No. 16-1275

In the Supreme Court of the United States

VIRGINIA URANIUM, INC., ET AL., PETITIONERS,

v.

JOHN WARREN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

This case is about whether a federal statute regulating what happens "*after* [uranium's] removal from its place of deposit in nature," 42 U.S.C. § 2092 (emphasis added), can be stretched to preempt a state law addressing what happens *before* it is removed—that is, *whether* the uranium will be mined in the first place. The answer is no.

There is no doubt that Congress could regulate uranium mining directly or limit States' ability to do so. But Congress has not enacted such a law. To the contrary, it is undisputed that the Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.*, does not regulate (and has never regulated) conventional uranium mining on nonfederal lands. Indeed, the Federal Government acknowledges that the States' inherent sovereign power to regulate such activities—up to and including banning them altogether—remains intact. See U.S. Cert. Br. 18.

Instead, petitioners insist that Virginia's three-decades-old choice not to license uranium mining within its borders is preempted because of the subjective motivations that (petitioners say) produced it. But this Court has already canvassed why any such approach to preemption would be deeply misguided. As Justice Scalia's opinion for the Court in *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.*, 559 U.S. 393 (2010) (*Shady Grove*) explained, "determining whether state and federal rules conflict based on the subjective intentions of the state legislature is

an enterprise destined to produce 'confusion worse confounded.' " *Id.* at 404 (citation omitted).

For one thing, there is the prospect of different results for otherwise-identical state laws. See *Shady Grove*, 559 U.S. at 404 ("one State's statute could survive pre-emption . . . while another State's identical law would not, merely because its authors had different aspirations"). What is more, a preemption analysis that turned on "the subjective intentions of the state legislature" would require trial courts "to discern, in every . . . case, the purpose behind any putatively preempted state . . . rule." *Id.* "That task w[ould] often prove arduous," and "[h]ard cases w[ould] abound." *Id.* "Many laws further more than one aim, and the aim of others may be impossible to discern." *Id.* "Predictably, federal judges would be condemned to poring through state legislative history—which may be less easily obtained, less thorough, and less familiar than its federal counterpart." *Id.* at 405.

Petitioners offer two basic arguments. First, they contend that the Atomic Energy Act and this Court's decisions construing it mandate a motivation-based preemption analysis in this context. Second, petitioners insist that the problems identified in *Shady Grove* simply vanish because of this case's procedural posture.

Petitioners are wrong on both counts. "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Yet petitioners never specify which

"enacted statutory text," *id*. at 501, they believe is doing the preemptive work here. Instead, petitioners' entire argument depends on contorting fragments of three sentences in two opinions from more than a quarter of a century ago—opinions that both *unanimously* rejected preemption challenges to state laws impacting matters far closer to the heartland of federal concern than the longstanding (and long-unchallenged) state policy at issue here.

Nor can petitioners escape these problems by relying on a "concession we have never made." Resp. Supp. Cert. Br. 2. Of course, any case-specific stipulation about "the subjective intentions of the state legislature," *Shady Grove*, 559 U.S. at 404, would matter only if those "subjective intentions" were relevant to the preemption question at issue—and, as we will explain, they are not. In addition, "we have *never* conceded that legislative purpose is purely a question of fact (historical or otherwise)" or "that the Virginia legislature's *sole* purpose in imposing a moratorium on conventional uranium mining was based on radiological safety concerns associated with uranium milling and tailings." Resp. Supp. Cert. Br. 6–7. To the contrary, the statutory text indicates that Virginia's General Assembly had a variety of concerns in mind, some of which were, even under petitioners' view, unquestionably permissible.

The decision below should be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–52a) is reported at 848 F.3d 590. The memorandum opinion of the district court (Pet. App. 53a–82a) is reported at 147 F. Supp. 3d 462.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2017. The petition for a writ of certiorari was filed on April 21, 2017, and granted on May 21, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The most directly relevant provisions of federal and state law are reproduced in the appendix to the petition for a writ of certiorari. Pet. App. 83a–189a.

STATEMENT

This case's most stubborn facts are these:

- The authority to determine whether to permit a physically intrusive and destructive activity like mining lies at the heart of a State's inherent power to regulate for the health and welfare of its citizens;
- The federal statute on which petitioners rely does not regulate—and has never regulated—conventional uranium mining on private land; and
- This Court has already recognized that the statutory provisions on which petitioners rely were "not intended to cut back on pre-existing

> state authority outside the [Federal Government's] jurisdiction." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 209–10 (1983) (*Pacific Gas*).

We begin with the history of the Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq*.

1. a. The first Atomic Energy Act was enacted in 1946, eleven months after the end of World War II. See Pub. L. No. 79-585, 60 Stat. 755 (Aug. 1, 1946) (1946 Act). Until then, nuclear technology was exclusively controlled by the United States Army as part of the Manhattan Project. See F.G. Gosling, U.S. Dep't of Energy, *The Manhattan Project: Making the Atomic Bomb* 99, 102–03 (2010). Under the 1946 Act, "the use, control, and ownership of nuclear technology remained a federal monopoly," *Pacific Gas*, 461 U.S. at 206, and non-federal parties were required to obtain a license from the newly created Atomic Energy Commission (Commission) before "transfer[ring]," "deliver[ing]," "receiv[ing] possession of or title to," or "export[ing]" uranium. § 5(b)(2), 60 Stat. 761 (transfer provision).[1]

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[1] The Atomic Energy Commission (AEC) was abolished in 1974, and its functions divided among several agencies. See *Huffman* v. *Western Nuclear, Inc.*, 486 U.S. 663, 666 n.4 (1988). For simplicity's sake, we use "Commission" to refer both to the AEC and the Nuclear Regulatory Commission, which handles the "licensing and related regulatory functions" formerly handled by the AEC. *Id.* (citation omitted); see *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council*, 435 U.S. 519, 526 n.2 (1978) (following the same approach).

But even while "contemplat[ing] that the development of nuclear power would be a Government monopoly," *Duke Power Co.* v. *Carolina Envtl. Study Grp.*, 438 U.S. 59, 63 (1978), the 1946 Act did not regulate (or even address) uranium mining on private land. The 1946 Act did not, for example, declare that all uranium in the United States belonged to the Federal Government. Cf. § 5(b)(7), 60 Stat. 762 (so declaring for "source material" found on federally owned lands); § 5(a)(2), 60 Stat. 760 (so declaring for *all* "fissionable material"). Instead, the 1946 Act "authorized and directed" the Commission "to purchase, take, requisition, condemn, or otherwise acquire, supplies of source materials or any interest in real property containing deposits of source materials necessary to effectuate the provisions of this Act." § 5(b)(5), 60 Stat. 762. And even the 1946 Act's otherwise sweeping transfer provision was expressly limited to the movement of uranium "*after* removal from its place of deposit in nature." § 5(b)(2), 60 Stat. 761 (emphasis added); see S. Rep. No. 79-1211, at 18 (1946) (noting that "source materials in their natural state are not capable of dangerous misuse").

b. In 1954, Congress revised the Atomic Energy Act to increase the private sector's role. See Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (Aug. 30, 1954) (1954 Act). Concluding "that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes," the 1954 Act "provid[ed] for licensing of private construction, ownership, and operation of commercial

nuclear power reactors . . . under strict supervision by the . . . Commission." *Duke Power*, 438 U.S. at 63.

Despite numerous changes, however, the 1954 Act maintained continuity with the 1946 Act about the scope of the Commission's authority to regulate uranium. The Commission retained "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials," *Pacific Gas*, 461 U.S. at 207, as well as the power to acquire nuclear materials directly by way of purchase or condemnation, 1954 Act, § 66, 68 Stat. 933 (42 U.S.C. § 2096). But, as with the 1946 Act, the 1954 Act reiterated that private parties need not obtain any sort of uranium-based license from the Commission until "*after* its removal from its place of deposit in nature." § 62, 68 Stat. 932 (42 U.S.C. § 2092) (emphasis added). Indeed, the 1954 Act went even further than the 1946 Act by prohibiting the Commission from requiring any "reports" about "any source material *prior to* its removal from its place of deposit in nature," § 65(a), 68 Stat. 933 (42 U.S.C. § 2095) (emphasis added).

c. In 1959, the year of the famous "kitchen debate" between then-Vice President Richard Nixon and Soviet Premier Nikita Khrushchev, Congress expanded the States' role in nuclear development by enacting new provisions now codified at 42 U.S.C. § 2021 (Section 2021). See Act of Sept. 23, 1959, Pub. L. No. 86-373, 73 Stat. 688 (1959 Act). Under the 1959 Act, "[t]he Commission was authorized to turn over some of its regulatory authority to any State which would adopt a suitable regulatory program," while "retain[ing]

exclusive regulatory authority over 'the disposal of'" certain material that "'should . . . not be disposed of without a license from the Commission.'" *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 250 (1984) (quoting 42 U.S.C. § 2021(c)(4)).

