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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

This Court regularly counsels both parties and courts to "start, as always, with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021) ("We begin with the text."). This petition lies at the intersection of three important federal statutes – the Hobbs Act, the judicial review provision of the Atomic Energy Act, and the Price-Anderson Act. *See* 28 U.S.C. §2341 *et* seq. ("Hobbs Act"); 42 U.S.C. §2239(b); 42 U.S.C. §2011 *et seq.* ("PAA"). At issue are fundamental questions of both federal subject matter jurisdiction and the nationally important issue of whether affected citizens and organizations can substantively challenge in federal court the mishandling of spent nuclear fuel ("SNF") by private contractors.

Public Watchdogs' petition underscores the regulatory agency "mission creep" that the Hobbs Act, as interpreted by the Ninth Circuit and other courts, has fostered and the potentially drastic real-world consequences that flow therefrom. As drafted, the Hobbs Act (as applied to the now-Nuclear Regulatory Commission ("NRC")) confers "exclusive jurisdiction" to federal appellate courts to review actions seeking to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain NRC "final orders." 28 U.S.C. §2342(4); 42 U.S.C. §2239(b)(1) ("any final order entered in any proceeding of the kind specified in [§2239(a)]. Then, in *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985), this Court held that an appellate court's "exclusive jurisdiction" under the Hobbs Act also encompassed "review of orders resolving issues preliminary or ancillary to" the NRC's final order.

The decision below, App. 1a-49a, dramatically expands the Hobbs Act beyond its textual bounds in two ways. First, it applies the Hobbs Act to claims challenging the conduct of private parties, here, NRC licensees ("Private Respondents"); and second, it applies the Act to all of the Private Respondents' "conduct that is expressly licensed, certified, and regulated by the NRC," or, said differently, any conduct "related to" "the NRC's regulatory and enforcement decisions." App. at 48a. As the United States contends, in its view, the Hobbs Act applies to any "actions taken by the licensees under the authority of both of these final NRC orders."[1]

In doing so, the Ninth Circuit has interpreted the Hobbs Act to provide essentially blanket immunity from civil suit by private litigants – under both federal and state law – against private parties who are NRC licensees, like Private Respondents, who allegedly have mishandled SNF. Any NRC licensee would contend that it only engaged in "conduct the NRC had licensed or certified" or was somehow "intertwined with the NRC's regulatory and enforcement decisions." US BIO at 10, 12. Thus, under the Ninth Circuit's (and Respondents') interpretation of the Hobbs Act, no action by an NRC licensee could be subject to judicial scrutiny.

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1. *See* Brief for the Federal Respondent in Opposition ("US BIO") at 12; Brief in Opposition to Petition for Writ of Certiorari by the Private Respondents ("PR BIO") at 10. Four Justices of this Court recently rejected the United States's overly broad interpretation of the Hobbs Act similar to its position here. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057-67 (2019) (Kavanaugh, J., concurring).

More generally, the Ninth Circuit's analysis provides cover from private suit for all manner of private entities regulated by agencies enumerated under the Hobbs Act. A plurality of this Court in *PDR Network* already expressed concern about the increasingly expansive interpretation of the Hobbs Act. *PDR Network*, 139 S. Ct. at 2057 (Thomas, J., concurring); *id.* at 2058 (Kavanaugh, J., concurring). This petition provides an appropriate vehicle to interpret the Hobbs Act according to its statutory text and define some ascertainable limits, rather than allow its penumbra to expand further. It also allows the Court to consider whether the Act can essentially act as a shield protecting regulated entities (like Private Respondents) from judicial review of their allegedly improper actions.

