No. 16-1275

In the

Supreme Court of the United States

VIRGINIA URANIUM, INC., et al.,

Petitioners,

v.

JOHN WARREN, et al.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. The Chamber has participated as *amicus curiae* in nearly every significant federal preemption case decided by this Court over the past decade. *See, e.g.*, *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017); *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190 (2017); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016); *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016); *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011); *Wyeth v. Levine*, 555

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

U.S. 555 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

The Chamber and its members have a strong interest in this case, as the decision below poses a threat both to the Nation's nuclear energy industry and to preemption doctrine as a whole.

SUMMARY OF ARGUMENT

The Atomic Energy Act assigns the federal government "broad regulatory authority over the development of nuclear energy." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525-26 (1978). Indeed, this Court concluded more than 30 years ago that the federal government has "occupied the entire field of nuclear safety concerns," and that the Atomic Energy Act accordingly preempts any state law "grounded in safety concerns" arising from the production of nuclear energy. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n* ("*PG&E*"), 461 U.S. 190, 212-13 (1983). In the decades since, the Court has reaffirmed that conclusion, reiterating that state laws "motivated by safety concerns" stemming from nuclear-related activities fall squarely within the field reserved to the federal government. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984).

Congress' decision to reserve the safety-related regulation of nuclear power development to the federal government makes eminent sense, as that is a field that the federal government is uniquely well suited to regulate. Because nuclear technology began as an exclusively federal enterprise, the states do not have any traditional experience, let alone expertise,

with determining how to manage the safety risks that the development of nuclear energy may pose. Moreover, in large part because this is an area with which they may be unfamiliar, states have an unfortunate tendency to succumb to local "not in my backyard" complaints about the perceived (unfounded as they may be) safety risks of in-state nuclear power development. Such local impediments to the development of nuclear power pose a risk not just to the Nation's energy grid and the economy it supports, but to the national security and defense interests that domestic development of nuclear power advances. In short, the development of nuclear energy is a matter of both abiding federal expertise and abiding federal interest.

The decision below poses a grave threat to the safety-regulation role that Congress has reserved to the federal government. This Court has held time and again that the preemption inquiry in this context turns not just on *what* a state seeks to regulate, but *why*. That should have made this an easy case, as Virginia has banned mining of the Nation's single largest uranium deposit not for economic or other non-preempted reasons, but simply because Virginia determined that uranium production is not safe enough. Indeed, at least at this motion-to-dismiss stage, the state does not dispute that it banned uranium *mining* at the Coles Hill deposit as a prophylactic safety measure to prevent radiation exposure allegedly associated with uranium *milling and tailings management*—activities that everyone agrees may be regulated only by the federal government. But that is not a judgment for Virginia to make, as any state law "grounded in [radiological]

safety concerns falls squarely within the prohibited field" occupied by the federal government. *PG&E*, 461 U.S. at 213.

In concluding otherwise, the Fourth Circuit not only ran afoul of the Atomic Energy Act and this Court's decisions interpreting it, but created a roadmap for evading the preemptive force of federal law. According to the Fourth Circuit, even assuming Virginia's mining ban rests on precisely the kind of safety judgment forbidden to the states, it is not preempted because the ban does not say *on its face* that the state has prohibited uranium *mining* to prevent purportedly unsafe *milling and tailings management* from occurring at Coles Hill. In other words, according to the Fourth Circuit, a state may escape the preemptive force of federal law through the simple expedient of declining to make explicit in its laws its preempted motivations. The decision below thus creates a loophole not just in the Atomic Energy Act, but in all manner of federal statutes and regulations, as it effectively invites states to use labels and form to try to circumvent federal law.

That result cannot be reconciled with the long line of decisions from this Court reiterating that the "Supremacy Clause cannot be evaded by formalism." *Haywood v. Drown*, 556 U.S. 729, 742 (2009). Simply put, when a state admittedly regulates for the specific purpose of countermanding federal judgments in an exclusive federal field, its actions are preempted no matter what label or form it may use. By concluding otherwise, the decision below threatens to disrupt not just the Atomic Energy Act and the critical industry of

nuclear power generation, but preemption doctrine as a whole.

