

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

VIRGINIA URANIUM, INC., ET AL.,)
 Petitioners,)
 v.) No. 16-1275
JOHN WARREN, ET AL.,)
 Respondents.)

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9
10 Washington, D.C.
11 Monday, November 5, 2018

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:07 a.m.

16 APPEARANCES:

17
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19 of the Petitioners.

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23 supporting the Petitioners.

24 TOBY J. HEYTENS, Solicitor General of Virginia,
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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 16-1275, Virginia Uranium
5 versus Warren.

6 Mr. Cooper.

7 ORAL ARGUMENT OF CHARLES J. COOPER

8 ON BEHALF OF THE PETITIONERS

9 MR. COOPER: Mr. Chief Justice, and
10 may it please the Court:

11 In the PG&E case, this Court held
12 that, although the State of California had the
13 undisputed regulatory power to place a
14 moratorium on the construction of new nuclear
15 plants, it was preempted under the Atomic
16 Energy Act from using that undisputed de jure
17 authority as a means for indirectly and de
18 facto regulating the nuclear safety of nuclear
19 plants.

20 JUSTICE GINSBURG: Mr. Cooper, there's
21 something odd with using PG&E for your side,
22 because the bottom line in that case was no
23 preemption.

24 MR. COOPER: That's true, Your Honor.

25 JUSTICE GINSBURG: So to say, well,

1 they had -- they said all this stuff along the
2 way, but the bottom line judgment in -- and
3 that was true in English as well -- no
4 preemption?

5 MR. COOPER: Your Honor, and -- and
6 the reason that the Court in PG&A came -- PG&E
7 came to that conclusion was it accepted the
8 court of appeals' interpretation of state law
9 that the purpose -- the purpose of that
10 regulatory -- that -- that -- the court's or
11 the -- California's exercise of regulatory
12 authority was not for the purpose of protecting
13 against radiation hazards, which is the --
14 which is the line drawn in the statute between
15 what is federal and what is state.

16 So PG&E, Your Honor, as I say, in --
17 clearly held that the state could not
18 indirectly -- use its acknowledged authority to
19 indirectly and de facto regulate a activity
20 that was in the exclusive authority of the NRC.

21 JUSTICE KAVANAUGH: What -- what if
22 it's --

23 MR. COOPER: And in this case --

24 JUSTICE KAVANAUGH: What if it's dual
25 purpose?

1 MR. COOPER: Well, Your Honor --

2 JUSTICE KAVANAUGH: Which a lot of
3 things are going to be in this context.

4 MR. COOPER: That's true, Your Honor,
5 and --

6 JUSTICE KAVANAUGH: So how -- how does
7 that work?

8 MR. COOPER: Justice Kavanaugh, in a
9 case where it's a dual purpose, this Court in
10 PG&E said, is it grounded in the impermissible
11 purpose? Is it grounded in -- the courts of
12 appeals have had no problem examining
13 situations where -- and that's going to be true
14 in most --

15 JUSTICE GORSUCH: Well, but, Mr.
16 Cooper --

17 MR. COOPER: -- legislation.

18 JUSTICE GORSUCH: -- Mr. Cooper, then
19 -- then we -- don't we get into trouble under
20 Shady Grove of guessing what the motivations of
21 a state legislature are and all the
22 methodological, epistemological, and federalism
23 questions that that raises? What do we do
24 about that?

25 MR. COOPER: Your Honor, this Court in

1 a variety of contexts is called upon to examine
2 the legislative purpose of a particular
3 enactment --

4 JUSTICE GORSUCH: I know we do it in
5 the Fourteenth -- Fourteenth Amendment context,
6 for example, but I'm --

7 MR. COOPER: Yes.

8 JUSTICE GORSUCH: -- I'm hard pressed
9 to come up with many other examples where we --
10 where we look at a state legislative purpose
11 and -- and -- and decide its permissibility
12 based on our assessment of -- of legislative
13 motive.

14 MR. COOPER: Well, Your Honor, and we
15 have not been able to find another statute
16 where Congress has prescribed a purpose-based
17 preemption standard.

18 But Congress has nonetheless, in terms
19 that are quite clear and in terms that this
20 Court in PG&E accepted and implemented, made
21 purpose the line between what is state -- what
22 is state and what is federal with respect to
23 the regulation of nuclear power development.

