No. 20-1676

IN THE

Supreme Court of the United States

PUBLIC WATCHDOGS,

Petitioner,

v.

SOUTHERN CALIFORNIA EDISON COMPANY, *et al.,*

Respondents.

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

MOTION FOR LEAVE TO FILE AND *AMICUS CURIAE* BRIEF OF NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW ENVIRONMENTAL ADVOCACY CLINIC, *ET AL.* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Amici Curiae ("Amici") are five environmental legal clinics. Pursuant to Supreme Court Rule 37.2(b), *Amici* respectfully move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of *certiorari*.

All parties were timely notified of proposed *Amici's* intent to file this brief. Petitioner has consented to the filing of the brief. *Amici* are filing this motion because we have been unable to secure consent from Respondent.* Proposed *Amici* therefore file this motion seeking leave to file the *amicus* brief. A copy of the proposed brief is attached.

As more fully explained in the Appendix to this motion and on page 1 of the attached brief under "Interests of *Amici Curiae*," *Amici* are environmental protection legal clinics dedicated to providing legal representation and advocacy services to people and organizations affected by activities that cause actual or potential environmental or human health hazards. *Amici's* interests include the protection of people and the environment from emissions and discharges of hazardous substances in violation of federal and state environmental laws. Accordingly, *Amici* have a particular interest in ensuring the availability of legal forums and procedures to protect those interests.

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*Emails requesting consent were sent to Respondent on June 15th, 2021, and June 20th, 2021, and a voicemail was left with Respondent on June 22nd, 2021. Email requesting consent was sent to Petitioner on June 7th, 2021. As of this date, Petitioner has consented, but we have not received a reply from Respondent.

This brief will assist the Court in determining whether to grant *certiorari* because *Amici* are well-positioned to point out the importance of this case in ensuring that cases regarding environmental protection that involve nuclear facilities, including environmental citizen suits, may be heard by district courts. *Amici* are not motived by a desire to influence the outcome of any pending case, nor are *Amici* interested in the merits of this particular case, *Public Watchdogs v. Southern California Edison Company, et al.* Rather, *Amici* can inform the Court of the broad implications of the Ninth Circuit's viewpoint that the Administrative Order Review Act requires virtually all suits against parties engaged in the business of nuclear materials be brought directly in the courts of appeals.

Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief as *Amici Curiae.*

Respectfully submitted,

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QUESTION PRESENTED

Whether the Hobbs Act deprives a federal district court of subject matter jurisdiction over state law and Price-Anderson Act claims asserted by a private actor against private party NRC licensees, on the ground such claims are "ancillary or incidental to" an NRC final order?

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INTERESTS OF *AMICI CURIAE*[1]

The Northwestern University Pritzker School of Law Environmental Advocacy Clinic is a nonprofit environmental protection legal clinic dedicated to providing legal representation and advocacy services to people and organizations affected by activities that cause actual or potential environmental or human health hazards. Among the clinic's interests are protection of people and the environment from emissions and discharges of hazardous substances in violation of federal and state environmental laws and ensuring the availability of legal forums and procedures to protect those interests.

The Golden Gate University School of Law Environmental Law and Justice Clinic provides pro bono legal representation and services to communities bearing disproportionate environmental burdens. Through litigation, policy advocacy, and education, the clinic supports traditionally underrepresented groups as they seek to improve their environmental conditions and participate in environmental decision-making. As

1. Pursuant to Supreme Court Rule 37.6, *amici curiae* (*"Amici")* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *Amici* certify that counsel of record for all parties received timely notice of *amici curiae's* intent to file this brief. The Petitioner consented to the filing of this brief in a letter on file with the Clerk's office. The Respondent has not responded to *Amici's* request and to the knowledge of *amici curiae* has not consented to the filing of this brief, and this brief is being filed pursuant to the attached motion for leave.

counsel for such groups, the clinic has filed numerous enforcement actions, including citizens suits under federal environmental laws. The clinic is also counsel in a proceeding before the Nuclear Regulatory Commission, which was initiated through a petition filed under 10 C.F.R. § 2.206.