ARGUMENT

I. Congress Has Made The Eminently Sensible Judgment That The Federal Government Is Best Positioned To Regulate The Complex Field Of Nuclear Safety Concerns.

Nuclear energy is unusual among energy sources in that it began as an exclusively federal enterprise. At the dawn of the atomic age 75 years ago, the federal government maintained a "federal monopoly" on "the use, control, and ownership of all nuclear technology." *English*, 496 U.S. at 80. When Congress passed the Atomic Energy Act in 1954, it "relaxed" that federal monopoly, "determin[ing] 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 under a program of federal regulation and licensing." *PG&E*, 461 U.S. at 194, 207. And with that relaxation came the introduction of a regulatory role for the states in "determining questions of need, reliability, cost and other related state concerns." *Id.* at 205. But while Congress left states free to "exercise their traditional authority" in these areas, *id.* at 212, Congress jealously guarded for the federal government "extensive control over the manner in which th[e] development [of nuclear energy] occur[s]," *Silkwood*, 464 U.S. at 249. In doing so, Congress reserved to the federal government exclusive authority to "regulate [nuclear] activities for purposes" of "protection against radiation hazards." 42 U.S.C. §2021(k).

That division of authority makes eminent sense. "Congress' decision to prohibit the states from regulating the safety aspects of nuclear development was premised on its belief that the [federal government] was more qualified to determine what type of safety standards should be enacted in this complex area." *Silkwood*, 464 U.S. at 250. And understandably so, as the federal government's historical monopoly over nuclear technology left states without the experience or expertise to regulate the process of developing nuclear power. To be sure, states may be better positioned to make non-safety-related judgments about which mix of power, and in what locations, best serves local economic and other interests. But states simply did not have—and in most instances still do not have—the extensive experience the federal government has acquired in "determin[ing] what type of safety standards" are most appropriate "in this complex area." *Id.*

That federal expertise, moreover, has only grown over time. The Nuclear Regulatory Commission ("NRC") has been acclaimed for its "high technical competence," which "cover[s] a wide range of technical areas." Int'l Atomic Energy Agency, *US Nuclear Regulatory Commission,* https://bit.ly/2u0ofDq (last visited July 24, 2018); *see also* U.S. Nuclear Regulatory Commission, *Backgrounder on National Security,* https://bit.ly/2mG6Lde (last visited July 24, 2018) ("NRC-regulated nuclear facilities are considered among the most secure of the nation's critical infrastructure."). And the federal government has developed considerable experience with nuclear technology through the military—experience that states simply are not in a position to develop. It is thus

little surprise that Congress reserved to the federal government "the entire field of nuclear safety concerns," *PG&E*, 461 U.S. at 212-13; this is an area that the federal government is simply better suited to regulate.

Of course, nuclear power is also an area in which the federal government has a uniquely strong interest, as nuclear energy is indispensable to our national security. That much is clear from the text of the Atomic Energy Act itself, which repeatedly emphasizes that one of its core purposes is to promote "the common defense and security." 42 U.S.C. §2013(c)-(e). In the decades since Congress passed the Atomic Energy Act, the importance of nuclear power to national security and defense has only grown. *See, e.g.*, Energy Futures Initiative, Inc., *The U.S. Nuclear Energy Enterprise: A Key National Security Enabler* 15 (Aug. 2017), https://bit.ly/2LoCEEP ("A vibrant domestic nuclear energy industry, including a healthy supply chain …, is essential for the achievement of U.S. national security objectives."). To take just two examples, "[u]ranium is the predominant source of fuel for … fissile material for nuclear warheads," Pet.App.4a, and "the U.S. Navy's nuclear-powered submarines and aircraft carriers are fueled with [highly enriched uranium] and rely upon its availability," Pet.App.348a.