I. Respondents Read The Hobbs Act To Shield Essentially All Their Conduct From Judicial Scrutiny.

The Hobbs Act gives appellate courts "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders of the [NRC] made reviewable by section 2239 of title 42." 28 U.S.C. §2342(4). Section 2239 authorizes 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), (a)(1)(A). To permit judicial review of NRC final orders by the court of appeals when an antecedent final order potentially negates such review, this Court held that "review of orders resolving issues preliminary or ancillary to the core issue in a proceeding

should be reviewed in the same forum as the final order resolving the core issue." *Lorion*, 470 U.S. at 743. That is, a "preliminary order" by the NRC, like deciding to have a hearing on a 2.206 petition or permit third-party intervention, should also be reviewed by the appellate court because the final order would be. *Id.*

Respondents and the Ninth Circuit read the Hobbs Act much more broadly. They contend that the Act grants "exclusive jurisdiction" to courts of appeal to review not only the validity of an agency's "final order," *see* 28 U.S.C. §2342(4) and 42 U.S.C. §2239, not only an agency's "orders resolving issues preliminary or ancillary" to the final order, as *Lorion* requires, but to decisions that are "incidental" to those orders, App. 47a, or "challenged conduct" of private parties (NRC licensees) "related to" or "intertwined with" "the NRC's regulatory and enforcement decisions." PR BIO at 10 (quoting App. 48a); PR BIO at 22. Or, as the Private Respondents also said, the Hobbs Act prohibits district court review of any "actions taken by the licensees under the authority of [various] final NRC orders." *Id.* at 10 (quoting App. 44a, 47a); US BIO at 12 (extending Hobbs Act to "conduct" by NRC licensees "the NRC had licensed or certified.").

This interpretation of the Hobbs Act is now wholly untethered to its statutory textual moorings. It governs not simply review of an agency's decision, whether a "final order" or an order "preliminary or ancillary" to that order. It also now governs review of "conduct" or "action" of purely private parties that is allegedly "intertwined with" or "related to" an agency's final order or even an agency's "regulatory and enforcement decisions." That subsumes all of an NRC licensee's conduct because, "as many a

curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). A licensee's conduct that is "related to" the "regulatory and enforcement decisions" of its licensing agency is essentially all its conduct.

That interpretation simply bears no relation to the Hobbs Act's text. It turns the Hobbs Act into a sprawling preemption provision, displacing state, and even federal, causes of action, even though this Court is reluctant to conclude that Congress intends to preempt state law (let alone federal law) unless that was its "clear and manifest purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (plurality) (discussing "high threshold" to find preemption). This concern has "particular force" in areas of public health and safety traditionally regulated by state law. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008).

This Court and others have pushed back against the overly expansive interpretation of the Hobbs Act employed by some courts. Where, as here, a private party challenges a private entity's conduct, the Hobbs Act should not come into play. *PDR Network*, 130 S. Ct. at 2056 (Thomas, J., concurring) ("[T]he Hobbs Act would have no role to play in this case" precisely because "[t]his suit is a dispute between private parties, and petitioners did not ask the District Court to 'enjoin, set aside, suspend' or 'determine the validity of any [agency] order.'"); *id.* at 2058 (Kavanaugh, J., concurring) ("The Hobbs Act does not expressly preclude judicial review of an agency's statutory interpretation in an enforcement action.").

An Eleventh Circuit panel recently encouraged its colleagues to "overrule our decisions in *Self* and *Mais*" because "our precedents overread the grant of exclusive jurisdiction in section 2342." *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1111-12, 1109 (11th Cir. 2019) (Pryor, Newsom, and Branch, JJ., concurring) (citing *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453 (11th Cir. 2012) and *Mais v. Gulf Coast Collection Bureau*, 768 F.3d 1110 (11th Cir. 2014)); *compare* PR BIO at 20-21 and US BIO at 15 (relying on *Self* and *Mais*).[2] That court concluded that the "sole context with which the [Hobbs] Act is concerned" is "direct review of agency orders by petitions for review" where the court's "judgment operates directly against the order and the agency that made it." *Id.* at 1108.

This petition presents an opportunity to explicate the Hobbs Act's boundaries and continue the Court's discussion in *PDR Network*.