The University of Michigan Law School Environmental Law and Sustainability Clinic provides an opportunity for students to learn how to practice environmental and related areas of law. Founded in 1983, the clinic regularly represents the National Wildlife Federation (NWF), its state affiliates, and other similar organizations. The clinic's focus is on water and wildlife resources, public lands, energy, and human health in the Great Lakes watershed.

The University of Detroit Mercy School of Law Environmental Law Clinic is a non-profit legal clinic representing clients in a variety of water quality, energy, air quality, and environmental justice matters. The clinic's work includes drafting comment letters on permit applications; researching and developing legislative proposals at the request of lawmakers and public interest organizations; petitioning federal and state environmental agencies for rulemaking; commenting on proposed federal, state and international environmental agreements and agency administrative rules; representing public interest organizations in administrative permit decision proceedings; challenging agency rulemaking and permitting decisions in state and federal courts; and bringing enforcement actions to set new precedents for the application of existing statutes and regulations to emerging environmental problems. The Environmental

Law Clinic works in partnership with the Great Lakes Environmental Law Center.

The University of Puerto Rico School of Law Environmental Law Clinic represents and advises individuals and non-profit entities affected by or concerned with environmental health and degradation, energy, and the protection of natural resources.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit in *Public Watchdogs v. Southern California Edison Company* is overly broad in its interpretation of jurisdiction under the Administrative Orders Review Act, 28 U.S.C. § 5841, *et seq.*, also known as the Hobbs Act ("Hobbs Act"). In holding that the Hobbs Act precludes jurisdiction in the district courts over any action that is "incidental" to a Nuclear Regulatory Commission ("NRC") license proceeding, the decision effectively sweeps into exclusive Hobbs Act jurisdiction all private actions against NRC licensees and their contractors - including as Petitioners argue Price Anderson Act ("PAA") cases, which have long been held to be properly brought in the district courts - and, of particular concern to *amici curiae* ("*Amici*") citizen suits under federal environmental laws where jurisdiction is specifically provided for in the district courts as well as state causes of action not otherwise covered by the PAA.

ARGUMENT

Petitioner Public Watchdogs ("Petitioner") brought suit in federal district court against the Nuclear Regulatory Commission ("NRC") and private defendant

nuclear energy companies and their decommissioning subcontractor, alleging dangerous tortious conduct in carrying out decommissioning activities at the San Onofre Nuclear Generating Station and, *inter alia,* seeking to enjoin that conduct under the Price Anderson Act and traditional state tort remedies. The Ninth Circuit held that Petitioner's PAA claims and all other claims brought fall within the exclusive jurisdiction of the court of appeals under the Hobbs Act because, "We must read the Hobbs Act broadly to encompass not only all final NRC actions in licensing proceedings, but also *all decisions that are preliminary, ancillary, or incidental to those licensing proceedings*." *Public Watchdogs v. S. Cal. Edison*, 984 F.3d 744, 757-58 (9th Cir. 2020) (emphasis added). In effect, the Ninth Circuit's decision would bring within the scope of the Hobbs Act – and the exclusive jurisdiction of the courts of appeals – any cause of action of any type, by any party, including private parties, against an NRC licensee. As Petitioner explains, that decision is contrary to the long history of district court jurisdiction over PAA claims by private parties. It would also sweep into the exclusive jurisdiction of the courts of appeals cases brought under citizen suit provisions of numerous environmental statutes that specifically provide for jurisdiction in the district courts any time an NRC licensee is named as a defendant as well as federal and state law claims by private parties for which jurisdiction is more appropriately located in district courts with established fact-finding procedures.

Amici urge the Court to grant certiorari to clarify the scope of the Hobbs Act and correct the Ninth Circuit's overly broad interpretation of the Act.

I. ON ITS FACE, THE NINTH CIRCUIT'S INTERPRETATION OF THE HOBBS ACT IS OVERLY BROAD AND CONTRARY TO THE PRECEDENTS OF THIS COURT.

