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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the Petition for Writ of Certiorari remains accurate.

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INTRODUCTION

The first sentence in Respondents' Brief captures the essence of their argument: because the regulatory jurisdiction of the Nuclear Regulatory Commission ("NRC") under the Atomic Energy Act ("AEA") is confined to activities that take place "*after* uranium's removal from its place of deposit in nature," they say, the statute cannot "preempt a state law addressing what happens *before* it is removed." Respondents' Br. 1 (brackets omitted). The argument rests on the premise that the scope of the field preempted by the AEA depends solely on *what activity* a State purports to regulate, regardless of *what purpose* the state regulation is designed to achieve and *what effect* the state regulation has on activities the NRC has exclusive authority to regulate. Under Respondents' theory, the mining ban would be perfectly valid even if Virginia's statute explicitly stated what is clear from its background and history: "because the Commonwealth of Virginia disagrees with the NRC that uranium milling and tailings-storage activities do not pose unacceptable radiological safety hazards, the mining of uranium is hereby banned until such time as *Virginia* is satisfied that milling and tailings-storage activities may be undertaken without significant radiological risk." Respondents' argument is squarely contradicted by both the text of the AEA and this Court's precedents interpreting it.

Congress defined the field preempted by the AEA "in part, by reference to *the motivation* behind the state law." *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) (emphasis added). A State may not regulate "for the

protection of the public health and safety from radiation hazards" arising from the milling of uranium ore and the storage of uranium tailings unless the NRC approves its regulatory program and enters an agreement vesting the State with regulatory authority. 42 U.S.C. § 2021(b). Absent such an agreement, Congress directed, the State may only "regulate activities for purposes other than protection against radiation hazards." *Id*. § 2021(k).

Virginia has no agreement with the NRC vesting it with authority over milling and tailings. But the mining ban challenged here, Respondents have repeatedly conceded, has both the purpose and the effect of prohibiting uranium milling and tailings-storage activities based on concerns about radiation hazards. If Section 2021 is to have any meaning, Virginia's ban cannot stand.

Respondents' argument is also foreclosed by this Court's decision in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission* ("*PG&E*"), 461 U.S. 190 (1983). *PG&E* considered a California law imposing a moratorium on construction of nuclear power plants. The law, like Virginia's here, regulated an *activity* squarely within the State's "traditional authority": "the certification of new nuclear plants," a task the Court described as "characteristically governed by the States." *Id*. at 191, 198, 205. The Court rejected California's argument—identical to Virginia's here—that because the AEA left undisturbed the State's authority to determine the "[n]eed for new power facilities," *id*. at 205, it could

exercise that authority for *any purpose*. Instead, the Court held that a state law "grounded in safety concerns falls squarely within the prohibited field," but it concluded that California's moratorium was not preempted only because it was based on "a non-safety rationale." *Id.* at 212-13.

Respondents claim that we have presented the Court with "carefully edited" snippets from *PG&E* while "shear[ing] important language" from that decision. Respondents' Br. 17. But it is Respondents who ignore the Court's stated reasoning. Most importantly, Respondents erroneously suggest that California's moratorium on construction of nuclear power plants differs from Virginia's mining ban because, "unlike uranium mining, 'nuclear construction' has always been a matter of intense federal concern and regulation." *Id*. at 28 (quoting *PG&E*, 461 U.S. at 206). But, again, this Court emphasized that the AEA "does not at any point expressly require the States to construct or authorize nuclear power plants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors." *PG&E*, 461 U.S. at 205. Indeed, the Court noted, the statute expressly reaffirms that authority to decide whether additional nuclear power plants should be constructed was "to remain in state hands." *Id*. at 208 (citing 42 U.S.C. § 2018).