II. Respondents' Alternatives Are Purely Hypothetical.

Respondents claim "there is no reason to fear" that the Ninth Circuit's decision will immunize licensees from liability for mishandling nuclear materials, PR BIO at 25, because private parties have other avenues to challenge licensee misconduct. Respondents' own arguments and this case's procedural history demonstrate otherwise.

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2. Courts have likewise advised that "great care must be taken not to 'throw the baby out with the bathwater,'" and dismiss private claims under other exclusive review provisions. *E.g.*, *Dougherty v. Carver F.S.B.*, 112 F.3d 613, 620 (2d Cir. 1996) (reversing dismissal for lack of subject matter jurisdiction over private claims).

A. A 2.206 Petition Is No Substitute For District Court Review.

The 2.206 process is no substitute for district court review; instead it essentially insulates an NRC licensee's conduct from substantive judicial review as this case shows. Petitioner filed a 2.206 petition with the NRC challenging the NRC's conduct which the NRC summarily denied. App. 54a-61a. It then sought Ninth Circuit review of that decision, but the court concluded that "Public Watchdogs [did] not overcome the presumption that the NRC's denial of the 2.206 decision [i]s unreviewable." App. 53a. Concluding that a 2.206 petition also governs challenges to a licensee's conduct makes that conduct "unreviewable" also.

A 2.206 petition falls short in other ways also. Neither Respondent disputes that Petitioner did not, and could not, assert a PAA claim or state law claim against the Private Respondents through a 2.206 petition. As Public Watchdogs explained previously, Pet. at 25-27, a 2.206 proceeding before the NRC simply lacks the procedural mechanisms and safeguards to litigate a PAA claim. A 2.206 petition can hardly be considered an adequate or meaningful substitute for a plaintiff's right to trial on her claims, especially those claims Congress intended to be tried in district court. *Id.*

Respondents repeatedly contend that Public Watchdogs sought the "same relief" in both its 2.206 petition and its district court case as support for their assertion that the district court litigation was "duplicative." US BIO at 11, 14-16; PR BIO at 31; *see also* App. at 48a. To the contrary, Public Watchdogs did not,

and could not, assert either its PAA claim or its state law claims there. It did not assert *any* claims against Private Respondents in that forum. The relief sought in the district court was directed primarily at Private Respondents, not the NRC, and challenged Private Respondents' conduct, not an NRC "final order." Seeking similar, even parallel, relief is not a jurisdictional bar in any event. Numerous regulatory agencies employ the same statutory claims and can seek functionally identical relief as is available to private litigants without depriving private litigants of their claims or their day in court.

B. Respondents Effectively Read The Price-Anderson Act Out Of Existence.

Respondents and the Ninth Circuit's interpretation of the Hobbs Act leaves little, if anything, of the PAA. The PAA created a federal "public liability action," justiciable in federal district court, that governs any suit asserting "legal liability arising out of or resulting from a nuclear incident," 42 U.S.C. §§2014(w), (hh), 2210(n)(2), and indemnifies licensees for "liability arising out of or in connection with the licensed activity." *Id.* §2210(c).

The opinion below dismissed Petitioner's PAA claim because it was "'inextricably intertwined' with the NRC's regulatory and enforcement decisions that are in turn related to the challenged conduct of [Private Respondents]." App. at 48a; PR BIO at 10. Respondents now contend that the Hobbs Act prevents district court adjudication of challenges to "the Commission's final orders, enforcement decisions *related to* those orders, or *conduct the NRC had licensed* or certified." US BIO at 12 (emphasis added). Such an interpretation necessarily

encompasses any PAA claim for "liability arising out of or in connection with … licensed activity," 42 U.S.C. §2210(c), or "resulting from a nuclear incident." *Id.* §§2014(w), (hh).

Respondents' efforts to minimize that straightforward conclusion are unavailing and posit a rationale absent from the Ninth Circuit's decision. They question whether Petitioner "plausibly allege[d] the existence of harm resulting from an actual nuclear incident," suggesting that federal jurisdiction under the PAA turns on this fact. PR BIO at 27. However, whether Petitioner "properly pled" its PAA claim is an appropriate issue for a Rule 12(b)(6) motion, not a basis to challenge the district court's "statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Id.*; *id.* ("[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.") (quotation omitted).

