRC. Regardless of whether these agency failings are labelled "exemptions," or simply "other agency action," the analysis in *Brodsky* compels the same conclusion: because these challenges do not seek to "determine the validity" of a proceeding held back in 2015 (before many of these events ever took place), they are not precluded by the Hobbs Act.

[7] The NRC wisely foregoes to advance the same erroneous arguments it made before the Second Circuit in *Brodsky v. NRC*, 578 F.3d 175 (2d Cir. 2009), but instead hopes to convince this Court that the case is distinguishable. Ans. Br. at 25

C. Appellees' overly broad interpretation of the Hobbs Act runs counter to settled judicial history, conflicts with the purpose of the Administrative Procedures Act, and would lead to incongruous and unfair results.

In addition to deviating from the text of the Hobbs Act, Appellees' arguments also conflict with the sound policy that has long animated federal jurisdiction. Because the Hobbs Act constitutes an aberration from traditional jurisprudence and deprives a litigant of the historically-provided minimum of two levels of federal judicial review, the statue should be construed narrowly and confined to its precise terms.

While the Hobbs Act represents a legitimate exercise of congressional authority over the jurisdiction of federal courts, its limitations on judicial review also mark a significant departure from established practice and history. *See* Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 So. Car. L. Rev. 411, 431 (1987) (having two levels of judicial consideration in the federal judicial system helps "shape [litigants'] perception of the fairness of the proceeding"); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L.

Rev. 89, 97 (1975) (two levels of review "preserves faith in the functioning of the legal system"). The Hobbs Act also runs counter to the goal of the Administrative Procedures Act ("APA") "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41, *modified*, 339 U.S. 908 (1950); *see also* Redish & McCall, *Due Process, Free Expression and the Administrative State*, 94 Notre Dame L. Rev. 297, 298 (2018).

The NRC's misinterpretation of the Hobbs Act stems from its overly expansive view of the phrase "to determine the validity of" an agency proceeding. *See* 28 U.S.C. § 2342(4) (emphasis added) and 42 U.S.C. § 2239(A)(1)(a) [Addendum 1, 52.] When coupled with the strict 60-day deadline for bringing such an action, 28 U.S.C. § 2344, the Act furthers the congressional purpose of reducing duplication of effort among various tribunals, and expediting challenges to particular agency actions. *See Lorion*, 470 U.S. at 740. But when serious and unforeseen dangers develop years after a licensing proceeding, it would make no sense to consider an action addressing those serious dangers as one

undertaken to "determine the validity" of a licensing proceeding held years earlier.

This precise point was raised by Justice Kavanaugh in his plurality opinion in *PDR Network*, and ignored by the NRC and Commercial Defendants in their Answering Briefs. NRC Ans. Br. 37-38 (dismissing *PDR Network* because instant case does not involve "judicial deference to agency interpretive rules"); CD Ans. Br. at 28-29 (same). As Justice Kavanaugh explained, 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.

Rather than adopt the NRC's overly-broad interpretation of the Hobbs Act, this Court should give the phrase "to determine the validity of" a meaning that most closely tracks the congressional goal of expediting the review of particular agency decisions, while still respecting the fact that the APA "creates a basic presumption of judicial review for one suffering legal wrong because of agency

action." *Id.* at 2060. For example, if a party challenging practices authorized by the NRC could reasonably have been expected to raise such a challenge at the time of the original proceeding, then its subsequent action will be deemed to be "determining the validity" of the prior proceeding. But if it would have been impossible or unreasonable to bring such a challenge at the time of the original proceeding—such as here, where the facts demonstrating the agency's arbitrary and capricious actions *had not even occurred*—then the Act should not apply. In this way, the text and purposes of both the Hobbs Act *and* the APA are respected, and the jurisprudential underpinnings of federal courts are not unnecessarily diminished.

II. The District Court erred in dismissing Public Watchdogs' APA claims on the grounds that the NRC's actions are immune from judicial review.

The District Court also held that it lacked jurisdiction over Public Watchdogs' APA claims because the NRC's actions on which those claims are based are presumptively unreviewable. [ER 20, 22.] This holding is erroneous and should be reversed.

This Court has long acknowledged "'the strong presumption that Congress intends judicial review of administrative action.'" *ASSE Intern., Inc. v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015) (quoting *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1998)). When an agency action is committed to agency discretion by law, however, it is presumptively unreviewable. *See id.* (citing 5 U.S.C. § 701(a)(2)).

