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 OF INDIANA, WASHINGTON, HAWAII, MARYLAND, MASSACHUSETTS, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Atomic Energy Act preempts Virginia's moratorium on conventional uranium mining, an activity all parties agree the Act gives the federal government no authority to regulate.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Washington, Hawaii, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Rhode Island, and Texas respectfully submit this brief as *amici curiae* in support of the respondent.

Relying on the savings clause of the Atomic Energy Act (AEA), 42 U.S.C. § 2021(k), petitioners ask the Court to establish a rule requiring courts to investigate the purpose of *any* state law that regulates *any* activity *even in the absence* of a "clear and manifest" congressional intent to preempt state regulation of that activity. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Such a rule would transform the AEA's savings clause, which plainly was designed as a mechanism to *expand* States' regulatory authority, into one that greatly *diminishes* it. *See* Pet. Br. 26.

Petitioners' theory not only ignores the text of the AEA, but also contradicts this and lower courts' decisions interpreting the statute, which hold that preemption turns on "whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' " *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212–13 (1983) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

In opposing petitioners' interpretive alchemy, the *amici* States have multiple interests at stake: (1) confining the scope of federal preemption to that intended by Congress; (2) safeguarding myriad state regulations—such as those related to hazardous waste—that could be jeopardized by petitioners' interpretation; and (3) limiting intrusive inquiries into lawmakers' subjective motivations.

SUMMARY OF THE ARGUMENT

I. Petitioners argue that the AEA preempts *any* state law that regulates for the purpose of protecting "against radiation hazards," regardless whether those laws regulate an activity over which the federal government has jurisdiction. Pet. Br. 31 (quoting 42 U.S.C. § 2021(k)). This theory is completely unsupported by the AEA's text. The AEA clearly provides that a party seeking preemption of a state law must first show that the law regulates an activity also regulated by the federal government. Only *then* does subsection 2021(k) come into play: 2021(k), the sole AEA provision referring to the "purposes" of state laws, will save such a state law if the law has a purpose "other than protection against radiation hazards." 42 U.S.C. § 2021(k).

II. The Court's precedents interpreting the AEA affirm the statute's plain meaning: The threshold requirement for preemption demands that the challenged state law regulate some activity also regulated by the federal government.

III. By dispensing with the threshold preemption requirement, petitioners' theory threatens numerous crucial state regulations, including regulations of hazardous waste.

IV. If the Court were to adopt petitioners' theory, *every* state law—no matter its age or subject matter—would be subjected to an intrusive inquiry into the motivations of its enactors. The Court should not impose such a burden on states in the absence of a clear statutory command. And whenever Congress requires such inquiries into legislative purpose, the Court should ensure that the judiciary treats them as questions of law, not questions of fact.

ARGUMENT

I. Petitioners' Theory Is Contradicted by the Text of the AEA

The Court's preemption doctrine is grounded in the Supremacy Clause, and "two cornerstones" gird its application. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); U.S. Const. art. VI, cl. 2. "First, 'the purpose of Congress is the ultimate touchstone in every preemption case.' " *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Second, courts must "'start 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*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485).

"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), and congressional intent to preempt is therefore discerned from "the text and structure of the statute at issue," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (*citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)). Thus, to "wander far from the statutory text [is] inconsistent with the Constitution." *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring in the judgment).

The AEA gives the federal government extensive authority to regulate activities related to nuclear energy, and state laws that purport to regulate these activities are generally preempted. But 2021(k)—which even the United States concedes is "framed as a 'savings clause,' " U.S. Cert. Br. 17–18—*saves* state laws that regulate an activity also regulated by the federal government so long as they have a non-radiation-hazard purpose.

Here, petitioners urge the Court to turn 2021(k) on its head: They would have the Court interpret the AEA to preempt *all* state laws enacted with the purpose of addressing concerns with "radiation hazards," *regardless of whether the activity the state seeks to regulate is also regulated by the federal government*. Pet. Br. 26. Such a test does not comport with the AEA's text.

A. No provision of the AEA authorizes petitioners' sweeping theory of preemption

Petitioners claim that the AEA preempts *all* state laws enacted with the purpose of addressing concerns with "radiation hazards" and maintain that states "may regulate *only* 'for *purposes* other than protection against radiation hazards.'" Pet. Br. 26 (quoting 42 U.S.C. § 2021(k)) (emphasis added). The United States would add a minor qualifier, that the AEA preempts a state law if its purpose is to address "radiation hazards *stemming from activities licensed under the statute*," U.S. Br. 12 (emphasis added). The United States' approach is utterly impracticable: It asks courts to determine not only whether a lawmaker was worried about hypothetical nuclear hazards, but also *which activities* generate those hypothetical nuclear hazards. More important, both theories are contradicted by the AEA's text.

