No. 16-1275

In the
Supreme Court of the United States

VIRGINIA URANIUM, INC., ET AL.,
Petitioners,

v.

JOHN WARREN, ET AL.,
Respondents.

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

BRIEF OF NATIONAL CONFERENCE OF STATE LEGISLATORS, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Lisa Soronen
STATE AND LOCAL LEGAL CENTER
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845

John J. Korzen
Counsel of Record
WAKE FOREST UNIVERSITY SCHOOL OF LAW APPELLATE ADVOCACY CLINIC
Post Office Box 7206
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

*Gibson*Moore Appellate Services, LLC
206 East Cary Street♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

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INTEREST OF AMICI CURIAE[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

SUMMARY OF THE ARGUMENT

Petitioners seek to compel a state to allow uranium minimum on nonfederal land based on

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[1] This brief was prepared by counsel for amici and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

federal preemption, even though the federal act in question is silent as to uranium mining on nonfederal land, mining is historically subject to state police power, and a statute in the state in question bans uranium mining. Such extraordinary relief would not be subject to a limiting principle. The Court should affirm the dismissal of such an unwonted claim.

Petitioners' implied preemption argument is also extraordinary, because it depends on divining the subjective intent of a state legislature rather than relying on the plain text of the state's legislation. Respondents persuasively contend that peering behind statutory text in search of some unexpressed actual motive is a fruitless endeavor.

For one thing, if legislative motive is a factual inquiry, then depositions and other discovery of sitting legislators might follow. Discovery of legislators and legislative staffers would be highly intrusive and also run afoul of the states' analogs to the federal Speech or Debate Clause, which are found in more than forty states. Determinations of the subjective intent behind legislation are also unreliable due to the mix of motives animating legislation and the passage of time.

Furthermore, states lack the resources to produce the types of legislative history available to courts construing federal statutes. The available legislative history documentation therefore varies greatly from state to state, making consistent preemption analysis based on legislative history impossible.

Finally, there is no workable rule for determining the subjective intent of state legislators. Allowing Petitioners' preemption claim to proceed would raise many unanswerable questions about when federal-

state conflicts can be resolved based on matters outside the statutory text.

ARGUMENT

Amici agree fully with the contentions in the Brief for Respondents. Amici write separately to oppose the extraordinary relief sought by Petitioners and to address further the problems inherent in determining a state legislature's subjective intent. *See* Resp. Br. at 38-43.

I. Petitioners seek extraordinary relief that is not subject to any limiting principle.

Petitioners seek extraordinary relief—a federal court injunction compelling a state sovereign, the Commonwealth of Virginia, to grant uranium mining permits on nonfederal land. They seek this relief even though the federal act in question never mentions uranium mining on nonfederal land, a Virginia statute does not permit uranium mining, and "the regulation of mining has long been recognized as a legitimate exercise of a state's police powers." *Simpson v. Commonwealth of Kentucky*, No. 88-5065 (L), 1989 WL 20625 (6th Cir. Feb. 28, 1989) (citing *Booth v. Indiana,* 237 U.S. 391, 396 (1915); *Wilmington Star Mining Co. v. Fulton,* 205 U.S. 60, 73 (1907) ("The use and enjoyment of mining property being subject to the reasonable exercise of the police power of the state. . . .")).

Amici fear the lack of any limiting principle on such relief. For example, imagine a three-step process, with the steps in chronological order dubbed A, B, and C. Might federal courts enjoin a state to require step A even though the state bans step A, step A has historically been subject to the state's police

power, and the federal act in question only regulates steps B and C? That is the relief Petitioners seek here.

Or imagine a federal Paper Production Act, the purpose of which includes encouraging the production of paper, overseen by a Federal Paper Agency (FPA). The Act is silent as to the clear cutting of trees on nonfederal land while allowing the clear cutting of trees on federal land. The Act and the FPA regulate safe practices only for the milling of trees into paper and the safe handling of pulp waste. A state does not allow clear cutting of trees. After the price of paper goes up, landowners seek an injunction requiring the state to allow them to clear cut trees on nonfederal land. Can a federal court so enjoin the state?

The dissent below would seemingly say "Yes, bring on the chainsaws." *See* Pet. 47a-48a (stating that the Act's purpose is to unleash "the power of the private sector" to develop nuclear energy). Amici contend that "No," federal silence as to step A while regulating only steps B and C does not preempt a state's ability to regulate step A, particularly where regulating step A has historically been a legitimate exercise of state police power. To force states to allow some preliminary step, in a process for which Congress has regulated only later steps, is wrong because "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

Again, how the rule sought by Petitioners might be limited is unclear. What if a federal act regulates only step C and neither step A nor step B, which have both historically been subject to state police power?

