No.

IN THE
Supreme Court of the United States

E.I. DUPONT DE NEMOURS & CO.,
GENERAL ELECTRIC CO., AND
UNC NUCLEAR INDUSTRIES, INC.,

Petitioners,

v.

STEVEN STANTON, GLORIA WISE,
WANDA BUCKNER, SHIRLEY CARLISLE, AND
KATHRYN JANELLE GOLDBLOOM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN VAN WART, P.C.
TIMOTHY A. DUFFY
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

CHRISTOPHER LANDAU, P.C.
Counsel of Record
JEFFREY B. WALL
KIRKLAND & ELLIS LLP
655 Fifteenth St., NW
Washington, DC 20005
(202) 879-5000

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by holding that the federal common law government-contractor defense does not apply as a matter of law to claims under the Price-Anderson Act, which provides the exclusive cause of action for all injuries allegedly caused by nuclear emissions.

2. Whether the Ninth Circuit erred by holding that petitioners may be held strictly liable under the Price-Anderson Act for federally authorized nuclear emissions.

3. Whether the Ninth Circuit erred, and deepened an acknowledged circuit split, by holding that a putative class member who files an individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners hereby certify as follows:

1. Petitioner E.I. DuPont de Nemours & Co. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

2. Petitioner General Electric Co. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

3. Petitioner UNC Nuclear Industries, Inc. has four parent companies: GE Engine Services UNC Holdings, Inc. II, GE Engine Services UNC Holdings I, GE Engine Services-Miami, Inc., and petitioner General Electric Co. No publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This case turns on the simple point that courts are not in the business of awarding damages for injuries allegedly arising from the Government's discretionary military decisions. Here, as part of the Manhattan Project at the height of World War II, the U.S. Government established a facility in Hanford, Washington, to produce plutonium for the atomic bomb, and effectively conscripted private contractors to operate that facility. The Government made the critical discretionary decisions with respect to the operation of that facility generally, and with respect to the conduct challenged in these lawsuits—the release of radioactive iodine (I-131)—specifically. Essentially, the Government was forced to balance the potential health effects of I-131 emissions, which were believed to be negligible, against the military imperative of producing as much plutonium as possible as quickly as possible. Whatever one might think, with the benefit of more than half a century of hindsight, about the particular balance struck by the Government, the fact remains that the decisions striking that balance lie at the core of the Government's military discretion.

Given that the Government has not waived its sovereign immunity for such discretionary decisions, plaintiffs cannot sue the Government for injuries allegedly caused by those decisions. Respondents thus sought to circumvent the Government's sovereign immunity by suing petitioners, the private contractors hired by the Government to implement its discretionary military decisions at Hanford. No matter how these lawsuits are captioned, however, there is no escaping the fact that they represent a

collateral attack on the Government's discretionary military decisionmaking. If ever any lawsuits were tailor-made for the government-contractor defense, these are the ones.

The Ninth Circuit, however, held that the defense does not apply as a matter of law to any claims arising under the Price-Anderson Act (PAA or Act), 42 U.S.C. § 2210 *et seq*., which provides the exclusive cause of action for all injuries allegedly caused by nuclear emissions. According to the Ninth Circuit, this Court made up the government-contractor defense out of whole cloth in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), so that the defense was not part of the established common law background against which Congress enacted the PAA amendments at issue here shortly after *Boyle*. The Ninth Circuit thereby opened up a huge loophole whereby plaintiffs cannot sue the Government *directly* for injuries allegedly caused by the Government's discretionary decisions involving nuclear emissions, but can sue the Government *indirectly* for such injuries by suing the private contractors hired (and indemnified) by the Government to implement those decisions.

And the Ninth Circuit only exacerbated that error by affirming the district court's decision to hold petitioners *strictly* liable under the Act, thereby precluding them from defending themselves on the grounds, among others, that the challenged emissions were federally authorized and their operation of Hanford was not negligent. According to the Ninth Circuit, only federal nuclear emissions standards duly promulgated under the Administrative Procedure Act (which was not even

enacted when the emissions at issue began) preempt state standards of care otherwise incorporated into the PAA. Thus, although the Ninth Circuit recognized that the emissions standards here were established under the aegis of the United States Army, the court held that compliance with those standards is no defense to liability.

Finally, the Ninth Circuit erred by holding that the pendency of a class certification motion tolls the statute of limitations for all members of the putative class, including those (like respondent Wise) who filed untimely individual actions while that motion was pending. Although the Ninth Circuit originally agreed with the Sixth Circuit that tolling is unwarranted under these circumstances, *see* App. 39-40a (citing *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005)), the court reversed course in response to respondents' petition for rehearing and agreed with the Second Circuit that tolling is warranted under these circumstances, *see* App. 41-42a (citing *In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007)). At the very least, this Court's review is warranted to resolve this acknowledged circuit conflict on an important and recurring issue of federal law.

At bottom, the Ninth Circuit stripped petitioners of three key defenses to liability: (1) the government-contractor defense, (2) the federal-standards defense, and (3) the statute-of-limitations defense. The Ninth Circuit is thereby forcing petitioners (and, indirectly, the Government) to defend themselves against thousands of nuclear emissions lawsuits with one hand tied behind their backs. In essence, the Ninth Circuit refused to recognize that these lawsuits

represent an attempt to challenge the Government's discretionary military decisionmaking. The law neither authorizes nor tolerates the imposition of liability (much less strict liability) under these circumstances. Accordingly, this Court should grant review.