Simply put, the Hobbs Act does not say what the Ninth Circuit said it requires. The plain language of the Hobbs Act is clear: "The Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . [a]ll final orders of the [NRC] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4).[2] Section 2239 provides for Hobbs Act review of "[a]ny final order entered in any proceeding" "for 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." 42 U.S.C. § 2239(b)(1), (a)(1)(A). As Petitioner rightly argues, this Court has held that "strict fidelity" to the terms of judicial review provisions that create or limit jurisdiction is required and, in the context of the Hobbs Act, courts of appeals have limited application of the exclusive jurisdiction provision to challenges to direct agency action – *i.e.*, agency orders, regulations and rules. *See* Public Watchdogs Petition for Certiorari ("Petition") at 13. *See also BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021) ("[T]his Court's task is to discern and apply the law's plain meaning as faithfully as we can"); *Hallstrom v. Tillamook County,* 493 U.S. 20, 110 S. Ct. 304, 107 L.Ed.2d 237 (1989) ("[A]bsent a clearly expressed legislative intent to the contrary, the words of the statute

2. The NRC now exercises powers formerly exercised by the Atomic Energy Commission and NRC orders are reviewable in the courts of appeals under 42 U.S.C. § 2239.

are conclusive."); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself.").

There is, in short, no statutory basis for the Ninth Circuit's broadening of the Hobbs Act's jurisdiction to encompass "*all*" decisions related to NRC licensees including those that are no more than "incidental" to NRC orders. Further, the Ninth Circuit's interpretation risks doing serious damage to the carefully constructed federal statutory framework for public enforcement of environmental laws.

II. THE NINTH CIRCUIT'S OVERLY BROAD INTERPRETATION OF THE HOBBS ACT'S EXCLUSIVE JURISDICTION PROVISION CONFLICTS WITH AND WOULD INTERFERE WITH SPECIFIC JURISDICTIONAL PROVISIONS OF FEDERAL ENVIRONMENTAL LAWS.

Taken as written, the Ninth Circuit's overbroad interpretation of the Hobbs Act's jurisdictional requirement would force virtually any suit against any entity overseen by the NRC – or even an entity contracting with an NRC licensee – into the courts of appeals, thereby conflicting with several federal statutes and undermining Congress's plan for enforcement of environmental laws.

A. Citizen Suit Provisions – Which Place Jurisdiction In The District Courts – Are Key Elements In Enforcement Of Federal Environmental Law.

Beginning with passage of the Clean Air Act ("CAA") in 1970, most major federal environmental statutes provide for a direct cause of action in federal district courts by citizens to enforce the requirements of the statute. *See* Edward Lloyd, *Citizen Suits and Defenses Against Them*, CW014 A.L.I.-C.L.E. 285, 293 (2015) (citing 42 U.S.C. § 7604) ("In 1970, Congress enacted the first citizen suit provision in the Clean Air Act," allowing citizens "to sue for injunctive relief to force the regulated public to comply with the requirements of the statute and to require EPA to perform mandatory duties imposed on it by the statute."). Similar citizen-suit provisions have been incorporated into several major environmental statutes, including the Federal Water Pollution Control Act (otherwise known as the Clean Water Act ("CWA")), 33 U.S.C. § 1365, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9609, and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a), among others. *See e.g.,* 11 Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, 11.4 Nat'l Resources & Env't 20, 21 (1997).