The presumption against judicial review of discretionary agency actions may be rebutted when the agency "has 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 n.4 (1985). Thus, the presumption of unreviewability "does not place the agency above the law," and a discretionary action by the NRC may be reviewed if a court concludes that the NRC is "inexcusably defaulting on its fundamental responsibility to protect the public safety from nuclear accidents." *Commonwealth of Mass. v. NRC*, 878 F.2d 1516, 1525 (1st Cir. 1989).

Likewise, a discretionary agency action may be subject to judicial review if the action is taken in violation of the agency's own regulations or practices. "Even where statutory language grants an agency 'unfettered discretion,' its decision may nonetheless be reviewed if regulations or agency practice provide a 'meaningful standard by which this court may review its exercise of discretion.'" *ASSE Intern.*, 803 F.3d at 1069 (quotations and citations omitted). Accordingly, this Court "'will find jurisdiction to review allegations that an agency has abused its discretion by exceeding its legal authority or by failing to comply with its own regulations.'" *Id.*

Here, the District Court had jurisdiction over the APA claims because they challenged (1) general policies of the NRC that amount to an abdication of its statutory responsibilities and (2) NRC actions taken in contravention of the agency's own regulations. The Amended Complaint set forth a pattern of NRC actions that reflect a general policy of deferring to Commercial Defendants on multiple grave matters of public health and safety, even after repeated demonstrations of their inability to safely conduct fuel transfer operations. Indeed, after Commercial

Defendants nearly caused a nuclear catastrophe on two separate occasions, the NRC did not suspend fuel transfer operations at SONGS. Instead, it allowed Commercial Defendants to determine on their own whether to voluntarily suspend fuel transfer operations until they could figure out how to execute these dangerous activities in way that did not threaten the health and safety of Southern California residents. The NRC's demonstrated policy of effectively delegating its most important regulatory functions to Commercial Defendants is the paradigmatic example of an agency abdicating its statutory responsibilities.

In allowing Commercial Defendants to resume spent fuel transfer operations, the NRC took various actions in contravention of its own regulations. [ER 228, 232, 247-49, 254.] For instance, NRC regulations allow nuclear power plant licensees to store spent nuclear fuel on site in a dry storage system only if the system has been approved by the NRC and is being operated in accordance with all applicable certificates of compliance ("CoC"). See 10 C.F.R. §§ 72.210, 72.212, and 72.214. Here, however, the NRC allowed Commercial Defendants to recommence the burial of spent nuclear

fuel at SONGS in damaged and defective canisters that had been surreptitiously redesigned and were no longer in compliance with the specifications of the applicable CoC. In addition, NRC regulations require that "storage systems must be designed to allow ready retrieval of spent fuel . . . for further processing and disposal." 10 C.F.R. § 72.122. Yet, the NRC is allowing Commercial Defendants to bury spent nuclear fuel at SONGS in canisters that Commercial Defendants readily admit cannot be safely reopened when the fuel inside inevitably needs to be repackaged. Thus, even if the NRC's ultimate enforcement actions are committed to agency discretion, those actions are reviewable here because the NRC has undertaken those actions in violation of its own regulations.

III. The District Court erred in dismissing Public Watchdogs' Claim under the Price-Anderson Act.

Nobody disputes that this appeal presents questions of first impression. But rather than respond to what was said, Commercial Defendants mangle Public Watchdogs' arguments and attack positions of their own invention. A brief reset is thus in order.

The year 1988 saw a sea change in how claims relating to the nuclear industry were to be adjudicated, including claims like those

arising out of the Three Mile Island incident, which didn't result in the sort of grave injuries that Commercial Defendants now assert as a jurisdictional prerequisite. *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1097 (10th Cir. 2015). Prior to that time, Price-Anderson Act litigation was confined to "extraordinary nuclear occurrences" and resulted in a hodge-podge of state and federal court suits. So Congress, via the 1988 amendments to the Price-Anderson Act ("PAA"), broadened the coverage of the PAA, essentially federalized state-law claims and provided a federal forum for those claims. *Estate of Ware v. Hosp. of the Univ. of Penn.*, 871 F.3d 273, 279 (3d Cir. 2017). Accordingly, all litigation of "public liability" claims (like those asserted here) are conducted under the PAA, which *exclusively* controls how claims are presented, what defenses are permitted, and whether state-law claims are preempted.[8]

[8] The exclusivity of the PAA in this context means just that. Other aspects of the AEA can't "preempt" what the PAA permits.

A. The Price-Anderson Act does not require injury caused by radiation exposure above federal dose limits in order to obtain equitable relief.