OPINIONS BELOW

The Ninth Circuit's decision, as amended on April 4, 2008 and July 29, 2008, is reported at __ F.3d __ and reprinted in the Appendix ("App.") at 1-60a. As thus amended, that decision supersedes the Ninth Circuit's earlier decisions reported at 497 F.3d 1005 and 521 F.3d 1028. The district court's unreported order granting respondents' motion to strike the government-contractor defense is reprinted at App. 68-86a. The district court's order granting respondents' motion for summary judgment on the federal-standards defense is reported at 350 F. Supp. 2d 871, and reprinted at App. 87-118a. The district court's unreported order denying petitioners' motion for reconsideration on the federal-standards defense is reprinted at App. 119-34a. The district court's unreported order denying petitioners' motion for summary judgment on the statute of limitations, and *sua sponte* granting respondents summary judgment on that issue, is reprinted at App. 135-55a.

JURISDICTION

The Ninth Circuit rendered its original decision on August 14, 2007, and amended that decision by orders dated April 4, 2008 and July 29, 2008. App. 1a, 61a, 67a. The Ninth Circuit denied a timely petition for rehearing *en banc* on April 4, 2008. App. 66a. On June 19, 2008, Justice Kennedy granted petitioners' application to extend the time within

which to petition for certiorari until August 15, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The PAA provides in pertinent part:

> The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material ….
>
> 42 U.S.C. § 2014(q)
>
> The term "public liability" means any legal liability arising out of or resulting from a nuclear incident ….
>
> 42 U.S.C. § 2014(w)
>
> The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under [42 U.S.C. § 2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.
>
> 42 U.S.C. § 2014(hh)

> A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

42 U.S.C. § 2210(d)(7)

> With respect to any extraordinary nuclear occurrence … which [meets certain conditions,] the [Nuclear Regulatory] Commission or the Secretary [of Energy], as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive … any issue or defense as to charitable or governmental immunity ….

42 U.S.C. § 2210(n)

STATEMENT OF THE CASE

A. Background

This case arises out of petitioners' work for the U.S. Government during World War II and the early

years of the Cold War. Petitioner DuPont was solicited by the U.S. Army to assist in the war effort by operating a facility in Hanford, Washington that produced plutonium for the atomic bomb under Army specifications. App. 8a, 11a. DuPont agreed to do so for no profit, in return for indemnity from the United States. App. 11a. Thus, DuPont's contract specified that the company "had no experience or special knowledge in the field of this project" and "will depend wholly on data and specifications of the War Department in carrying out the work, and … therefore cannot assume responsibility for the correctness or adequacy of such data or specifications." CA9 Excerpts of Record ("ER"), No. 05-35866, at 164-65.

For present purposes, the process for producing plutonium at Hanford consisted of three key steps. The first step involved controlled fission of uranium inside a reactor, which created miniscule amounts of plutonium, as well as other fission byproducts (including I-131), inside slugs of uranium metal. *Id.*, at 283. The second step involved storing or "cooling" the uranium slugs discharged from the reactor to allow time for some of the radioactive materials (including I-131, which has a half-life of only eight days) to decay. *Id.* at 283-84. The third step involved dissolving the slugs in acid to separate the plutonium for further processing and thereby also releasing other radioactive byproducts, including I-131. Depending on how long the slugs were stored at the second step (and how much I-131 had therefore decayed), a greater or lesser amount of I-131 was emitted in gaseous form during the third step. *Id.* at 227-28, 284; *see also id.* at 316 ("Longer cooling times could reduce the volume of I-131

emitted."); *id.* ("Given the need for plutonium for atomic weapons the cooling times were often shorter than desirable to reduce I-131 emissions."); App. 12a ("The key to decreasing I-131 emissions was to allow for longer cooling times of the uranium slugs used to produce the plutonium. This strategy, however, often conflicted with the federal government's orders to increase plutonium production.").

I-131 was already well known to scientists and the medical community at that time. In particular, because I-131 concentrates in the human thyroid, it already was being used to diagnose and treat thyroid problems. *See* CA9 ER, at 181-82, 285. Indeed, I-131 was used for medical purposes at levels far beyond those at issue here: for diagnostic purposes, patients were exposed to tens of rads of I-131, and, for treatment purposes, to hundreds or thousands of rads of I-131. *Id.* at 285, 291.[1] Government scientists, on the basis of this medical experience as well as the results of animal studies, set exposure limits at Hanford of one rad per day for the thyroid, which they concluded was well below the level at which any harmful effects from I-131 exposure had been observed. *Id.* at 155-56, 181-82, 285-86; *see also id.* at 409 ("It is not disputed that scientists

[1] A "rad" (roentgen absorbed dose) is a measure of the radioactive energy absorbed by the body or a particular organ. Because calculation of a dose of radiation takes into account the mass of tissue exposed, it takes less energy to give an equal dose to a smaller organ. Thus, for example, the energy needed to produce a whole-body dose of 0.1 rads would actually be greater than the energy needed to produce a dose of 1 rad to a smaller organ like the thyroid.

established a safety level of one rad per day for humans."). Based on the one-rad-per-day exposure limit, the Government approved detailed operating instructions that specified particular cooling times for particular power levels and appropriate dissolving conditions. *See id.* at 200-21.

The Hanford facility began producing plutonium in December 1944. *See id.* at 225. In light of the wartime exigency, the Government insisted on producing as much plutonium as possible as quickly as possible to develop an atomic bomb. *See id.* at 229-39. By mid-July 1945, the United States detonated its first atomic bomb at Alamogordo, New Mexico. *See id.* at 235-36. The bomb dropped on Nagasaki, Japan, on August 9, 1945, was made with plutonium produced at Hanford. *See id.* at 239; *see also* App. 11a.

The end of World War II brought only a temporary respite to the Government's push for more plutonium. Although the Government ordered that production should continue, cooling times were extended to 60 days "to reduce radioactivity due to iodine ... which has been detected in sagebrush as far away as Walla Walla." CA9 ER, at 244. Still, however, it did not take long for the Government to want more plutonium than Hanford was then capable of producing: "There was never a time, after the end of the war, when Hanford or DuPont could optionally have chosen to slow production. Production schedules were never optional but were determined by War Department orders." *Id.* at 245.