"[T]he point of the 1959 Amendments was to heighten the States' role." *Pacific Gas*, 461 U.S. at 209. In particular, "Congress made clear that [Section 2021] was not intended to cut back on pre-existing state authority outside the [Commission's] jurisdiction," *id.* at 209–10, and that Section 2021 did "not attempt to regulate materials which the [Commission] does not now regulate under the Atomic Energy Act of 1954." S. Rep. No. 86-870, at 4 (1959); accord H.R. Rep. No. 86-1125, at 4 (1959) (same). Instead, the 1959 Act "provide[d] a statutory framework within which the States [could] *assume* an independent regulatory role in extensive areas *now occupied by* the Atomic Energy Commission."[2] In particular, Section 2021(k) was "intended to make clear that the bill [did] not impair the State authority to regulate activities *of [Commission] licensees* for the manifold health, safety, and economic purposes other than radiation prevention." S. Rep. No. 86-870, at 12 (1959) (emphasis added); accord H.R. Rep. No. 86-1125, at 12 (1959) (same).

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[2] *Federal-State Relationship in the Atomic Energy Field: Hearings Before the J. Comm. on Atomic Energy*, 86th Cong. 290 (1959) (*1959 Hearings*) (statement of John S. Graham, Comm'r, Atomic Energy Comm'n) (emphasis added).

d. Over the last six decades, federal regulators have repeatedly acknowledged that they lack the authority to regulate uranium mining on private land. In 1959, two Commission representatives testified before Congress that "[t]he Commission does not have regulatory jurisdiction . . . over the mining of uranium."[3] In a 1978 adjudication, the Commission acknowledged that its "authority over uranium ore and other 'source material' attaches only '*after* removal from its place of deposit in nature,' and not when the ore is mined." *In re Rochester Gas & Elec. Corp.*, 8 N.R.C. 551, 554 n.7 (1978). In 2006, the Commission issued an opinion emphasizing that it "does not regulate conventional uranium mining," stating that the Commission "begins its oversight at the mill, rather than at the mine" and that "[c]onventional mining is controlled by other regulatory authorities"—that is, by States. *In re Hydro Res.*, 63 N.R.C. 510, 512–13 (2006) (discussing how "[t]he State of New Mexico . . . regulates conventional uranium mining within the state"); accord U.S. Br. 14 (acknowledging that "uranium mining . . . is outside [the Commission's] jurisdiction"); *id.* at 4 n.2, 22 (same).

2. Until the late 1970s, no one knew there were substantial uranium deposits in Virginia. That changed, however, when deposits were discovered in various locations throughout Virginia, including in Pittsylvania County. Pet. App. 5a, 216a. Following that discovery,

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[3] See *1959 Hearings* 83 (statement of H.L. Price, Dir., Div. of Licensing & Regulation, Atomic Energy Comm'n); see *id.* at 60 ("the Commission . . . does not regulate mining") (statement of Robert Lowenstein, Ofc. of Gen. Counsel, Atomic Energy Comm'n).

the Virginia General Assembly directed the Coal and Energy Commission (state energy commission) "to evaluate the environmental effects of uranium exploration, mining, and milling which may be expected to occur in the Commonwealth and any possible detriments to the health, safety, and welfare of Virginia citizens which may result from uranium exploration, mining or milling." 1981 Va. Acts 1404 ¶ 5 (Pet. App. 170a).

In 1982, the General Assembly enacted legislation permitting uranium exploration but imposing a one-year ban on uranium mining. 1982 Va. Acts 426 (Pet. App. 170a–77a); see § 45.1-283 (Pet. App. 176a) (providing that "permit applications for uranium mining shall not be accepted by any agency of the Commonwealth prior to July 1, 1983"). In the text of that legislation, the General Assembly recognized that "[t]he mining of uranium within the Commonwealth has the potential to provide its citizens with employment opportunities and other economic benefits." § 45.1-272, ¶ 1 (Pet. App. 170a–71a). At the same time, the General Assembly also noted "that the improper and unregulated exploration for uranium can adversely affect the health, safety, and general welfare of the citizens of this Commonwealth" and that "additional statutes . . . may be necessary in order to assure that any uranium mining and milling which may occur in the Commonwealth will not adversely affect the environment or public health and safety." § 45.1-272, ¶¶ 2 & 3 (Pet. App. 171a).

In 1983, the General Assembly extended the moratorium indefinitely by amending the 1982 legislation to provide that no permits shall be issued "until a program for permitting uranium mining is established by statute." 1983 Va. Acts 3, art. 1 (Pet. App. 177a–78a) (codified at Va. Code § 45.1-283). In the text of that legislation, the General Assembly reaffirmed that although "uranium mining and milling activity can generate substantial benefits, it also raises a wide range of environmental and other local concerns." Art. 2, § 45.1-285.1 (Pet. App. 178a). While emphasizing that a preliminary study "ha[d] not identified any environmental or public health concern that could preclude uranium development in Virginia," the General Assembly also found "that a possibility exists that certain impacts of uranium development activity may reduce or potentially limit certain uses of Virginia environment and resources, and that therefore additional evaluation of the costs and benefits of such activity is necessary before a final decision can be made regarding its acceptability." *Id.* (Pet. App. 178a).

To that end, the 1983 legislation created a Uranium Administrative Group (working group or group) and charged it with presenting a report to the state energy commission analyzing "the costs and benefits of permitting uranium development at [a] specific site," "the advantages and disadvantages of enacting legislation under which permits could be issued for uranium milling and mining," and "the advantages and disadvantages of seeking agreement with the federal government providing for discontinuance of the federal

government's responsibility for regulating uranium milling and tailings management." § 45.1-285.5(C)(1), (2), and (4) (Pet. App. 181a–82a).

In 1985, the state energy commission presented a report to Virginia's Governor and General Assembly. JA 119–34. By a 12-8 vote, the state energy commission adopted the working group's recommendation that "the moratorium on uranium development can be lifted" but only if "essential specific recommendations derived from the work of the [working group] are enacted into law." JA 124 (emphasis removed); see JA 122 (vote tally). In particular, the working group recommended that Virginia should "become an agreement state with the right to license a uranium development facility," that "a specific statute appropriate for the regulation of uranium mining should be enacted," and "that the state's current nondegradation standard with respect to water should be clearly affirmed and made applicable to uranium development." JA 125–26. The report also included separate statements from 10 of the working group's 18 members, 2 of whom dissented from the group's report and recommendations. JA 129–52.

"Despite the [state energy commission's] recommendation, the General Assembly did not move to lift the moratorium." Pet. App. 5a–6a; accord Pet. App. 221a (acknowledging that a bill proposing to lift the moratorium was "withdrawn" in 1986).

3. Petitioners are four companies formed or controlled by people who have owned the land containing Virginia's uranium reserves "for generations." Pet. C.A.

Br. 2; see Pet. App. 196a–98a, 201a (listing plaintiffs). As petitioners have repeatedly acknowledged, they made no effort to overturn Virginia's ban on uranium mining for more than two decades. See Pet. Br. 18. Then, after the price of uranium increased in the mid-2000s, petitioners "engage[d] the political process, urging [Virginia] lawmakers to reconsider the ban on uranium mining." *Id.*[4]

Having been unsuccessful in their efforts to lobby the Virginia legislature, petitioners turned to the courts. In August 2015—more than 33 years after Virginia first imposed a moratorium on uranium mining and more than 32 years after that moratorium was extended indefinitely—petitioners filed suit in federal court, claiming that Virginia's law had been preempted all along. Pet. App. 190a–238a. As relief, petitioners requested an injunction directing respondents (various state officials sued in their official capacities) "to ignore that invalid state statute and accept and process Virginia Uranium's permit and license applications in the same manner they would an application relating to any other natural mineral resource." Pet. App. 193a.

4. Respondents moved to dismiss petitioners' complaint under Federal Rule of Civil Procedure 12(b)(6). The district court granted that motion and

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[4] Although petitioners state that Virginia "reconsidered" its then-longstanding policies regarding uranium mining "during the period from 2008 to 2013," Pet. Br. 15, no such legislation has come to a vote in either chamber of the Virginia General Assembly from 1983 to the present. Pet. App. 229a (stating that a proposal to repeal the moratorium was "withdrawn" in 2013). As a result, the only state laws at issue here were enacted in 1982 and 1983.

denied petitioners' motion for summary judgment as moot. Pet. App. 53a–82a.