Commercial Defendants' arguments rely on a false premise: namely, that physical injury is always a jurisdictional prerequisite to relief under the PAA. While that may be true when a plaintiff is seeking *damages* for injury from a nuclear incident, that's not true across-the-board. Indeed, Commercial Defendants' response, which is littered with parentheticals that call attention to words and phrases like "compensable," "property damage," "unlocked cash register," "compensation," and "costs," proves the point. So rather than beg the question, let's face it head on: May a District Court temporarily enjoin the dangerous and negligent ongoing storage and transfer of spent nuclear fuel under the PAA? The answer is "yes."

Commercial Defendants led the District Court into error by urging that relief under the PAA is *always* and *only* triggered by physical injury caused by a radiation leak above federal dose limits. That's plainly not the case. The statute itself—in providing for "precautionary evacuations"—facially demonstrates that it can be

triggered **before** anyone can be harmed from negligent nuclear-related activities. Rather than face this fact, Commercial Defendants retreat behind a "waiver" argument that Dr. Johnson might have labeled a "last refuge."[9] This is silly. Public Watchdogs is not arguing that it has a "precautionary evacuation" claim; instead, it refers to this language in the statute to demonstrate that Commercial Defendants are wrong in taking the flat-footed position that PAA relief is unavailable absent exposure above federal dose limits. It's an *analogy*, not a *claim*. As discussed below, equitable relief is available under the PAA, and no showing of physical injury from exposure to radioactive materials is required.

B. Equitable relief is available under the Price-Anderson Act.

As noted in Public Watchdogs' opening brief, the precautionary evacuation provision of the PAA is stated in the traditional terms of equitable relief: that is, it operates in the face of an "event that is not classified as a nuclear incident but that poses imminent danger of bodily injury or property damage from

[9] James Boswell, *The Life of Samuel Johnson*, at 182 (1986 ed.).

the radiological properties of . . . spent nuclear fuel . . . ." 42 U.S.C. § 2014(gg). Were this not enough, there's plenty of reason to conclude that equitable relief is available under the PAA. First, it's "clear 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 U.S. 238, 256 (1984) (emphasis added). It's beyond cavil that state-law tort remedies include injunctions.

Second, the PAA gives district courts "original jurisdiction" over PAA claims. "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Reebok Int'l., Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552 (9th Cir. 1992). Here, there's no indication that Congress carved equitable remedies from a district court's "original jurisdiction" over the PAA. And it's obvious enough that Congress knows how to do just that, having

done so with respect to some punitive damages and costs remedies. 42 U.S.C. §§ 2210 (q) (certain costs), (s) (punitive damages).[10]

IV. Public Watchdogs' nuisance claim is not preempted.

Commercial Defendants serve up an incoherent theory of preemption, at once chiding Public Watchdogs for arguing that the question presented is whether "the PAA 'preempts the entire field of nuclear radiation,'" and then four sentences later urging that "The Ninth Circuit has consistently ruled that the PAA preempts state law causes of action." We're entitled to ask, "which is it?"

What's really at issue here is Commercial Defendants' stubborn refusal to acknowledge that the Price-Anderson Act is part of the Atomic Energy Act. Once that point is recognized, it becomes clear that the PAA's "unusual preemption provision" is the only possible basis for preempting state-law claims like those asserted here. *See El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473,

[10] Commercial Defendants' correctly point out that a couple of district court cases cited in Public Watchdogs' Opening Brief did not result in the issuance of injunctions. CD Ans. Br. at 44, n.11. Counsel intended to note that injunctions are often sought, without apparent objection, in PAA cases. Last-minute editing overstated the point. We respectfully regret the error, and modify the Opening Brief accordingly.

484 (1999). So Public Watchdogs hasn't waived anything by saying that it is the PAA, and not the entire AEA, that is at issue.[11]

On their more substantive points, Commercial Defendants once again fall back on cases demonstrating no more than that (1) plaintiffs can't recover damages under the PAA in no-injury cases, (2) states and their subdivisions can't pass laws regulating nuclear safety, or (3) prior to the 1988 amendments to the PAA, some courts held that state-law claims were preempted by the AEA.

On the latter point, the 1988 amendments, far from institutionalizing some version of field preemption, preserved "the state law nature of the underlying tort claims." *Day v. NLO, Inc.*, 3 F.3d 153, 154 n.1 (6th Cir. 1993). And dismissing Justice Gorsuch's well-reasoned opinion in *Cook* as an "outlier" won't do—the issues he analyzes in that case are equally applicable.