DuPont's contract had been written to expire at the end of the war. The company, however, agreed to stay on until the Government could find a

replacement firm. *Id.* at 245-51. On September 1, 1946, Hanford operations were transferred from DuPont to General Electric (GE), which (like DuPont) signed a contract whereby the company would earn no profit from its work. *Id.* at 251, 283; *see also* App. 12a.

Plutonium output at Hanford increased exponentially from 1946 to 1948 as the Cold War began and the U.S. Government aimed to establish a stockpile of atomic weapons. On January 2, 1947—two days after the civilian Atomic Energy Commission (AEC) assumed control over the Nation's nuclear weapons program—"the Joint Chiefs of Staff formally advised President Truman that they considered the present supply of atomic weapons not adequate to meet the security requirements of the United States." CA9 ER, at 374 (internal quotation omitted). The AEC soon ordered GE "to make increased plutonium production at Hanford its top priority." *Id.* at 375.

At the same time, GE was seeking permission to increase cooling times from 60 to 90 days, which would have reduced I-131 emissions but also plutonium production. *Id.* at 374; *see also* App. 12a. The AEC denied the request. *See id.* In April and November 1948, GE again sought to increase cooling times—to 125 days—in response to new radiation protection standards recommended by the National Committee on Radiation Protection. CA9 ER, at 379. Again, the AEC denied the request, and specifically rejected the notion that the National Committee's levels were in any way binding absent adoption by the AEC. *Id.*; *see also id.* at 391 (noting the "continual conflict ... between the U.S. Government's

desire to maximize production of plutonium at Hanford, and the contractor's concern with minimizing the impact of ... operations upon the health and safety of Hanford workers and nearby residents").[2] On December 2, 1949, shortly after the Soviet Union detonated its first atomic bomb, the Government directed GE to dissolve a partial batch of uranium slugs that had been cooled for only 15 days as part of an experiment to test monitoring equipment. *See id.* at 364, 385-87. This event—known as the "Green Run" for the "green" or hot metal dissolved—produced the largest quantity of I-131 to be released since the earliest days of wartime production.

By the 1950s, however, I-131 emissions from Hanford were reduced to negligible levels, as the production process was adjusted to allow more cooling time, and technological improvements allowed better filtering of such emissions. Studies have not shown that I-131 emissions from Hanford at any point in the 1940s or 50s caused any harm. In 2002, the Centers for Disease Control released a comprehensive, state-of-the-art epidemiological study, which found *no* increased incidence or risk of any thyroid disease in the population exposed to

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[2] Indeed, in October 1948, GE actually shut down the facility after some radioactive particles were discovered some 200 miles away. CA9 ER, at 380. This provoked an angry response from the AEC that "in the future no such step was to be taken without consulting the Commission." *Id.* GE was forced to concede "it was ultimately the U.S. government's verdict ... which caused production to be resumed, since '[GE] would not dare to accept such responsibility.'" *Id.*

I-131 from Hanford. *See* CA9 ER, at 417.01-.29; *see also* http://www.cdc.gov/nceh/radiation/hanford/htdsweb/index.htm (last visited August 14, 2008).

B. Proceedings Below

1. District Court Proceedings

Respondents are five individuals who lived "downwind" of the Hanford facility during World War II and the early years of the Cold War, and claim that I-131 emissions from the facility during that period eventually caused them to develop either cancer or thyroid disease. They are among over 2,500 individual plaintiffs who filed (or joined) these lawsuits against petitioners starting in 1990. After lengthy pretrial proceedings not relevant here, the district court (Nielsen, J.) adopted a "bellwether" plan in which twelve plaintiffs would be selected (six by plaintiffs, six by petitioners) to have their claims fully adjudicated.

The bellwether plaintiffs thereafter moved under Fed. R. Civ. P. 12(f) to strike the government-contractor defense. The district court granted the motion, holding that the defense did not apply as a matter of law to any claims arising under the PAA. *See* App. 68-86a.

The bellwether plaintiffs thereafter moved for partial summary judgment on the federal standards defense, arguing that petitioners had engaged in an abnormally dangerous activity, and hence should be held strictly liable for any injuries caused by their conduct under Washington law as incorporated into the PAA. Again, the district court granted the motion, rejecting petitioners' argument that they should be allowed to defend themselves by reference

to their compliance with applicable federal nuclear safety standards. *See* App. 110-16a; *see also* App. 133a.

Finally, petitioners moved for summary judgment with respect to the claims of any plaintiff who did not file within three years of the *later* of (1) February 27, 1986 (the date on which the U.S. Government publicly disclosed detailed documents concerning I-131 emissions from Hanford), or (2) the date on which an individual plaintiff was diagnosed with an injury allegedly caused by I-131 emissions from Hanford. The district court not only denied the motion, but granted the plaintiffs summary judgment on the statute of limitations (even though they had never moved for such relief). *See* App. 135-55a. According to the district court, the applicable three-year statute of limitations was tolled for almost *thirteen years*, from August 6, 1990 (when the first putative class action was filed) until May 30, 2003 (when plaintiffs withdrew any remaining motions for class certification). App. 151-54a.

The district court, however, granted petitioners summary judgment with respect to five of the six bellwether cases chosen by petitioners (a ruling plaintiffs did not appeal), and the final bellwether plaintiff chosen by petitioners voluntarily dismissed her claims, so only the six bellwether cases chosen by plaintiffs proceeded to trial in April 2005. After fourteen days of trial and four days of deliberations, the jury returned verdicts in favor of two of the bellwether plaintiffs (respondents Stanton and Wise), verdicts in petitioners' favor with respect to three other bellwether plaintiffs (respondents Buckner, Carlisle, and Goldbloom), and no verdict

with respect to the final bellwether plaintiff (Rhodes). The jury awarded Stanton $227,508 and Wise $317,251. After the district court entered judgment on the verdicts and certified those judgments for immediate appeal under Fed. R. Civ. P. 54(b), petitioners appealed the judgment in favor of respondents Stanton and Wise.