The court began with petitioners' field-preemption argument. Pet. App. 62a–80a. Emphasizing that one "must know the boundaries of th[e] field" involved, *id.* at 63a (quoting, *inter alia*, *De Canas* v. *Bica*, 424 U.S. 351, 360 n.8 (1976)), the district court concluded that the preempted field did not include conventional uranium mining on private land, thus leaving intact the Commonwealth's status as "the paramount proprietor[] over its mineral lands." *Id.* at 66a, 68a (internal quotation marks and citation omitted). The court acknowledged petitioners' allegations "that the General Assembly impermissibly premised Va. Code Ann. § 45.1-1283 on radiological safety concerns," but it rejected the view that federal law bars States from regulating "*any* activity with the intent to protect against radiation hazards unless by agreement with the [Commission]." *Id.* at 68a–69a.

The district court also rejected petitioners' obstacle-preemption argument. Pet. App. 80a–82a. Although "Congress has broadly stated a policy promoting atomic energy," the court explained that Congress "has evinced no purpose or objective that nonfederal uranium deposits be conventionally mined." Pet. App. 81a. The court also noted that "[s]hould the [Commission] wish that a nonfederal uranium deposit be conventionally mined," *id.* at 81a n.20, it may invoke its authority "to purchase, take, requisition, condemn, or otherwise acquire" "any interest in real property" and "rights to enter upon any real property" first to look for and then

to obtain any necessary uranium. 42 U.S.C. § 2096(a), (b), and (c).

5. The court of appeals "agree[d] with the district court that federal law does not preempt state regulation of conventional uranium mining" and thus affirmed. Pet. App. 4a.

a. The court of appeals first rejected petitioners' assertion "that conventional uranium mining is an 'activity' under [42 U.S.C. §] 2021(k)," Pet. App. 8a, explaining that provision only comes into play when "a state purports to regulate an activity that is also regulated by" the Atomic Energy Act, *id.* at 9a. The court noted that, under petitioners' "more expansive reading of Section 2021(k)'s preemptive reach," neither States nor the Federal Government could regulate conventional uranium mining, a result "[t]hat cannot be the law." *Id.* at 13a. The court acknowledged that "uranium millings and tailings storage are 'activities' . . . regulated by the" Commission. *Id.* But the court emphasized that "the plain language of the Commonwealth's ban does not mention uranium milling or tailings storage," *id.* at 14a, and it noted that petitioners did not "allege that the Virginia legislature acted with discriminatory intent," *id.* at 15a. Under those circumstances, the court of appeals "adhere[d] to the edict that courts 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive,'" emphasizing that, under federal law, the Commonwealth "was plainly allowed" to regulate uranium mining, including by banning it altogether. *Id.* (quoting *United States* v. *O'Brien*, 391 U.S. 367, 383

(1968)). The court of appeals also rejected petitioners' obstacle-preemption argument. *Id.* at 18a–19a.

b. Judge Traxler dissented. Pet. App. 20a–52a. He acknowledged that federal law preempts only "activities the [Atomic Energy] Act regulates," *id.* at 20, and that "the *substance* of Virginia's law . . . does not conflict with the Act, which does not regulate conventional mining on nonfederal lands," *id.* at 39a. Judge Traxler, however, understood this Court's decision in *Pacific Gas* as establishing that "a statute's *purpose* can itself bring the statute within the prohibited field," *id.*, and he understood respondents as having "*concede[d]* the truth of [petitioners'] allegation that the moratorium is grounded on the Virginia legislature's concerns regarding the radiological safety of uranium ore milling and tailings storage," "two activities [that] are regulated under the Act," *id.* at 40a–41a. Judge Traxler also concluded that conflict preemption applied because "Virginia has interfered with Congress's chosen method of uranium development." *Id.* at 49a.

SUMMARY OF ARGUMENT

There is no basis for concluding that Virginia's three-decades-old statute prohibiting uranium mining within its borders is preempted by a federal statute that does not begin to regulate uranium until "*after* its removal from its place of deposit in nature." 42 U.S.C. § 2092 (emphasis added).

A. Petitioners' field-preemption argument fails. "There is no federal pre-emption *in vacuo*" and petitioners have not identified any "enacted statutory text"

that brings regulation of conventional uranium mining into the preempted field. *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 501, 503 (1988).

Although they repeatedly reference 42 U.S.C. § 2021(k), petitioners never actually assert that provision is what preempts Virginia Code § 45.1-283. The reason is obvious. Section 2021(k) does not preempt anything, nor does it address matters (like state regulation of uranium mining) that have never been brought within federal regulatory authority. To the contrary: Section 2021(k) cautions courts *against* drawing any preemptive inference from provisions of the 1959 Act that gave States a new mechanism for obtaining regulatory authority over certain matters that previously had been the exclusive province of the Federal Government.

Petitioners build nearly their entire case around three carefully edited sentences from two decisions of this Court: two sentences from *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983); and one sentence from *English* v. *General Electric Co.*, 496 U.S. 72 (1990). Yet petitioners repeatedly shear important language from all three sentences and omit other language that confirms the more qualified nature of the points the Court was making. Petitioners' argument also cannot be squared with the actual holdings of those cases, both of which unanimously rejected preemption challenges to state laws addressing

matters far closer to the heart of exclusive federal authority under the Atomic Energy Act than this one.

Even if the purpose of Virginia's law were relevant to answering the preemption question here (and it is not), petitioners are mistaken both about how purpose analysis works in the preemption context and what we have and have not "conceded." The materials on which petitioners rely—including quotations from newspaper articles written more than a quarter of a century after the enactment of the only Virginia statute being challenged—confirm this Court's previous warning that making preemption decisions turn "on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded.'" *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.*, 559 U.S. 393, 404 (2010) (citation omitted). And, as we pointed out at the cert stage, "we have *never* conceded that legislative purpose is purely a question of fact (historical or otherwise)" or "that the Virginia legislature's *sole* purpose in imposing a moratorium on conventional uranium mining was based on radiological safety concerns associated with uranium milling and tailings." Resp. Supp. Cert. Br. 6–7.

B. The Court should also reject petitioners' abbreviated obstacle-preemption argument. Congress has never sought to reduce or limit a State's inherent power to regulate uranium mining within its borders. Quite the contrary. Each iteration of the Atomic Energy Act has been careful to preserve the principle that federal regulatory concern does not begin until "*after* [uranium's] removal from its place of deposit in nature." 42 U.S.C. § 2092 (emphasis added); see S. Rep.

No. 79-1211, at 18 (1946) ("source materials in their natural state are not capable of dangerous misuse"). Indeed, the unmistakable trend since 1946 has been to *increase* the States' role in the development and regulation of nuclear energy.

ARGUMENT

"[B]oth the Federal Government and the States wield sovereign powers." *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). Valid federal statutes are, of course, "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. But preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009) (quotation marks and citation omitted).

That assumption stands unrebutted here. It is common ground that this is not an express preemption case. See *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (noting that express preemption requires "express language in a statute"). There is no field preemption because the "enacted statutory text," *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) (*Isla Petroleum*), reveals no purpose to preempt state laws regulating matters over which the Commission lacks regulatory authority. And there is no obstacle preemption because the history of the Atomic Energy Act reveals a deliberate

decision *not* to preempt state regulation of uranium mining.

I. A State's preexisting authority to regulate mining within its borders does not fall within the preempted field

"Every Act of Congress occupies some field." *De Canas* v. *Bica*, 424 U.S. 351, 360 n.8 (1976) (citation omitted). Accordingly, the first step of field-preemption analysis is to identify the specific "*area*" or "*field*" in which Congress "intended to foreclose any state regulation." *Oneok*, 135 S. Ct. at 1595 (internal quotation marks and citation omitted).

The "presumption against pre-emption of state police power regulations," *Cipollone* v. *Liggett Group*, 505 U.S. 504, 518 (1992), applies not only to the "question whether Congress intended any pre-emption at all" but also "to questions concerning the *scope* of its intended invalidation of state law." *Medtronic, Inc.* v. *Lohn*, 518 U.S. 470, 485 (1996). And just as "[t]he common law is not a brooding omnipresence in the sky," *Southern Pac. Co.* v. *Jensson*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Isla Petroleum*, 485 U.S. at 503.

Petitioners are remarkably coy in identifying the "enacted statutory text," *Isla Petroleum*, 485 U.S. at 501, they believe preempts Virginia Code § 45.1-283. At times, petitioners gesture at 42 U.S.C. § 2021 (Section 2021) in its entirety. At others, petitioners focus on Section 2021(k). Elsewhere, petitioners claim that

preemption is dictated by this Court's previous decisions. And, finally, petitioners fall back on a "concession" they insist we made. None of petitioners' arguments establish that the preempted field encompasses state regulation of uranium mining.