24 JUSTICE GORSUCH: So we're just stuck
25 with purpose whether we like it or not. I -- I

1 -- I got it.

2 MR. COOPER: That's -- that's the
3 bottom line, yes, Your Honor.

4 JUSTICE GORSUCH: But is PG&E perhaps
5 distinguishable on this basis: That at least
6 there California was directly regulating the
7 construction of nuclear power plants,
8 prohibiting them, and that is an area under,
9 what is it, 2021(c) that's expressly preempted.

10 Here, you have efforts to regulate
11 mining, an upstream activity, that are not
12 expressly dealt with in the statute. So what
13 do we do about that?

14 MR. COOPER: Your Honor, I don't think
15 that distinguishes PG&E at all because, in
16 PG&E, the state was using its acknowledged
17 power to decide whether nuclear power plants
18 would be constructed.

19 JUSTICE GORSUCH: Well, but that --
20 that --

21 MR. COOPER: That's a (c) activity.

22 JUSTICE GORSUCH: I'm sorry to
23 interrupt, but I just want to narrow the
24 question so that we might be more productive,
25 for -- for me, helpfully for me.

1 There, California was regulating
2 construction. And that's -- that's dealt with
3 by (c), but (k), I grant you, 2021(k), does
4 seem to have a carveout based on purpose.

5 MR. COOPER: Yes.

6 JUSTICE GORSUCH: You got me there,
7 okay?

8 (Laughter.)

9 MR. COOPER: Yes.

10 JUSTICE GORSUCH: But I think Justice
11 White was saying, well, within the construction
12 world, all right, we have this carveout under
13 (k) that we have to deal with, and California
14 might regulate construction for purposes other
15 than safety considerations, for economic or
16 other considerations.

17 What do we do about it when -- when a
18 state comes along and says, I'm not even going
19 to regulate construction, I'm not even going to
20 get into that game, I'm not in the (c) game at
21 all? Why would we look at (k)? Why would we
22 look at anything? Why wouldn't we just say
23 this is just not an area that Congress
24 regulated? Congress just couldn't come to
25 agreement on how to regulate mining?

1 MR. COOPER: Well, to come back to
2 PG&E, what the -- what California regulated was
3 not construction. It -- it preempted
4 construction. It pretermitted construction.

5 And what the Atomic Energy Act gives
6 the NRC regulatory control of is how a plant is
7 constructed. So, before you get to the how,
8 California answered the whether.

9 And it -- and this Court acknowledged
10 that that was within its authority. But what
11 it couldn't do was use that de jure authority
12 over whether to effectively and indirectly
13 regulate the nuclear safety of the operation of
14 the plant.

15 The State of Virginia is doing exactly
16 the same thing here. It's using its --

17 JUSTICE GINSBURG: Suppose -- suppose
18 Virginia had said we think that the extraction
19 is a dangerous activity, so we are justifying
20 this ban on mining to protect the workers from
21 the hazards associated with mining, not with
22 milling or tailing, just mining.

23 Then I take it you would lose, right?

24 MR. COOPER: I would lose, Your Honor,
25 yes. I would lose if that was the State of

1 Virginia's genuine purpose.

2 What the Congress has -- asks the
3 courts to do is to determine the purpose of a
4 -- of a state regulation, state regulations
5 ranging in the -- in this body of law from a
6 state very creatively denying municipal
7 services, such as fire and police, sewer,
8 garbage, to restricting access on its public
9 roads in order to -- to -- to -- to use those
10 sovereign powers in order to prevent the -- the
11 -- coming into existence the regulatory power
12 of the NRC in the first place.

13 And that is what PG&E says, quite
14 reasonably, states cannot do. If they could do
15 that, it would make a mockery -- as this Court
16 said in the National Meat Association case,
17 would make a mockery of the purpose-based
18 preemption standard that Congress has
19 prescribed.

20 CHIEF JUSTICE ROBERTS: I might just
21 be repeating Justice Gorsuch's question, but
22 you've conceded, if they talk about mining
23 hazards, that that's -- you lose. And I
24 appreciate the candor.

25 But what if the legislation is written

1 to protect against mining hazards and of the, I
2 don't know, 60 members of the legislature, 20
3 of them say this is a great way to keep nuclear
4 energy out of the state and we should do that?