Nuclear energy is also critical to the national economy. Reactors fueled by uranium are responsible for fully 20% of the electricity produced in this country, Pet.App.202a, and nuclear energy offers many benefits that confirm its value to a diversified energy economy. For example, nuclear power

"accounts for nearly two-thirds of the country's emissions-free power generation," and nuclear reactors "operate at about a 90% capacity factor, higher than any other fuel type." *Expand Nuclear Energy Use and Commit to a Nuclear Waste Solution*, U.S. Chamber of Commerce Inst. for 21st Century Energy, http://bit.ly/1nyGP0I (last visited July 24, 2018). In no small part because of these benefits, the United States "has the greatest number of nuclear reactors in the world at present, and therefore the greatest demand for nuclear fuel." CA4 JA236.[2] Any disruption in the production of nuclear power thus poses a grave threat not just to individual states, but to the national economy.

Finally, this is also an area particularly well suited to federal regulation because states have an unfortunate tendency to yield to often very vocal "not in my backyard" constituencies when it comes to the development of nuclear energy within their borders. This is a case in point. Coles Hill is the single "largest natural deposit of uranium in the United States and one of the largest in the world," with an estimated 119 million pounds of uranium ore. Pet.App.201a. It is thus no exaggeration to say that whether the deposit may be mined will have a massive impact on the entirety of the Nation's nuclear power industry. And the impact is even more profound for Virginia and its residents, as estimates suggest that mining the Coles Hill deposit could "generate $4.8 billion of net revenue for Virginia businesses." Pet.App.202a. Yet the state is still unwilling to allow Coles Hill to be mined, out of

[2] Citations to "CA4 JA" refer to the Joint Appendix filed in the Fourth Circuit.

professed concerns that the development of uranium can *never* be made safe enough for Virginians. That extraordinary hostility to the prospect of local nuclear energy development is powerful evidence of the wisdom of Congress' decision to give the federal government the power to "determine what type of safety standards should be enacted in this complex area." *Silkwood*, 464 U.S. at 250.

In short, the development of nuclear energy is a matter of both abiding federal expertise and abiding federal interest. It is thus imperative that courts guard just as jealously as Congress has the federal government's exclusive authority over "the entire field of nuclear safety concerns." *PG&E*, 461 U.S. at 212-13.

II. The Decision Below Is Impossible To Reconcile With This Court's Atomic Energy Act Cases.

The decision below poses a grave threat to the federal government's authority to regulate the development of nuclear power, as it guts the Atomic Energy Act of a core element of its preemptive force. The Atomic Energy Act is unusual in that "the pre-empted field" under the Act is defined, "in part, by … the *motivation* behind the state law"—specifically, whether it is animated by concerns about radiological safety. *English*, 496 U.S. at 84 (emphasis added). That is clear on the face of the statute. Not only does the Act give the federal government the power to regulate nuclear power plants and the antecedent activities of uranium "milling" (*i.e.*, the extraction of uranium from ore) and "tailings management" (*i.e.*, the handling of radioactive waste

products generated by uranium milling). *See, e.g.*, 42 U.S.C. §§2111(a), 2014(e)(2), 2133; 10 C.F.R. pt. 40, app. A. The Act also expressly provides that states retain the power to regulate nuclear energy-related activities only "for purposes *other than protection against radiation hazards*." 42 U.S.C. §2021(k) (emphasis added). It is thus not only appropriate, but essential, for courts to identify the *purpose* of state regulation in this area, as that is the only way to determine if it is preempted.

This Court's decision in *PG&E* is illustrative. There was no dispute in that case about *what* the state was trying to regulate: It wanted to impose a moratorium on nuclear power plants. But to answer the question of whether that moratorium was preempted, this Court had to determine *why* the state imposed it, and "whether there [wa]s a non-safety rationale." *PG&E*, 461 U.S. at 213. If there was not, then the moratorium could not stand, as any state regulation "grounded in [radiological] safety concerns falls squarely within the prohibited field" occupied exclusively by the federal government. *Id.*; *accord* Brief for the United States as *Amicus Curiae* 13 ("a State's moratorium on uranium mining is preempted if that moratorium is grounded in safety concerns about the operation of NRC-licensed milling and tailings-management facilities"). Simply put, "a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment" of Congress. *PG&E*, 461 U.S. at 213.