Commercial Defendants say precious little about a district court's ability to stop a nuisance in its tracks under the anticipatory

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[11] It is true that a state-law claims (either direct or as incorporated via the PAA) do not exhaust the whole of preemption analysis. For instance, a municipal ordinance purporting to ban nuclear activity would be evaluated under the AEA generally, not the PAA specifically.

nuisance (or "prospective nuisance") doctrine. In fact, the defendants say nothing at all beyond a vague assertion of "preemption" that rests on the slender thread of yet another *damages* case holding that the interpretation of a federal statute is not a matter of state law. But preemption is beside the point, anyway, because the anticipatory nuisance doctrine is a feature of federal common law (as well as state law) and, as such, is untouched by Supremacy Clause preemption. *See, e.g., Missouri v. Illinois*, 180 U.S. 208, 248 (1900); *Cal. Tahoe Reg. Planning Agency v. Jennings*, 594 F.2d 181, 193 (9th Cir. 1979).

Finally, it is impossible to reconcile Commercial Defendants' arguments (1) that Public Watchdogs cannot state a claim under the PAA because it does not allege a physical injury caused by exposure to radioactive materials above federal dose limits, and (2) that the PAA preempts Public Watchdogs' nuisance claim. Indeed, this Court has held that the PAA does not preempt state law claims arising from nuclear power plant operations if the state law claims are predicated on something other than exposure to radioactive materials. *See Golden v. CH2M Hill Hanford Grp., Inc.*, 528 F.3d

681, 684 (9th Cir. 2008) ("Nevertheless, it is possible that Golden suffered emotional distress from exposure to the nonradioactive materials that is separate and distinct from his emotional distress claim for exposure to the radioactive materials. If so, the former would not be preempted by the Price-Anderson Act, even though Golden can't show that he suffered physical injuries as a result of this exposure."). Because Public Watchdogs' state law claims are not predicated on present exposure to radioactive materials—a point Commercial Defendants repeatedly emphasize—they cannot be preempted by the PAA.

V. The District Court erred in Dismissing Public Watchdogs' nuisance claim.

A. Public Watchdogs' pleaded a cognizable "special injury."

The District Court held that Public Watchdogs' alleged organizational injury is not a "special injury" sufficient to confer standing to bring a public nuisance claim against Commercial Defendants. [ER 34-35.] Contrary to Commercial Defendants' arguments on appeal, this holding is erroneous and should be reversed.

The Supreme Court has long held that an organization can establish standing by alleging "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Such organizational injury "constitutes far more than simply a setback to the organization's abstract social interests." *Id.* Moreover, the Supreme Court "has also made clear that a diversion-of-resources injury is sufficient to establish organizational standing at the pleading stage, even when it is broadly alleged." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (internal quotations omitted).

Here, Public Watchdogs plainly alleged that Commercial Defendants' reckless burial of spent nuclear fuel at SONGS has caused injury to its organizational activities and that Public Watchdogs has sought to discourage Commercial Defendants from continuing their reckless conduct. [ER 254-55.] At the pleading stage, Public Watchdogs was not required to present evidence or an exhaustive list of the resources it has been forced to expend to combat Commercial Defendants' nuisance. Rather, broad

allegations of organizational injury are sufficient. *See Nat'l Council of La Raza*, 800 F.3d at 1040. If allowed to proceed with its public nuisance claim, Public Watchdogs will show that, unlike the public at large, it has been forced to expend significant resources combatting Commercial Defendants' public nuisance by, among other things, participating in SONGS public engagement panels, participating in proceedings before the California Public Utilities Commission, and filing petitions before the NRC. These diversions of Public Watchdogs' resources constitute concrete and particularized injury that is sufficient to confer standing. Accordingly, the District Court erred in holding that Public Watchdogs lacks standing to bring a public nuisance claim because it failed to allege a cognizable special injury.

B. Public Watchdogs was not required to plead a "special injury" because it alleged a nuisance that is both public and private.

Although Public Watchdogs did allege a cognizable "special injury," the District Court also erred in holding that Public Watchdogs was required to allege such an injury to maintain its public nuisance claim. [ER 35.] Under California law, "when the

nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public." *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1551 (2009). A "private nuisance is a civil wrong based on disturbance of rights in land." *Koll-Irvine Cntr. Prop. Owners Ass'n v. Cty. of Orange*, 24 Cal. App. 4th 1036, 1041 (1994). "An injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause." *Birke*, 169 Cal. App. 4th at 1550 (internal quotations omitted). Moreover, "[i]t is settled that, regardless of whether the occupant of land has sustained physical injury, he may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or a nuisance." *Id.* at 1551.