Subsection 2021(k) is the only provision in the AEA that refers to the "purposes" of state law. Petitioners and the United States can either attempt to transform 2021(k) into an affirmative preemption clause or look for preemption elsewhere in the AEA. Both routes lead to absurdity.

1. Begin with the plain meaning of 2021(k). The provision reads in full: "*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) (emphasis added). It plainly limits how courts "construe[]" the other provisions of "this section": A state may regulate *notwithstanding* those other provisions so long as its reason for doing so is not "protection against radiation hazards." Thus, 2021(k)'s inquiry into the "purposes" of a state law applies only *after* the party challenging the state law makes the threshold showing that the state law regulates an activity the federal government regulates under the AEA.

Petitioners' arguments from canons of statutory interpretation do not undermine the straightforward meaning of the statutory text. Pet. Br. 33–34. Both the *expressio unius* and superfluity arguments are answered by other provisions of the AEA that could preempt some—but not all—state laws.

The *expressio unius* canon implies that *some* state regulations are permissible "only for purposes other than protection against radiation hazards." Pet. Br. 33 (internal citation and quotation marks omitted; emphasis removed). But the universe of state regulations to which this test applies includes only those regulations that otherwise fall within the scope of some *other* AEA provision. *See Pacific Gas*, 461 U.S. 190, 212–13 (internal quotation marks omitted) ("the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government.").

Consider, for example, the AEA's general prohibition against transferring or receiving "source material [e.g., uranium ore, 42 U.S.C. § 2014(z)] after removal from its place of deposit in nature." 42 U.S.C. § 2092. Under section 2092, no one may transfer or receive uranium ore without a license from the Nuclear Regulatory Commission. *Id.* The federal government thus regulates this activity. Yet states may, under 2021(k), regulate transfer of uranium ore in a way that does not conflict with federal regulation, so long as the purpose is *not* "protection against radiation hazards." 42 U.S.C. § 2021(k). And under subsection 2021(b), states may so regulate even for protection from radiation hazards if they secure an agreement from the Nuclear Regulatory Commission "discontinu[ing] its regulatory authority." *Id.* § 2021(b). The *expressio unius* canon supports the inference that these are the only ways states can regulate uranium ore transfer, but only because section 2092 regulates the transfer of uranium ore. Where, as here, a state's law does *not* regulate a matter also regulated by the federal government, 2021(b) and 2021(k) are irrelevant and petitioners' *expressio unius* argument has no application.

Similarly, petitioners' reliance on the canon against superfluity ignores that 2021(k) saves some state regulations that *are* preempted by other provisions of the AEA, such as section 2092. Far from "effectively excis[ing] Subsection (k) from the text," Pet. Br. 34, the plain-text meaning gives 2021(k) a crucial

role: It exempts state regulation of matters regulated by the federal government so long as their purpose is unrelated to concerns with radiation hazards.

The many decisions interpreting similar "nothing . . . shall be construed" provisions confirms that this one, like the others, is a savings clause. Courts routinely recognize that Congress uses this formulation to limit the effect—including the preemptive effect—of other provisions of a statute. *See, e.g., Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 333 (2003) (recognizing preemption "savings clause" in Employee Retirement Income Security Act); *Sec'y of the Interior v. California*, 464 U.S. 312, 341 n.21 (1984) (recognizing "savings clause" in Outer Continental Shelf Lands Act); *United States v. Menasche*, 348 U.S. 528, 529 (1955) (recognizing "savings clause" in Immigration and Nationality Act of 1952); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 691 (6th Cir. 2015) (recognizing preemption savings clauses in Clear Air Act and Clean Water Act).

In sum, it is impossible to transmogrify 2021(k) into an affirmative preemption provision that invalidates all state laws adopted to address radiation hazards. Doing so requires considerable revisions, deleting the provision's first twelve words, changing the second "to" to "may," and adding an "only" after "activities":

> ~~Nothing in this section shall be construed to affect the authority of~~ any

> State or local agency ~~to~~ **may** regulate activities **only** for purposes other than protection against radiation hazards.