2. Ninth Circuit Proceedings

The Ninth Circuit (per Schroeder, C.J., joined by Goodwin and Hawkins, JJ.) in relevant part affirmed the judgment in favor of respondents Stanton and Wise. *See* App. 60a. The court originally reversed the judgment in favor of respondent Wise on statute of limitations grounds, *see* App. 39-41a, 60a, but, in response to respondents' petition for rehearing, reversed course and issued a substantially amended decision, *see* App. 41-42a, 60a.

As relevant here, the Ninth Circuit first recognized that "[t]he overarching issue" presented by these cases is the applicability of the federal common law government-contractor defense, App. 18a, and affirmed the district court's conclusion that the defense does not apply as a matter of law to claims under the PAA, *see* App. 18-26a. In particular, the Ninth Circuit held that "Congress did not enact the PAA against a backdrop of well-established common law principles that included the government contractor defense," App. 23a, on the theory this Court had not recognized that defense until a few months before the relevant PAA amendments in 1988.

The Ninth Circuit then agreed with the district court that petitioners could be held strictly liable under the Price-Anderson Act even though they

complied with federal radiation standards. *See* App. 26-29a. The court recognized that, as a general matter, "nuclear operators are not liable unless they breach federally-imposed dose limits." App. 27a; *see also id.* ("Strict liability may not be imposed for I-131 releases within federally-authorized limits, because any federal authorization would preempt state-derived standards of care."). The court declared, however, that the federal emissions standards in effect at Hanford in the 1940s, "although established under the aegis of the United States Army, did not carry the force of law and thus cannot provide the basis for a safe harbor from liability." App. 28a. According to the Ninth Circuit, only formal federal standards duly promulgated under the Administrative Procedure Act (APA)—which did not even exist at the time that the emissions challenged here began—would suffice. *See id.*

The Ninth Circuit finally held that respondents were entitled to class action tolling under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), even in individual actions filed while class certification remained pending. On that issue, the Ninth Circuit reversed course in response to respondents' petition for rehearing. The Ninth Circuit originally accepted petitioners' argument that it made no sense to apply *American Pipe* tolling with respect to plaintiffs, like respondent Wise, who filed individual actions while class certification was pending, because such persons could not reasonably claim to have been relying on the pending class action to vindicate their rights. *See* App. 39-41a. On this point, the Ninth Circuit expressly aligned itself with "[t]he Sixth Circuit, which is the only circuit to have addressed the issue directly," App. 39a (citing *Wyser-Pratte*, 413 F.3d at

569), along with the First Circuit, which "tangentially reached a similar conclusion two decades earlier," *id.* (citing *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983)), and "countless federal district courts," *id.* (citing cases). In response to respondents' petition for rehearing, however, the Ninth Circuit abruptly reversed course, and aligned itself with the Second Circuit, which had meanwhile come out the other way on the issue (without addressing any of the contrary precedents). *See* App. 41-42a (citing *WorldCom*, 496 F.3d at 256).

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erred By Holding That The Federal Common Law Government-Contractor Defense Does Not Apply As A Matter Of Law To Claims Under The Price-Anderson Act.

The Ninth Circuit erred, as a threshold matter, by holding that the federal common law government-contractor defense does not apply as a matter of law to claims under the PAA. For all intents and purposes, the court thereby abolished the United States' sovereign immunity where, as here, the Government relies on private parties to implement its discretionary decisions involving nuclear emissions.

There is no question that sovereign immunity generally bars claims directly against the United States challenging discretionary decisions, whether in the nuclear context or any other context. *See, e.g.*, 28 U.S.C. § 2680(a); *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 992-99 (9th Cir. 1987);

Allen v. United States, 816 F.2d 1417, 1419-24 (10th Cir. 1987). The federal common law government-contractor defense protects that immunity by preventing parties who cannot sue the United States *directly* for its discretionary decisions from suing the United States *indirectly* by suing private contractors tasked with implementing such decisions. *See, e.g.*, *Boyle*, 487 U.S. at 512; *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

The government-contractor defense, thus, does not exist to protect government contractors; it exists to protect the sovereign immunity of the United States. "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Boyle*, 487 U.S. at 512. Regardless of whether the United States is legally obligated to indemnify the contractor, the United States ultimately pays the price. *See, e.g.*, *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1452 (9th Cir. 1990) ("[P]ermitting the contractor to be held liable would undercut the effectiveness of the [government's] immunity …, since contractors would eventually pass off the costs of such litigation to the government in [their] contract price."); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983) ("[H]olding the supplier liable in government contractor cases … would subvert [sovereign immunity] since military suppliers, despite the government's immunity, would pass the cost of accidents off to the United States."); *id.* at 450-51 ("It is consistent with [sovereign immunity] to construe the government contractor rule so as to avoid

imposing on the contractor liability properly attributable to acts of [the] government."). Where (as here) the United States is required to indemnify the contractor, contractor liability is passed along even *more* directly, so the government-contractor defense applies with even *greater* force.

Moreover, the government-contractor defense "is based not on a simple economic concern for government procurement costs, but on the government's need to exercise judgment." *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 (9th Cir. 1997); *see also McKay*, 704 F.2d at 449 ("[T]o hold military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decisions."). The defense, in other words, protects more than just the public fisc; it also protects the Government's discretionary decisionmaking. *See Snell*, 107 F.3d at 746 ("The defense is intended to implement and protect the discretionary function exception under the Federal Tort Claims Act, 28 U.S.C. § 2680(a)."); *see also Nielsen*, 892 F.2d at 1454 ("The [*Boyle*] Court reasoned persuasively that the interests of the government in avoiding scrutiny of sensitive military decisions" justifies the government-contractor defense); *id.* (noting that *Boyle* "changed the intellectual mooring of [the government contractor] defense … to the discretionary function exception of the Federal Tort Claims Act"). Indeed, the Ninth Circuit acknowledged below that "[t]he defense is intended to implement and protect the discretionary function exception of the Federal Tort Claims Act." App. 19a. Whether the United States' discretionary military decisions are implemented by the United

States itself or by a private party, those decisions should not be subject to second-guessing in the courts through lawsuits for damages.

