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 *Amici Curiae* in Support of Respondents for the Members of the Southern Virginia Delegation to the Virginia General Assembly, Local Chambers of Commerce, Civic, Trade, and Economic Development Associations, and Municipalities

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STATEMENT OF INTEREST OF *AMICI*[1]

Together, the organizational *amici* represent business and community leaders throughout Southern Virginia with a long and demonstrated commitment to improving economic opportunities in the region. *Amici* have worked for decades to create jobs and ensure economic success, while preserving the high quality of life that citizens in the region have come to expect. They have developed an economic vision for the region that is premised on agriculture, tourism, motorsports, and the natural scenic beauty of Southern Virginia. Specifically, the chambers of commerce *amici* represent businesses in Pittsylvania County (where the Coles Hill Deposit is located) and in adjacent municipalities. These businesses have long expressed concerns about a large-scale mining project due to volatility in the global uranium market, which would threaten job creation and economic vitality for the region.

The elected official *amici* represent legislative districts in the Virginia General Assembly that cover Pittsylvania County where the Coles Hill Deposit is located, along with all or part of several adjacent cities and counties throughout Southern Virginia. Other jurisdictions within these legislative districts include all or part of the City of Danville and

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[1] The parties have filed letters with the Clerk indicating blanket consent to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund its preparation or submission.

Pittsylvania County, and three counties directly adjacent to Pittsylvania: Halifax, Henry, and Campbell Counties, as well as the City of Martinsville. All or part of several additional Counties are also within the legislative districts of *amici*: Amelia, Brunswick, Carroll, Charlotte, Dinwiddie, Franklin, Mecklenburg, Lunenburg, Prince Edward, Prince George, and Nottoway Counties, and the City of Galax.

A detailed description of all *amici curiae* is provided in the Appendix to this brief.

SUMMARY OF ARGUMENT

Members of the Virginia General Assembly, local Chambers of Commerce, and other civic associations included here as *amici* support the Commonwealth's moratorium on uranium mining largely because of concerns that the mining industry would threaten job security for the region. The economic concerns of *amici* serve legitimate State interests and are not preempted by the Atomic Energy Act.

The text of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq*. ("AEA" or "the Act") explicitly leaves to the States the authority to regulate uranium "prior to removal from its place of deposit in nature." 42 U.S.C. § 2095 (2018). Thus, the question of how to regulate conventional uranium mining—or whether to ban it altogether—falls outside of the purview of the Nuclear Regulatory Commission ("NRC"). The NRC has historically recognized as much, declining to regulate "radioactive air emissions from debris left

over from unlicensed conventional mining activities" as lying "beyond the scope of the Atomic Energy Act." *In re: Hydro Res., Inc.,* 63 N.R.C. 510, 515 (2006).

Given the lack of NRC authority over conventional mining, Petitioners ask this Court to impose a remedy that would require the Commonwealth to develop its own uranium mining regulations. *See* Part I, *infra*. Yet it cannot be the case that federal courts would interpret the AEA to require state regulation of uranium mining when Congress itself could not impose that command on the States. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York v. United States,* 505 U.S. 144, 178 (1992).

What is more, concerns about conventional uranium mining *qua* mining supported Virginia's decision to adopt the moratorium in 1982, and to extend the moratorium indefinitely in 1983. *See* Part II, *infra*. The 1983 Virginia Acts of Assembly included language stating that the legislature, based on a preliminary study from the time period, had "not identified any environmental or public health concern that could preclude uranium development in Virginia." Act of Feb. 24, 1983, ch. 3, 1983 Va. Acts 3 (codified at VA. CODE ANN. § 45.1-283 (2018)). The 1983 legislative enactment also referenced "local concerns," "socioeconomic effects of the uranium development activity at the specific site," and the need for greater analysis of "the costs and benefits"

of allowing uranium mining in Southern Virginia. *Id.;* Pet'rs' App. 178a, 187a-88a.

The economic factors evident in 1983 remain in the market today. A report from the National Academy of Sciences ("NAS") indicates that uranium mining has historically been a boom-and-bust industry. *See* Part III, *infra*. Prices spiked in the 1970s, but suffered a steep and sustained decline throughout the 1980s and 1990s. For many years, the spot price for yellowcake remained at or below $20 per pound when adjusted for inflation. Today, spot prices remain near $25. These numbers are significant because Petitioner Virginia Energy Resources, Inc. has confirmed in filings with Canadian securities officials that the Coles Hill Deposit would be uneconomic to mine absent a far higher price for uranium. *See* Part III, *infra*. The data are especially concerning to *amici*, who are wary of volatility in the uranium mining industry, which could leave behind a shuttered mine and a weakened local economy.

Finally, local chambers of commerce and other economic development associations have relied on Petitioners' acquiescence to the legitimacy of Virginia's moratorium. *See* Part IV, *infra*. In columns published in regional newspapers, Petitioner Virginia Uranium, Inc. pledged that if "the NAS finds that uranium mining cannot be done safely, we will obviously not pursue lifting the

moratorium."[2] Petitioners relied on this pledge as they continued work to build a stable economy premised on agriculture, tourism, education, and other complimentary businesses. The doctrine of laches "may bar long-dormant claims for equitable relief." *City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 217 (2005). Given the reasonable likelihood of economic harm to *amici* if Virginia's moratorium were nullified, the laches doctrine is applicable here.