That should have made this an easy case. Virginia does not contest (and cannot contest, at this

motion to dismiss stage) petitioners' allegations that the state "legislature banned uranium mining only as a means to prevent milling and tailings management from occurring in Virginia," out of professed concerns about the safety of those federally regulated activities. Pet.App.26a-27a. Virginia's ban thus "conflict[s] directly with the countervailing judgment" of Congress and the NRC that existing federal regulation suffices to address safety concerns about milling and tailings management. *PG&E*, 461 U.S. at 213. Yet the Fourth Circuit concluded that petitioners' preemption claim failed *as a matter of law*, "declin[ing] the invitation" to "look past the statute's plain meaning to decipher whether the legislature was motivated to pass the ban by" concerns about the safety of milling and tailings management. Pet.App.14a.

That reasoning is impossible to reconcile with this Court's decisions in *PG&E* and *English*. As those cases confirm, petitioners' request that the courts determine the purpose behind Virginia's ban is no mere "invitation." It is the inexorable command of the Atomic Energy Act and this Court's precedents interpreting it. *See, e.g.*, *PG&E*, 461 U.S. at 213; *English*, 496 U.S. at 84. Lower courts may no more "decline" the "invitation" to make that determination than they may "decline" the "invitation" to apply the Supremacy Clause. By refusing to answer the very question that this Court has deemed central to determining whether state regulation in this area is preempted, the decision below deprives the Atomic Energy Act of its core preemptive force.

III. The Decision Below Provides A Roadmap For State And Local Governments To Evade The Preemptive Force Of Federal Law.

The Fourth Circuit's decision not only guts the Atomic Energy Act of much of its preemptive force, but also provides a roadmap to states seeking to evade the preemptive force of all manner of federal statutes. As this Court has admonished time and again, it is the substance of a state law, not its form, that controls the preemption inquiry. *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004); *Howlett v. Rose*, 496 U.S. 356, 382-83 (1990); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). States thus cannot evade the Supremacy Clause through the simple expedient of labeling their laws something other than what they are. To be sure, in many preemption cases, the substantive inquiry turns on the *effect* of a state law, not its purpose. But when Congress chooses, as it did in the Atomic Energy Act, to define "the pre-empted field, in part, by … the motivation behind the state law," *English*, 496 U.S. at 84, then courts must look beyond labels and form to determine the purpose behind the challenged law. Otherwise, states could avoid preemption merely by declining to make their true motivations explicit—as Virginia has now succeeded in doing here.

Indeed, even accepting the Fourth Circuit's mistaken conclusion that it matters only *what* Virginia sought to regulate, not *why*, the decision below still cannot be reconciled with the principle that preemption turns on substance, not form. Here, the state does not dispute that the "legislature banned uranium mining *only as a means to prevent milling*

and tailings management from occurring in Virginia," Pet.App.26a-27a (emphasis added)—two activities that no one disputes may be regulated only by the federal government, *see* Pet.App.12a-13a. In other words, the state does not dispute that it sought to ban mining only as a means to regulate (or, more aptly, prohibit) the very activities that everyone agrees it may not regulate. Yet the Fourth Circuit nonetheless concluded that the state's ban was not preempted, simply because the "the plain language of the … ban *does not mention* uranium milling or tailings storage." Pet.App.14a (emphasis added). Thus, under the Fourth Circuit's view, a state is free to countermand federal regulation to its heart's content, so long as it is smart enough not to "mention" preempted fields on the face of its law.

That reasoning finds no support in any of this Court's preemption jurisprudence. Take this Court's cases involving the Federal Arbitration Act ("FAA"). Just this past Term, this Court reiterated that states may not "target arbitration *either by name or by more subtle methods*, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (emphasis added). Just as the FAA "preempts any state rule discriminating *on its face* against arbitration," so, too, the FAA "displaces any rule that *covertly* accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (emphasis added). Thus, if a state adopts a "rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that

disallow an ultimate disposition by a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)," the rule is preempted all the same, regardless of whether it happens to "mention" arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011).