Thus, the premise of *PG&E* was that the State, as a general matter, had authority to decide whether to permit construction of a nuclear power plant. Nevertheless, the Court squarely rejected California's

argument, identical to Virginia's submission here, that the State could exercise this unquestioned regulatory authority based on radiological safety concerns arising from subsequent activities that are subject to exclusive NRC regulation—in *PG&E*, how the plant is constructed and operated. Just as the Act preempted California from using its general authority over the need for new nuclear power plants to "completely prohibit new construction until its safety concerns are satisfied by the federal government," *id*. at 212, Virginia may not use its traditional authority over mining to completely prohibit uranium mining until its concerns about the radiological safety of milling and tailing-storage operations are satisfied.

Respondents' other efforts to distinguish *PG&E* are equally unconvincing, and they are ultimately left asking the Court instead to simply *repudiate* the opinion. Respondents' Br. 32 n.7 (arguing that the reasoning of *PG&E* is "wrong in several respects"). But Respondents failed to make this argument in their opposition to certiorari and so it comes too late. It also comes with too little. *PG&E* was correctly decided, and in any event, Respondents have not shown anything approaching the "special justification" required for this Court to overrule its previous interpretation of a statute. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

Respondents inveigh at length on the difficulties of discerning the purpose behind a State law; but it is no more difficult here than in a host of other areas in which legislative purpose must be determined to

resolve federal questions. In any event, difficult or not, that is part of the test for preemption that Congress has chosen, and this Court's task is to faithfully apply it, not come up with an easier one.

Respondents protest that they have not really conceded that the purpose of the mining ban is to protect against the radiological safety hazards arising from milling and tailings-storage activities. But in fact they *repeatedly* conceded this point *at every stage* of the litigation, both courts below (as well as the dissent in the Court of Appeals) acknowledged and relied upon the concession, and Respondents repeated the concession in their Brief in Opposition in this Court. *Even now* they do not advance any serious argument that the ban is not "grounded in [these] safety concerns." *PG&E*, 461 U.S. at 213.

Finally, Respondents' mining ban impermissibly frustrates and obstructs the purposes of the AEA.

ARGUMENT

I. Respondents' Approach to Field Preemption Is Flatly Contrary to the Text of the AEA.

1. In 1959, Congress enacted Section 2021 "to clarify the respective responsibilities" under the AEA "of the States and the [Nuclear Regulatory] Commission." 42 U.S.C. § 2021(a)(1). Section 2021(b) specifies that if a State wishes "to regulate the materials

[within the NRC's exclusive jurisdiction] for the protection of the public health and safety from radiation hazards," it must first obtain the NRC's "agreement[] . . . providing for discontinuance of the regulatory authority of the Commission" over the radiation hazard in question. *Id.* § 2021(b). Absent such an agreement, the State is left only with its preexisting authority "to regulate activities for *purposes other than* protection against radiation hazards." *Id.* § 2021(k) (emphasis added).

Because Virginia has no agreement vesting it with the NRC's authority over the milling of uranium ore or the storage of uranium tailings, the Commonwealth *may not* regulate for the purpose of "the protection of the public health and safety from radiation hazards" arising from those materials. *Id*. § 2021(b). Yet as Respondents have repeatedly conceded (more on that below), the mining ban has the purpose and effect of regulating the radiological hazards arising from uranium milling and tailings-storage by precluding those follow-on activities. If a State can in this manner regulate the radiological hazards entrusted to the NRC regardless of whether it has reached an agreement with the NRC, Section 2021 is empty of any significance.

Respondents' cursory efforts to rebut these textual arguments are unpersuasive. Noting that "Section 2021(b) grants States that enter into agreements with the Commission a *new* power to regulate matters that otherwise would lie within exclusive federal jurisdiction," Respondents argue that this fact somehow

"destroys the predicate for . . . the maxim *expressio unius est exclusio alterius*." Respondents' Br. 26 n.5. To the contrary, the new power granted by Section 2021(b) *is the predicate* for the *expressio unius* inference, for that new power to regulate for the purpose of protecting against radiation hazards is conditioned on an agreement between the State and the NRC. The expression of one carefully conditioned way of regulating for radiological safety purposes is necessarily an exclusion of the State's authority to regulate for those purposes in any other way. *Raleigh & Gaston R.R. Co. v. Reid*, 13 Wall. (80 U.S.) 269, 270 (1871). Section 2021(k) confirms the point, providing that the preemptive scope of the remainder of Section 2021 "shall [not] be construed to affect" State authority "to regulate activities for purposes other than protection against radiation hazards." If Section 2021 *has no preemptive scope*, as Respondents say, then Subsection k has *no function at all*.