5 What is the purpose of that
6 legislation? Still to protect against mining
7 hazards, or do you look behind it and it says,
8 well, a third of them thought it was a good way
9 to keep nuclear power out? How -- how do you
10 analyze that question?

11 MR. COOPER: Your Honor, the -- the
12 courts can't accept simply as written what the
13 state may say in terms of what the purpose is.
14 That's -- that's exactly what happened in the
15 Entergy case from the Second Circuit.

16 The -- the legislature in Vermont was
17 acutely aware of PG&E and acutely aware of
18 trying to avoid preemption. And so, on the
19 face of the statute, it articulated non-safety
20 rationales for what was, the court of appeals
21 determined, its -- its concealed purpose, which
22 was radiation hazards of nuclear power
23 generation.

24 So the -- the courts really have to
25 look behind to see if, in fact, the -- the

1 legislature is motivated and its purpose is a
2 prohibited radiation hazard.

3 JUSTICE SOTOMAYOR: Is this going to
4 require deposing every single legislative
5 member?

6 MR. COOPER: No, Your Honor.

7 JUSTICE SOTOMAYOR: Because what do
8 you look at? In a lot of these things, people
9 just vote. They don't say why. Or they do
10 what one of my colleagues suggested, they give
11 mixed motives.

12 This is an odd way to read a
13 preemption statute.

14 MR. COOPER: Your Honor, I know of no
15 case, that I'm aware of anyway, when this Court
16 and the federal courts go about the what is
17 ordinary business of trying to determine
18 legislative purpose, where legislators have
19 been deposed. That is not what we have in
20 mind.

21 What the courts look to in these cases
22 are the standard, ordinary indicia of -- of --
23 of objective purpose. What does the text say?
24 By the way, the text in this case says a lot
25 about that.

1 But what is the legislative history?
2 What are the historical contexts of -- of the
3 legislation itself? What was the legislature
4 addressing? What --

5 JUSTICE KAGAN: But you would concede,
6 Mr. Cooper, that two states with exactly the
7 same statutes, it could come out different ways
8 because the legislative history was different
9 in the two states?

10 MR. COOPER: It -- it -- it could,
11 Your Honor, if -- if the purpose animating the
12 legislature through the best good-faith
13 examination of the court's looking at that
14 issue came to the conclusion that, yes, this
15 genuine and non-prohibited purpose was the
16 but-for purpose, if you will, of the
17 legislation.

18 Yes, that -- that is --

19 JUSTICE KAGAN: It seems to present
20 real opportunities for gamesmanship as well,
21 sort of bad incentives for a state. Just cover
22 over your purpose?

23 MR. COOPER: Your Honor, and we've
24 seen that -- we've seen that in -- in cases
25 that have been decided in -- in this line. As

1 I was saying, the -- the Entergy case itself,
2 the legislature was very careful to attempt to
3 obscure what was, and the courts determined
4 quite properly, what was genuinely animating
5 the legislative body in that case.

6 And it's not unusual in this
7 particular area. And when -- when Congress
8 determined to create a system of dual
9 regulation and drew the line between the
10 purpose of the state to regulate radiation
11 hazards, it was reserving for the federal
12 government that particular area with good
13 reason.

14 It was allowing the states to regulate
15 in the area of electric generation as they had
16 always done and to -- if -- if -- if the states
17 would have regulated this particular plant as
18 though it was a fossil fuel plant, then there
19 would be no doubt that its purposes were not
20 nuclear safety.

21 JUSTICE KAVANAUGH: But how are we
22 going to tell that in most cases? Justice
23 Kagan's question about two state laws are going
24 to be treated differently based on our inquiry
25 or the federal court's inquiry into the

1 subjective motive seems very odd.

2 The thing that concerns me about this
3 is, how is this going to work?

4 MR. COOPER: Your Honor --

5 JUSTICE KAVANAUGH: And -- and one way
6 would be, as Justice Sotomayor said, subjective
7 motivations depositions. You rightly say, I
8 think, that that's not what you're looking for.

9 So what's -- what is it? You ask
10 whether the state can articulate a legitimate
11 non-safety rationale, that's -- that's a
12 possible answer.

13 MR. COOPER: That's -- that's --

14 JUSTICE KAVANAUGH: But that's too
15 low, I think you're going to say.

16 MR. COOPER: You're right, I am going
17 to say that, Your Honor.

18 JUSTICE KAVANAUGH: But then what do
19 -- what -- what is the answer, for something
20 workable that makes sense here? That's what --
21 that's what's bothering me.