Might a federal court enjoin a state that prohibits steps A and B so as to require the state to permit both of them? Truly Petitioners' claim would lead to such slippery slopes. A ruling for Petitioners would inject mischief and uncertainty into preemption analysis. Amici ask the Court for this reason to affirm the lower court.

II. Preemption analysis should not turn on the subjective intentions of state legislators.

Petitioners also make an extraordinary implied preemption argument. They would require courts to look past the plain language of decades-old state statutes and attempt to divine a single "true purpose" of state legislators at the time of enactment. They argue that Virginia's ban on uranium mining should be preempted because Virginia *intended also* to ban uranium millings and tailings storage. But the Virginia legislature did not actually ban uranium milling or tailings storage; it only banned mining. Who knows what the Virginia legislature intended in the early 1980s when it passed the ban? It should not even matter when the federal statute only addresses uranium milling or tailings storage.

Preemption should not be based on an exploration for the subjective intent of state legislators, for numerous reasons, including that: (1) discovery of state legislators' subjective intentions would be intrusive and inconclusive; (2) the availability of state legislative history varies widely from state to state; and (3) there is no workable rule for determining the subjective intent of state legislators.

1. If determining the purpose of a challenged state law involves an issue of historical fact, as Petitioners and the Federal Government assume, *see*

Resp. Br. at 34, then plaintiffs may seek to discover the purposes of state legislators in enacting legislation, including by depositions, interrogatories, and more. Such discovery would be improper, however, because it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). The Speech or Debate Clause of the United States Constitution explicitly protects Senators and Representatives from legal inquiries based on their speech during sessions of their respective houses. U.S. Const. art. I, § 6, cl. 1 ("for any speech or debate in either House, they shall not be questioned in any other place").

The Constitution included the Speech or Debate Clause because "[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one." *Tenney*, 341 U.S. at 373 (quoting II Works of Jams Wilson 38 (Andrews ed. 1896)). The clause means that "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney*, 341 U.S. at 377.

The Constitution of Virginia contains a similar provision that grants immunity to legislators "for any speech or debate in either house." Va. Const. art. IV, § 9. The clause also exempts members of the Virginia General Assembly from being subject to civil process during sessions. *Id.* The Eastern District of Virginia has held that the Virginia Speech or Debate Clause and the United States Constitution's Speech or

Debate Clause prohibit a plaintiff from subpoenaing and deposing a Virginia state legislator to inquire into his legislative activity or his motives for the activity. *Greenburg v. Collier*, 482 F. Supp. 200, 204 (E.D. Va. 1979).

Forty-three other state constitutions contain a section similar to the Speech or Debate Clause. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 224 (2003). This protection is critical because "society's increasing propensity to litigate and contemporary distrust of government almost guarantee that disaffected individuals—and even some political opportunists—will seek creative ways to gain relief through, extract information from, or merely harass or burden, elected state representatives." *Id.* at 226-27. Thus, discovery of state legislators' subjective intent might not even be allowed.

Discovery of state legislators' subjective intent, if even allowed, would put a burden on legislative resources, including the time of legislators and their staffers. And to what end would such fact discovery lead? Legislators should not be expected to recollect their intentions years after the fact. According to the "forgetting curve," people are typically unable to retrieve roughly 50% of information one hour after receiving it. Joyce W. Lacy & Craig E. L. Stark, *The Neuroscience of Memory: Implications for the Courtroom*, Nat'l Inst. Health, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4183265/pdf/nihms-624859.pdf (last visited Aug. 28, 2018). Memory is especially malleable, and legislators' might understandably recall motivations that did not exist at the time or forget ones that did. *See id.*

Eyewitness testimony is considered most reliable when recorded immediately after an event, certainly not thirty-five years later. *Id.*

2. Moreover, states do not have the resources of the Federal Government and its ability to create extensive legislative history. The resources for creating and the availability of different types of legislative history varies significantly from state to state. *See* Bart M. Davis, Kate Kelly, & Kristin Ford, *Use of Legislative History: Willow Witching for Legislative Intent*, 43 Idaho L. Rev. 585, 586 (2007). Searching for legislative intent can be a "perilous quest" due to "the nature of the legislative process and the unreliability of the records as consensus documents." *Id.* at 600. For the intent of Congress, courts at least have the reliable recordation of Congressional debates on the floor and in committees. Richard A. Danner, *Justice Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 Duke J. Comp. & Int'l L. 151, 165-70 (2003). At the state level, however, there is no guarantee of finding legislative history as extensive as the Congressional records.