"[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'" *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) (quoting *Dodd v. United States*, 545 U.S. 353, 359 (2005)). And in light of the frequency with which similar savings clauses limit preemption in other statutes, accepting this contortion would cast doubt on many state laws across many different policy areas. The Court should not do so here.

2. Because 2021(k) is a savings clause, the only way to reach petitioners' conclusion that "a State may regulate *only* 'for purposes other than protection against radiation hazards,' " Pet. Br. 33 (quoting 42 U.S.C. § 2021(k)), is to interpret the other provisions of the AEA to preempt *every* state law, only then to be saved by 2021(k), as limited by its purpose test. But to state this theory is to reject it: The AEA has never preempted all state laws in general, or even state regulation of uranium mining in particular.

No AEA provision explicitly displaces states' authority to regulate uranium mining, much less explicitly preempts all state laws. As the United States acknowledges, the AEA has no general "express-preemption provision." U.S. Cert. Br. 18. And it beggars belief to think that—without 2021(k) in place to

save laws with non-radiation-hazard purposes—earlier versions of the AEA preempted *all* state laws.

That leaves the 1959 Amendments that enacted 2021(k). And, other than a minor amendment to 42 U.S.C. § 2138, all of the 1959 Amendments are now codified at 42 U.S.C. § 2021. None of section 2021's subsections includes so much as a hint of congressional intent to preempt state regulation of uranium mining, much less an intent to preempt all state laws:

- (a) lists the statute's purposes;
- (b) authorizes the Commission to enter into agreements with states;
- (c) requires the Commission to retain authority over activities unrelated to uranium mining;
- (d) imposes requirements on Commission State agreements;
- (e) requires agreements to be published in the Federal Register;
- (f) authorizes the Commission to grant exemptions to licensing requirements and regulations;
- (g) directs the Commission to work with states in formulating standards;
- (h) directs the EPA to consult with experts regarding radiation matters;
- (i) authorizes the Commission to provide training and inspection assistance to the states with which it has agreements;

- (j) authorizes the Commission to suspend agreements to protect health and safety;
- (k) is the savings clause;
- (l) permits states to participate in licensing determinations;
- (m) says agreements with states do not affect the Commission's authority to protect the common defense;
- (o) imposes requirements on states' regulation of byproduct material.

There is thus no trace of preemption in the 1959 Amendments, which is unsurprising, for "the point of the 1959 Amendments was to *heighten* the states' role." *Pacific Gas*, 461 U.S. at 209 (emphasis added).

Ultimately, no support for petitioners' preemption theory exists in the text or structure of the AEA. The AEA does not preempt state regulation of uranium mining, and 2021(k)'s purpose test is therefore irrelevant. Petitioners' challenge to Virginia's uranium-mining moratorium should end there.

B. The presumption against preemption requires any doubts to be resolved in favor of state law

The text and structure of the AEA leave no doubt that 2021(k) is a savings clause, not an affirmative preemption clause. But even if there were doubt, the Court's precedents require resolving it in favor of Virginia's uranium-mining moratorium.

First, petitioners argue that the AEA preempts an extremely broad field of state regulation: all state laws with the purpose of addressing radiation hazards. Pet. Br. 26. But 2021(k), the AEA's savings clause, creates a presumption that the AEA does *not* preempt the field. Federal courts have regularly observed that the "existence of [a] preemption savings clause indicates that Congress did not intend to preempt the field." *Time Warner Cable v. Doyle*, 66 F.3d 867, 878 n.12 (7th Cir. 1995); *see also Johnson v. Am. Towers, LLC*, 781 F.3d 693, 703 (4th Cir. 2015) ("The savings clause demonstrates that congressional intent to completely preempt this area of law is neither clear nor manifest."). Subsection 2021(k) therefore creates a presumption against broad field preemption that neither petitioners nor the United States have overcome.

Second, and more fundamentally, the Court has said many times that it utilizes a presumption against preemption "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied." *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (alteration and ellipsis in original). In other words, the Court assumes "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." *Id.* (quoting *Medtronic*, 518 U.S. at 485); *see also Arizona v. United States*, 567 U.S. 387, 400 (2012). "Thus,

when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). This presumption applies equally where, as here, the question is "the *scope* of [Congress's] intended invalidation of state law." *Medtronic*, 518 U.S. at 485.