22 MR. COOPER: Your Honor, I think if --
23 if you're -- if you're groping, if you were,
24 for a framework for courts to analyze this, it
25 seems to me the Court in Arlington Heights

1 produced a perfectly apt way for courts to
2 approach this.

3 If the -- the person, the plaintiff
4 challenging the preemption of the statute can
5 demonstrate that the prohibited purpose was a
6 motivating factor, then the state has to come
7 in and show that it would have been enacted
8 even in the absence of the motivating factor.

9 And, again, the -- the -- the Congress
10 drew the line here because it wanted to ensure
11 -- and this was -- purpose is actually in this
12 a narrowing preemption because, typically, if
13 -- if the state enacts a measure, regardless of
14 what its purpose is, that is an indirect
15 regulation of that which is exclusively
16 federal. As in the National Meat Association
17 case, the court doesn't look into what the
18 purpose was. It simply preempts it, quite
19 properly.

20 This actually takes -- takes the
21 standard preemption doctrine and its state --
22 it's friendlier to the state's interests
23 because it allows states, as (k) explicitly
24 says, to regulate the materials at issue --
25 source, byproduct, and special nuclear

1 materials -- for purposes other than protection
2 against radiation hazards.

3 But, when it comes to something that
4 dramatically important, protection against
5 radiation hazards of these nuclear materials,
6 the Congress wanted that to be exclusively
7 federal, and so it drew the line on -- on
8 purpose.

9 If I may reserve the balance of my
10 time, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 General Francisco.

14 ORAL ARGUMENT OF GENERAL NOEL J. FRANCISCO
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE PETITIONERS

17 GENERAL FRANCISCO: Mr. Chief Justice,
18 and may it please the Court:

19 Under the Atomic Energy Act, Virginia
20 can ban uranium mining because it thinks that
21 mining isn't safe. But what it can't --

22 JUSTICE GINSBURG: Because it thinks
23 mining is what?

24 GENERAL FRANCISCO: Because mining
25 isn't safe. But what it can't do is ban

1 uranium mining because uranium processing isn't
2 safe.

3 JUSTICE SOTOMAYOR: Can you, the
4 federal government, order the state to permit
5 and regulate mining?

6 GENERAL FRANCISCO: No, Your Honor, I
7 don't think so.

8 JUSTICE SOTOMAYOR: So, if you can't
9 do that, then how can you force them or judge
10 any reason they give for saying I don't want to
11 do it?

12 GENERAL FRANCISCO: Well, Your Honor,
13 this is simply a straightforward preemption
14 analysis. And all that's required here --

15 JUSTICE SOTOMAYOR: But you just told
16 me you can't order them to mine.

17 GENERAL FRANCISCO: Right. And if
18 Virginia --

19 JUSTICE SOTOMAYOR: Or to apply safety
20 reasons. So, if you can't order them to do it,
21 wouldn't we be, in effect, doing that if we
22 said your purpose for not wanting to do this is
23 preempted, now you must?

24 GENERAL FRANCISCO: Not in the
25 slightest, Your Honor, because, if Virginia's

1 mining ban were preempted, Virginia wouldn't
2 have to do anything. It could apply its
3 existing mining laws, it could adopt a new
4 mining law if it wanted, or it could leave the
5 entire area completely unregulated.

6 But the one thing that Pacific Gas
7 tells us that it can't do, is it can't use the
8 authority that it does have to reach into and
9 indirectly regulate something reserved
10 exclusively --

11 JUSTICE KAGAN: May --

12 GENERAL FRANCISCO: -- to the federal
13 government.

14 JUSTICE KAGAN: -- may -- may I go
15 back to Justice Gorsuch's question --

16 GENERAL FRANCISCO: Yes, Your Honor.

17 JUSTICE KAGAN: -- about PG&E and
18 whether it's the same as or different from this
19 case? And it seems -- this might be just a
20 different way of saying what he said, but it
21 does seem to me that when you're talking about
22 construction of a nuclear plant, there's
23 obvious dual authority between the federal
24 government and the states.

25 2018 gives a lot of authority to the

1 states, and then 2021(c) clearly makes this a
2 part of what the Commission looks at.