This Court's interpretation of the remarkably similar preemption provisions of the Occupational Safety and Health Act ("OSH Act") in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992), strongly supports this reading. Like Section 2021(b), Section 18(b) of the OSH Act provides that a State may "assume [regulatory] responsibility" for occupational health and safety if it reaches agreement with the Secretary of Labor to take over the authority. "The unavoidable implication of this provision," the Court held in *Gade*, "is that a State may not enforce its own occupational safety and health standards without

obtaining the Secretary's approval." 505 U.S. at 99 (plurality opinion); *accord id.* at 112-13 (Kennedy, J., concurring). Further, just as Section 2021(k) *expressly preserves* State authority to "regulate for *purposes other than* protection against radiation safety," Section 18(a) of the OSH Act "saves from pre-emption any state law regulating an occupational safety and health issue with respect to which no federal standard is in effect." *Id.* at 100 (plurality). "[T]he natural implication of this provision is that state laws regulating the same issue as federal laws"—that is, state laws outside the savings clause—"are not saved," for that would render the savings clause "superfluous." *Id.*; *accord id.* at 112 (Kennedy, J., concurring). The same conclusion necessarily follows here.

Respondents emphasize that "none of Section 2021's provisions address state regulation of uranium mining." Respondents' Br. 21. That observation is true but entirely misses the point. Section 2021 does not address uranium mining—or any of the other innumerable activities States may regulate, such as police and fire protection, the use of state roads and rails, or (as this Court recognized in *PG&E*, 461 U.S. at 198, 205) the certification of the need for new power plants. There was no need to specify the myriad activities generally subject to State regulation (if such specification were possible) because Congress chose to define the preempted field based on the *purpose* of the State's regulation and its *effect* on activities subject to exclusive NRC regulation, not the *activities* States generally may regulate.

Respondents suggest that prior to Section 2021's enactment in 1959, States could have banned uranium mining for the purpose of protecting against the radiation hazards of uranium milling- and tailing-storage activities. Whether or not that is so, one of Congress's stated purposes in enacting Section 2021 was to "clarify the respective responsibilities . . . of the States and the Commission" in this area. 42 U.S.C. § 2021(a)(1). And as clarified by Section 2021, there is no question that States may not regulate activities otherwise within their authority if they are doing so "for purposes" of "protection against radiation hazards" arising from activities subject to exclusive NRC regulation. *Id*. § 2021(k). For this reason, Respondents' hypothetical about the 16-year-old and the family car is wholly inapt. The hypothetical assumes that the sole purpose of Section 2021 was to extend new regulatory authority to the States, but by its plain text that provision was *also* intended to clarify the *limits* on State authority under the AEA.

2. Respondents repeatedly invoke this Court's decision in *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988), but *Isla Petroleum* is completely irrelevant to this case. *Isla Petroleum* involved the Emergency Petroleum Allocation Act of 1973, which had authorized the President to set petroleum prices and expressly preempted any state regulation in conflict with those price controls. *Id*. at 497. The plaintiffs challenged a Puerto Rico regulation as preempted under the Act, but by the time they brought suit Congress had expressly repealed the

President's authority to control petroleum prices. *Id*. at 498-99. As a result, the plaintiffs were reduced to arguing that Congress's *elimination* of federal regulation in this field should be understood as preempting state regulation. *Id*. at 500. This Court disagreed, holding that the "repeal of [federal] regulation did not leave behind a pre-emptive grin without a statutory cat." *Id*. at 504.