It is important to emphasize that the Ninth Circuit did not hold that the government-contractor defense does not apply on the specific facts of this case. Rather, the decision below is far more sweeping: the Ninth Circuit held that the defense is categorically inapplicable to *any* claim arising under the Price-Anderson Act, even if it is undisputed that the defense would otherwise apply. *See* App. 18-26a. That is so, according to the Ninth Circuit, because that defense "was *first* recognized by the Supreme Court less than twenty years ago in *Boyle*." App. 19a (emphasis added). Thus, the Ninth Circuit held that "[d]efendants are not entitled to the government contractor defense, because *the statute predates clear judicial recognition of any such defense*." App. 21a (emphasis added); *see also id.* at 9a ("Congress enacted the PAA before the courts recognized the government contractor defense.").

That holding is not only far-reaching but clearly wrong. This Court did not make up the government-contractor defense out of whole cloth in *Boyle*; rather, that defense has been well established at least since the Court's *Yearsley* decision in 1940. *See* 309 U.S. at 20-21 ("[I]f th[e] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."). *Boyle* simply reaffirmed the defense in 1988, and made clear that it applies not only to performance contracts (like the ones at issue in *Yearsley* and here) but also to procurement contracts.

See, *e.g.*, *Boyle*, 487 U.S. at 506 (noting that *Yearsley* recognized the federal common law government-contractor defense for performance contracts, and "we see no basis for a distinction" between performance contracts and procurement contracts"). Not surprisingly, many courts before *Boyle*—*including the Ninth Circuit itself*—relied on *Yearsley* to apply the federal common law government-contractor defense to contractors who implemented the Government's discretionary decisions. *See, e.g.*, *McKay,* 704 F.2d at 448 (noting that the government-contractor defense, "first articulated by the Supreme Court in *Yearsley* …, protects a government contractor from liability for acts done by him while complying with government specifications during execution of performance of a contract with the United States"); *Koutsoubos v. Boeing Vertol, Div. of Boeing Co.*, 755 F.2d 352, 354 (3d Cir. 1985) ("It is clear that federal common law provides a defense to liabilities incurred in the performance of government contracts.") (citing *Yearsley*); *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) ("Traditionally, the government contractor defense shielded a contractor from liability when acting under the direction and authority of the United States.") (citing *Yearsley*). The Ninth Circuit below thus based its narrow interpretation of *Yearsley* on the *dissent* in *Boyle*. *See* App. 22a (quoting *Boyle*, 487 U.S. at 524-25 (Brennan, J., dissenting)).

Indeed, the Ninth Circuit's analysis fails on its own terms, because *Boyle* was decided *before* the relevant amendments to the PAA in 1988 established an exclusive federal cause of action for all injuries allegedly caused by nuclear emissions. *See* App. 21a. The Ninth Circuit tried to downplay that point by

asserting that "[w]hile the government contractor defense was technically a recognized common law principle at the time Congress enacted the PAA, it was hardly a well-established doctrine." *Id.* But, as noted above, the government-contractor defense *was* "a well-established doctrine," at least as applied to performance contracts, decades before *Boyle*. And how the Ninth Circuit could declare that the doctrine was not "well established" even *after* it was specifically endorsed by this Court in a high-profile case is a mystery. If anything, the fact that this Court decided *Boyle* just two months before the relevant PAA amendments only *strengthens* the presumption that *Boyle* set a clear legal baseline against which those amendments were enacted.

The key point here is that if Congress wanted to negate the federal common law government-contractor defense in cases under the PAA, it could and would have said so in the statute. *See, e.g.*, *United States v. Texas*, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.") (internal quotation omitted). Thus, a federal statute will not be deemed to abrogate a federal common law rule unless the statute "speak[s] directly" to the question addressed by the common law. *Id.* (internal quotation omitted); *see also County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 236-37 (1985).

Indeed, Congress *did* negate the government-contractor defense in specific provisions of the PAA not applicable here, thereby underscoring that it was

perfectly well aware of the defense. For example, in the limited context of underground nuclear detonations, the PAA provides that "no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar … liability." 42 U.S.C. § 2210(d)(7). The Ninth Circuit, however, dismissed this provision as "not clear." App. 24a. According to the Ninth Circuit, "[i]t … appears to be referring to traditional sovereign immunity from any liability rather than the more sophisticated principles of accountability that underlie modern exceptions of governmental tort liability." *Id.* But this provision by its terms applies to government "contractor[s]," which are not entitled to "traditional sovereign immunity." *See, e.g.*, *Boyle*, 487 U.S. at 505 n.1; *United States v. Orleans*, 425 U.S. 807, 813-14 (1976). The point here is that Congress was perfectly capable of limiting generally applicable defenses like the government-contractor defense in the PAA when it wanted to. *See, e.g.*, 42 U.S.C. § 2210(n)(1) (authorizing the Secretary of Energy to obtain a waiver of "any issue or defense as to charitable or governmental immunity" with respect to "any extraordinary nuclear occurrence"); 42 U.S.C. § 2210(d)(1)(B)(i)(II) (authorizing the Secretary of Energy to "incorporate in agreements of indemnification … the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity"). These provisions would be inexplicable if such defenses were categorically unavailable under the PAA in the first place.