3 And, you know, Mr. Cooper said there's
4 the whether question and the how question.
5 But, honestly, if you think about the thing,
6 there -- there's dual authority in one area,
7 and it seems to me that that's not true here,
8 where the Act specifically says that the
9 Commission's authority starts when the --

10 GENERAL FRANCISCO: Sure.

11 JUSTICE SOTOMAYOR: -- materials are
12 extracted from the earth and has nothing to do
13 --

14 GENERAL FRANCISCO: Right.

15 JUSTICE KAGAN: -- with what happens
16 prior to that. So isn't the separation
17 involved in these two activities very different
18 from the separation involved in the PG&E
19 context?

20 GENERAL FRANCISCO: So my -- my answer
21 to your question is no. And if I could explain
22 by reference also to the facts of some other
23 cases.

24 Take Skull Valley, for example.
25 There, the state, everyone agreed, had complete

1 authority over the use of the roadways. But
2 what the state couldn't do was effectively shut
3 down a spent nuclear fuel facility by
4 preventing any fuel from reaching the facility
5 in the first place by way of the roads.

6 JUSTICE GORSUCH: General, I -- I -- I
7 understand that's a nice Tenth Circuit case, so
8 well done.

9 (Laughter.)

10 JUSTICE GORSUCH: But it doesn't bind
11 this Court. So what do we do about -- I'm
12 stuck where Justice Kagan is, and so it's not
13 going to help me to cite a Tenth Circuit case,
14 I'm sorry, colleagues.

15 (Laughter.)

16 JUSTICE GORSUCH: But I -- I want to
17 know from first principles why PG&E isn't
18 simply explained as a construction case.

19 GENERAL FRANCISCO: Sure.

20 JUSTICE GORSUCH: And construction, I
21 don't see whether and how in the statute in
22 (c). I see construction, period.

23 GENERAL FRANCISCO: Right.

24 JUSTICE GORSUCH: And California was
25 regulating construction in some fashion.

1 GENERAL FRANCISCO: Right. And I --

2 JUSTICE GORSUCH: Here -- here, it's
3 mining. And maybe Congress should have
4 preempted in mining, instead of just starting
5 with milling, but it didn't.

6 GENERAL FRANCISCO: Yeah.

7 JUSTICE GORSUCH: So why isn't that
8 the end of the case?

9 GENERAL FRANCISCO: Because I think
10 the answer to your question is that neither
11 PG&E nor anything that we're arguing here is
12 really a nuclear-specific rule.

13 Take the National Meat Association
14 case, for example, a decision of this Court.
15 The federal government had exclusive regulatory
16 authority over slaughterhouse operations. And
17 what the Court made clear was that the state
18 couldn't use its authority over the sales of
19 meat to reach into and indirectly regulate
20 slaughterhouse operations.

21 Here, the purpose inquiry actually
22 narrows the scope of preemption because not
23 only does the state have to use the authority
24 that it does have to reach into and indirectly
25 touch upon something that the federal

1 government regulates, it has to do so for a
2 very specific and impermissible purpose.

3 And I think that if you adopted a
4 contrary rule, unlike the one adopted by the
5 Fourth Circuit, it really is a road map for
6 completely undermining a multibillion-dollar
7 industry.

8 And that, Your Honor, is the reason I
9 was citing Skull Valley, not because I believe
10 that the holding obviously is binding on this
11 Court, because its facts show that a state
12 could simply shut down all nuclear activity by
13 designating the roadway leading up to a nuclear
14 plant as unsuitable for commercial trucking,
15 even if the only commercial trucks that ever go
16 up that roadway are to make deliveries to the
17 facility.

18 JUSTICE KAGAN: But a problem --

19 JUSTICE ALITO: Well, purpose is
20 usually a subjective concept, but -- and that's
21 what Congress -- that's the term Congress chose
22 to use in 2021(k), but is there a way of
23 understanding that as applying an objective
24 standard that doesn't boil down to rational
25 basis review? So the inquiry wouldn't be what

1 was in the minds of these particular
2 legislators, but would a reasonable
3 legislator -- is -- do -- enact this particular
4 prohibition if its objective was not
5 disagreement with the federal regulations?

6 GENERAL FRANCISCO: Yes, Your Honor, I
7 think there is. And -- and, Justice Kavanaugh,
8 I think this also goes to the concern that you
9 were raising as well.