ARGUMENT

I. *Pacific Gas* and this Court's Preemption Jurisprudence Mandate Deference to Virginia's Exercise of its State Sovereignty.

The text of the AEA leaves to the States the question of how to regulate conventional uranium mining—or whether to ban it altogether. *See* 42 U.S.C. §2092 (2018) (granting NRC authority over "source material"[3] "after removal from its place of deposit in nature"); *see also* 42 U.S.C. § 2095 (2018) (declaring that reports on the "handling of source material" shall not be required by the NRC "prior to removal from its place of deposit in nature").

Faced with this statutory language, Petitioners premise their challenge to Virginia's moratorium on

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[2] Walter Coles, *Uranium Company Renews Pledge to Protect Virginians*, VIRGINIAN-PILOT, Mar. 27, 2011, at 8 (Hampton Roads Section).

[3] The Act defines "source material" to include uranium. 42 U.S.C. § 2014(z) (2018).

conventional uranium mining on a gross misreading of *Pacific Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n,* 461 U.S. 190 (1983). Yet the *Pacific Gas* Court unanimously upheld the legitimacy of a California law that imposed a state moratorium on the construction of new nuclear power plants until the federal government had met its obligations under the AEA to ensure that "there exists a demonstrated technology or means for the disposal of high-level nuclear waste." 461 U.S. at 198.

In *Pacific Gas*, the Court delineated a line between federal and state authority with respect to nuclear power construction: "States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Id.* at 205. In this context, "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 213 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court only embarked upon the search for a "non-safety rationale" for California's law *after* determining that the plain text of the statute touched upon an area—namely, safety requirements for the disposal of high-level nuclear waste—that was explicitly within the authority of the NRC. Only after making this activity-based determination did the Court turn to, and accept, California's economic (*i.e.* non-safety) purpose in enacting the law. The *Pacific Gas* Court upheld California's law upon observing that "the

legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed *or even stopped* for economic reasons." *Id.* at 223 (emphasis added).

Here, Petitioners would have the Court proceed to the uncertain task of attempting to ascertain Virginia's legislative intent (for a statute enacted more than thirty-five years ago and in a State without any official legislative history[4]) before conducting the critical, activity-based inquiry that serves as the threshold in *Pacific Gas*.

Similar to the regulation of electric utilities, conventional mining is an activity that is "characteristically governed by the States." *Id.* at 205. Mining, like the provision of electricity, has "been regulated for many years, and in great detail by the States." *Id.* at 206. Both activities fall within the "historical police powers of the States" and cannot be superseded by the AEA unless that was the "clear and manifest purpose of Congress." *Id.* (quoting *Santa Fe Elevator Corp.*, 331 U.S. at 230).

Thus, there is no need to inquire into the Commonwealth's motives for enacting a moratorium on uranium mining during the 1982 and 1983 legislative sessions because Congress has left to the States the authority to regulate uranium "prior to

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[4] Virginia's Division of Legislative Services ("DLS") observes that "legislative intent is not officially recorded in Virginia." DLS, *Legislative Reference Center*, http://dls.virginia.gov/lrc/leghist.htm (last visited Aug. 29, 2018).

removal from its place of deposit in nature," 42 U.S.C. § 2095 (2018); Pet'rs' App. 111a. The text of the AEA explicitly places the activity regulated by Virginia's statute outside the purview of AEA, and the deference afforded the States in regulating the extraction of uranium from its place in nature has been acknowledged by the regulatory body tasked with implementing the Act. *See In re: Hydro Res., Inc.*, 63 N.R.C. 510, 512-13 (2006) (reading 42 U.S.C. 2092 as "precluding [NRC] jurisdiction over uranium mining.").

The NRC's analysis from *In re: Hydro* is instructive. There, the NRC explained that even "radioactive residue from previous mining activity amounts to 'background radiation' and does not count toward" the dosage limit for setting an NRC permit. *Id.* at 512. The NRC explained: "Conventional mining is controlled by other regulatory authorities. The State of New Mexico, for example, regulates conventional uranium mining within the state. . . . Pursuant to this authority, New Mexico has enforced cleanup orders . . . with respect to its uranium mining activities within the state." *Id.* at 513. Challengers to the NRC-issued permit had argued that high levels of gamma radiation from prior mining activities should be accounted for in setting new federal permit limits. *Id.* at 514. The NRC, however, had no power to broaden the AEA to reach these radiological safety concerns and instead held as follows:

> Were the NRC to expand the definition of TEDE [total effective dose

> equivalent] to include radioactive air emissions from debris left over from unlicensed conventional mining activities, the agency, in effect, would be entering an area of regulation that it has historically considered beyond the scope of the Atomic Energy Act. This we decline to do.

Id. at 515.

Congress, of course, could have mandated that the NRC directly regulate conventional uranium mining on private land, which might have preempted state-specific bans covering that activity. *See, e.g., Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (upholding the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447 (codified at 30 U.S.C. § 1201 *et seq.* (2018)), where "the full regulatory burden will be borne by the Federal Government" if a State chooses not to regulate). But the AEA, as enacted, cannot possibly be read to prohibit Virginia's moratorium precisely because there is no federal regulation of conventional uranium mining under the Act.