The presumption against preemption has "particular[]" force here because the States have "traditionally occupied" the arena of land-use regulation generally and mining regulation specifically. *Wyeth*, 555 U.S. at 565. Virginia's uranium-mining moratorium is effectively a regulation of the use of land in Virginia, and the Court has long recognized that "[r]egulation of land use . . . is a quintessential state and local power." *Rapanos v. United States*, 547 U.S. 715, 738 (2006). And even with respect to mining specifically, Congress has recognized that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining . . . should rest with the States." 30 U.S.C. § 1201(f). To this day the federal government still does not regulate uranium mining. *See* Pet. Br. 45; U.S. Br. 14. It can hardly be said, therefore, that the AEA displaces states' traditional regulatory authority.

Neither petitioners nor the United States has articulated preemption theories consistent with the text of the AEA. And they certainly have not shown that the AEA evinces a "clear and manifest purpose of Congress" to preempt every state law adopted with the purpose they claim is forbidden. *Wyeth*, 555 U.S. at 565. Accordingly, no basis exists for declaring Virginia's uranium-mining moratorium to be preempted.

II. Petitioners' Theory Misreads the Cases Interpreting the AEA

A. This and lower courts have recognized AEA preemption only of state laws that regulate an activity also regulated by the federal government

The decisions interpreting the AEA affirm the straightforward interpretation articulated above: A state law is field-preempted by the AEA if the state law regulates an activity regulated by the federal government under the AEA, and, so long as the law does not directly conflict with federal law, subsection 2021(k) will *save* a state law from preemption if it has a purpose "other than protection against radiation hazards." 42 U.S.C. § 2021(k).

1. The Court announced this test in its first case addressing preemption under the AEA, *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983). There, it held that "the test of preemption is

whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' " *Id.* at 212–13 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

The United States disputes that *Pacific Gas* required the party favoring preemption to show that the activity at issue is "regulated by the federal government." *Id.* In support of this position it argues that the challenged law "barr[ed] construction of nuclear power plants [and] did not directly regulate a subject committed to [the Nuclear Regulatory Commission's] regulatory authority[.]" U.S. Br. 25 (internal emphasis omitted). This is incorrect. The Nuclear Regulatory Commission regulates the construction of power plants, *see* 42 U.S.C. § 2235, and *Pacific Gas* observed that the Nuclear Regulatory Commission specifically determined "that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal," *Pacific Gas*, 461 U.S. at 213. Indeed, only *after* reaching this conclusion did the Court deem it "necessary to determine whether there [wa]s a non-safety rationale for" the law. *Id.*

The Court applied this holding in *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984), where it addressed the AEA's possible preemption of state tort remedies for radiation injuries. The Court acknowledged that "[i]f there were nothing more . . . [than the AEA's] foreclosure of the states from conditioning the operation of nuclear plants on compliance

with state-imposed safety standards," these state tort remedies arguably would fall within the preempted field. *Id.* at 250–51. But there *was* more. The AEA's text—in particular "Congress' failure to provide any federal remedy for persons injured by such conduct"—and the history of other congressional actions in the nuclear energy sphere—provided "ample evidence that Congress had no intention of forbidding the states from providing" such remedies. *Id.* at 250–51. The federal government, therefore, had not "so completely occupied the field of safety that state remedies are foreclosed . . . ." *Id.* at 256.

The Court reaffirmed this test and further narrowed "the preempted field of nuclear safety as that field has been defined in prior cases" in *English v. General Electric Company*, 496 U.S. 72, 90 (U.S. 1990), a preemption challenge to state intentional infliction of emotional distress claims arising from violations of AEA whistleblower provisions, *id.* at 78. The Court found "no evidence of the necessary 'clear and manifest' intent on the part of Congress" to preempt those tort claims. *Id.* at 83.

2. Consistent with *Pacific Gas*, *Silkwood*, and *English*, the Circuits are united in requiring, as a threshold inquiry, that state laws challenged under the AEA touch on some activity "in any way regulated by the federal government." *Pacific Gas*, 461 U.S. at 212–13.

In *Skull Valley Band of Goshute Indians v. Nielson*, the Tenth Circuit recognized that "[i]n each instance, the question of preemption is one of determining Congressional intent." 376 F.3d 1223, 1240 (10th Cir. 2004) (citing *Wardair Canada Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 6 (1986)). Discerning such intent from the AEA and the Nuclear Waste Policy Act, the Tenth Circuit concluded that spent nuclear fuel storage is an activity regulated by the federal government. *Id.* at 1242. Utah's challenged laws, ostensibly enacted to regulate matters traditionally within state control (e.g., licensing, county planning, and roads), were preempted because they "address matters of radiological safety *that are addressed by federal law* and that are the *exclusive* province of the federal government." *Id.* at 1246 (emphasis added).