Respondents also ignore that lack of injury was not the rationale for the decision below. That was grounded on the court's expansive reading of the Hobbs Act and its belief that Petitioner's claims against the Private Respondents "challenged NRC licensing orders or decisions that were ancillary or incidental to NRC licensing decisions." App. at 48a. The decision also did not turn on any nuanced distinction that "Price-Anderson Act claims that seek damages for injuries suffered" fall outside the Hobbs Act, as the United States suggests. US BIO at 18.

Respondents also contend that a PAA claim is cognizable provided it "does not attack NRC orders or the actions that a licensee has taken under those orders[.]" PR BIO at 27. The PAA action they posit is entirely chimerical. Any PAA public liability claim would necessarily challenge actions a licensee took under an NRC order since it requires a "nuclear incident," 42 U.S.C., §§2014(w), (hh), and its indemnification provision only applies to "licensed activity." 42 U.S.C. §2210(c). *See* Pet. at 24-25.

The interpretation of the Hobbs Act Respondents and the Ninth Circuit espouse therefore effectively reads the PAA out of existence.

C. Respondents Eliminate State Law Claims Already Approved By This Court and Others.

Respondents' reading of the Hobbs Act also ignores state law theories applicable against NRC licensees long permitted by this Court and others. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088 (10th Cir. 2015). Both of these cases involved claims of NRC licensee misconduct or negligence when engaged in licensed activities. *Silkwood*, 464 U.S. 238 (state law strict liability and negligence claims against NRC licensee that purportedly complied with NRC regulations); *Cook*, 790 F.3d 1088 (state law nuisance claim against nuclear plant due to licensee's mishandling of nuclear waste). The decision below cannot be squared with these (and other) cases that permit plaintiffs—without restriction from the Hobbs Act—to pursue claims against licensees "related to" "actions taken under" NRC orders. PR BIO at 27.

Respondents' assertion that *Silkwood* and *Cook* "do not even mention the Hobbs Act," US BIO at 17; PR BIO at 12-15, proves Petitioner's point, not Respondents'. These cases were litigated against NRC licensees in district court challenging "conduct that is expressly licensed, certified, and regulated by the NRC," PR BIO at 10 (quoting App. 48a); US BIO at 12, without the Hobbs Act being mentioned, let alone used by licensees as a shield from district court review of traditional state law causes of action asserted by private litigants. If the Hobbs Act prevented district court challenges to NRC licensee conduct that is "inextricably intertwined" or "related to" NRC regulatory and enforcement decisions, the NRC licensees in *Silkwood* and *Cook* who sought to avoid district court review of their conduct surely would have raised it. US BIO at 17 (quoting App. 48a); PR BIO at 10. So, in *Silkwood* and *Cook*, there is district court review. Here, the Hobbs Act precludes such review. The Ninth Circuit's overbroad interpretation of the Hobbs Act conflicts with this Court's precedents and merits review.

III. This Petition Does Not Present Vehicle Issues.

Respondents' vehicle arguments are misplaced. Since Petitioner's complaint was dismissed on its pleading, there are no "fact-bound" issues to address. US BIO at 20. The petition turns on questions of statutory interpretation. Nor is the district court's alternate holding relevant. US BIO at 17-19; PR BIO at 32. It played no role in the Ninth Circuit's analysis for which Petitioner seeks review. And Private Respondents' standing question is illusory. PR BIO at 29-30 (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)). *Transunion*'s standing analysis does not require a nuclear accident before nearby residents

of SONGS can challenge the improper handling of SNF by nuclear licensees there and seek primarily injunctive relief. *Transunion*, 141 S. Ct. at 2210 ("a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, [if] risk of harm is sufficiently imminent and substantial.") (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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