Accordingly, Petitioners' reading of the Act would obligate the Commonwealth to develop a program for conventional uranium mining in violation of this Court's anti-commandeering decisions. *See, e.g., New York v. United States*, 505 U.S. 144, 166 (1992) ("We have always understood that even where Congress has the authority under the Constitution

to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *Printz v. United States*, 521 U.S. 898, 935 (1997) (finding that a command for state law enforcement officers to administer or enforce a federal regulatory regime is "fundamentally incompatible with our constitutional system of dual sovereignty"); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475 (2018) (the anti-commandeering doctrine "withhold[s] from Congress the power to issue orders directly to the States").

In *New York*, the Court examined a federal law that required States to either "take title" to low-level radioactive waste or to subsidize its transfer. In striking down the law, the Court articulated a notion of federalism-respecting preemption whereby "Congress encourages state regulation rather than compelling it [because] state governments remain responsive to local electorate's preferences [and] state officials remain accountable to the people." *Id.* at 168. When Congress compels states to regulate, on the other hand, "the accountability of both state and federal officials is diminished." *Id.* The Court thus concluded as follows:

> No matter how powerful the federal interest involved, *the Constitution simply does not give Congress the authority to require States to regulate.* The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt

> contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Id. at 178 (emphasis added).

Similarly, while Congress could directly regulate uranium mining, it cannot constitutionally adopt legislation that expressly requires States to develop their own uranium mining regulations. Under Petitioners' theory of the case, however, the Court would interpret the AEA to do just that. If the moratorium were to be preempted, the Commonwealth would be forced to regulate. This interpretation cannot possibly stand as a permissible application of the Court's preemption doctrine. It cannot be that federal courts would interpret the AEA to require state regulation of uranium mining when Congress could not place that command in the text of the statute.

In sum, Congress chose not to regulate "any source material prior to removal from its place of deposit in nature," 42 U.S.C. § 2095 (2018), instead leaving the States' authority over conventional mining undisturbed. Exercising that authority, Virginia imposed a moratorium on uranium mining beginning in 1982, and in the intervening years, communities in Southern Virginia developed other industries that would now conflict with Petitioners' proposed uranium mining project.

II. Concerns about Conventional Uranium Mining *Qua* Mining Support Virginia's Decision to Enact Va. Code § 45.1-283.

From the time of its original enactment in 1982, Virginia's moratorium on uranium mining was premised in substantial part on the adverse impacts that might be anticipated from mining *qua* mining. *See* Act of Apr. 7, 1982, ch. 269, 1982 Va. Acts 269 (codified as amended at VA. CODE ANN. § 45.1-283 (2018)) ("the Virginia Act"). The Virginia Act went on to confirm that "uranium mining shall be deemed to have a significant effect on the surface," with a cross reference to VA. CODE ANN. § 45.1-180(a) (2018), part of the State's mining law dating back at least to 1968.

Amendments to the Virginia Act in 1983 extended the moratorium indefinitely—maintaining the ban "until a program for permitting uranium mining is established by statute." Act of Feb. 24, 1983, ch. 3, 1983 Va. Acts 3; (codified at VA. CODE ANN. § 45.1-283); Pet'rs' App. 178a. The legislative enactment actually included language that dismissed radiological concerns. In pertinent part, the Virginia enactment, as amended in 1983, read as follows:

> The General Assembly finds . . . that a preliminary study, identifying many potential environmental and other effects of uranium development . . . *has not identified any environmental or public health concern that could*

> *preclude uranium development in Virginia.*
>
> The General Assembly further finds, however, that a possibility exists that certain impacts of uranium development activity may reduce or potentially limit certain uses of Virginia['s] environment and resources, and that therefore additional evaluation of the costs and benefits of such activity is necessary before a final decision can be made regarding its acceptability in the Commonwealth.

1983 Va. Acts 3 (emphasis added); Pet'rs' App. 178a.[5]

Notwithstanding radiological concerns raised by citizen stakeholders or even dissenting members of a Uranium Administrative Group ("UAG") consisting

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[5] The quoted language appears in the legislative enactment from 1983, but it is not in the codified text of the Virginia Act, which simply states:

> Notwithstanding any other provision of law, permit applications for uranium mining shall not be accepted by any agency of the Commonwealth prior to July 1, 1984, and until a program for permitting uranium mining is established by statute. For the purpose of construing § 45.1-180 (a), uranium mining shall be deemed to have a significant effect on the surface.

VA. CODE ANN. § 45.1-283 (2018).

of non-legislators—such concerns, as they were understood in the early 1980s, were not dispositive for the General Assembly as a whole in enacting the moratorium. Rather, the 1983 Acts of Assembly included language which suggests that the legislature, based on a preliminary study from that time period, "had not identified any environmental or public health concern" that would justify maintaining a ban on uranium mining. *Id.* According to Chapter 3 of the 1983 Acts of Assembly, the moratorium was needed for an array of factors, including "local concerns." *Id.* Consequently, the General Assembly sought additional cost-benefit studies to determine whether uranium mining would be a net-positive for the Commonwealth's economic development.