These citizen-suit provisions "reflect[] Congress's recognition that '[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.'" *NRDC, Inc. v. Train*, 510 F.2d 692, 699–700 (D.C. Cir. 1974) (discussing CAA legislative history). They were "designed to provide

a procedure permitting any citizen to bring an action *directly against polluters* violating the . . . standards and . . . restrictions imposed under the law or against the Administrator grounded on his failure to discharge his duty to enforce the statute." *Id.* at 700 (emphasis added). Moreover, "[t]he legislative history of the Clean Air Act Amendments [also] reveals that the citizen suits provision *reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced*." *Id.* (emphasis added). This legislative history also "reflects Congress' intention to grant broad authority for citizen enforcement." *Nw. Envt'l Advocs. v. City of Portland*, 56 F.3d 979, 987 (9th Cir. 1995), cert. denied, 518 (U.S. 1018) (1996). Indeed, "[u]nderstanding that there would be undesirable underenforcement of environmental laws because of limited regulatory resources, Congress equipped many federal environmental laws with citizen suit provisions, which essentially confer 'private attorney general status' on the citizenry." Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 Ecology L.Q. 1, 40 (1995). As such, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (quoting *Friends of the Earth v. Carey,* 535 F.2d 165, 172 (2d Cir. 1976) (referring to citizen suit provision of the CAA)).

And, citizen suits in environmental cases have furthered Congressional intent. "Citizen suits . . . have had enormous impact in enhancing government enforcement of

environmental laws and in spurring government agencies to implement such laws in a creative and expansive manner. They have given citizens a new and expanded role in the governance of the environment. Citizen participation in environmental matters has evolved beyond petitioning government, beyond commenting on proposed governmental actions, to a partnership with government in enforcing environmental laws and in assuring their prompt implementation." Lloyd, *supra*, at 290.

Citizen suits have also "achieved significant environmental benefits," and have "spawned new environmental programs, expanded others, and assured that Congressional directives were implemented by sometimes recalcitrant and often overburdened agencies. Congress has adopted the programs initiated in citizen suits by amending statutes to incorporate these litigation successes." *Id.* at 280–91. In other words, "Citizen suits work . . . . [They] have secured compliance by myriad agencies and thousands of polluting facilities, diminished pounds of pollution produced by the billions, and protected hundreds of rare species and thousands of acres of ecologically important land." James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits At 30*, 10 Widener L. Rev. 1, 3–4.

Congress has expressed support for these impacts: "In 1985 the Senate Committee on Environment and Public Works recognized that citizens fulfilled their enforcement role against violators of environmental statutes as intended by these provisions." Lloyd, *supra*, at 290. As the record indicated, "[c]itizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and supplement to [sic] government enforcement

actions. They have deterred violators and achieved significant compliance gains." S. Rep. No. 99-50, at 28 (1985).

Notably as well, the citizen suit provisions were enacted beginning in the 1970's long after the Hobbs Act and its jurisctional strictures were in place. The jurisdictional placement of citizen suits in the district courts would make no sense if Congress had intended Hobbs Act jurisdiction to apply. *Cf.* Petition at 27 ("Even if a conflict existed between these statutes, 42 U.S.C. § 2014 would control as the later-in-time act of Congress.").

The potential preclusive effect on environmental citizen suits of the Ninth Circuit's opinion in *Public Watchdogs* is broad and would defeat the purpose of citizen suit provisions in a wide variety of environmental cases unrelated to NRC orders, regulations or rules. NRC licensing activities include construction, operation and decommissioning of nuclear power plants as well as export and import of nuclear materials, and construction, operation and maintenance of nuclear waste disposal sites and cover use of materials including medical, industrial and academic uses of nuclear materials. *See* U.S. NRC, *Licensing*, https://www.nrc.gov/about-nrc/regulatory/licensing.html (last visited June 21, 2021). Each of these activities intersects with areas addressed by environmental laws, for example, the CAA and the CWA, which are intended to be enforced in part by citizen suits brought in the district courts. Indeed, the NRC's own rules recognize this intersection and the continuing applicability of federal environmental statutes in NRC licensing procedures. As an NRC regulatory guide states, "In many cases, the NRC cannot issue a license or permit

until the appropriate State or other Federal agencies [including the U.S. EPA] have granted licenses or permits to the applicant. Applicants are required to comply with applicable Federal and State environmental statutes." *See* U.S. Nuclear Regulatory Commission, *Preparation of Environmental Reports for Nuclear Power Stations*, https://www.nrc.gov/docs/ML1807/ML18071A400.pdf (last visited June 21, 2021). The Ninth Circuit's opinion would strip federal court oversight of the very statutes the NRC's own guide recognizes as applicable.