This case is nothing like *Isla Petroleum*. Petitioners do not contend that the AEA created a regime free from all Government control—state or federal—as was argued in *Isla Petroleum*. *See id*. at 500. And far from "pre-emption *in vacuo*," *id.* at 503, the text of the AEA unambiguously preempts state regulation that has the purpose and effect of regulating activities, like uranium milling and tailing-storage, that are subject to the exclusive jurisdiction of the NRC. Section 2021(b) allows a State to regulate such activities for radiological-safety purposes only *pursuant to* an NRC agreement, and Section 2021(k) confirms that in all other cases States may exercise their traditional regulatory authority only "for purposes *other* than protection against radiation hazards." (emphasis added). Indeed, if States were not preempted from regulating for radiological-safety purposes unless they followed the Section's procedure, Section 2021 as a whole would be rendered *utterly meaningless*. Respondents contend that we cannot rely on Section 2021 as a whole, Respondents' Br. 21, but the ordinary principles of statutory interpretation say otherwise. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW § 24, p. 167 (2012) (statute's "text must be construed as a whole").

Were the Court to hold, as Respondents urge, that there is no "enacted statutory text" in the AEA supporting preemption, the result would be that the AEA *preempts nothing at all*. But even the Commonwealth does not take its *Isla Petroleum* argument seriously enough to accept that conclusion. Respondents concede that "[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field," insisting that they "have no quarrel" with that view of preemption. Respondents' Br. 27, 29, 30. By admitting that the AEA has *any* "prohibited field," the Commonwealth gives away the game. *Isla Petroleum* does not apply where the question is not whether the statute has any preemptive force at all, but rather *the scope* of the field preempted.

3. Respondents repeatedly invoke Justice Scalia's opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), *see, e.g.*, Respondents' Br. 38; *see also* Amicus Brief of Preemption Law Professors 10-17 (Sept. 4, 2018) ("Professors' Br."), but it has little, if any, bearing on the question before the Court. The issue in *Shady Grove* was whether a New York statute prohibiting class actions in certain cases was preempted by FED. R. CIV. P. 23 in cases brought in federal court. The Court held that the New York law was preempted because it directly conflicted with Rule 23. 559 U.S. at 398-99. The Court then responded to the dissent's argument that even if "the literal terms of [the state statute] address the same subject as Rule 23—*i.e.*, whether a class action may be maintained—. . . the provision's *purpose* is to restrict only remedies." *Id*. at 402. After cataloging some of the

difficulties with discerning legislative purpose, the Court refused to determine "whether [the] state and federal rules conflict based on the subjective intentions of the state legislature." *Id*. at 404.

As an initial matter, however difficult it may be to determine the purpose behind a state statute prohibiting class actions, the lower federal courts have faithfully and ably applied the AEA's purpose-based test since the Court announced it in *PG&E*. *See* Pet. Br. 47-52 (citing cases). And this Court routinely assesses the motivation underlying state enactments in other areas of the law. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (equal protection); *Maine v. Taylor*, 477 U.S. 131, 140-45 (1986) (dormant commerce clause).

In any case, the Court in *Shady Grove* had the discretion to decline to apply a purpose-based test because Rule 23 did not define its preemptive scope at all, much less by express reference to the purpose of the state law in question. In contrast, as this Court has repeatedly recognized, the clear text of the AEA defines the preempted field "in part, by reference to *the motivation* behind the state law." *English*, 496 U.S. at 84; *see* 42 U.S.C. § 2021(k) (States may not regulate for "purposes" of "protection against radiation hazards"). The language of a statute "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), and the judicial task "is to apply the text of the statute, not to improve upon it." *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014) (brackets omitted).

The point is well illustrated by this Court's jurisprudence under the Religious Freedom Restoration Act ("RFRA"). In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause does not require strict judicial scrutiny when a "neutral, generally applicable law" burdens an individual's "religiously motivated action." *Id.* at 881, 882-83. As in *Shady Grove*, Justice Scalia, writing for the Court, justified this rule in part by pointing to the formidable difficulties of such an inquiry: it could involve courts in "[j]udging the centrality of different religious practices," for example, and would require that "judges weigh the social importance of all laws." *Id.* at 887, 890. But when Congress responded to *Smith* by requiring that very inquiry by statute, the Court unanimously recognized that the Court's reservations about the difficulty of the inquiry must be set aside:

> We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test. . . .