10 I think that the way you would analyze
11 this is by looking at the text, the legislative
12 history, the historical context in which it was
13 enacted, and the plausibility of any
14 permissible non-safety rationale that the state
15 puts forward.

16 If the state puts forward a plausible
17 non-safety rationale and that rationale is not
18 otherwise foreclosed by the text, legislative
19 history, and historical context, then I think
20 the state wins.

21 The problem in this case is that the
22 Fourth Circuit effectively assumed that the
23 purpose of this law was to prohibit uranium
24 processing because uranium processing was
25 unsafe. But it held that that was simply

1 irrelevant to the disposition of the case.

2 JUSTICE GORSUCH: But, General, even
3 under your standard, we have a problem of mixed
4 motives, because every piece of legislation has
5 a variety of motives behind it. We have a lot
6 of congressmen with a lot of different
7 purposes.

8 I'm not sure I understand how you're
9 going to solve the problem. In Virginia, we
10 have in this record evidence that they're
11 concerned both about --

12 GENERAL FRANCISCO: Right.

13 JUSTICE GORSUCH: -- environmental and
14 economic impacts from mining itself, as well as
15 with other things.

16 So what do we do with those cases
17 where, at the end of the day, it's
18 indeterminate?

19 GENERAL FRANCISCO: So two responses,
20 Your Honor. The first, which I'll get off of
21 quickly because I -- I don't think you're going
22 to find it fully responsive, is that you don't
23 have to address that here because the Fourth
24 Circuit refused to apply any purpose inquiry at
25 all.

1 But, secondly, I think that the answer
2 lies in where the burden of proof is. The
3 burden of proof is on those challenging state
4 law. And if they cannot establish that the
5 principal or predominant purpose of this law
6 was impermissible, then they lose.

7 And so, here, the Fourth Circuit
8 refused to undertake any inquiry at all because
9 it effectively assumed that the purpose was in
10 Petitioners' favor but concluded that that was
11 irrelevant.

12 JUSTICE KAVANAUGH: Any plausible
13 non-safety rationale, that's your test?

14 GENERAL FRANCISCO: I think, if it's
15 not foreclosed by the text, legislative
16 history, and historical context and they can
17 establish a plausible rationale at the time
18 that this was adopted, then, yes, I think that
19 --

20 JUSTICE KAVANAUGH: So that answers
21 Justice Gorsuch's question because, if there's
22 at least one plausible non-safety rationale,
23 that's good enough or --

24 GENERAL FRANCISCO: I think that
25 plausible non-safety rationale has to be

1 sufficient to sustain the law.

2 JUSTICE KAVANAUGH: What does that --

3 GENERAL FRANCISCO: So, for --

4 JUSTICE KAVANAUGH: -- what does that
5 mean?

6 GENERAL FRANCISCO: So, for example,
7 suppose that Virginia put forward a rationale
8 of we don't like big, huge, ugly holes dug into
9 the Virginia countryside, which is a very
10 plausible rationale. But suppose that in a
11 particular area of Virginia they actually have
12 tons of big, ugly holes dug in the Virginia
13 countryside by way of coal mines.

14 CHIEF JUSTICE ROBERTS: I thought they
15 just said we don't want -- we've got too many
16 but don't want any more.

17 JUSTICE BREYER: Yeah.

18 GENERAL FRANCISCO: Well, Your Honor
19 -- and I think that that's exactly the type of
20 analysis that the statute itself requires when
21 it required that type of purpose inquiry,
22 because I do think otherwise -- otherwise, you
23 really are giving state and local governments a
24 road map for undermining a multibillion-dollar
25 industry. Just one other example.

1 JUSTICE KAGAN: Well, General, you --
2 you've been talking about the undermining of
3 this industry, but I guess a couple of things
4 is, one is that as long as there is this other
5 purpose or as long as the state can say that
6 there's this other purpose, it will just as
7 successfully be able to undermine the industry.

8 And then on the -- on the -- as well,
9 this statute does give the federal government
10 the ability to make sure that states can't
11 really undermine it if the federal government
12 wants a nuclear industry badly enough, because,
13 in addition to the fact that somebody can
14 import this material from another state or from
15 another country, the federal government itself
16 can mine for this material on its own lands, or
17 it can condemn lands and -- and do it with
18 newly acquired lands.