A. Section 2021 as a whole has nothing to do with—and does not preempt—state regulation of uranium mining

The bulk of petitioners' brief suggests that Section 2021 as a whole does the preemptive work. But Section 2021 is, by itself, longer than many federal statutes, with 15 subsections spanning nearly four complete double-columned and single-spaced pages in the printed version of the United States Code. See 42 U.S.C. § 2021. Just like there can be no preemption by "congressional intent in a vacuum," *Isla Petroleum*, 485 U.S. at 501, there can be no preemption by pointing to 2,571 words of headings and text and saying "it's in there somewhere." See *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 612 (1991) ("field pre-emption cannot be inferred")

At any rate, none of Section 2021's provisions address state regulation of uranium mining. Although the presumption against preemption "does not rely on the absence of federal regulation" in a given area, *Wyeth*, 555 U.S. at 565 n.3, it is surely significant that Congress has *never* elected to regulate conventional uranium mining itself or to limit or disable the States' inherent authority to do so. See *Murphy*, 138 S. Ct. at 1480 (noting that Congress may grant private parties

"a federal right to engage in certain conduct subject only to certain (federal) constraints").

To the contrary, the Atomic Energy Act itself has long been careful to provide—and federal regulators have repeatedly recognized—that the zone of federal concern does not even commence until "*after* [uranium's] removal from its place of deposit in nature." 42 U.S.C. § 2092 (emphasis added); see S. Rep. No. 79-1211, at 18 (1946) (noting that "source materials in their natural state are not capable of dangerous misuse"); pages 6–9, *supra*. It would be more than a bit strange to find field preemption over an area that Congress has specifically declined to regulate in the very statute at issue. Cf. *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (explaining that "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them'" (internal citation omitted)).

B. Section 2021(k) does not preempt anything

Although it is cited 12 times in their brief, petitioners never actually come out and say that Section 2021(k) is what preempts Virginia Code § 45.1-283. Cf. U.S. Br. 13 (asserting without further elaboration that a "purpose-based approach to field preemption in this sphere is rooted in the text of Section 2021(k)"). But the most likely explanation for that glaring omission is

not hard to discern. As its text makes clear, Section 2021(k) is not a preemption clause at all. Rather, Section 2021(k) preserves state authority by directing courts not to draw preemptive inferences from the rest of Section 2021.

Section 2021(k) reads, in its entirety: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). That language establishes no federal standards that could conflict with state law. Nor does it disable States from acting in any particular area.

Instead, Section 2021(k) is addressed to courts. And its message is straightforward: We understand that Section 2021 creates a mechanism by which States may obtain authority that they previously lacked—that is, the "*discontinuance* of certain of the Commission's regulatory responsibilities . . . and the *assumption thereof* by the States," 42 U.S.C. § 2021(a)(4) (emphasis added). But even though those provisions provide that States availing themselves of that opportunity *gain* the ability to regulate formerly Commission-regulated materials "for the protection of the public health and safety from radiation hazards," § 2021(b), do not infer that States declining the offer are now *barred* from regulating those same "activities for purposes *other than* protection against radiation hazards," § 2021(k) (emphasis added). Quite the opposite of a roving preemption machine, Section 2021(k) simply emphasizes that Section 2021 does not alter

preexisting State authority over federally regulated activities even absent an agreement between a given State and the Commission.

Section 2021(k) thus functions like the Eleventh Amendment, which uses similar "shall not be construed" language. See U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). As this Court has explained, the Eleventh Amendment is neither the origin nor the source of a State's constitutionally protected sovereign immunity. Rather, "the adopted text addressed the proper interpretation of" the words "Judicial power" in "the original Constitution." *Alden* v. *Maine*, 527 U.S. 706, 722 (1999); accord *Hans* v. *Louisiana*, 134 U.S. 1, 11 (1890) (noting that the Eleventh Amendment "did not in terms prohibit suits by individuals against the States"). Indeed, nearly all of this Court's modern sovereign immunity jurisprudence—which recognizes States' immunity from a variety of suits not covered by the text of the Eleventh Amendment—is based on that fundamental distinction. See *Alden*, 527 U.S. at 728 (explaining that such decisions "reflect a settled doctrinal understanding . . . that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself").

The same is true here. Virginia's authority to regulate conventional uranium mining—a physically intrusive and inherently destructive activity with

lasting consequences for the Commonwealth's lands and citizens—"neither derives from, nor is limited by" Section 2021(k). *Alden*, 527 U.S. at 713. Instead, Virginia's power to regulate such activities within its borders "is a fundamental aspect of the sovereignty which [Virginia] enjoyed before the ratification of the Constitution and which [it] retain[s] today" unless those powers have been "altered by" either the Federal Constitution or a valid federal law. *Id.* And for the reasons already explained, Section 2021(k) makes no such alteration.

A simple example reinforces the point. Imagine that a 16-year-old has for many years been walking to school with her friends. When she gets her driver's license, her parents establish rules governing use of the family car, including a prohibition against using it to drive her friends. No one would understand those new rules about use of the car—including the prohibition against driving friends—as creating a totally new prohibition on walking to school with her friends.

Yet that extreme reading is essentially what any argument based on Section 2021(k) is claiming here. Before Section 2021 was enacted in 1959, federal law generally barred States from regulating uranium once it was out of the ground, but left the States' preexisting authority to regulate conventional mining (including uranium mining) untouched. Then, through Section 2021, Congress *expanded* State authority by creating a mechanism for interested States to gain the ability to regulate some post-extraction activities, see 42 U.S.C. § 2021(b), subject to numerous conditions and federal

oversight, see, *e.g.*, §§ 2021(b), (j) & (o). Congress further emphasized that "[n]othing in" that *new* statutory "section shall be construed to affect" *any* States' "authority . . . to regulate activities for purposes other than protection against radiation hazards." § 2021(k) (emphasis added). But just like the example with the daughter and the car, there is no basis for reading Section 2021(k) as imposing any new and freestanding additional restrictions on State authority—much less restrictions on States' ability to regulate matters (here, mining) for which their sovereign authority has never been limited in the first place. Accord S. Rep. No. 86-870, at 12 (1959) (stating that Section 2021(k) was "intended to make it clear that the bill does not impair the State authority to regulate activities *of [Commission] licensees* for the manifold health, safety, and economic purposes other than radiation protection" (emphasis added)).[5]

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[5] At various points, petitioners seem to identify 42 U.S.C. § 2021(b) (Pet. App. 91a–92a) as another possible textual hook. See Pet. Br. 2, 32–33. But, like Section 2021(k), that provision does not purport to take away authority that States have always had. Instead, Section 2021(b) grants States that enter into agreements with the Commission a *new* power to regulate matters that otherwise would lie within exclusive federal jurisdiction. This distinction is critical, because it destroys the predicate for petitioners' reliance on the maxim *expressio unius est exclusio alterius*. The relevant "exclusion" here is Congress's repeated decision—in the text of the statute—to disclaim federal authority over uranium until "*after* its removal from its place of deposit in nature." 42 U.S.C. § 2092 (emphasis added).

C. Petitioners repeatedly omit key language from both *Pacific Gas* and *English* that confirms the limited scope of the preempted field

Lacking any support in the "enacted statutory text," *Isla Petroleum*, 485 U.S. at 501, petitioners seek to hang their field-preemption argument almost entirely on three sentences from two decisions of this Court: two sentences from *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 209–10 (1983) (*Pacific Gas*); and one sentence from *English* v. *General Elec. Co.*, 496 U.S. 72 (1990). Neither case supports petitioners' argument.

1. In *Pacific Gas*, the Court unanimously rejected a preemption challenge to a state law that imposed a moratorium on the certification of new nuclear reactors until a state energy commission certified the existence of adequate nuclear waste facilities. 461 U.S. at 198, 200, 203. In *English*, the Court held, once again unanimously, that federal law did not preempt a common law intentional-infliction-of-emotional-distress claim brought by an employee of a nuclear-fuels production facility who claimed she was fired "in retaliation for the employee's nuclear-safety complaints." 496 U.S. at 74, 85. Those cases both involved matters far closer to the heartland of federal concern under the Atomic Energy Act than this one, which would make this case an especially odd vehicle for this Court's first preemption holding under the sort of theory urged here.

2. More than 70 years ago, this Court "remind[ed] counsel that words of our opinions are to be read in light of the facts of the case under discussion." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132–33 (1944). Yet petitioners' arguments based on *Pacific Gas* and *English* are predicated on—and, indeed, require—omitting key language from the very sentences on which petitioners rely.

a. The first pertinent sentence from *Pacific Gas* reads, in its entirety:

> A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field.