Some states are able to create significantly more or less legislative history than others. Rhode Island, for example, has no floor or committee debate records available. *Id.* The only legislative history in Missouri is official copies of bills, without support documentation of legislative comments or debate. Missouri Legislative History: Legislative History, U. Mo. Sch. L., http://libraryguides.missouri.edu/c.php?g=28632&p=175352 (last visited Aug. 27, 2018). Idaho does not make drafting records of bills available to the public and does not record legislative floor debate. Davis, supra, at 586. It does make

available committee minutes and attachments and some statements of legislative intent from state House and Senate Reports. *Id.* Colorado researchers can find procedural history, audio records of legislative hearings and floor debates, summaries of committee meetings, and different versions of the bill. Peggy Lewis & Matt Dawkins, *Researching Legislative History*, 44 Colo. L. 33 (2015). North Carolina provides the chronological bill history, committee minutes, and possibly floor debate audio records for some laws. North Carolina General Assembly Legislative Library, *North Carolina Legislative History Step by Step*.

On the other hand, Texas provides audio and video of legislative floor debates, bill files with committee reports and analyses, house and senate journals, statements of legislative intent, committee meeting minutes, and session summaries. Davis, *supra*, at 586; Legislative Reference Library of Texas: Typical Materials, https://lrl.texas.gov/legis/legintent/typicalMaterials.cfm#minutes (last visited Aug. 27, 2018).

Virginia has little legislative history. Virginia does not officially record legislative intent through any means. Legislative Reference Center: Legislative History, Va. Division Legis. Servs., http://dls.virginia.gov/lrc/leghist.htm (last visited Aug. 27, 2018). The only tools to search for legislative intent are drafts of bills, fiscal impact statements, and video archives of floor sessions. *Id.* Transcripts are not provided for the videos. *Id.*

The varying availability of legislative history materials at the state level confirms this Court's statement that "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,'" *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010) (quoting *Sibbach v. Wilson & Co.,* 312 U.S. 1, 14 (1941)). The same law might survive preemption in one state and be preempted in another simply due to the differences in available legislative history materials. *Id.* Because laws are often passed for multiple purposes, determining the different purposes "may be impossible to discern." *Id.* Federal judges asked to preempt state law "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 (citing R. Mersky & D. Dunn, *Fundamentals of Legal Research* 233 (8th ed. 2002); Torres & Windsor, *State Legislative Histories: A Select, Annotated Bibliography*, 85 L. Lib. J. 545, 547 (1993)). This Court has rejected the approach required by Petitioners' preemption theory before and should do so again here.

3. Finally, without a workable rule for determining the subjective intent of state legislators, Petitioners' claim should not go forward. *See Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (declining to permit punitive damages for injuries to nonparty victims because it "would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur?"); *United States v. Ursery*, 518 U.S. 267, 284 n.2 (1997) (rejecting proposed rule as "unworkable"); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 893 (2009) (Roberts,

C.J., dissenting).(a standard is problematic when it "fails to provide clear, workable guidance for future cases"). Any test for seeking the subjective intent of a state legislature would raise more questions than it could possibly answer. *See Caperton*, 556 U.S. at 893-98 (Roberts, C.J., dissenting) (listing forty questions created by the majority's test for judicial recusal).

There is no workable rule for determining the subjective intent of state legislators. How exactly could a federal court determine the subjective intent of a state legislature that passed a statute? Would the statements of a majority of then-serving legislators as to their intent be sufficient? How about language regarding legislative intent in a unanimous committee report? But what if that language was left out of the final legislation or modified? What about the statement of a bill's sponsor? What about legislators' statements made during consideration of a prior version of a statute? And how to determine the subjective intent of a legislature in a state without resources to produce much in the way of legislative history? In short, there is no workable rule for the divining of subjective legislative intent.

This lack of a workable standard suggests a possible reason why Petitioners argue so repeatedly that Virginia has "conceded" that the 1983 Virginia law in question has a purpose bringing it within the preempted field.

In conclusion, whether state legislation may be preempted should be assessed based on the plain language that the state legislature carefully arrived at. Legislative history is "often murky, ambiguous, and contradictory," and it can be cherry-picked to support a desired outcome. *Exxon Mobil Corp. v.*

Allapattah Servs., 545 U.S. 546, 568 (2005). Courts should not disregard the plain language of a state statute based on speculation of legislative intent not contained in the text. *Lexington Ins. Co. v. Precision Drilling Co.*, 830 F.3d 1219, 1221 (10th Cir. 2016) (opinion of then-Judge Gorsuch). In *Lexington*, the Tenth Circuit reasoned that "the task of trying to discern the textually unexpressed intentions of (or really attribute such intentions to) a legislative body composed of scores or often hundreds of individuals is a notoriously doubtful business." *Id.* Petitioners' preemption case depends on that "notoriously doubtful business" and invites unwarranted second-guessing of the enactments of separate sovereigns. Amici urge this Court to affirm the dismissal of Petitioners' complaint.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

LISA SORONEN
STATE AND LOCAL
LEGAL CENTER
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845

JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY
CLINIC
Post Office Box 7206
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

SEPTEMBER 2018 *Counsel for Amici Curiae*