The 1983 amendments to the Virginia Act also directed the UAG to submit a report to the Virginia Coal and Energy Commission. *See* Pet'rs' App. 181a-182a. Although this directive included references to mining, milling, and tailings management, those analyses were to be conducted in the context of their relation to the economy as a whole. The concluding passages of the 1983 amendments to the Virginia Act, therefore, focused on the "socioeconomic effects of the uranium development activity at the specific site and its associated regulation on the local community and the Commonwealth," Pet'rs' App. 187a, and a "description of the costs and benefits of allowing the proposed uranium development activity" along with "a description of the person or groups of persons likely to receive the benefit or bear the costs. . . ." Pet'rs' App. 187a-188a. While the

1983 amendments surely mention "radionuclides" in sundry passages, the focus of the legislation was on the cost-benefit analyses, and as stated at the outset of the legislative chapter, "other local concerns." Pet'rs' App. 178a.

In sum, the language from the 1983 legislative enactment fits plainly within the zone of authority left to the States under the AEA and within traditional areas of State regulation that the *Pacific Gas* Court confirmed could justify slowing or even stopping uranium mining for "economic reasons." *Pacific Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n,* 461 U.S. 190, 222-23 (1983). Indeed, while the Virginia Act is exclusively limited to uranium mining, the *Pacific Gas* Court left to States far greater autonomy to affect the "development of nuclear power" beyond the reach of Virginia's narrowly tailored law. *Id*. As the Court held:

> Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.

Id. at 223.

Seeking to extend the meaning of the Virginia Act far beyond its text, Petitioners cite to a series of statements made by legislators, candidates for office, and unelected private citizens, all made approximately three decades after the last legislative action by the General Assembly in 1983. *See* Pet'rs' Br. 19 (citing Pet'rs' App. 239a-97a).[6] Inquiring into the motive of a state legislature is especially problematic. *See, e.g., Shady Grove Orthopedic Assoc.s, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010) (the "approach of 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'") (internal citation omitted); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1480 (2018) (for preemption the touchstone is whether the law itself "confers rights or imposes restrictions that conflict with the federal law"); *United States v. Woods*, 571 U.S. 31, 47-48 (2013) (noting the inapplicability of statements of intent "written after passage of the legislation" which "therefore d[o] not inform the decisions of the members of Congress who vot[e] in favor of the [law]" and holding that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory

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[6] The statements of private citizens with no official role in the Virginia General Assembly cannot possibly be leveraged to infer the intent of the legislature decades after the enactment of a statute.

interpretation.") (citations omitted); *Pacific Gas and Elec. Co.*, 461 U.S. at 216 ("What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it.").

The challenge is exacerbated here, as "legislative intent is not officially recorded in Virginia."[7] For that reason, "[i]t is well-settled [in Virginia courts] that 'we determine the General Assembly's intent from the words contained in the statute.'" *Newberry Station Homeowners Ass'n, Inc. v. Bd. of Supervisors of Fairfax Cty.*, 285 Va. 604, 614, 740 S.E.2d 548, 553 (2013) (internal citation omitted). Where the language of a Virginia statute is straightforward and unambiguous, "resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning." *Id.* (citation omitted).

The Virginia rule on legislative interpretation is relevant were this Court to consider how the Virginia Act is applied within the Commonwealth. Under the Virginia Act, it is legal for Petitioners to construct a facility to mill uranium ore that has been mined out-of-state and to process that ore into U_3O_8 (*i.e.*, yellowcake) in Virginia. For comparison's sake, the Cameco Corporation is one of the world's largest uranium companies. Ore slurry from Cameco's McArthur River mine has historically been transported "in special containers 80 kms [kilometers] southwest to Key Lake where it's milled and blended for processing with low-grade ore

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[7] *See* DLS *supra*, note 4.

stockpiled at the mill."[8] Similarly, the ore slurry from Cameco's Cigar Lake deposit "is trucked in special containers to . . . [the] McClean Lake mill 70 kms [kilometers] northeast."[9] The feasibility of transporting ore would likely depend on the market price for a mill's finished product, which in recent decades has swung from below $20 per pound of yellowcake to over $160 per pound when adjusted for inflation.[10] Any application of Virginia's statute within the Commonwealth, however, would not fluctuate with the price of uranium.

Finally, to the extent this Court would look to legislative motive at all, it undeniably would be the motive of the legislature that enacted the Virginia Act, not one of several legislatures that failed to take any action between 2009 and 2014. Not only are statements made between 2009 and 2014 irrelevant for inferring the intent of the General Assembly in 1983, they are also impossible to ascribe to a single legislature given that the House of Delegates reorganized three times during that timeframe, the Virginia Senate reorganized twice, and two Governors served as chief executive of the

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[8] Cameco Corp., *Businesses*, https://www.cameconorth.com/about/businesses (last visited Aug. 20, 2018).

[9] *Id.*

[10] *See* NATIONAL RESEARCH COUNCIL, URANIUM MINING IN VIRGINIA: SCIENTIFIC, TECHNICAL, ENVIRONMENTAL, HUMAN HEALTH AND SAFETY, AND REGULATORY ASPECTS OF URANIUM MINING AND PROCESSING IN VIRGINIA, 93 (2012), https://doi.org/10.17226/13266.

Commonwealth.[11] *See Abbott v. Perez*, 138 S.Ct. 2305, 2325 (confirming that when challenging legislative districts that were finally adopted in 2013, "there can be no doubt about what matters: It is the intent of the 2013 Legislature" and not the intent of the 2011 legislature that adopted "defunct and never-used plans"); *see also Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (reviewing the constitutionality of a 1901 Alabama law based on the motivation of the legislature at the time of "its original enactment" and declining to consider whether the law "would be valid if enacted today").