This Court's cases interpreting the Natural Gas Act ("NGA")—an area of law implicating similar interests as this case—reflect the same principle. Under the NGA, the regulation of wholesale natural-gas prices lies with the federal government, while the regulation of retail natural-gas prices remains with the states. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594 (2015). But that does not mean that the analysis begins and ends with determining *what* a state seeks to regulate. While state laws that "direct[ly] regulat[e] the prices of [interstate] wholesales of natural gas" are preempted, the same is true of "state regulations which would indirectly achieve the same result," "whether or not framed to achieve ends … ordinarily within the ambit of state power." *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 90-91 (1963); *see also, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988) ("the things Act 144 regulation is *directed at*, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority" (emphasis added)).

This Court's decision in *National Meat Association v. Harris*, 565 U.S. 452 (2012), is also illustrative. There, the Court addressed whether the Federal Meat Inspection Act ("FMIA")—which preempts state statutes addressing the front-end

processes of inspecting, handling, and slaughtering livestock—preempted a state statute that prohibited slaughterhouses, at the back-end, from *selling* meat that satisfied all federal requirements. *Id.* at 455, 463-64. Although "the FMIA's preemption clause does not usually foreclose 'state regulation of the commercial sales activities of slaughterhouses,'" *id.* at 463, the Court nonetheless held the state law preempted, for any other conclusion would allow "any State [to] impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* at 463-64. That, the Court explained, "would make a mockery of the FMIA's preemption provision." *Id.* at 464.

The same logic carried the day in *Engine Manufacturers Association v. South Coast Air Quality Management District,* 541 U.S. 246 (2004). There, the Court considered whether the Clean Air Act, which prohibits states from adopting or enforcing "standard[s] relating to the control of emissions," preempted local regulations requiring fleet operators to buy only those vehicles satisfying state pollution standards that far exceeded federal requirements. *Id.* at 249, 251. Addressing the argument that the rules escaped preemption because they targeted the *purchase* of vehicles, and did not directly regulate the *manufacturing* process, the Court concluded that such a distinction "would make no sense" "for pre-emption purposes." *Id.* at 255. As the Court explained, "[t]he manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them." *Id.*

Haywood v. Drown likewise "confirms that the Supremacy Clause cannot be evaded by formalism." 556 U.S. at 742. There, the Court considered whether a state—"[m]otivated by the belief that damages suits filed by prisoners against state correction officers were by and large frivolous and vexatious"—could shield those officers from lawsuits under §1983 by stripping state courts of jurisdiction to hear them. 556 U.S. at 731, 733. Although the Court acknowledged that, as a formal matter, a state has inherent "authority to organize its courts," the Court concluded that "a State's invocation of 'jurisdiction'" could not be a "trump that ends the Supremacy Clause inquiry." *Id.* at 740-41. As the Court explained, Congress made a judgment through §1983 that "*all* persons who violate federal rights while acting under color of state law shall be held liable for damages," *id.* at 737, and a state cannot countermand that judgment through "an immunity statute cloaked in jurisdictional garb," *id.* at 742.

Of course, these are but a handful of the cases in which this Court has made clear that states cannot evade the preemptive force of federal law through the simple expedient of including or omitting magic words in their legislation. Yet that is precisely the result that the Fourth Circuit's decision below countenances. So long as a state "does not mention" on the face of its law its intent to target an area reserved by Congress to the federal government, the preemption inquiry is at an end. Indeed, the Fourth Circuit allowed Virginia's ban to escape preemption even though the state *admits* (at least at this stage) that the ban rests on a judgment that milling and tailings management pose too great of radiological safety concerns—a

judgment that "conflict[s] directly with the countervailing judgment" of Congress and the NRC. *PG&E*, 461 U.S. at 213.

This Court should therefore reverse the decision below, restore the full preemptive force of the Atomic Energy Act, and reaffirm that "[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of [one] word" instead of another. *Howlett*, 496 U.S. at 382-83. Any other disposition not only will provide a roadmap for states to impede Congress' efforts to encourage domestic uranium mining, but will embolden them to employ the same clever labeling and workarounds in all manner of other federally regulated areas. Neither outcome has anything to recommend it.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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