461 U.S. at 213.

Despite quoting language from that one sentence 12 times in their opening brief, petitioners reproduce the full sentence only once, where it appears embedded inside an 82-word block quote. Pet. Br. 37–38. In contrast, the other eleven uses all omit the sentence's first six words: "A state moratorium on nuclear construction. . . ." See, *e.g.*, Pet. Br. 31 ("as this Court held over three decades ago, a State law 'grounded in [radiological] safety concerns falls squarely within the prohibited field'"); accord *id.* at i, 2, 3, 5, 27, 30, 31, 38, 40, 41 (same).

But those carefully excised words are critical because, unlike uranium mining, "nuclear construction" has always been a matter of intense federal concern and regulation. Such construction was under "a federal monopoly" until 1954, *Pacific Gas*, 461 U.S. at 206, and

even since then, federal regulators have been charged with "strict supervision" of all "private construction, ownership, and operation of commercial nuclear power reactors." *Duke Power*, 438 U.S. at 63; see *Power Reactor Dev. Co.* v. *International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 404–07 (1961) (describing various statutes and regulations that give the Commission authority over nuclear power plants). For that reason, the Court was on solid ground when it said that: "A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field." *Pacific Gas*, 461 U.S. at 213. But none of that has anything to do with the issue here, which involves a state moratorium on an activity that has never even been regulated (much less entirely occupied) by federal law.[6]

b. The other sentence from *Pacific Gas* on which petitioners rely reads, in its entirety:

> Rather, the Federal Government has occupied the entire field of nuclear safety concerns,

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[6] On page 2 of their brief, petitioners attempt a similar sleight of hand with language that appears three sentences later in *Pacific Gas*. That sentence reads: "*That being the case*, it is necessary to determine whether there is a non-safety rationale for [Cal. Pub. Res. Code Ann.] § 25524.2." *Pacific Gas*, 461 U.S. at 213 (emphasis added). As the preceding three sentences make clear, that language was building off the Court's earlier observation that "[a] state moratorium on nuclear construction grounded in safety reasons" would fall within the preempted field. *Id.* Contrary to petitioners' careful editing, that sentence states no general rule that it is always "necessary to determine [the] . . . rationale," Pet. Br. 2, for *any* challenged state law.

> except the limited powers expressly ceded to the States.

461 U.S. at 212.

Here too, petitioners quote the full sentence only once, as part of that same 82-word block quote. See Pet. Br. 37–38. The other six times the sentence appears, petitioners have removed both the first word ("Rather") and the last nine ("except the limited powers expressly ceded to the States"). See, *e.g.*, Pet. Br. 29 ("By these actions, as this Court held in its foundational *PG&E* decision, the federal government 'occupied the entire field of nuclear safety concerns.'"); accord *id.* at i, 1, 26, 39, 54 (same).

But, once again, the omitted words are critical. The word "rather" underscores that the Court was responding to the specific argument it had summarized just three sentences earlier—California's contention "that although safety regulation of nuclear power plants by States is forbidden, a State may completely prohibit *new construction* until its safety concerns are satisfied by the Federal Government." *Pacific Gas*, 461 U.S. at 212 (emphasis added). As explained above, we have no quarrel with the view that, when it comes to construction of nuclear power plants, "the Federal Government has occupied the entire field of nuclear safety concerns." *Pacific Gas*, 461 U.S. at 212. But, again, that is irrelevant to the issue here.

The sentence's last nine words—"except the limited powers expressly *ceded to* the States," *Pacific Gas*, 461 U.S. at 212 (emphasis added)—further underscore the qualified nature of the point the Court was making.

The power to regulate mining within its borders is not something that Congress has "ceded to" Virginia. Rather, it is a power that Virginia has always had, a power the Federal Government has never assumed, and thus a power there never would have been any occasion to "cede" back. (In contrast, the sentence from *Pacific Gas* on which petitioners rely is immediately followed by a footnote in which the Court identifies three federal statutes that "specifically authorize[]" the States to take certain actions regarding nuclear power plants. *Pacific Gas*, 461 U.S. at 212 n.25.)

c. Petitioners' reliance on *English* fares no better. The sentence from that decision on which petitioners rely reads, in its entirety:

> In other words, the Court defined the preempted field, in part, by reference to the motivation behind the state law.

English, 496 U.S. at 84. Saying that a particular type of "motivation" is sometimes necessary before preemption will be found is not, of course, the same as saying it is invariably sufficient. But that is precisely the logical leap petitioners ask this Court to take.

As with *Pacific Gas*, moreover, both the sentence itself and the surrounding context confirm that petitioners are overreading it. Despite quoting portions of that one sentence from *English* six times throughout their brief, petitioners *never once* include the first five words: "In other words, the Court . . . " *English*, 496 U.S. at 84. See Pet. Br. i, 2, 4, 26, 39, 46. But, as those carefully omitted words make clear, the ones that follow are simply a restatement of the previous sentence.

And, as was true with *Pacific Gas*, the previous sentence makes clear that petitioners are stretching the Court's point far beyond its limited context: "Indeed, the majority of the Court [in *Pacific Gas*] suggested that a 'state moratorium *on nuclear construction* grounded in safety concerns falls squarely within the prohibited field.'" *English*, 496 U.S. at 84 (emphasis added) (quoting *Pacific Gas*, 461 U.S. at 213).[7]

3. Petitioners' discussion of *Pacific Gas* also omits language that affirmatively undermines their argument that the 1959 Act—which first enacted Section 2021—brought state regulation of uranium mining into the preempted field. As *Pacific Gas* explained,

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[7] Petitioners also omit language from *English* that threatens to cut the legs out from under their entire theory of the case. In *English*, this Court specifically flagged—and specifically declined to decide—"[w]hether the suggestion of the majority in *Pacific Gas* that legislative purpose is relevant to the definition of the pre-empted field is part of the holding of that case." 496 U.S. at 84 n.7.

As in *English*, it is unnecessary to decide here whether some of the language in *Pacific Gas* was dictum because Virginia's 35-year-old decision not to license uranium mining within its borders escapes preemption either way. Were the Court to reach the question, however, we submit that Justices Blackmun and Stevens were right that the language on which petitioners rely was both "unnecessary to the Court's holding" and "wrong in several respects." *Pacific Gas*, 461 U.S. at 223–24 (Blackmun, J., concurring in part and concurring in the judgment); see *id.* at 224 (explaining that "Congress has occupied not the broader field of 'nuclear safety concerns,' but only the narrower area of *how* a nuclear plant should be constructed and operated to protect against radiation hazards" (emphasis added)). Such a conclusion would not impact the result of *Pacific Gas* or *English*, both of which unanimously rejected preemption challenges.

"the point of the 1959 Amendments was *to heighten* the States' role," and "Congress made clear that" even Section 2021(c)—which identified certain regulatory authority that "was exclusively for the Commission to exercise"—"was not intended to cut back on pre-existing state authority *outside* the [Commission's] jurisdiction." *Pacific Gas*, 461 U.S. at 209–10 (emphasis added); see *id.* at 222 (noting "the continued preservation of state regulation in traditional areas"). That language cannot be squared with petitioners' claim that the 1959 Act, *sub silentio*, imposed new limits on States' ability to regulate matters (here, mining) that have *always* fallen outside federal regulatory jurisdiction.

D. Neither allegations about the state legislature's subjective motivations nor claims about what respondents have conceded warrants a different result

The heart of petitioners' argument is that Virginia Code § 45.1-283 is preempted not because of what it *does* (forbid issuance of licenses to mine uranium) but rather because of *why* (petitioners claim) it was enacted. See, *e.g.*, Pet. Br. 40 (asserting that Virginia's law is preempted because it "is motivated by the purpose of protecting against the radiological hazards of uranium milling and the storage of uranium tailings").

That argument does not withstand scrutiny. For the reasons already explained above, the zone of federal preemption does not begin until "after [uranium's] removal from its place of deposit in nature." 42 U.S.C. § 2092; see Parts I(A), (B), & (C), *supra*. And even if petitioners were right that purpose mattered here, they

are wrong both about how courts should assess the "purpose" of an allegedly preempted state law and what we have (and have not) "conceded."