19 GENERAL FRANCISCO: Sure.

20 JUSTICE KAGAN: So there's a limit to
21 how far any state is able to undermine the
22 federal goal here if the federal goal is real
23 enough.

24 GENERAL FRANCISCO: I agree, Your
25 Honor, but two responses to the first part of

1 your question, and then I'd like to address the
2 second part of your question as well.

3 On the first part of your question, we
4 assume that the states engage in good faith,
5 and we assume that the states aren't going to
6 misstate their reasons for doing something.

7 But I will tell you that it is a lot
8 more difficult for a state to, for example,
9 rezone all land that nuclear activity is taking
10 place on as residential, even if it's totally
11 unsuitable for residential dwelling, if they
12 know they're going to have to come forward and
13 justify that.

14 And may I finish the second point,
15 Your Honor?

16 CHIEF JUSTICE ROBERTS: Briefly.

17 GENERAL FRANCISCO: Yes. In my -- in
18 response to the second part of your question,
19 Justice Kagan, yes, the federal government can
20 in certain circumstances condemn land. But
21 take not something like this case, but take
22 something like an ongoing nuclear facility
23 where the state is using, under the Fourth
24 Circuit's rule, its authority to rezone that
25 land as residential to completely obstruct it

1 and shut it down.

2 It is a lot more difficult for the
3 federal government to come in and condemn an
4 entire operating nuclear power plant.

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Heytens.

9 ORAL ARGUMENT OF TOBY J. HEYTENS
10 ON BEHALF OF THE RESPONDENTS

11 MR. HEYTENS: Mr. Chief Justice, and
12 may it please the Court:

13 This is an obstacle preemption case
14 masquerading as a field preemption case. There
15 is no field preemption here because of the
16 undisputed fact that the Nuclear Regulatory
17 Commission does not and cannot regulate any
18 aspect of uranium mining, including the safety
19 aspects of uranium mining.

20 And there is no obstacle preemption
21 here because the Atomic Energy Act and the
22 Nuclear Regulatory Commission have repeatedly
23 reaffirmed that states have the ability to
24 regulate mining up to and including by banning
25 it altogether.

1 JUSTICE KAVANAUGH: They -- they can
2 regulate milling, correct?

3 MR. HEYTENS: Excuse me, I want to
4 make -- the federal government regulates
5 milling --

6 JUSTICE KAVANAUGH: Right.

7 MR. HEYTENS: -- Justice Kavanaugh,
8 yes.

9 JUSTICE KAVANAUGH: Yeah. So the
10 mining and milling occur together, correct? In
11 other words, they occur -- you don't have
12 mining without milling; you don't have milling
13 without mining.

14 MR. HEYTENS: Justice Kavanaugh,
15 there's a way -- the in situ leaching process,
16 they literally occur at the same time.

17 JUSTICE KAVANAUGH: If you have
18 conventional mining.

19 MR. HEYTENS: I'm sorry, yes, you have
20 to mill before you can mine. That's correct.

21 JUSTICE KAVANAUGH: Right.

22 MR. HEYTENS: But -- but I think in
23 many ways what this case boils down to is two
24 questions about Pacific Gas, either one of
25 which is sufficient to resolve this case in our

1 favor.

2 The first question is why the Court
3 conducted a purpose analysis in Pacific Gas,
4 and the second question is what is the nature
5 of the purpose analysis that Pacific Gas did.
6 So let me take the first question: why did the
7 Court do it.

8 The reason the Court did it is
9 because, as several members of this Court have
10 already flagged, Pacific Gas was dealing with
11 an area of overlapping shared authority between
12 the federal and state government. And I know
13 the yellow brief dwells on this, so I want to
14 quote some of the language in the Court's
15 opinion that addresses this.

16 The Court said at page 194 of its
17 opinion that that case arose at an issue
18 involving the intersection of federal and state
19 authority. The Court said at pages 211 and 212
20 of its opinion that it was involving the dual
21 regulation of nuclear-powered energy
22 generation, and the --

23 JUSTICE ALITO: Before you get too
24 deeply into that decision, which you have
25 addressed very extensively and well in your

1 brief, could I just ask you this:

2 Suppose the Virginia General Assembly
3 enacted a law that reads as follows: The
4 General Assembly disagrees with the federal
5 government that uranium tailings can be safely
6 stored in Virginia and, for that reason and
7 only that reason, we are banning the practice
8 of uranium mining.