The Second Circuit in *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 408–09 (2d Cir. 2013), likewise recognized that its "'task is to ascertain Congress' intent in enacting the federal statute at issue.' " (quoting *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 95 (1983)). Assured that the challenged Vermont laws addressed matters regulated by the federal government—nuclear waste storage, plant operation, and state inspections at the Vermont Yankee nuclear power plant—the Second Circuit held that the laws were preempted because Vermont lacked a "non-safety rationale" in enacting them. *Id.* at 415 (quoting *Pacific Gas*, 461 U.S. at 213)).

3. Each of the decisions cited by petitioners and *amici* also required the challenged state laws to touch on some matter regulated by the federal government. *United States v. Manning*, 527 F.3d 828, 838 (9th Cir. 2008) and *United States v. Kentucky*, 252 F.3d 816, 823 (6th Cir. 2001) (concerning materials regulated by the AEA); *Me. Yankee Atomic Power Co. v. Me. Pub. Util. Comm'n*, 581 A.2d 799, 803 (Me. 1990) (concerning nuclear power plant decommissioning); *Long Island Lighting Co. v. Suffolk Cty., N.Y.*, 628 F. Supp. 654, 664 (E.D.N.Y. 1986) (concerning nuclear emergency response testing); *Suffolk Cty. v. Long Island Lighting Co.*, 728 F.2d 52, 57-58 (2d Cir. 1984) (concerning design, construction, and operation of a nuclear power plant); *Conn. Yankee Atomic Power Co. v. Town of Haddam Planning & Zoning Comm'n*, 19 Fed. App'x 21, 22 (2d Cir. 2001) (concerning a nuclear waste storage facility); *Me. Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 53 (D. Me. 2000) (concerning the storage of spent nuclear fuel).

The cases cited by petitioners and *amici* outside the AEA context likewise require a showing of specific congressional intent to preempt state law. *Wyeth*, 555 U.S. at 565. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (Federal Arbitration Act, enacted "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," preempted California's judicial rule "[r]equiring the availability of classwide arbitration"); *Oneok Inc. v. Learjet Inc.*, 135 S. Ct. 1591,

1599 (2015) (where "the Natural Gas Act was drawn with meticulous regard for the continued exercise of state power," state antitrust claims against natural gas traders are not preempted); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308–09 (1988) (preempting "a state law whose central purpose is to regulate maters that Congress intended FERC to regulate"); *Howlett v. Rose*, 496 U.S. 356, 383 (1990) (preempting school officials' state sovereign immunity defense because "as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage"); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985) (preempting state tort claim because "Congress intended [Labor Management Relations Act] § 301 to pre-empt this kind of derivative tort claim").

B. Because the federal government does not regulate conventional uranium mining, Virginia's moratorium is not preempted

The Atomic Energy Act of 1946 gave the federal government a monopoly on the generation of nuclear power, and, like the current AEA, required a license to "transfer . . . source material," but limited the licensure requirement to activity taken only "*after* [source material's] removal from its place of deposit in nature." The Atomic Energy Act of 1946, Pub. L. No. 79-585 § 5(b)(2), 60 Stat. 761 (1946) (emphasis added). The subsequent statute, the Atomic Energy Act of

1954, withdrew the federal government's monopoly on nuclear power, but still required a license to "transfer . . . any source material," again applying that requirement only "*after* [source material's] removal from its place of deposit in nature." The Atomic Energy Act of 1954, Pub. L. No. 83-703 § 62, 68 Stat. 932 (1954) (emphasis added). This limitation on the federal government's jurisdiction continues to this day. *See* 42 U.S.C. § 2092.

Indeed, as petitioners and supporting *amici* concede, uranium mining is an activity necessarily preceding uranium's "removal from its place of deposit in nature," and therefore no AEA provision explicitly displaces state authority to regulate uranium mining. *See* Pet. Br. 45 ("[T]he mining of uranium [is] an activity beyond the [Nuclear Regulatory Commission's] jurisdiction."); U.S. Br. 14 (acknowledging "uranium mining . . . is outside the [Nuclear Regulatory Commission's] jurisdiction").