1. As we flagged at the cert stage, petitioners and the Federal Government repeatedly assume that determining the purpose of a challenged state law involves an issue of historical fact. See Resp. Supp. Cert. Br. 8. Even at the merits stage, petitioners and the Federal Government offer neither authority nor argument in support of that assumption. In any event, the assumption is wrong.

a. Petitioners have not identified any previous decision of this Court that treats the identification of a state law's purpose as one of historical fact. With the exception of claims of racial discrimination under the Equal Protection Clause (an issue discussed at pages 41–43, *infra*), neither have we.

i. Take, for example, this Court's three previous decisions involving preemption under the Atomic Energy Act. To be sure, *Pacific Gas* referenced this Court's "general practice [of] plac[ing] considerable confidence in the interpretations of state law reached by the federal courts of appeals." 461 U.S. at 214. But courts of appeals, of course, have no power to engage in fact-finding. And, more importantly, this Court never scrutinized the allegations of the challengers' complaint or the evidence they presented, much less suggested that the case might come down to factual findings by the district court. Instead, the Court treated the inquiry of "whether there [was] a nonsafety rationale for" the challenged law, *id.* at 213, as a fundamentally *legal*

question and even disclaimed any "attempt[] to ascertain California's true motive." *Id.* at 216.[8]

The same is true of this Court's other decisions involving the Atomic Energy Act. In *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court held that federal law did not preempt a state-law "award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility." *Id.* at 241. The Court never attempted to uncover Oklahoma's "motivation" for permitting punitive damages under such circumstances. Instead, the Court deemed it sufficient that "[p]unitive damages have long been part of traditional state tort law" and that the relevant federal materials revealed that "Congress assumed that state-law remedies, in whatever form they might take, were

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[8] There was ample evidence in *Pacific Gas* that could have supported a finding that radiological safety concerns were at least a motivating factor for the challenged California law. To give just one example, the petitioners' brief quoted an official opinion from California's attorney general stating that "the effect of these statutes is to assert California's regulatory authority over radiological hazards." Pet. Br. at 41, *Pacific Gas*, *supra*, No. 81-1945 (quoting 61 Op. Cal. Att'y Gen. 159, 166 (1978)); accord *id.* at 44–48 (citing additional evidence). Yet even though the district court had granted summary judgment to the challengers, see *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 489 F. Supp. 699, 700 (E.D. Cal. 1980), this Court affirmed the court of appeals' decision holding that the challenged state laws "*are not preempted*" without remanding for any further proceedings. *Pacific Legal Found.* v. *State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 910, 928 (9th Cir. 1981) (emphasis added); see *Pacific Gas*, 461 U.S. at 223 ("The judgment of the Court of Appeals is *Affirmed*.").

available to those injured by nuclear incidents." *Id.* at 255–56.

The Court's analysis in *English* was to the same effect. To be sure, the Court stated "that the state tort law at issue" in that case was "not motivated by safety concerns." 496 U.S. at 84. But, once again, the Court did not make that determination after poring over statements by state legislators or decisions of the relevant state courts. Instead, the *English* Court emphasized this Court's own previous identification of "a nonsafety *rationale*" for intentional infliction of emotional distress damages—namely, "the State's 'substantial interest in protecting its citizens from the kind of abuse of which [petitioner] complain[s].'" *Id.* at 83 (alterations in original; emphasis added) (quoting *Farmer* v. *Carpenters*, 430 U.S. 290, 302 (1977)). Cf. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 404–05 (2010) (explaining that, if preemption turned on "the subjective intentions of the state legislature," "[i]t is not even clear that a state supreme court's pronouncement of the law's purpose would settle the issue, since the existence of a factual predicate for avoiding federal pre-emption is ultimately a federal question").

ii. The same is true of the broader preemption and statutory interpretation contexts. Both areas, of course, involve attempts to determine the "purpose" of a given law in a general sense. See *Isla Petroleum*, 485 U.S. at 501 (noting this fact). But, in those broader contexts, too, we are aware of no decision of this Court treating the identification of that "purpose" as a matter

of historical fact under Federal Rule of Civil Procedure 12(b)(6)—much less for purposes of summary judgment under Rule 56 or clear-error review under Rule 52(a)(6).

The various decisions cited by the Federal Government and other amici, see U.S. Br. 28–30; Chamber of Commerce Amicus Br. 12–16, reinforce the point. In those cases, the challenged state laws were held preempted because of what they *did* rather than the motivations alleged to have produced them. See *National Meat Ass'n* v. *Harris*, 565 U.S. 452, 468 (2012) (noting that the challenged state law "endeavors to regulate the same thing [as federal law], at the same time, in the same place—except by imposing different requirements"); *Engine Manuf. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004) (concluding that "[a] command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emission standards is as much an 'attempt to enforce' a 'standard' as a command, accompanied by sanctions, that a certain percentage of a manufacturer's sales volume must consist of such vehicles").[9]

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[9] See also *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017) (referring to laws "disfavoring contracts that (oh so coincidentally) have *the defining features of* arbitration agreements" (emphasis added)); *Haywood* v. *Drown*, 556 U.S. 729, 740 (2009) ("having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to *shut the courthouse door* to federal claims that it considers at odds with its local policy" (emphasis added)); *Northern Nat'l Gas Co.* v. *State Corp. Comm'n of Kansas*, 372 U.S. 84, 91 (1963) ("These state orders necessary *deal with* matters which directly affect the ability of the Federal Power Commission to regulate comprehensively. . . ." (emphasis added)).

Indeed, in *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008), the Court expressly declined to plumb—much less base a decision on—"Maine's actual motivation for the laws at issue here." *Id.* at 374.

b. This Court's decision in *Shady Grove* has already canvassed the intractable problems with equating the purpose of a challenged law with "the subjective intentions of the state legislature." 559 U.S. at 404. This case simply underscores the point.

Different outcomes for identical state laws. The Federal Government acknowledges that "States retain the authority to regulate conventional uranium mining—or to prohibit it altogether" so long as "that regulation is grounded in concerns about mining itself, which is not subject to NRC regulation." U.S. Cert. Br. 16, 18. Thus, under petitioners' approach "one State's statute could survive pre-emption . . . while another State's identical law would not, merely because its authors had different aspirations." *Shady Grove*, 559 U.S. at 404.

The problem of multiple purposes. "The best evidence of . . . purpose is the statutory text." *West Va. Univ. Hosps.* v. *Casey*, 499 U.S. 83, 98 (1991). But here the text of the 1982 statute that imposed Virginia's original moratorium expressly identifies multiple "*purposes*" (plural in the original), including "encourag[ing] and promot[ing] the safe and efficient exploration for uranium resources within the Commonwealth" and "assur[ing] . . . that uranium mining and milling will be subject to statutes and regulations which protect the environment and the health and safety of the

public." 1982 Va. Acts 426, § 45.1-272, ¶ 4 (Pet. App. 171a) (emphasis added); see *Shady Grove*, 559 U.S. at 404 (noting that "[m]any laws further more than one aim").

The special challenges of determining state legislative motive. There is a reason one will search petitioners' brief in vain for references to the state-law equivalent of the *Congressional Record* or a federal House or Senate Report: No such sources exist in Virginia.[10] See *Shady Grove*, 559 U.S. at 405 (noting that "state legislative history . . . may be less easily obtained, less thorough, and less familiar than its federal counterpart").

The materials on which petitioners rely only underscore the problems with making preemption determinations turn on judicial efforts to discern the motivations of state legislatures. Take, for example, petitioners' heavy reliance on dissenting opinions filed by two unelected citizen members of the state working group that were (along with other materials) submitted to the Virginia General Assembly in 1985. See Pet. Br. 17–18. This Court has long emphasized that "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States* v. *O'Brien*,

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[10] See Virginia Div. of Leg. Servs., Legislative Resource Center, Legislative History, http://dls.virginia.gov/lrc/leghist.htm ("legislative intent is not officially recorded in Virginia"); *A Guide to Legal Research in Virginia* 3.202(E), at 21 (8th ed. 2017) (Joyce Manna Janto, ed.) (stating that Virginia's *House Journal* and *Senate Journal* "do not contain committee reports, the text of bills, or floor debates").

391 U.S. 367, 384 (1968); accord *Pacific Gas*, 461 U.S. 216 (same). Yet petitioners seek to take things several steps further by quoting extensively from dissenting opinions from two *non-legislator* members of an 18-person working group and then seeking to attribute those views to *the Virginia legislature as a whole*. See also *Edwards* v. *Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) (noting the difficulties of "discerning the subjective motivation" of even a single legislator).

The other materials on which petitioners rely—what petitioners call "Public Statements by Members of Virginia's General Assembly Between 2009 and 2014," Pet. App. 239a—are no less suspect. This Court has described "[p]ost-enactment legislative history" as "a contradiction in terms" and "not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011). Yet petitioners ask this Court to rely on statements made between 2009 and 2014 in assessing the motivation behind a Virginia statute that last came to a vote in 1983. That is not how statutory interpretation works in any context. Cf. *Isla Petroleum*, 485 U.S. at 501 (disclaiming any attempt to identify "congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text").