III. Uranium Mining Is Inconsistent with the Vision for Economic Development that Southern Virginia Has Pursued Over Many Decades.

The Commonwealth, working with local governments represented by *amici,* long ago chose an economic path for Southern Virginia that includes building a stable economy focused on agriculture, tourism, motorsports, education, and other complimentary industries. This path does not include a large uranium mine.[12]

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[11] Members of the Virginia House of Delegates are elected to two-year terms in odd-numbered years, after which the House reorganizes, electing a Speaker and making Committee assignments. Members of the Virginia Senate are elected to four-year terms in odd-numbered years, with the Senate reorganizing following each general election in which Senators are elected.

[12] As one local civic leader recently observed, "I see a beautiful river, and I can see shops and technology companies. All of those things fit together. I don't see a mine." Robert

Even the modern, *non*-legislative history cited by Petitioners (which, as stated in Part II, *supra*, is irrelevant to the preemption analysis), evinces a host of motives for not amending the Virginia Act, including state economic development motives. Thus, Delegate Glenn R. Davis (R-Virginia Beach), reportedly expressed a preference for offshore drilling for natural gas, along with wind and solar power, as "technologies [that] hold much more promise for domestic energy production and Virginia Beach job creation than uranium mining does." Pet'rs' App. 244a. Delegate Manoli Loupassi (R-Richmond) articulated the economic concerns in greater detail:

> The anticipated economic benefits of the proposed mining operation are speculative. The operation of uranium mining is price-dependent. When prices are high, mines flourish. When prices drop, uranium mines close and uranium miners lose their jobs. … The 'Boom to Bust to Boom to Bust' cycle is well-documented in the uranium mining industry, and has shown amazing consistency over the past 25 years.

Pet'rs' App. 264a-66a.

Powell, *Solon of Southern Virginia: Civil leader raises concerns about uranium mining in his home county*, VIRGINIA BUSINESS MAGAZINE, (June 28, 2012), http://www.virginiabusiness.com/news/article/solon-of-southern-virginia.

A National Academy of Sciences study on uranium mining in Virginia ("NAS Report") confirms many justifications for building a diverse and stable economy in Southern Virginia without uranium mining.[13] The NAS Report, for example, identifies various adverse impacts for surface water and groundwater quantity and quality from the state-regulated mining activities and wholly distinct from any federally regulated processing of uranium ore that might occur after mining.[14]

Critical to the business interests of Southern Virginia, the NAS Report also documents the boom-and-bust nature of the uranium mining industry, making it especially unwelcome for communities looking to stabilize their economies. The NAS Report notes that uranium prices spiked in the 1970s, but shortly thereafter suffered a steep and sustained decline: "there were depressed uranium prices for the 1980s and 1990s with spot prices well below the cost of production for most uranium mines."[15] In fact, the NAS Report shows that from 1989 through 2004, the spot price of uranium remained at or below $20 per pound when adjusted a

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[13] *See* NATIONAL RESEARCH COUNCIL, *supra* note 10.

[14] *See id.* at 181-87, 193-97, 199.

[15] *See id.* at 92.

for inflation[16] Today, publicly available data show that prices for uranium remain near $25.[17]

These figures are sobering to local economic development leaders, given that Petitioners' public filings with Canadian securities administrators show that development of the Coles Hill Deposit would not be economically viable at such low prices. Petitioners' recent securities filing claims that the Coles Hill Deposit "has the potential for attractive economics based on an assumed U_3O_8 price of $64 per lb," requiring a dramatic increase in uranium prices before mining could even begin in Southern Virginia.[18] The volatility of the project as a whole is confirmed by the disclosure that a "change in the prices of uranium of $5.00 per lb results in a potential change in the project NPV [net present value] of $110.0 million."[19] Even more disconcerting

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[16] *See id.* at 93.

[17] *See* Ux Consulting Company, LLC, *UxC Nuclear Fuel Price Indicators*, https://www.uxc.com/p/prices/UxCPrices.aspx (last visited Aug. 29, 2018) (showing a weekly spot price of $26.10 as of August 20, 2018, and a month-end price of $25.70 as of July 30, 2018).

[18] Virginia Energy Resources, Inc., *Management Discussion and Analysis: 1st Quarter Ended March 31, 2018*, 4 (downloadable through the System for Electronic Document Analysis and Retrieval (SEDAR), which "is a filing system developed for the Canadian Securities Administrators," and published online at https://www.sedar.com/homepage_en.htm).

[19] *Id.*

for *amici* is the disclosure that the project might not be economically feasible to mine at all: "overly onerous regulations might dramatically increase the estimates for capital expenditures and operating costs for the Coles Hill project to the point where the required return on capital is insufficient to support the advancement of the project to commercial production."[20]

In short, *amici* continue to maintain non-safety justifications for leaving the Commonwealth's moratorium undisturbed. These justifications serve legitimate State interests, none of which are preempted by the AEA.

IV. The Doctrine of Laches Should Protect Local Communities That Have Relied on Petitioners' Prior Acceptance of the Virginia Act.