Because the federal government does not regulate conventional uranium mining, the Fourth Circuit correctly held that petitioners' challenge to Virginia's uranium mining moratorium must end there. *Va. Uranium*, 848 F.3d at 599.

III. Petitioners' Theory Could Jeopardize State Laws Congress Has Expressly Authorized

Accepting petitioners' preemption theory and discarding the threshold requirement of common-activity regulation would do more than produce the wrong result here; it could jeopardize other important state laws, including those Congress has expressly authorized states to adopt.

Again, petitioners argue that AEA preemption turns entirely on the purpose of a state law, regardless whether "the matter on which the state asserts the right to act is in any way regulated by the federal government." *Pacific Gas*, 461 U.S. at 212–13. Such an expansive, non-textual theory of AEA preemption would jeopardize, for example, state hazardous waste laws authorized by the Resource Conservation and Recovery Act (RCRA), which establishes "cradle to grave" regulation of hazardous waste. *See generally* 42 U.S.C. §§ 6901–6992(k); § 6926(b). Forty-eight states administer RCRA-authorized hazardous waste programs in lieu of RCRA. *See e.g.*, Ala. Code ch. 22-30; Ariz. Rev. Stat. tit. 49, ch. 5; Ark. Code Ann. §§ 8-7-201, *et seq.*; Cal. Health and Safety Code div. 20, ch. 6.5; Colo. Rev. Stat. ch. 25-15; Ind. Code § 13-22-2-1; Idaho Code ch. 39-4401; Ky. Rev. Stat. ch. 224.46; Nev. Rev. Stat. §§ 459.400, *et seq.*; Ohio Rev. Code ch. 3734; Or. Rev. Stat. chs. 465, 466; Wash. Rev. Code ch. 70.105.)

Such programs require "facilities" that treat, store, or dispose of hazardous waste to obtain permits. 42 U.S.C. § 6925(a). A facility's permit defines prescriptive engineering and operating standards and includes facility-specific terms and conditions the "State Director determines necessary to protect human health and the environment." 40 C.F.R. § 270.32(b)(2). Facility permits also provide standards for the "closure" of the facility and require "corrective action" (cleanup) for any releases during the facility's life. *See* 40 C.F.R. § 264.111.

These requirements apply with equal force if a facility manages hazardous waste that contains AEA material. Although RCRA's definition of "solid waste" specifically excludes AEA material, *see* 42 U.S.C. § 6903(27), when non-radioactive hazardous waste blends with AEA material, the resulting "mixed waste" *is* subject to RCRA by virtue of RCRA's application to the "hazardous" component of the waste. *See, e.g.*, EPA Notice: State Authorization to Regulate the Hazardous Components of Radioactive Mixed Wastes Under the Resource Conservation and Recovery Act, 51 Fed. Reg. 24,504 (July 3, 1986); DOE Final Rule: Radioactive Waste; Byproduct Material, 52 Fed. Reg. 15,937 (May 1, 1987); EPA Clarification Notice: Clarification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste, 53 Fed. Reg. 37,045 (Sept. 23, 1988). In fact, EPA will authorize a state hazardous waste program only if the state has authority to "regulate the

hazardous components of radioactive mixed wastes." 51 Fed. Reg. at 24,504 (internal citations and quotation marks omitted).

Because of the commingled nature of mixed waste, regulation of the RCRA portion necessarily has an incidental effect on the waste that would otherwise be regulated by the AEA. Regulations concerning the closure of tanks, for instance, require adherence to performance standards for waste removal and decontamination. *See* 40 C.F.R. § 264.111, –.197. Similarly, hazardous waste that is "land disposal restricted" must be treated to specific standards before disposal. *See, e.g.*, 40 C.F.R. § 268.40 (treatment standard for "[r]adioactive high level wastes generated during the reprocessing of fuel rods" is "vitrification"). To the extent these standards apply to RCRA waste, AEA material unavoidably will be affected as well.

Congress has expressly ratified this incidental, but substantial, regulation. In 1992, Congress enacted the Federal Facility Compliance Act (FFCA) (Pub. L. No. 102-386, Title I, § 102(a), (b), 106 Stat. 1505, 1506 (Oct. 6, 1992)), which is codified in RCRA.