B. The District Courts Are A Recognized Forum For Environmental Citizen Suits, Including Actions Involving NRC Licensees.

Critical to consideration of Public Watchdogs's Petition, there is a history of these citizen-suit provisions being used by plaintiffs to bring environmental suits against operators of NRC-licensed nuclear facilities in the district courts, a practice supported by the lower courts.

For example, the decision of the Third Circuit in *Susquehanna Valley All. v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980) directly addresses the issue and holds that citizen suit jurisdiction in the district court under the CWA is not constrained by the jurisdictional stricture of the Hobbs Act. In *Susquehanna Valley All.*, residents living near a nuclear facility brought suit in federal district court against the NRC, its Chairman, and the owner and operator of the nuclear power plant, alleging that defendants planned "to partially decontaminate" water contaminated with nuclear waste, and "threaten[ed] to release this water eventually into the Susquehanna River, where because

of the proposed decontamination system's technological limitations it [would] contaminate both municipal water systems and fish and other wildlife used by the plaintiffs for food" in violation of the CWA. *Id.* at 234.[3] The Third Circuit rejected defendants' arguments that the Hobbs Act required that these claims be brought initially in administrative proceedings before the NRC (and, it follows, on appeal from NRC administrative proceedings, exclusively in the court of appeals). Accordingly, the court held, "the district court erred in dismissing Count III for lack of subject matter jurisdiction. The NRC and the Operators, perhaps anticipating that result, urge that the dismissal should nevertheless be affirmed for failure to state a claim upon which relief may be granted. Their theory is that NRC has authority to enforce the Federal Water Pollution Control Act with respect to radioactive discharges from nuclear power reactors, and that the doctrine of exhaustion of administrative remedies prevents a district court from considering this complaint. This argument is a variant of that which we discussed . . . that the alleged violation of section 301(f), 33 U.S.C. § 1311(f), can be considered by the court of

3. *Amici* and Petitioner's position is further supported by this Court's recent interpretation of 15 U.S.C. § 717r(b) in *PennEast Pipeline Co. v. New Jersey*, 594 U.S. ___, No. 19-1039 (June 29, 2021). In *PennEast Pipeline*, this Court concluded that a federal law claim that requires interpretation of a FERC order does not fall within the appellate court's "exclusive jurisdiction" when that interpretation does not seek to "modify" or "set aside" the FERC order. In *PennEast Pipeline*, neither the parties nor the Court contended that § 717r(b) deprived the district court of subject matter jurisdiction to hear the dispute or that the ongoing parallel proceeding before FERC and the D.C. Circuit in any way suggested that the district court proceeding should be dismissed. See slip op. at 6-7; 15 U.S.C. § 717f(h) (original jurisdiction in district court).

appeals when it reviews a final order of the NRC. There is no room for that argument in the enforcement scheme of the Federal Water Pollution Control Act. The citizens' suit provision in section 505, 33 U.S.C. § 1365, contains its own specification of the degree to which district courts must defer to administrative agencies. Under the plain language of that section, the district courts should defer for sixty days, and at that point determine whether or not the violation has been halted by administrative action [by the Environmental Protection Agency] or otherwise. If [ ] it has not been so halted, the citizen's suit goes forward." *Id.* at 244.

Similarly, in *Steward v. Honeywell International, Inc.*, 469 F. Supp. 3d 874 (S.D. Ill. 2020), plaintiffs brought a class action suit in federal district court, asserting various causes of action including federal claims pursuant to the RCRA, the CERCLA, and the CAA against the owner of a nuclear facility, based on allegations that the plant had "emitted air contaminated with radioactive and other toxic materials," which settled "into the [surrounding] soil and buildings" over the years, "causing property loss and damages." *Id.* at 876. The district court allowed plaintiffs' CERCLA and part of its CAA claim to survive a motion to dismiss. And likewise, in *Student Pub. Int. Rsch. Grp. of New Jersey v. Jersey Cent. Power & Light Co.*, 642 F. Supp. 103, 109 (D.N.J. 1986), environmental groups brought suit in federal district court under the citizen suit provision of the CWA against nuclear power plant operators alleging violations of federal and state water pollution permits. The court determined that plaintiffs had standing to bring the action and that they could sue for defendants' past violations of the CWA. *Id.* Further, because "no genuine issues of material fact exist[ed] as to whether or not the

defendants' permit violations [were] excusable," the court granted summary judgment for plaintiffs. *Id.*