The Ninth Circuit thus ultimately retreated to asserting that "[e]ven assuming … that Congress

intended to ensure that the modern defense did not apply to underground detonation claims, it does not follow that Congress also intended, without saying so, that the defense would apply in all other situations." App. 24a. But that assertion negates the Ninth Circuit's basic premise that the 1988 PAA amendments were not enacted against the background of the federal common law government-contractor defense. In light of that premise, statutory silence with respect to the government-contractor defense cannot be construed as an implicit abrogation of that defense. *See, e.g.*, *Texas*, 507 U.S. at 534.

The Ninth Circuit, however, proceeded to assert that the government-contractor defense "would conflict with the Congressional statutory aim to provide compensation for nuclear injuries." App. 24a. But that assertion is question-begging. While "provid[ing] compensation for nuclear injuries" is certainly *a* goal of the PAA, it is neither the *only* goal nor an *absolute* goal. Because the United States has never waived its sovereign immunity for injuries involving nuclear emissions allegedly caused by its discretionary decisions, there can be no "Congressional statutory aim to provide compensation" for such injuries. If that compensatory goal were absolute, as the Ninth Circuit suggested, then Congress would have waived the United States' sovereign immunity.

Finally, the Ninth Circuit suggested the government-contractor defense was somehow inconsistent with the "comprehensive" PAA scheme, including its indemnification provisions. App. 25-26a; *see also id.* at 9a, 21a. That suggestion is

misplaced. Although the PAA is "comprehensive" in the sense that it provides the *exclusive* cause of action for all injuries allegedly caused by nuclear emissions, *see, e.g.*, *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991), it is not "comprehensive" in the sense that it sets forth a reticulated scheme of substantive liability and defenses. To the contrary, the Act generally incorporates substantive *state* law, and does not purport to set forth the underlying standards for liability or defenses. *See* 42 U.S.C. § 2014(hh). Therefore, the fact that the Act does not specifically *ratify* a particular defense does not mean that the Act thereby *abrogates* that defense.

Nor is there any merit to the suggestion that the Act's indemnification provisions implicitly negate the government-contractor defense. Those provisions simply ensure that entities covered by the Act will not face ruinous liability, and therefore decline to become involved in nuclear-related activities in the first place. It is worth noting in this regard that the Act is not limited to government contractors; to the contrary, the vast majority of nuclear facilities in this country are operated not by government contractors, but by private utilities. And even government contractors are not invariably covered by the defense; to the contrary, the defense applies only under limited circumstances where the contractor is implementing the Government's discretionary decisions. *See Boyle*, 487 U.S. at 512. The Act's indemnification provisions simply encourage utilities to invest in nuclear energy, provided that they meet certain safeguards (such as obtaining approved levels of insurance). *See* 42 U.S.C. § 2210(a), (b), (c). In no way does the Government's statutory

obligation to indemnify qualified operators of nuclear facilities *if* they are held liable under the Act suggest an intention to expand the circumstances under which they may be held liable. Indemnification is like a form of insurance, and certainly the fact that persons are insured provides no basis to expand their underlying liability. Indeed, indemnification provisions kick in only *after* an operator has been held liable, and hence have no bearing on whether the operator should be held liable in the first place.

Given that the Federal Government frequently relies on private contractors to implement its discretionary decisions, it is hard to overstate the practical implications of the decision below. Indeed, the Ninth Circuit's reasoning extends well beyond the PAA context. If it is true, as the Ninth Circuit held, that the federal common law government-contractor defense does not apply to the PAA because that defense was not well-established by the fall of 1988, then it logically follows that the defense does not apply to *any* federal statutory cause of action enacted before the fall of 1988. Because most federal statutory causes of action fall into this category, the Ninth Circuit effectively gutted the federal common law government-contractor defense, and thereby subjected the Government to potentially vast financial exposure for its discretionary decisions.

Whether the Ninth Circuit likes it or not, the government-contractor defense is the law of the land, just as it was the law of the land when Congress enacted the relevant PAA amendments in 1988. Petitioners should thus have the chance to try to establish that the defense applies to the facts of this case, which they were never allowed to do in light of

the district court's ruling, affirmed by the Ninth Circuit, that the defense does not apply to PAA claims as a matter of law. This Court should not allow the Ninth Circuit to have the last word on this important and far-reaching question of federal law, with dramatic implications for the United States' sovereign immunity, and thus should grant review.

II. The Ninth Circuit Erred By Holding That Petitioners May Be Held Strictly Liable Under The Price-Anderson Act For Federally Authorized Nuclear Emissions.

The Ninth Circuit further erred by affirming the district court's decision holding petitioners *strictly* liable for any injuries caused by I-131 emissions from Hanford, and thereby precluding petitioners from defending themselves without reference to the reasonableness of their conduct, including the fact that the challenged emissions were federally authorized. As several courts of appeals have recognized, the PAA does not allow the imposition of strict liability under state law (as incorporated into the PAA) for federally authorized emissions. *See*, *e.g.*, *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307-08 (11th Cir. 1998) (*per curiam*); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240-41 (1984) ("[S]tates are precluded from regulating the safety aspects of nuclear energy."); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 208 (1983) ("[T]he safety of nuclear technology [is] the *exclusive* business of the federal government.") (emphasis added).

The Ninth Circuit did not purport to disagree with these decisions, but instead drew a distinction between federal safety standards promulgated under the APA and the military safety standards applied at Hanford during World War II and the early years of the Cold War. App. 27-28a. Although the Ninth Circuit recognized that the standards applied at Hanford were "established under the aegis of the United States Army," App. 28a, the court nonetheless declared that those standards "did not carry the force of law," and thus could not be characterized as "federally-authorized emission levels." *Id.*; *see also id.* (distinguishing between "site specific safety rules" established by the Army at Hanford and "comprehensive, federal standards"). That asserted distinction has no basis in law or logic.