Courts have recognized that the preempted "field" under the AEA excludes states' regulation of the RCRA component of mixed waste. *See United States v. Kentucky*, 252 F.3d 816, 823 (6th Cir. 2001) (RCRA and the AEA provide the federal government "exclusive authority to regulate the radioactive component

of waste mixtures, whereas EPA—or states authorized by EPA under the RCRA—retain the authority to regulate the hazardous portion."); *United States v. Manning*, 527 F.3d 828, 833 (9th Cir. 2008); *Legal Envtl. Assistance Found. Inc. v. Hodel*, 586 F. Supp. 1163, 1167 (E.D. Tenn. 1984).

Under petitioners' preemption theory, all of these state hazardous waste laws could be challenged and—even though facially valid—subjected to examination for improper purpose at the mere suggestion of a state's underlying concern with "radiation hazards." Petitioners' test would also open the door to preemption defenses every time a state issues penalties pursuant to its RCRA-authorized laws to facilities that manage hazardous waste with an AEA material component.

Courts "should not become embroiled in attempting to ascertain" the "true motive" of a state. *Pacific Gas*, 461 U.S. 190, 216. But under petitioners' test, courts would be forced to conduct resource-intensive evidentiary hearings to determine whether a state had an improper intent each time a state's hazardous waste law is challenged. And if a challenger manages to show that a state did have radiation hazards in mind, its law would be preempted, despite Congress' intent to maintain the "dual regulatory scheme" for the regulation of mixed waste established by RCRA and the AEA. *United States v. Kentucky*, 252 F.3d at

823. A void would occur in an area Congress intended and expressly authorized the states to fill.

Similarly here, preemption of Virginia's uranium mining moratorium would create a regulatory void in an area traditionally reserved to the states and not otherwise regulated by the federal government. *See Va. Uranium*, 848 F.3d at 596. The Fourth Circuit correctly considered the threshold question whether uranium mining is regulated under the AEA. Concluding that uranium mining is not "in any way regulated by the federal government[,]" the Fourth Circuit properly ended its inquiry and upheld Virginia's ban. *Va. Uranium*, 848 F.3d at 596 (quoting *Pacific Gas*, 461 U.S. at 212–13) (internal citations omitted). This approach is consistent with the Court's precedents and should be affirmed.

IV. The Court Should Not Expand Inquiries into a State's Purpose

A. The Court should not impose an inquiry into a state's purpose unless Congress has expressly required it

In addition to the textual, doctrinal, and practical problems discussed above, petitioners summarily dismiss the extent of intrusion into states' sovereignty created by their interpretation of the AEA. The Court has adopted its "clear and manifest purpose" test "because the States are independent sovereigns in our

federal system," and preemption is "a serious intrusion into state sovereignty." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 488 (1996). The degree of intrusion threatened by judicial inquiry into legislative purpose makes a presumption against petitioners' position—and a requirement of an express statement from Congress—doubly appropriate here.

Petitioners urge the Court to treat 2021(k)'s purpose test as if it encompasses *all* state laws. And they ask the Court to conduct this inquiry by looking past the text of Virginia's moratorium on uranium mining, which "*facially purport[s]* to regulate a matter outside the [Nuclear Regulatory Commission's] jurisdiction." Br. 40 (emphasis in original). Indeed, petitioners urge the Court to permit a *jury* to investigate the Virginia legislature's "true purpose." *Id.* at 41. Construing the AEA this way would greatly expand "judicial inquiries into legislative or executive motivation," and these inquires "represent a *substantial intrusion* into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (emphasis added).

A straightforward—and correct—interpretation of subsection 2021(k) confines such inter-branch intrusion to a small set of laws, and only when a state chooses to try to save a law that regulates an activity also regulated by the federal government under the AEA. Petitioners' interpretation, on the other hand, imposes intrusive judicial inquiries into the "actual"

purpose behind numerous state laws. Indeed, if the facial subject matter of a state law cannot save it from preemption, then literally *any* state law could be challenged in search of an improper purpose lurking somewhere in the mind of a key legislator or regulator.

The Court should never presume that Congress has authorized an expansive intrusion into the actual motivations of state officials. Whether in the preemption context or any other, before imposing on states a judicial inquiry into actual purpose, the Court should require, at the very least, a "clear and manifest" statement of Congress's intent that it do so. *Medtronic*, 518 U.S. at 485. And because the AEA's text does not even suggest such an intent—much less explicitly articulate it—petitioners' interpretation of the AEA should be rejected.