Under the Ninth Circuit's sweeping jurisdictional holding in *Public Watchdogs,* none of these suits brought under citizen suit provisions in federal district court against NRC licensed entities would have been permitted to go forward. Instead, contrary to the explicit legislative framework, under the Ninth Circuit's ruling, these cases would have been forced initially into an administrative procedure before the NRC with any appeal to the courts of appeals. That is not what Congress intended and is not what other courts have held.

C. The District Courts Are The Most Efficient And Appropriate Venue For Environmental Claims Not Directly Related To An NRC Order.

As this Court has recognized, a significant purpose underlying the location of cases covered by the Hobbs Act was judicial efficiency by avoiding duplicative records before the NRC and the district courts. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 740 (1985) (quoting H.R.Rep. No. 2122, 81st Cong., 2d Sess., 4 (1950)) ("[T]he submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice."). That is not the case in environmental citizen suit claims. The record created by the NRC in its licensing procedures will say nothing about subsequent actions by an NRC licensee that violate environmental laws, for example, the environmental effects of a discharge of nuclear tainted materials into nearby groundwater or emissions of nuclear or non-nuclear materials that violate state-issued CAA permits.

Moreover, the NRC is not the agency with expertise to handle such claims in an administrative forum. Indeed, the types of concerns most typically raised in citizen suits involve violations of environmental standards, which are generally set by the Environmental Protection Agency or state environmental agencies, not the NRC. *Contrast, Laws and Executive Orders*, https://www.epa.gov/laws-regulations/laws-and-executive-orders (last visited June 25, 2021) ("A number of laws serve as EPA's foundation for protecting the environment and public health"), *with*, U.S. NRC *How the NRC Protects You*, (last visited June 25 2021), https://www.nrc.gov/about-nrc/radiation/protects-you.html#142873 ("[T]he NRC ensures that users of radioactive materials keep radiation exposures within the agency's specified dose limits and as low as reasonably achievable. In addition, users must obtain a license from the NRC and be inspected to ensure that they are following the agency's regulations and safely using radioactive materials."). And, as this Court has recognized, when an administrative agency does not have the requisite procedures or substantive expertise to evaluate a claim or develop a record, the district courts are the more appropriate forum for a case to be brought than a court of appeals, which the Ninth Circuit's decision would require. This is particularly true where the standard of review by the appellate court is highly deferential as is the case under the Hobbs Act. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980) (discussing the "mechanical limitations of the courts of appeals").

Further, and entirely contrary to Congressional intent, sweeping environmental citizen suits under the jurisdictional requisites of the Hobbs Act has the potential to defeat any meaningful hearing of the citizen suit claims. The NRC's regulations allow "[a]ny person" to file a

"request" with the NRC to "institute a proceeding" for modifying, suspending, or revoking a license to remedy license violations. *See* C.F.R. § 2.206(a). However, as was the case in Public Watchdogs' § 2.206 petition related to this case, the NRC has discretion whether to initiate proceedings based on the complaint, *see* Petition at 10-11 and 25 and cases cited therein, and in the event it chooses not to do so, no meaningful record is created by the agency and a court of appeals' review of that limited record is conducted under a highly deferential standard. *Id.* at 25.