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (citation omitted). So too here: in Section 2021, Congress deliberately chose to define the scope of the field preempted by the AEA

by means of a test that looks in part to the purpose of state law. The difficulty of the task is no license for the courts to refuse the assignment.

II. Respondents' Approach to Field Preemption Cannot Be Squared with This Court's Precedent.

This Court has addressed the preemptive scope of the AEA on three occasions, and each time it has affirmed the purpose-based preemption inquiry established by Congress in Section 2021. *See English*, 496 U.S. at 84; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984); *PG&E*, 461 U.S. at 213. Respondents' efforts to escape—or, failing that, repudiate—these repeated holdings are meritless.

Respondents accuse us of "repeatedly omit[ting] key language from both *Pacific Gas* and *English*," Respondents' Br. 27, but it is their efforts to sweep those precedents aside that conflict with this Court's unambiguous language at every turn. The Commonwealth first argues that *PG&E* involved a state attempt to regulate "private construction, ownership, and operation of commercial nuclear power reactors," which is a matter under the "strict supervision" of the federal government. *Id.* at 29. But *PG&E* could not have been clearer in repeatedly rejecting this characterization of what the case was about: "At the outset, we emphasize that the statute *does not* seek to regulate the construction or operation of a nuclear powerplant." *PG&E*, 461 U.S. at 212 (emphasis added); *see also* U.S. Br. 19 ("California had sought to regulate the antecedent question

whether a plant should be constructed, not *how* it should be constructed."); *id.* at 25-26.

Next, Respondents say that *PG&E*'s holding is distinguishable because this case "involves a state moratorium on an activity that has never even been regulated (much less entirely occupied) by federal law." Respondents' Br. 29. The same was true in *PG&E*. The Court repeatedly emphasized that the States have regulatory jurisdiction over "the generation of electricity itself, [and] the economic question whether a particular plant should be built." 461 U.S. at 207; *see also id*. at 206 (describing the authority to determine the need for new power plants as "a field which the States have traditionally occupied"); *id*. at 206 (AEA itself provided that States may regulate the question whether a new power plant may be constructed) (citing 42 U.S.C. § 2018). The Court in *PG&E* looked to the purpose of California's law not because it regulated an activity exclusively governed by federal law *but because it regulated an activity normally governed by State law*. *See PG&E*, 461 U.S. at 212.

Respondents point out that federal regulation "does not even commence until '*after* [uranium's] removal from its place of deposit in nature,'" and argue that "field preemption [should not extend] over an area that Congress has specifically declined to regulate in the very statute at issue." Respondents' Br. 22 (first alteration in original) (quoting 42 U.S.C. § 2092). But federal regulation of nuclear power plant construction and operations likewise does not even commence until *after* the decision is made by the State to permit the

construction of a plant in the first place, and Congress specifically declined to regulate that decision in the very statute at issue. *See* 42 U.S.C. § 2018. Nevertheless, this Court held that field preemption *does* extend to such an antecedent state decision when its purpose and effect are to regulate activities, based on radiation safety concerns, that are subject to the NRC's exclusive jurisdiction. *PG&E*, 461 U.S. at 212-13.