Virginia's uranium mining ban was first enacted in 1982 and amended in 1983. In the intervening thirty-five years, the Southern Virginia region has developed a diverse economy. Petitioners are only now raising their preemption claim, long after significant, non-uranium investments in the region have been made. Astoundingly, Petitioners filed this challenge after pledging to local communities that they would leave the moratorium undisturbed pending resolution of the NAS Report. *See* Part III, *supra*. In the *Danville Register & Bee* and elsewhere, Petitioner Virginia Uranium, Inc. affirmed:

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[20] *Id.* at 13.

> We are prepared to work with members of the General Assembly in 2012 to lift the moratorium on uranium mining if, and only if, the NAS concludes that this can be done with the highest regard for the well-being of people, livestock and the environment. . . . On the other hand, if the NAS finds that uranium mining would entail unacceptable risks, we will not pursue lifting the moratorium in 2012. Period.[21]

In similar language published in the Norfolk-based *Virginian-Pilot,* Petitioners further asserted their acquiescence to the role of the Virginia General Assembly:

> We are committed to heeding the findings of the study when they are released, regardless of the outcome. If, and only if, the NAS concludes that properly regulated uranium mining can be done safely, we intend to pursue lifting the moratorium in the General Assembly. . . . On the other hand, if the NAS finds that uranium mining cannot

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[21] Walter Coles, *No End-Run Around the Study,* DANVILLE REGISTER & BEE, Mar. 28, 2011, A8 (reproduced in the Appendix to this brief).

> be done safely, we will obviously not pursue lifting the moratorium.[22]

Domestic travel and tourism in Halifax County, Pittsylvania County, and the City of Danville alone supported 2,100 jobs and more than $41.6 million in payroll for 2016, the most recent year for which data are available. Tourism in these communities further generated more than $206 million in total expenditures as calculated by the Virginia Tourism Corporation, including more than $14 million in state and local tax receipts.[23]

According to an analysis by the Weldon Cooper Center for Public Service at the University of Virginia, Pittsylvania County benefited from more than $340 million in direct economic impacts from agriculture-related industries in 2015, with total economic impacts from agriculture topping out at $412.9 million. [24] In fact, agriculture-related

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[22] Walter Coles, *Uranium Company Renews Pledge to Protect Virginians*, VIRGINIAN-PILOT, Mar. 27, 2011, 8 (Hampton Roads section) (reproduced in the Appendix to this brief).

[23] *See* Virginia Tourism Authority, *The Economic Impact of Domestic Travel on Virginia Counties 2016*, at 27-28 (2017), https://www.vatc.org/wp-content/uploads/2017/09/2016_Economic_Impact_of_Domestic_Travel_on_Virginia_and_Localities.pdf.

[24] *See* TERANCE J. REPHANN, WELDON COOPER CENTER FOR PUBLIC SERVICE AT THE UNIVERSITY OF VIRGINIA, THE ECONOMIC IMPACT OF VIRGINIA'S AGRICULTURE AND FOREST INDUSTRIES 54 (2017), http://www.vdacs.virginia.gov/pdf/weldoncooper2017.pdf.

industries provide the Counties that are home to, and immediately adjacent to, the Coles Hill Deposit (Pittsylvania, Henry, Halifax, Franklin, Bedford, and Campbell counties) a total of $3.2 *billion* in economic benefits annually.[25]

Private boarding school education is also a significant part of the Southern Virginia economy. Hargrave Military Academy and Chatham Hall are nationally prominent, private boarding schools located in Chatham, Virginia. Chatham Hall was founded in 1894 and draws students from an international pool of applicants. Hargrave Military Academy, founded in 1909, is an exceptional private military boarding school that also prides itself on its international reputation and influence. Both schools sit less than ten miles, by car, from the Coles Hill Deposit.

All of this economic development occurred while Petitioner, Virginia Uranium, Inc., and its predecessor companies accepted the Commonwealth's mining ban as a duly enacted law. Virginia Uranium, Inc., was founded in January of 2007, but according to Petitioner it was preceded by a "predecessor company," Marline.[26] Marline

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[25] *See id.* When the benefits from forestry-related industries are included, the total economic benefit exceeds $5.3 billion. *Id.*

[26] *See* Virginia Uranium, Inc., *History of VUI and Coles Hill*, http://www.virginiauranium.com/who-we-are/history-of-coles-hill/ (last visited August 1, 2018) ("On January 16, 2007 Virginia Uranium was formed, with Walter Coles as chairman .

investigated the Coles Hill Deposit in 1982, the very same year that the Virginia General Assembly enacted the Virginia Act.[27]

Petitioners failed to raise any concerns regarding federal preemption of the Virginia Act for more than thirty years, while *amici* and the Commonwealth worked to build the economy of Southern Virginia without uranium mining. "The principle that the passage of time can preclude relief has deep roots in our law. . . . It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief." *City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 217 (2005). *See SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC,* 137 S.Ct. 954, 960 (2017) ("Laches is 'a defense developed by courts of equity' to protect defendants against 'unreasonable, prejudicial delay in commencing suit.'") (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1973 (2014)); *see also Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 379 (2004) ("Laches might bar a petition for a writ of mandamus if the petitioner 'slept upon his rights . . . and especially if the delay has been prejudicial to the [other party], or

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. . Norman Reynolds, who had been president of *the predecessor company, Marline,* brought his valuable experience to the table as a Director and as President and Chief Executive Officer.") (emphasis added).