Finally, channeling citizen suit claims to the NRC under the Hobbs Act would preclude the specific remedies provided for by Congress for citizen suits brought to enforce environmental statutes. As noted above, the citizen suit provisions are in large part an enforcement tool. Accordingly, the principal relief they offer is injunctive relief. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987) ("These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws"); *see also* Lloyd, *supra*, at 295. However, the NRC generally is not the agency with expertise in assessing violations of the environmental laws and its injunctive authority does not extend to enforcement of those laws.

In sum, the Ninth Circuit's decision is vastly overbroad. If allowed to stand, it would upset the carefully constructed framework for citizen suit enforcement established in most major federal environmental statutes and disrupt long-established environmental litigation regimes. *Certiorari* should be granted to prevent the misdirection and possible preclusion of environmental

citizen suits from the Congressionally mandated district court jurisdiction.

III. THE NINTH CIRCUIT DECISION IN *PUBLIC WATCHDOGS* WOULD ALSO IMPROPERLY PRECLUDE DISTRICT COURT JURISDICTION OVER STATE LAW TORT CLAIMS.

While environmental citizen suits provide an important vehicle for promoting compliance with environmental laws, they are not an exclusive means for challenging conduct that threatens environmental or human health harms. This Court and the majority of courts of appeals that have considered the issue have long held that even in the context of nuclear regulation (first by the Atomic Energy Commission and currently by the NRC), that state tort claims retain viability as a vehicle for environmental protection and to address tortious actions by NRC licensed facilities. The Ninth Circuit's decision improperly precludes district court jurisdiction not only over PAA cases, but also over these state law tort claims.

A. This Court's Precedent Clearly Recognizes Continuing Viability of State Law Tort Claims Against NRC Licensed Facilities.

The Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) is directly contravened by the Ninth Circuit's decision. In *Silkwood*, the Court expressly concluded that state law tort remedies are not preempted by either the Atomic Energy Act or NRC (then Atomic Energy Commission) regulation. *Id.* at 253. ("The belief that the NRC's exclusive authority to set safety standards did not foreclose the use of state tort remedies was reaffirmed when the Price-Anderson Act was amended

in 1966. The 1966 amendment was designed to respond to concerns about the adequacy of state law remedies.") (citing S.Rep. No. 650). As subsequent cases have held, only the exclusive cause of action for "nuclear incidents" under the PAA limits this principle. *See Cook v. Rockwell International Corp.,* 790 F.3d 1088, 1097 (10th Cir. 2015) (Gorsuch, J.) ("[L]ittle in the [PAA's] history suggests an intent to preclude recovery or inhibit the operation of state tort law in cases involving lesser nuclear occurrences that don't give rise to the sorts of injuries and damages involved in more serious nuclear incidents. Indeed, the evidence suggests that Congress sought to minimize interference with State law so that the only interference with State law is . . . in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the government indemnity.") (internal citations and quotation marks omitted).[4] While not directly addressing jurisdictional issues – but proceeding

4. There is a possible conflict among the Circuits on whether the PAA preempts all state actions irrespective of whether or not a claim rises to the level of a "nuclear incident" covered by the PAA. *Compare and contrast Cook with e.g., Contronco v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186, 199-202 (5th Cir. 2011); *Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 571 (9th Cir. 2008); *Ranier v. Union Carbide Corp.,* 402 F.3d 608, 617 (6th Cir. 2005)*; Roberts v. Fla. Power & Light Co.,* 146 F.3d 1305, 1308 (11th Cir. 1998); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1096 (7th Cir. 1994); *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 854 (3d Cir. 1991). *But see Cook*, 790 F.3d at 1098 ("One case on which the defendants place great emphasis simply says [t]he PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents. . . . But precisely no one disputes this beside-the-point point. The issue before us isn't what happens in the event of a nuclear incident, but . . . what happens in the face of a lesser occurrence.") (internal citations and quotation marks omitted).

as though no jurisdictional barrier existed – other state tort claims have gone forward in district courts. *See e.g., Citizens for Alts. v. Cast Transp.,* No. CIV 99-321 MCA/ ACT, 2004 U.S. Dist. LEXIS 34843, at *1 (D.N.M. 2004); *Lamb V. Martin Marietta Energy Sys.,* 835 F. Supp. 959, 965 (W.D. Ky.1993); *Crawford v. Nat'l Lead Co.*, 784 F. Supp. 439, 445 (S.D. Ohio 1989).