Respondents' effort to brush aside this Court's opinion in *English* also fails. The Court's plain statement in that case that the AEA's preempted field is "defined . . . , in part, by reference to the motivation behind the state law" may safely be ignored, according to Respondents, because "[s]aying that . . . 'motivation' is sometimes necessary before preemption will be found is not . . . the same as saying it is invariably sufficient." Respondents' Br. 31. Yet again, the *English* Court expressly *rejected* the very distinction proposed by Respondents. An impermissible purpose, this Court explained, is *not "necessary* to place a state law within the pre-empted field," since States may not directly regulate activities such as "nuclear-plant construction and operation" even out of "nonsafety concerns." *English*, 496 U.S. at 84. But because the field is *also* partially "defined by reference to the purpose of the state law in question," an impermissible purpose *is sufficient*. *Id.*

Ultimately, Respondents ask the Court to repudiate the reasoning of *PG&E* as "both unnecessary to the Court's holding and 'wrong in several respects.'" Respondents' Br. 32 n.7. This prayer for relief comes too

late in the day. Respondents did not ask the Court to overrule the majority opinion in *PG&E* in their Brief in Opposition to certiorari, so that door is now closed to them. *Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002).

Even if the issue was properly before the Court, Respondents have not come close to justifying the overruling of *PG&E*. First, *PG&E*'s interpretation of the purpose-based preemptive scope of the AEA is plainly correct. Second, because "*stare decisis* is a foundation stone of the rule of law," any "departure from the doctrine demands special justification." *Bay Mills Indian Community*, 134 S. Ct. at 2036 (quotation marks omitted). "What is more, *stare decisis* carries enhanced force when a decision . . . interprets a statute," as *PG&E* did, for "[t]hen, unlike in a constitutional case, critics of [the] ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Respondents have not provided the "special justification" necessary for this Court to "reverse course." *Id.*

III. Respondents' Approach to Field Preemption Would Permit States To Stymie the Development of Atomic Energy.

Since *PG&E* was handed down in 1983, the Nation's atomic energy industry has developed based upon the jurisdictional boundary-markers laid down by that opinion. Respondents provide *no plausible*

explanation of how a ruling in their favor could be written without effectively overruling the lower-court decisions that have protected the industry against pretextual State regulations driven by local concerns about radiological safety that are not shared by the NRC. *See, e.g.*, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004); *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013).

The domestic production of uranium is critical to both national security and our economy. *See* Amicus Brief of Senators Cotton, Inhofe, and Cruz 3, 19 (July 26, 2018); Amicus Brief of the Chamber of Commerce 7-8 (July 26, 2018). But powerful localist political forces frequently impel States to pretextually regulate radiological hazards outside their authority. "Time and again, the lower courts have properly determined that state action, although facially permissible, was undertaken for an impermissible radiological safety purpose." Amicus Brief of Entergy Operations, Inc. 5 (July 26, 2018); *see also* Amicus Brief of Nuclear Energy Institute 3 (July 26, 2018). Respondents' approach to preemption would dismantle this critically important body of preemption jurisprudence from the foundation up, providing "an easy roadmap for evasion of Congress's judgments regarding the States' carefully defined and limited role in this sphere." U.S. Br. 27.

Respondents' perfunctory response to these concerns is far from reassuring. Because the federal government does not regulate the activity of uranium mining, the Commonwealth says, the Court can deny

preemption on that basis without "say[ing] anything . . . about States' ability to regulate (directly or indirectly) either nuclear power plants or the storage and transportation of spent nuclear fuel," which, unlike uranium mining, are "subjects of pervasive federal regulation." Respondents' Br. 48 (citations and quotation marks omitted). That argument obviously does not work. Rather than comparing apples to apples, Respondents are trying to compare the *pretext*, in one case, with the *genuine purpose*, in the other. Nuclear power plants and fuel are subject to pervasive federal regulation, true enough, but *so are uranium milling and tailings management*. Under the rule Respondents urge the Court to adopt, just as Virginia would be permitted to ban uranium milling and tailing-storage activities through the pretext of banning uranium mining, so too would Utah be permitted to ban storage of spent fuel through the pretext of regulating state roads, municipal police and fire service, and corporate liability rules. *But see Skull Valley*, 376 F.3d at 1247-48.

IV. Respondents Have Repeatedly Conceded that Virginia's Ban Is Grounded in Impermissible Radiological Safety Concerns Related to Milling and Tailings Activities.