[27] *See* Katherine E. Slaughter, *Will Uranium Get a Glowing Welcome in Virginia?*, 28 VA. ENVTL. L. J. 483, 487 (2010).

to the rights of other persons.'") (quoting *Chapman v. Cty. of Douglas*, 107 U.S. 348, 355 (1883)) (alterations in original). Hence, the doctrine of laches should bar Petitioners from seeking the declaratory and injunctive relief they have requested here.

CONCLUSION

The Virginia General Assembly's legislative enactment in 1983 represents a legitimate exercise of the State's historic police powers. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Appendix

APPENDIX

I. LIST OF *AMICI CURIAE*

MEMBERS OF
THE SOUTHERN VIRGINIA DELEGATION TO
THE VIRGINIA GENERAL ASSEMBLY,
LOCAL CHAMBERS OF COMMERCE,
CIVIC, TRADE, AND ECONOMIC
DEVELOPMENT ASSOCIATIONS,
AND MUNICIPALITIES

Members of the Southern Virginia Delegation to the Virginia General Assembly:

State Senator William M. Stanley, Jr.

Senator Frank M. Ruff, Jr.

Delegate Leslie R. "Les" Adams

Delegate James E. Edmunds, II

Delegate Daniel W. Marshall, III

Delegate Thomas C. Wright, Jr.

Municipalities:

Halifax County, Virginia Board of Supervisors

Town Council of Halifax, Virginia

Town Council of South Boston, Virginia

Town of Clarksville, Virginia

Chambers of Commerce:

Danville-Pittsylvania County Chamber of Commerce

Halifax County, Virginia Chamber of Commerce

Clarksville, Virginia Lake Country Chamber of Commerce

Civic, Trade, and Economic Development Associations

Halifax County, Virginia Farm Bureau

Halifax County Department of Tourism

River District Association (Danville, Virginia)

Economic Development Authority for the Town of Clarksville, Virginia

The Alliance for Progress in Southern Virginia

The Virginia Coalition

Danville Industrial Development, Incorporated

Danville Area Development Foundation

Industrial Development Authority of Halifax County, Virginia

Industrial Development Authority of South Boston, Virginia

II. *Description of Amici*

The Southern Virginia delegation to the Virginia General Assembly includes six State Senators and Delegates whose districts comprise the Coles Hill Deposit in Pittsylvania County and many of the surrounding communities in the region. The delegation includes State Senator William M. Stanley, Jr., a Republican representing the 20th Senatorial District; Senator Frank M. Ruff, Jr., a Republican representing the 15th Senatorial District; Delegate Leslie R. "Les" Adams, a Republican representing the 16th House District; Delegate James E. Edmunds, II, a Republican representing the 60th House District; Delegate Daniel W. Marshall, III, a Republican representing the 14th House District; and Delegate Thomas C. Wright, Jr., a Republican representing the 61st House District. The legislative districts for Senator Stanley and Delegate Adams encompass the entirety of the Coles Hill Deposit.

The Chambers of Commerce for Halifax County, Pittsylvania County, the City of Danville, and the town of Clarksville, along with the Industrial Development Authority for Halifax County, the Industrial Development Authority of South Boston, Virginia, and the Economic Development Authority for the Town of Clarksville, collectively represent hundreds of businesses, from sole proprietors to companies with over 350 employees. These organizations have worked together for decades to improve business opportunities in the region and to promote a vibrant, profitable, business community for Southern Virginia. The Chambers and related associations also collaborate with the Halifax County, Virginia Farm Bureau, which works on

behalf of the area's farmers to promote agriculture and agriculture-dependent businesses.

The Danville Industrial Development Authority, Inc., organized in 1947, is primarily engaged in promoting and supporting industrial development in the City of Danville, Virginia and Pittsylvania County, Virginia. It often coordinates its efforts with the Danville Area Development Foundation, Inc., organized in 1958, which is primarily engaged in assisting and promoting the industrial and commercial development of the City of Danville, Virginia and the immediate surrounding area. They are joined by the River District Association, which was formed in 1999 to coordinate efforts to revitalize the downtown Danville community. In addition, the Alliance for Progress in Southern Virginia, based in Danville, and the Virginia Coalition, based in Halifax County, have coordinated with business leaders opposed to uranium mining in Southern Virginia.

The municipal government *amici* include the Board of Supervisors of Halifax County, Virginia and the towns of South Boston, Halifax, and Clarksville. Collectively, they are home to more than 35,000 residents. The scenic rivers and nearby Buggs Island Lake are popular destinations for camping, fishing, hunting, boating, swimming, and water skiing. Halifax County is also home to the Virginia International Raceway ("VIR"), a nationally recognized motorsports destination and venue. VIR has been ranked by Road & Track Magazine as one of the top ten "North American race tracks you need

to visit." The Halifax County Department of Tourism is a joint governmental partnership with Halifax County, Virginia, the Town of South Boston and the Town of Halifax. It serves as the official marketing organization for these municipalities, working to promote agritourism, motorsports, arts and culture, and the natural scenic beauty of Southern Virginia.

III. Walter Coles, *Uranium Company Renews Pledge to Protect Virginians*, VIRGINIAN-PILOT, Mar. 27, 2011, at 8 (Hampton Roads section).

Your editorial mischaracterizes our company's position on the National Academy of Sciences study of uranium mining in Pittsylvania County, as well as the General Assembly's deliberations on whether to lift Virginia's moratorium on uranium mining.