These cases could not have been brought originally in the district courts under the Ninth Circuit's Hobbs Act jurisdictional channeling. Indeed, the effect of the Ninth Circuit's decision would be to overrule *Silkwood sub silencio.*

B. Tort Law Fills An Important Role In Environmental Cases That The Ninth Circuit's Decision Would Preclude.

Tort law provides an important gap-filler to correct environmental harms that serves a distinct purpose from environmental statutes and their implementing regulations. Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 Fordham L. Rev. 737, 748–52 (2011). As an NRC regional director testified in the *Silkwood* trial: "[O]ur experience is that . . . equating compliance to safety . . . is not a 100% guarantee . . . . Our experience is that licenses are deficient in certain areas. It is hard to foresee all the conditions that may exist that you might want a license condition to touch on." *See* Brief for Appellant in Response to Brief of Solicitor General & In Opposition to Appellee's Motion to Dismiss or Affirm at 15, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (No. 81-2159); *see also* Brief for States of Nevada, Ohio, New York, Alaska, Arizona, Hawaii, Louisiana, Maine,

Massachusetts, New Jersey, New Mexico & South Carolina as Amicus Curiae in Support of Jurisdictional Statement at 27–28, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (No. 81-2159) ("licenses and regulations say nothing about liability for tortious . . . injuries caused by licensees," the licensing regime cannot "be regarded as [a] direct substitute[] for tort actions.").

Further, while both environmental statutes and regulations on one hand and tort remedies on the other "may be said to impact environmental interests, . . . [an environmental statute] prospectively regulates conduct, mindful of minimizing harm to human health and the environment, while the tort system acts to remedy a harm that has occurred." Latham, *supra*, at 755. Whereas environmental regulations set generally prospective standards, tort law "examines whether a harm is tortiously caused by fault or unreasonable conduct." *Id.* at 760.

The Ninth Circuit's overbroad language would require that a common law tort action brought against a private defendant be pigeon-holed into the Hobbs Act's narrow jurisdictional channeling on the basis that the wrongful conduct is somehow "incidental to" its NRC-licensed activities. This result would again deprive litigants of the important opportunity to fully litigate claims intended to hold wrongdoers accountable for environmental (and other) harms and would likewise preclude access to the fact-finding and injunctive procedures normally available in tort cases.

CONCLUSION

The storage of radioactive materials carries tremendous environmental and public health risks. *See* Patsy T. Mink, *Nuclear Waste: The Most Compelling Environmental Issue Facing the World Today*, 8 Fordham Envt'l L. Rev. 165, 165, 168 (2011) (emphasizing the "environmental hazards of nuclear waste" and noting that "it is hard to dispute that nuclear waste is a tremendous health hazard"). Given these risks, courts should be extremely cautious in deviating from well-established environmental litigation procedures that have long ensured compliance with environmental regulations. Legal remedies under environmental law citizen suit provisions, common law tort actions, and the Price Anderson Act play a vital role in protecting our natural resources, as well as public health and safety. These causes of action must be allowed to proceed in trial courts, where parties have an opportunity to build a record and to litigate their claims based on the facts and under legal standards provided by relevant statutes or common law understandings.

The Ninth Circuit's broad interpretation of the Hobbs Act puts the continued viability of these important legal actions at risk in the context of nuclear facilities—a context in which accountability for environmental and public health harms is especially critical. This harmful precedent risks severely hindering enforcement of environmental laws by giving private nuclear facility operators an expansive shield against any suit to remedy wrongful conduct or tortious conduct in trial courts - the forums best positioned to litigate the merits of any such claims.

We urge the Court to grant *certiorari* and to limit the Ninth Circuit's holding so as to correct the overly broad jurisdictional sweep of the Hobbs Act adopted by that court.

Respectfully submitted,

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