Federal preemption did not spring into life upon the enactment of the APA in 1946. To the contrary, it has long been established that a valid exercise of federal power trumps any inconsistent exercise of state power. As this Court recognized in *Yearsley*, "if th[e] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing [the Federal Government's] will." 309 U.S. at 20-21. Thus, if the Federal Government authorizes particular conduct, state law cannot impose liability (much less strict liability) for that conduct. *See*, *e.g.*, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 331-32 (1981) (state cannot impose liability for abandonment of railroad line authorized by ICC); *Radio Station WOW v. Johnson*, 326 U.S. 120, 132 (1945) (state cannot order transfer of broadcast license granted by FCC). Whether the

federal standard is site-specific or broadly applicable is immaterial: petitioners were entitled to rely on the federally approved dose limits, and are now entitled to defend themselves on the ground that they complied with those limits. The Ninth Circuit decision below opens the door to mischief, and undermines exclusive federal control over nuclear safety, by allowing state law to impose more stringent standards of care in this area than federal standards.

At the very least, the decision below on this score cannot possibly stand in light of the procedural posture of this case. The district court granted summary judgment against petitioners by holding that federal safety standards *never* preempt state law incorporated into the PAA. *See* App. 110-16a; 133a. The Ninth Circuit disavowed that broad holding, *see* App. 26-27a, by declaring instead that the military safety standards in this case "did not carry the force of law," App. 28a. But the Ninth Circuit had no factual basis for that assertion, given that the parties here dispute the nature and scope of the Army's safety standards at Hanford. Thus, under no circumstances was the Ninth Circuit entitled to affirm the grant of summary judgment against petitioners based on the theory that the federal safety standards at Hanford during the period in question lacked preemptive force.

III. The Ninth Circuit Erred By Holding That A Putative Class Member Who Files An Individual Lawsuit While A Motion For Class Certification Is Pending Is Nonetheless Entitled To Class Action Tolling.

Finally, the Ninth Circuit erred, and deepened an acknowledged circuit split, by holding that a putative class member who files an individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling under *American Pipe*. *See* App. 38-42a. Indeed, in response to respondents' petition for rehearing, the Ninth Circuit flipped from one side of the circuit split to the other. *See* App. 61-66a. Unfortunately, the Ninth Circuit ended up on the wrong side of the split—and, regardless of which side is right or wrong, this Court should resolve this conflict on an important and recurring question of federal law.

The Ninth Circuit originally sided with the Sixth Circuit in holding that a plaintiff who files an individual action while a motion for class certification is pending cannot claim the benefit of *American Pipe* tolling. *See* App. 39-40a (citing *Wyser-Pratte*, 413 F.3d at 569); *see also Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983) (same); *cf. Wachovia Bank & Trust Co. v. National Student Mktg. Corp.*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980) (same). On rehearing, respondents pointed out that the Second Circuit had subsequently come out the other way, in a decision that addressed neither the Ninth Circuit's original decision in this case nor any other contrary decision. The Ninth Circuit

nonetheless decided to follow the Second Circuit. *See* App. 41-42a (citing *WorldCom*, 496 F.3d at 256).

The Ninth Circuit thereby erred. As that court explained in its original decision below, "the purposes of class action tolling under *American Pipe* 'are not furthered when plaintiffs file independent actions before decision on the issue of class certification.'" App. 39a (quoting *Wyser-Pratte*, 413 F.3d at 569); *see also Glater*, 712 F.2d at 739; *Wachovia*, 650 F.2d at 346 n.7. The whole point of *American Pipe* tolling, after all, is to promote "the efficiency and economy of litigation which is a principal purpose" of the class action device by allowing plaintiffs to rely on a pending class action rather than filing their own separate lawsuits. 414 U.S. at 553; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351 (1983) ("Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid … a needless multiplicity of actions.").

Needless to say, "[t]he policies behind Rule 23 [of the Federal Rules of Civil Procedure] and *American Pipe* would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing." *Glater*, 712 F.2d at 739; *see also Wyser-Pratte*, 413 F.3d at 568-69 ("The purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided."). A putative class member who files an individual lawsuit while class certification is pending obviously cannot claim to have relied on the pendency of the class action,

and allowing such a plaintiff to invoke *American Pipe* tolling would create the very inefficiency that *American Pipe* sought to prevent. "Plaintiffs should not be permitted to benefit from tolling while at the same time pursuing their own action." *In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132, 1150 (C.D. Cal. 2003).[3]

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[3] Not surprisingly, as the Ninth Circuit noted in its original decision, "[c]ountless federal district courts" have come to this same conclusion. App. 39a (citing *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 451 (S.D.N.Y. 2003), *vacated*, 496 F.3d 245 (2d Cir. 2007); *Heritage*, 289 F. Supp. 2d at 1150); *see also Hubbard v. Correctional Med. Servs., Inc.*, No. 04-3412, 2008 WL 2945988, at *7-8 (D.N.J. July 30, 2008); *McMillian v. AMC Mortgage Servs., Inc.*, No. 07-773, __ F. Supp. 2d __, 2008 WL 2357236, at *2 & n.7 (S.D. Ala. June 10, 2008); *In re Fed. Nat'l Mortgage Ass'n Sec. Litig.*, 503 F. Supp. 2d 25, 33 n.7 (D.D.C. 2007); *Puttick v. America Online, Inc.*, Nos. MDL 1500, 05-Civ.-5748, 2007 WL 1522612, at *2-4 (S.D.N.Y. May 23, 2007); *In re Enron Corp. Sec. Litig.*, 465 F. Supp. 2d 687, 715-16 (S.D. Tex. 2006); *Irrer v. Milacron, Inc.*, No. 04-72898, 2006 WL 2669197, at *7 (E.D. Mich. Sept. 18, 2006); *Kozlowski v. Sheahan*, No. Civ.A. 05-C-5593, 2005 WL 3436394, at *3 & n.1 (N.D. Ill. Dec. 12, 2005); *Fezzani v. Bear, Stearns & Co.*, 384 F. Supp. 2d 618, 632-33 (S.D.N.Y. 2004); *Calvello v. Electronic Data Sys.*, No. 00-CV-800, 2004 WL 941809, at *3-4 (W.D.N.Y. Apr. 15, 2004); *In re Ciprofloxacin Hydrochloride Antitrust Litig.,* 261 F. Supp. 2d 188, 221 (E.D.N.Y. 2003); *Chazen v. Deloitte & Touche, LLP*, 247 F. Supp. 2d 1259, 1271-72 (N.D. Ala.), *aff'd in part & vacated in part on other grounds*, 88 Fed.Appx. 390 (11th Cir. 2003) (*per curiam*); *Shaffer v. Combined Ins. Co. of Am.*, No. 02-C-1774, 2003 WL 22715818, at *2-3 (N.D. Ill. Nov. 18, 2003); *Prohaska v. Sofamor, S.N.C.*, 138 F. Supp. 2d 422, 433 (W.D.N.Y. 2001); *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 514 (S.D.N.Y. 2001); *Chinn v. Giant Food, Inc.,* 100 F. Supp. 2d 331, 334-35 (D. Md. 2000); *Rahr v. Grant Thornton LLP,* 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000); *Wahad v. City of New York*, No. 75