Our company has unequivocally said that the well-being of Virginia's residents and the sustainability of our environment are our foremost concerns.

To ensure the protection of public health and the environment, we have consistently supported the independent study being conducted by the National Academy of Sciences (NAS). We have provided all of the resources, data and expertise at our disposal to ensure the NAS has everything it needs to leave no stone unturned.

We are committed to heeding the findings of the study when they are released, regardless of the outcome. If, and only if, the NAS concludes that properly regulated uranium mining can be done

safely, we intend to pursue lifting the moratorium in the General Assembly. This does not undermine the study, precisely because our efforts are contingent upon just one possible outcome of the study.

On the other hand, if the NAS finds that uranium mining cannot be done safely, we will obviously not pursue lifting the moratorium.

For those concerned about rushing a vote in the General Assembly, keep in mind that 2012 will mark the end of a long and orderly process conducted by the state over the last three years that has involved numerous studies and public hearings. Furthermore, lifting the moratorium would be only the first step in a lengthy process. Developing state regulations and obtaining the necessary permits will take years and allow ample opportunities for public comment, technical and scientific review and scrutiny by all stakeholders.

The editorial failed to point out that it has been the strident opponents of uranium mining who have consistently undermined the NAS study, not Virginia Uranium.

In an April 2009 letter to the Richmond Times-Dispatch, representatives of the three leading opponents of uranium mining Virginia – the Southern Environmental Law Center, the Piedmont Environmental Council and the Virginia League of Conservation Voters – made their position clear when they said they "did not want the study in the first place."

The bottom line is that our company will not push to lift the moratorium if the NAS determines that it would pose unacceptable risks. We hope

opponents of uranium mining will adopt the same reasonable approach if the NAS finds that mining can be done safely.

We should all have full faith and confidence in the Academy to deliver an independent, scientifically based assessment, and we should all fully commit to abide by its findings.

Walt Coles, Sr.
Chairman of the Board
Virginia Uranium Inc.
Chatham

IV. Walter Coles, *No End-Run Around the Study*, DANVILLE REGISTER & BEE, Mar. 28, 2011, at A8.

Because of irresponsible commentary in some area publications, I would like to reaffirm our company's position on the National Academy of Sciences' study of uranium mining in Virginia and the General Assembly's deliberations on whether to lift Virginia's moratorium on uranium mining.

Since the formation of Virginia Uranium Inc. in 2007, we have consistently said that the well-being of Virginia's residents and the sustainability of our environment are our foremost concerns. We all breathe the same air, drink the same water and enjoy the same majestic beauty of Virginia's environment. We will not undertake any actions that would in any way threaten these sacred treasures.

To ensure the protection of public health and the environment, we have consistently agreed with the

need for an independent, scientific study of the potential impacts of uranium mining in Virginia.

Since the Virginia Coal and Energy Commission tasked the National Academy of Sciences to conduct such a study in 2009, we have unequivocally supported the efforts of the NAS. We have provided all of the resources, data and expertise at our disposal to ensure that the NAS has everything it needs to leave no stone unturned.

The NAS will release the findings of its study in December. We are fully committed to heeding those findings – regardless of the outcome. Our position on this has remained unchanged since the inception of the study. We are committed to this process and dedicated to following the conclusions of the study.

We sincerely hope the NAS will find that properly regulated uranium mining and milling can be conducted safely in Virginia. We do not believe there is anything irresponsible or inappropriate about making preparations for this possibility.

We are prepared to work with members of the General Assembly in 2012 to lift the moratorium on uranium mining if, and only if, the NAS concludes that this can be done with the highest regard for the well-being of people, livestock and the environment. This does not in any way undermine the NAS study, precisely because our plans are contingent upon just one possible outcome of the NAS study.

For those who may be concerned that lifting the moratorium would be a rush to mining uranium, we assure you that, in fact, it would only be the first step in a very lengthy process that will take years before a single shovel enters the ground. Developing

state regulations and obtaining the necessary permits will take years and allow ample opportunities for public comment, technical and scientific review and careful scrutiny by all stakeholders.

On the other hand, if the NAS finds that uranium mining would entail unacceptable risks, we will not pursue lifting the moratorium in 2012. Period.

Ironically, it has been the opponents of uranium mining who have consistently and vociferously undermined the NAS study, not Virginia Uranium. Mining opponents have characterized the NAS as corrupt, pro-nuclear and inadequate to the task of the study and have even lambasted the study itself as a waste of money and a rigged, foregone conclusion.

In an April 2009 letter to the Richmond Times-Dispatch, representatives of the three leading opponents of uranium mining in Virginia – the Southern Environmental Law Center, the Piedmont Environmental Council and the Virginia League of Conservation Voters – went so far as to say that they "did not want the study in the first place." Commonsense would suggest that these powerful, influential groups be held to account for their outright disregard for the NAS and its scientific-based study.

The bottom line is that neither our company nor the General Assembly will push to lift the moratorium if the NAS determines that uranium mining and milling cannot be done safely. We hope opponents of uranium mining will adopt the same reasonable approach if the NAS finds that mining can be done safely. We should all have full faith and

confidence in the Academy to deliver an independent, scientifically based assessment, and we all should fully commit to abiding by its findings.

Coles, a resident of Chatham, is chairman of Virginia Uranium, Inc.