The problems with this approach are well-illustrated by the very first "statement" on which petitioners rely: "Adams said he is against lifting the ban because there is no consensus that uranium mining can be done safely." Pet. App. 239a. Delegate Les Adams was elected to the Virginia General Assembly in

2013 and first seated in 2014, more than 30 years after Virginia Code § 45.1-283 was enacted.[11] The statement reproduced above—which does not purport to be a direct quotation from Adams—is contained in a newspaper article that was written when Adams was a candidate for office rather than a member of the General Assembly. Such materials do not even "qualify as legislative 'history' " in the first place. *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 298 (2010). Cf. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 623 n.52 (2006) ("We have not heretofore, in evaluating the legality of executive action, deferred to comments made by [government] officials to the media.").

c. As they did below, petitioners seek to draw an analogy to this Court's cases governing intentional race discrimination. See Pet. Br. 43; see also *Hunter* v. *Underwood*, 471 U.S. 222, 229 (1985) (treating whether a provision of Alabama's 1901 constitution had a discriminatory purpose as a question of fact for purposes of clear-error review under Federal Rule of Civil Procedure 52(a)). One need look neither hard nor long, of course, to find examples where the constitutional commitment to eradicating our Nation's history of invidious racial discrimination has impacted the application of otherwise-controlling rules. See, *e.g.*, *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 867 (2017) ("no-impeachment rule" for juries); *Virginia* v. *Black*, 538 U.S. 343, 363 (2003) (holding that a state may "outlaw cross

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[11] Virginia House of Delegates Member Listing, http://virginiageneralassembly.gov/house/members/members.php?id=h0252.

burnings done with the intent to intimidate"); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). This case, in contrast, involves the proper interpretation of a federal statute regulating purely economic matters.

At any rate, petitioners' proposed analogy to the constitutional law of race discrimination fails on its own terms. Even in that context, it is not enough simply to allege an impermissible purpose: the challenged law also must have a constitutionally significant effect. See *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971) (emphasizing the lack of authority for the view "that a legislative act may violate equal protection *solely* because of the motivations of the men who voted for it" (emphasis added)). As the Court has recognized, there also would be an "element of futility" to any motives-only analysis because the same law "would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons." *Id.*; accord *Pacific Gas*, 461 U.S. at 216 (making the same point).

All of that is true here too. Regardless of the precise reasons why various members of the Virginia General Assembly voted to impose a one-year moratorium on uranium mining in 1982 and then to extend that moratorium indefinitely in 1983, there has been no unequal treatment of similarly situated citizens or infringement on any federally guaranteed right. And were this Court to strike down Virginia's longstanding policy based on the perceived motives of some of its supporters, there would be nothing to prevent the General Assembly from reenacting precisely the same

policy on bases that were identified in the original statutory text and that are, even under petitioners' field-preemption theory, entirely permissible. See U.S. Cert. Br. 16, 18 (acknowledging that "States retain the authority to regulate conventional uranium mining—or to prohibit it altogether" so long as "that regulation is grounded in concerns about mining itself").

2. That leaves petitioners' repeated assertions that we have "conceded" that the 1983 Virginia law that forbids permits for uranium mining has a purpose that brings it within the preempted field. To reiterate: any such "concession" would be irrelevant here because a State's regulation of uranium mining simply does not fall within the preempted field. See Parts I(A), (B), & (C), *supra*. At any rate, petitioners' "concession" argument is also fatally flawed.

a. Petitioners are remarkably imprecise about what we have "conceded," claiming most often that we have acknowledged "that the ban is *motivated by* concerns" about milling and tailings. Pet. Br. 3 (emphasis added); accord *id.* at 15, 19, 24, 40 (same). But "[m]any laws further more than one aim," *Shady Grove*, 559 U.S. at 404, and saying a law was "motivated by" one concern is not the same as saying there were no other motivations, much less that there is no other purpose or "rationale" for the challenged law, *Pacific Gas*, 461 U.S. at 213. Indeed, the text of the 1983 legislation that rendered the moratorium permanent identified a risk that, on its face, has no inherent connection to radiological concerns about milling and tailings: the possibility "that certain impacts of uranium development

activity may reduce or potentially limit certain uses of Virginia environment and resources." 1983 Va. Acts 3, Art. 2 § 45.1-285.1 ¶ 2 (Pet. App. 178a); see § 45.1-285.1 ¶ 1 (Pet. App. 178a) (emphasizing that "a preliminary study . . . *has not* identified any environmental or public health concern that could preclude uranium development in Virginia" (emphasis added)).

b. Even petitioners' carefully selected excerpts reveal that we have never conceded—even for argument's sake—that the Virginia General Assembly's *sole* motivation in declining to license uranium mining was based on safety concerns about milling and tailings or that there is no "non-safety rationale" for banning such mining. *Pacific Gas*, 461 U.S. at 213; see Resp. Supp. Cert. Br. 6–7 (noting this point).

Petitioners first cite this sentence from the memorandum in support of our motion to dismiss: "Assuming for purposes of the current motion the Plaintiffs are correct, and *one of the purposes* behind enacting [Virginia Code] § 45.1-283 was to address radiological safety concerns, nothing in the [Atomic Energy Act] precludes such a consideration." JA 43–44 (emphasis added) (three footnotes omitted) (quoted in part at Pet. Br. 25). But "one of the purposes" is not the same thing as the sole purpose, and that reference to "radiological safety concerns" does not distinguish between potential concerns related to *milling* as opposed to *mining*.[12]

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[12] The footnotes accompanying the pertinent sentence also identify numerous reasons why such an assumption was neither relevant nor warranted. See JA 43 n.15 (emphasizing "that 'inquiry into legislative motive is often an unsatisfactory venture,' "

The same is true of our reply brief in support of our motion to dismiss. See Pet. Br. 25 (citing JA 211–13). There too we argued that the court "need not conduct a searching review of legislative motive" because "*regardless* of what Virginia may have considered in either passing or declining to overturn the current ban, the [Atomic Energy Act] does not reach uranium mining and the Commonwealth was entitled to exercise the entirety of its police powers in making such a determination." JA 211–13 (emphasis added) (footnotes omitted); see JA 212 nn.7 & 9 (reiterating the points discussed in note 12, *supra*).

To be sure, our Fourth Circuit brief stated that the extrinsic materials petitioners submitted in connection with their motion for summary judgment were "beside the point . . . because Rule 12(b)(6) required [respondents] to accept as true that Virginia enacted the moratorium based on radiological safety concerns." JA 216. As explained above, there is a critical difference between "based on" and "solely based on" and between "radiological safety concerns" and "radiological

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especially because "the Virginia General Assembly . . . does not regularly publish committee reports or similar documentation" (quoting *Pacific Gas*, 461 U.S. at 216)); JA 44 n.16 (noting that "[m]uch of what [petitioners] discuss in their lengthy narrative occurred after the enactment of the statute" and questioning the "[h]ow these post-hoc actions bear upon the decision to enact the statute"); JA 44 n.17 (explaining that "[t]he attachments to [petitioners'] Complaint fail to support their central tenet" and that the only laws actually enacted by the General Assembly "state that the study of uranium mining, and then the enactment of the moratorium, stem from . . . concerns about potential adverse effects upon the 'environment and the health and safety of the public' " (quoting Va. Code Ann. § 45.1-272 (1982)).

safety concerns arising from milling," and even that brief emphasized that respondents "did not (and do not) concede the truth of the hearsay in [the various] newspaper articles and other materials." JA 216 n.58. Even if that one sentence in our court of appeals brief could reasonably be construed as broader than others we have made—and it should not—this Court is not bound by a "concession" that was, by its terms, simply a legal opinion about the operation of the Federal Rules of Civil Procedure. See, *e.g.*, *Massachusetts* v. *United States*, 333 U.S. 611, 624 n.23 (1948) (stating that this Court is "not bound to accept" a "concession" about how to properly interpret a legal rule "as either sound or conclusive of the litigation. It is not, even in terms, a confession of error").[13]

c. Nor would judicial efficiency or the broader public interest be served by resolving this case based on a passing "concession" in lower-court briefing—especially when we made clear before this Court granted certiorari that we did not agree we made any such concession. See Resp. Supp. Cert. Br. 6 ("Because the point may prove critical were this Court to grant review, it is important to be clear about what we have and have not

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[13] Petitioners also assert that "[b]oth rulings below are . . . predicated on the assumption that Virginia's uranium ban is motivated by radiological safety concerns related to milling and tailings management." Pet. Br. 24. But "[i]t is well established that [a] respondent may defend the judgment of the Court of Appeals on any ground supported by the record," *Lewis* v. *Jeffers*, 497 U.S. 764, 786 n.3 (1990), and we made clear before this Court granted certiorari that we believed the court of appeals had overread the relevant "concession." See Resp. Supp. Cert. Br. 7 n.3.