As this case comes to the Court, Respondents have repeatedly *conceded* that the ban on uranium mining is grounded in concerns about the radiological safety of milling and tailings operations—matters entrusted exclusively to the NRC. Respondents now attempt to walk back their concession, but the record is clear.

In the district court, Petitioners' complaint repeatedly alleged that the ban was grounded in concerns about the radiological safety of milling and tailings management, *e.g.*, Compl., Pet.App.232a, and in moving to dismiss, Respondents explicitly accepted those allegations as true, J.A.43-44. Petitioners' cross-motion for summary judgment again argued that Virginia's ban was motivated by these impermissible concerns, introducing nearly 700 pages of evidence into the record in support of the point. In response, rather than disputing that its ban was motivated by milling- and tailings-related concerns, Virginia instead argued that "[t]he Court need not conduct a searching review of legislative motive." J.A.211-12 (footnote omitted). The district court expressly accepted Respondents' concession, noting that "the General Assembly enacted [the ban] out of concern for uranium (and therefore, radiological) safety." Pet.App.69a.

In their briefing before the Fourth Circuit, Respondents again conceded the point. "All of [the] materials" that Petitioners had introduced into the record showing the radiological safety purpose of Virginia's ban "were beside the point," Respondents argued, "because Rule 12(b)(6) required defendants to accept as true that Virginia enacted the moratorium based on radiological safety concerns." J.A.216 (footnote omitted); *see also id.* at n.58. Both the majority and the dissent in the Court of Appeals likewise accepted Respondents' concession and decided the case on the assumption that the purpose of the mining ban was to preclude uranium milling- and tailing-storage

activities based on concerns about radiological safety. Pet.App.10a ("the Commonwealth concedes that it lacks a non-safety rationale for banning uranium mining"); Pet.App.52a (Traxler, J., dissenting) ("the Commonwealth has conceded at this point in the litigation that [the uranium mining ban] was enacted for just that purpose").

Finally, Respondents once again conceded this point before this Court. Our Petition repeatedly emphasized "the Commonwealth's admission (at least for purposes of its motion to dismiss) that its true motivation for banning uranium mining was to protect against the radiological hazards of uranium milling and tailings storage," Pet.21; *see also* Pet.2, 13, 15, 18, 27, and the point is even embedded in the Question Presented, *see* Pet.i. Under this Court's Rule 15.2, Respondents were obliged to dispute the existence or nature of that concession in their brief opposing our Petition. But instead, Respondents acknowledged that they were "assuming for purposes of a Rule 12(b)(6) motion that Virginia's uranium-mining moratorium was based on radiological safety concerns," Opp.26, and again argued that the concession about the Commonwealth's motivation was irrelevant. Opp.17.[1] Respondents note that they did raise the issue in their supplemental brief responding to the amicus brief submitted by the United States in response to the Court's

[1] In light of their complete failure to dispute the nature of their concession in the Brief in Opposition, Respondents' remarkable suggestion that the Court should dismiss the writ as improvidently granted comes with poor grace. Respondents' Br. 14.

invitation. But Rule 15.2 requires a respondent to "point out in the brief in opposition, *and not later*, any perceived misstatement made in the petition." (emphasis added).

Even now, Respondents tellingly do not deny that their ban is "grounded in [radiological] safety concerns." *PG&E*, 461 U.S. at 213. Instead, they advance two narrow arguments: (i) the purpose of the ban is a question of law, not "historical fact," and therefore not subject to concession, Respondents' Br. 34; and (ii) they conceded only that the ban was *partially* "motivated by" impermissible concerns, not *solely* motivated by them, *id.* at 43; *see also* Professors' Br. 20-21. Because neither argument was advanced or passed upon in the courts below, they are not properly before this Court. *E.g.*, *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1170 (2017). In any case, both lack merit.