In reversing itself, the Ninth Circuit agreed with the Second Circuit that "applying *American Pipe* tolling to plaintiffs who filed individual suits before certification is consistent with the purpose underlying statutes of limitations," which the Second Circuit characterized as "provid[ing] notice to defendants of a claim before the underlying evidence becomes stale." App. 41-42a. But that argument proves too much: if that were true, then statutes of limitations should be tolled for any plaintiff who brings the same claim against a defendant that has already been brought by someone else, regardless of whether the first lawsuit was a class action. By filing an individual lawsuit while a motion for class certification is pending, a putative class member

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Civ. 6203, 1999 WL 608772, at *5-6 (S.D.N.Y. Aug. 12, 1999); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C-897, 1998 WL 474146, at *8 (N.D. Ill. Aug. 6, 1998); *Stutz v. Minnesota Mining & Mfg. Co.,* 947 F. Supp. 399, 404 (S.D. Ind. 1996); *Chemco, Inc. v. Stone, McGuire & Benjamin*, No. 91-C-5041, 1992 WL 188417, at *2 (N.D. Ill. July 29, 1992); *Pulley v. Burlington N., Inc.,* 568 F. Supp. 1177, 1179-80 (D. Minn. 1983); *Wachovia Bank & Trust Co., N.A. v. National Student Mktg. Corp.*, 461 F. Supp. 999, 1011-12 (D.D.C. 1978), *aff'd in relevant part*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980). To be sure, a minority of district courts have come out the other way, thus mirroring at the district-court level the conflict that now exists at the appellate level. *See, e.g.*, *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL 2692674, at *2, 4 (E.D. La. July 2, 2008); *Shriners Hosps. for Children v. Qwest Commc'ns Int'l, Inc.*, No. 04-cv-781, 2007 WL 2801494, at *2-3 (D. Colo. Sept. 24, 2007); *Lehman v. UPS, Inc.*, 443 F. Supp. 2d 1146, 1148-51 (W.D. Mo. 2006); *Schimmer v. State Farm Mut. Auto. Ins. Co.*, No. 05-cv-2513, 2006 WL 2361810, at *5-6 (D. Colo. Aug. 15, 2006); *Rochford v. Joyce*, 755 F. Supp. 1423, 1428 (N.D. Ill. 1990).

effectively opts out of the class, and thereby disclaims whatever benefits (like tolling) accrue to absent class members. *See, e.g., Fezzani v. Bear, Stearns & Co.*, 384 F. Supp. 2d 618, 632-33 (S.D.N.Y. 2004); *Heritage*, 289 F. Supp. 2d at 1149-50; *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000).

Nor is it true, as the Ninth Circuit declared in aligning itself with the Second Circuit, that denying *American Pipe* tolling to plaintiffs who file their own lawsuits while class certification is pending would "diminish" those plaintiffs' "right to file at the time of their choosing." App. 42a. While putative class members are free to file individual lawsuits while class certification is pending, they are not free to file *untimely* individual lawsuits. Once they miss the deadline, in other words, they no longer have a "right to file at the time of their choosing." *Id.* Indeed, the whole point of statutes of limitations is to negate any such "right." Respondent Wise is a good example: although she was diagnosed with thyroid cancer in April 1993, she did not file this lawsuit until July 1997, outside the relevant three-year statute of limitations for personal injuries, *see* Wash. Rev. Code § 4.16.080(2). At that point, her only basis for pursuing a claim was as a member of a timely filed class action. *See, e.g., American Pipe*, 414 U.S. at 552-56.

Regardless of whether the First and Sixth Circuits, on the one hand, or the Second and Ninth Circuits, on the other, are correct on this point, this Court should resolve the conflict. Plaintiffs who wish to bring an individual lawsuit while a motion for class certification is pending should know if they are

entitled to *American Pipe* tolling if their claims are untimely, because otherwise they presumably would not pursue such lawsuits. Similarly, defendants should know if such lawsuits are untimely, so that they can avoid the expense of litigating (or settling) them. And the lower courts should know how to resolve this recurring issue. *See, e.g.*, *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL 2692674, at *2, 4 (E.D. La. July 2, 2008) (recognizing circuit split on this issue); *Shriners Hosps. for Children v. Qwest Commc'ns Int'l, Inc.*, No. 04-cv-781, 2007 WL 2801494, at *2-3 (D. Colo. Sept. 24, 2007) (same). In the end, no one benefits from continued uncertainty.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

KEVIN VAN WART, P.C.
TIMOTHY A. DUFFY
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

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CHRISTOPHER LANDAU, P.C.
Counsel of Record
JEFFREY B. WALL
KIRKLAND & ELLIS LLP
655 Fifteenth St., NW
Washington, DC 20005
(202) 879-5000