'conceded.' ").[14] Even in this particular case, any such concession would—at most—help petitioners defeat a motion to dismiss for failure to state a claim on which relief can be granted. See JA 43 ("Assuming for purposes of the current motion. . . ."); JA 216 (expressly referencing "Rule 12(b)(6)"). Respondents thus would not be bound by any such "concession" in further proceedings, including for purposes of a motion for summary judgment or a trial on the merits.

The Federal Government suggests that "this Court need not address what evidence would be necessary or sufficient to prove" petitioners' allegations of impermissible motive on remand. U.S. Br. 27 n.7. Such assurances would provide little comfort to the lower courts charged with hearing cases in which such motive is alleged and squarely denied. Or the state officials who would be required to litigate under a completely undefined "motive" standard. Or, most especially, the state legislators who would (barring further doctrinal elaborations) be required to contemplate the prospect of depositions about why they voted how they did on both enacted and failed proposals. See Resp. Supp. Cert. Br. 7 (explaining that the Federal Government's assurances "attempt to skate over several difficult questions about how analysis of legislative purpose works in this context"). Nor are these challenges off in the distance: they would arise immediately on remand in this very case.

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[14] Were the Court to conclude that it did not grant review to determine the existence or scope of any "concession," it should dismiss the writ of certiorari as improvidently granted.

3. Petitioners and their amici contend that refusing to base preemption determinations "on the subjective intentions of the state legislature," *Shady Grove*, 559 U.S. at 404, "would provide an easy roadmap for evasion of Congress's judgments regarding the State's carefully defined and limited role in this sphere." U.S. Br. 27. For reasons we have already explained, the single clearest judgment Congress made in this area is to leave undisturbed the States' status as "the 'paramount proprietor[ ] over [their] mineral lands" until after those minerals have been removed from the ground. Pet. App. 66a (internal quotation marks and citation omitted). There is thus no need for the Court to say anything here about States' ability to regulate (directly or indirectly) either nuclear power plants, see Entergy Amicus Br. 5–14, or "the storage and transportation of spent nuclear fuel," U.S. Br. 27—areas that were (unlike uranium mining) previously subject to a federal monopoly and remain subjects of pervasive federal regulation.

What is more, this Court has already considered and rejected this precise argument in *Pacific Gas*. Although the Court described similar arguments of "petitioners and the United States" in that case as having "considerable force," the Court emphasized that "the legal reality remains that Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons." *Pacific Gas*, 461 U.S. at 223. "Given this statutory scheme," the Court concluded, "it is for Congress to rethink the division of regulatory authority in light

of its possible exercise by the States to undercut a federal objective." *Id.* Such an approach would be far more respectful of "the dignity that is consistent with [the States'] status as sovereign entities," *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002), than adopting a new and intrusive form of field preemption analysis based on concerns that "a State [may] misuse[]" the authority that both the Constitution and the Atomic Energy Act leave "in its hands." *Pacific Gas*, 461 U.S. at 216.

II. There is no basis for finding obstacle preemption

Petitioners' abbreviated conflict-preemption argument should be rejected for essentially the same reasons the Court rejected a similar argument in *Pacific Gas*. See 461 U.S. at 220–22.

A. "[C]onflict pre-emption exists where compliance with both state and federal laws is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, 135 S. Ct. at 1595 (internal quotation marks and citation omitted). There is no claim that the first strand of conflict preemption is present here. Badly as they may want to mine uranium in Virginia, petitioners do not contend federal law requires them to do so.

Nor is there any basis for finding obstacle preemption.[15] That form of preemption analysis requires

[15] Because this case does not warrant preemption under the Court's existing obstacle-preemption jurisprudence, there is no

"examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000). As we have already explained, Congress never sought to reduce or limit the States' inherent and preexisting power to regulate uranium mining within their borders. See *West Va. Univ. Hosps.*, 499 U.S. at 98 (emphasizing that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone"). To the contrary, the unmistakable trend since 1946 has been to increase the States' role in the development and regulation of nuclear energy. See *Pacific Gas*, 461 U.S. at 209 (stating that "the point of the 1959 Amendments was to heighten the States' role").[16]

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need to determine whether that doctrine should be reconsidered because it "leads to the illegitimate—and thus unconstitutional—invalidation of state laws." *Wyeth*, 555 U.S. at 604 (Thomas, J., concurring in the judgment). Were the Court to conclude otherwise, it should modify its existing doctrine as necessary to avoid preemption here. See *id.* at 587 (Thomas, J., concurring in the judgment) (expressing particular skepticism of arguments based on "interpretation[s] of broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law," all of which are involved here). And even were the Court to replace its current "physical impossibility" standard with a "direct conflict" standard, no such conflict exists because federal law does not give petitioners any sort of affirmative "right" to mine uranium. *Id.* at 589–94 (Thomas, J., concurring in the judgment).

[16] Congress also undertook a substantial revision of the Atomic Energy Act early this century without disturbing the uranium mining moratorium in Virginia or any other State. See Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 601–657, 119 Stat. 594, 779–814 (Aug. 8, 2005). This too undermines any contention

To be sure, "[t]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." *Pacific Gas*, 461 U.S. at 221. But Congress did not seek to develop nuclear power "at all costs," *id.* at 200, and the "comprehensive federal scheme" for nuclear power has never covered uranium mining. *Arizona* v. *United States*, 567 U.S. 387, 406 (2012) (quoting *Isla Petroleum*, 485 U.S. at 503) (internal quotation marks omitted).

For that reason, petitioners' attempt to analogize this case with *Arizona* v. *United States* falls flat. See Pet. Br. 56–57. There, Congress had struck a "careful balance" about precisely the same issue that state law was attempting to regulate: "unauthorized employment of aliens." *Arizona* v. *United States*, 567 U.S. at 406. Here, in contrast, the Atomic Energy Act has never regulated conventional uranium mining at all. And, contrary to petitioners' suggestions, see Pet. Br. 56, the proper inference is "that the historic police powers of the States were not to be superseded," *Wyeth*, 555 U.S. at 565, not that Congress silently intended to preempt *all* State authority in this area and thus leave uranium mining entirely unregulated by either the States or the Commission. As the court of appeals aptly stated, "[t]hat cannot be the law." Pet. App. 13a.

B. Petitioners' obstacle-preemption argument also violates the spirit, and perhaps the letter, of the anti-commandeering doctrine. It should be common

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that the "clear and manifest purpose of Congress" was to displace Virginia's exercise of its sovereign power. *Pacific Gas*, 461 U.S. at 206.

ground that Congress could not simply order States to create a regulatory apparatus to oversee uranium mining within their borders. See *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992).

Yet that is, in practice, exactly what accepting petitioners' obstacle-preemption argument would do here. As the Commission has repeatedly acknowledged, under existing law it does not—and cannot—regulate uranium mining. See page 9, *supra*. It is inconceivable that entities like petitioners would be entitled to engage in a form of mining that has never been permitted in Virginia entirely "free of government oversight." Pet. App. 13a. Cf. 33 U.S.C. § 1313 (establishing State water quality standards under the Clean Water Act, which would likely be impacted by stormwater runoff from a large mining operation); 33 U.S.C. § 1319 (Clean Water Act's enforcement provision). So the inevitable effect of a ruling for petitioners on an obstacle-preemption theory would be exactly the same as the obviously unconstitutional statute hypothesized above. This prospect too confirms the wisdom of respecting Congress's longstanding decision to forego federal regulation—and thus leave States' preexisting regulatory authority undisturbed—until "*after* [uranium's] removal from its place of deposit in nature." 42 U.S.C. § 2092 (emphasis added).

* * *

As always, Congress remains free to alter the balance between the States and the Federal Government when it comes to uranium mining. If Congress

concludes that States are hindering vital national interests or that existing mechanisms are insufficient to ensure an adequate national supply of uranium—a drumbeat by petitioners and their amici that goes conspicuously unendorsed by the Federal Government itself—Congress could change the law and provide for federal oversight over uranium mining on private property or limit the States' ability to regulate in this area. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268–69, 280–83, 305 (1981) (upholding the Surface Mining Act under the Commerce Clause and against other constitutional challenges). But, absent such action, the correct instruction to draw from the text, structure, and history of the Atomic Energy Act is that Congress did not intend to preempt state regulation of conventional uranium mining.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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