Here, Public Watchdogs alleged a nuisance that is both public and private. Specifically, it alleged that it has at least "one member who lives within the zone of exposure to a catastrophic release of radioactive material at SONGS." [ER 207.] This allegation is sufficient to create a plausible inference that at least one of Public Watchdogs' members faces fear for her safety because of Commercial Defendants' nuisance and that at least one of its members will suffer injury to its private property, health, and comfort if Commercial Defendants' nuisance is not abated. Because Public Watchdogs alleged a nuisance that is both public and private, it was not required to allege a "special injury." As such, the District Court erred in dismissing the public nuisance claim based on a supposed failure to allege such an injury.

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

Commercial Defendants argue that the District Court correctly dismissed Public Watchdogs' nuisance claim pursuant to California Civil Code § 3482 because "[t]he activities and conduct challenged by Appellant have been undertaken pursuant to licenses

and certifications under the express statutory authority of the NRC." CD Ans. Br. at 59. This argument fails for several reasons.

First, the California Supreme Court "has consistently applied a narrow construction to section 3482 and to the principle therein embodied." *Friends of H Street v. City of Sacramento*, 20 Cal. App. 4th 152, 160 (1993). Under this narrow construction, "[a] statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the *express terms* of the statute under which the justification is made, *or by the plainest and most necessary implication* from the powers expressly conferred, *so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury*." *Id.* (emphasis in original). Neither the district court nor Commercial Defendants have identified any specific provision of the AEA that authorizes Commercial Defendants to bury deadly spent nuclear fuel 108 feet from the Pacific Ocean in damaged and defective canisters that were surreptitiously redesigned without the prior approval of the NRC. Nor cannot be fairly stated that, in passing the AEA,

Congress contemplated that nuclear power plant licensees should be allowed to engage in such reckless and abhorrent behavior. Accordingly, Commercial Defendants failed to satisfy their burden of showing a statutory provision that expressly authorizes their conduct, and therefore failed to establish that Section 3482 bars Public Watchdogs' nuisance claim.

Second, "although acts authorized by statute cannot give rise to nuisance liability, the *manner* in which those acts are performed may constitute a nuisance." *Id.* (emphasis in original). Even if Commercial Defendants could point to a specific provision of the AEA that expressly authorizes their conduct (they cannot), Public Watchdogs alleged that Commercial Defendants are burying spent nuclear fuel at SONGS negligently and in violation of NRC regulations. Put another way, Public Watchdogs alleged that the *manner* in which Commercial Defendants are carrying out activities pursuant to NRC licenses constitutes a nuisance. These allegations must be accepted as true at the pleading stage, and they are more than sufficient to defeat any defense under Section 3482. Accordingly, for this additional reason, the district court erred in

concluding that Public Watchdogs' nuisance claim is barred by Section 3482.[12]

Third, although they argue that their actions have "been undertaken pursuant to the express authority of the NRC," Commercial Defendants inexplicably fail to disclose to the Court that the NRC is currently investigating whether the Holtec canisters being buried at SONGS continue to comply with NRC regulations and the applicable CoC. On March 18, 2020 (thirteen days **before** Commercial Defendants filed their Answering Brief), the NRC sent a letter to Holtec regarding a notice of violation for Holtec's "failure to conduct an adequate evaluation in accordance with 10 C.F.R. § 72.48 prior to making proposed design changes" to its multipurpose canisters. *See* ADAMS Doc. ML 19330F234 (accessible at http://www.nrc.gov/reading-rm/adams.html). In the letter, the NRC found that Holtec's response to the notice of

[12] Relatedly, the District Court erred in concluding that Public Watchdogs' nuisance claim is barred by Section 3482 because it can challenge Commercial Defendants' violations of NRC licenses and regulations under 10 C.F.R. § 2.206. [ER 37.] The mere fact that Public Watchdogs may have other available avenues to challenge Commercial Defendants' conduct is irrelevant to whether its nuisance claim is barred by Section 3482.

violation was "inadequate" and "did not fully address the violation." *Id.* In addition, the NRC explained that "allowing the [canister] to scratch, or suffer mechanical wear up to a wall thickness of 0.216" presents a potential impact to the surface of the [canister] and affects the confinement design function as specified in the Holtec" CoC. *Id.*[13] This ongoing investigation into whether the Holtec canisters remain in compliance with NRC regulations and the applicable CoC further belies Commercial Defendants' argument that their conduct is expressly authorized by the NRC, and further justifies reversal of the District Court's decision that Public Watchdogs' nuisance claim is barred by Section 3482.

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

[13] It is telling that Commercial Defendants failed to disclose this ongoing investigation into the Holtec canisters, especially considering Commercial Defendants' false accusation that Public Watchdogs' counsel is in "dereliction of its duty to the Court" by allegedly failing to acknowledge controlling precedent. *See* Ans. Br. at p. 47, n. 12.

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: April 13, 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:

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

[X] 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 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** April 13, 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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