Taking the second point first, whether milling-and-tailings-related concerns were the "sole" motivation for the ban is completely irrelevant. The AEA preempts state laws "*grounded* in safety concerns," *PG&E*, 461 U.S. at 213 (emphasis added), not just laws "grounded *solely* in safety concerns." *See Entergy*, 733 F.3d at 422. Section 2021 contains no exception allowing States to regulate "for the protection of the public health and safety from radiation hazards" without an agreement with the NRC so long as their regulations tangentially pursue *other* purposes as well. The precise degree to which impermissible concerns must predominate over other purposes in the State's overall constellation of motives is a matter best left for the lower

courts in the first instance. *See* U.S. Br. 23, 27 n.7. Petitioners have consistently argued and alleged that impermissible radiological-safety concerns were the predominate and but-for cause of the ban, *e.g.* Pet.App.232a, and that plainly suffices under any plausible version of the inquiry.

Respondents' attempt to escape their repeated concession by casting the issue as a question of law fares no better. As Respondents admit, in at least some contexts this Court has considered the issue of a State's motivation as "a question of fact," and it is unclear why the inquiry would be any different here. Respondents' Br. 41 (citing *Hunter v. Underwood*, 471 U.S. 222, 229 (1985)); *see also Hunt*, 526 U.S. at 549 (equal protection); *Taylor*, 477 U.S. at 140-45 (dormant commerce clause).

V. Virginia's Ban Is Also Preempted Because it Frustrates the AEA's Purposes and Objectives.

Finally, Virginia's uranium-mining ban is independently preempted because it is an obstacle to the implementation of the AEA's purposes and objectives.[2] The AEA has two core purposes that are relevant here: to vest the federal experts at the NRC with exclusive power to ensure public health and safety from

[2] Like their request to overrule *PG&E*, Respondents' suggestion that the Court overrule its "existing doctrine" on obstacle preemption, Respondents' Br. 50 n.15, comes too late, *Shelton*, 535 U.S. at 660 n.3.

radiological hazards, and to promote the private-sector development of peacetime atomic power. *See* U.S. Br. 31. Respondents' ban frustrates both of them. It prevents the private development of the Nation's largest untapped uranium resource, hobbling a domestic industry that is of critical military and economic importance. *See supra*, Part III. And it does so based on a judgment about radiological safety that the NRC has *considered and rejected*. *See* Amicus Brief of former Nuclear Regulators 4, 11, 33-35 (July 26, 2018).

Moreover, the challenged ban independently violates obstacle-preemption principles by "conflict[ing] with Congress's chosen system for state participation in the regulatory field of nuclear-safety concerns," U.S. Br. 32—the Section 2021 Agreement process. It would impermissibly "undercut" that congressionally designed process if the State could take the regulatory reins "without undergoing the [statutory] approval process." *Gade*, 505 U.S. at 100-01 (plurality); *see also id.* at 113 (Kennedy, J., concurring). The Commonwealth provides no response to this argument.

Instead, Respondents make the novel claim that invalidating the mining ban would "violate[ ] the spirit, and perhaps the letter, of the anti-commandeering doctrine," because "in practice," Virginia would feel compelled to "create a regulatory apparatus to oversee uranium mining." Respondents' Br. at 51, 52. The argument is clearly wrong. As Respondents acknowledge, the injunction we request would not require Virginia to establish any new regulatory regime; it would merely enjoin State officials to ignore Virginia's

mining ban and "accept and process" our State permit applications, under existing law, like any other mining application. Respondents' Br. 13 (quoting Pet.App.193a). To the extent the Commonwealth concludes its existing regulation of mineral mining must be supplemented by "a regulatory apparatus to oversee uranium mining," *id.* at 52, *that would be the Commonwealth's choice*. A federal decision striking down a state electoral map as unconstitutional is not "commandeering" merely because "in practice" the "inevitable effect" of such a decision will be to require the State to enact a new apportionment. *Id.* at 51-52; *cf. Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 675 (1964). It is settled that anti-commandeering principles do not limit "the power of federal *courts* to order state officials to comply with federal law" since "the text of the Constitution plainly confers this authority." *New York v. United States*, 505 U.S. 144, 179 (1992).

CONCLUSION

The Court should reverse the judgment of the Fourth Circuit.

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Respectfully submitted,

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