B. Questions of state purpose should be treated as questions of law, not fact

The intrusiveness of petitioners' preemption theory is exacerbated by their unsupported assumption that an inquiry into the "purposes" of a state regulation under subsection 2021(k) should be treated as a question of fact. In attempting to demonstrate the purpose of Virginia's uranium mining moratorium, petitioners cite statements made in 1984, after the moratorium had been adopted, by members of a study group who opposed lifting the moratorium, *see* Pet.

Br. 17–18, and statements made in 2013 by state legislators who voted to retain the moratorium, *id.* at 18–19. These statements, of course, are relevant only if the purpose of Virginia's moratorium is a factual question—although even then it is not clear why the statements are probative, for none were made by the legislators who actually enacted the challenged law.

Petitioners are wrong to treat the question of the moratorium's purpose as a factual one. That approach is inconsistent with how federal courts approach preemption questions, and it creates serious practical problems.

In *Pacific Gas*, the Court specifically refused to "become embroiled in attempting to ascertain California's true motive." *Pacific Gas*, 461 U.S. at 216. And federal courts have consistently dismissed requests to peer into lawmakers' inner motivations in other preemption contexts as well. *See, e.g., Bldg. Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184, 191 (2d Cir. 2012) ("[W]hen a court assesses whether a governmental policy has a regulatory purpose, it looks primarily to the objective purpose clear on the face of the enactment, not to allegations about individual officials' motivations in adopting the policy."); *N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation does, not why legislators voted for it or what political coalition led to its enactment."); *Colfax*

Corp. v. Illinois State Toll Highway Auth., 79 F.3d 631, 635 (7th Cir. 1996) (refusing to "go behind the contract to determine whether [a state highway authority's] real, but secret, motive was to regulate labor").

As the Court observed in *Pacific Gas*, courts treat legislative purpose as a question of law because an "inquiry into legislative motive is often an unsatisfactory venture." 461 U.S. at 216. Such inquiries are difficult because, as the Court has pointed out "on so many prior occasions[,] . . . it is often 'difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators.'" *Bush v. Vera*, 517 U.S. 952, 1014 n.9 (1996) (Stevens, J., dissenting) (quoting *Palmer v. Thompson*, 403 U.S. 217, 225 (1971)); *see also United States v. O'Brien*, 391 U.S. 367, 384 (1968) (observing that these inquiries "are a hazardous matter" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it").

With statutory interpretation, courts may *occasionally* struggle to determine which of two mutually contradictory meanings a legislature intended; but with investigating a law's purpose, they nearly *always* find it impossible to determine with any confidence whether a statute was borne of a forbidden motive. A legislator "can quite consistently intend" to ad-

vance multiple purposes, including a forbidden purpose, "and evidence of a sort available only to the Almighty would be needed to sort them out or to assign them relative weights." John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1214 (1970).

Focusing on the factual question of the legislature's "true" purpose also creates the possibility of differential treatment of identical laws: "[O]ne State's statute could survive pre-emption . . . while another State's identical law would not, merely because its authors had different aspirations," or perhaps simply because of a lack of evidence. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010). This problem can arise even in the context of a single legislature, for a state law could be invalidated and then "reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, 391 U.S. at 384. In addition to its impracticality, such differential treatment seriously undermines the "'fundamental principle of equal sovereignty' among the States." *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 544 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

These problems are further intensified in the many states, including Indiana, that do not publish legislative debates. *See Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 974 (Ind. 1998) ("Indiana publishes only

sparse legislative history."); *Millikan v. U.S. Fid. & Guar. Co.*, 619 N.E.2d 948, 951 (Ind. Ct. App. 1993) ("In states like Indiana that preserve no legislative debate and comment we must often speculate as to why particular provisions may have been enacted."). Without written documentation of legislative debates, determining precisely what motivated a legislature becomes nearly impossible, particularly where, as here, the law at issue was passed several decades earlier. The only remaining option is to obtain sworn testimony from long-since-retired state lawmakers, if they are even around. Requiring such absurd inquiries into the psyches of former state legislators is the logical consequence of petitioners' "actual motive" theory; one can scarcely imagine a starker intrusion into state sovereignty.

***

Petitioners urge the Court to ignore its precedents and transform AEA subsection 2021(k) from a savings clause into a provision authorizing preemption of *any* state law adopted to address radiation hazards. In doing so, petitioners run roughshod over the AEA's text, the cases interpreting it, the practical consequences of adopting their theory, and the presumptions the Court traditionally exercises in preemption and legislative-purpose cases. The Court should reject petitioners' request to revise the statute Congress has written.

CONCLUSION

For these reasons, the judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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