9 Would that be preempted?

10 MR. HEYTENS: Justice Alito, we do not
11 think even that mythical statute would be
12 preempted. And let me -- I'll start by
13 explaining why we don't think that, and then
14 I'll explain why I don't think the answer to
15 that matters in this case.

16 JUSTICE ALITO: Yeah, how would that
17 be -- I mean, doesn't that make nonsense of
18 2120 -- 2021(k)?

19 MR. HEYTENS: Justice Alito, I don't
20 think it does and here's why: I think the
21 predicate for 2021(k) is the existence of an
22 NRC-regulated activity.

23 2021(k) has to be read in pari materia
24 with 2021(b). 2021(b) also refers to purpose,
25 and it says that in a situation where the state

1 negotiates for the discontinuance of commission
2 authority, the state again gets the right to
3 regulate those activities for purposes of
4 health and safety.

5 And then 2021(k) comes along and says:
6 Just because you haven't gotten a 2021(b)
7 agreement doesn't mean you can't regulate for
8 other purposes.

9 JUSTICE BREYER: So why -- why can't
10 the -- you know, the imagination allows you to
11 think of all kinds of things where they stop
12 the tailing. No one who works in a tailing
13 plant can eat. All right? You know, that's
14 not going to be a real law.

15 But they can't eat, they can't have
16 electricity in the plant, they can't build it
17 in the first place because it's residential.
18 You name it, they have authority in all kinds
19 of places and all they have to do to stop the
20 tailings is they use this other authority
21 solely in order to stop the tailings, and you
22 say that's just fine.

23 MR. HEYTENS: Well -- well, Justice
24 Breyer, I think there are two different reasons
25 why that's distinct from this situation. First

1 --

2 JUSTICE BREYER: I know the eating is
3 distinct, but what I'm driving at is the
4 general matter of -- of I were in a state
5 legislature, and you could think of a thousand
6 ways, my guess, is we stop tailings in our
7 state how. And then you look to an area you
8 can regulate and you regulate that area, but
9 you do it in a way that nobody can build a
10 plant. Okay?

11 MR. HEYTENS: Yes.

12 JUSTICE BREYER: Now I don't think
13 that's a far-fetched question.

14 MR. HEYTENS: I -- I think the --

15 JUSTICE BREYER: And that's what they
16 say happened here.

17 MR. HEYTENS: Yes, and I think the
18 answer to your question, Justice Breyer, goes
19 back to a point that Justice Gorsuch made
20 earlier. In that situation, if we're talking
21 about a plant, we are talking about dual
22 overlapping federal and state authority under
23 2021.

24 JUSTICE BREYER: But that's not my
25 question. It's the tailings they can't

1 regulate. You get my question?

2 MR. HEYTENS: Yes, Justice Breyer.

3 JUSTICE BREYER: A good lawyer, like
4 you, and he finds a different area, and it just
5 turns out that the regulation in this different
6 area will stop them from ever having tailings.
7 And that's why they did it. Okay? So -- so
8 that's my problem.

9 MR. HEYTENS: Just -- let me try this
10 again, Justice Breyer.

11 When we're talking about a tailings
12 facility, we're in an area of overlapping
13 authority because NRC regulates tailings
14 management. And at that point, you are covered
15 by 2021(k). And the Court has to conduct the
16 sort of purpose analysis that's mandated by
17 2021(k).

18 Our submission is that this case is
19 fundamentally different because we are
20 regulating mining --

21 JUSTICE KAVANAUGH: But, when you're
22 regulating mining, you're always regulating
23 milling because you have the two together, but
24 you can't regulate milling, as you acknowledge,
25 but the two are interlinked in a way that I'm

1 not sure you can disaggregate in the way you're
2 doing.

3 MR. HEYTENS: Justice Kavanaugh, I
4 understand that conceptually we -- we could
5 have a metaphysical debate about whether you
6 can separate mining and milling and whether --

7 JUSTICE KAVANAUGH: It's -- in the
8 real world, it's not separated.

9 MR. HEYTENS: Well, Justice Kavanaugh,
10 in the statute, it's separated. And in NRC's
11 judgment, they're separated.

12 I think the best evidence of that is
13 discussed in our brief. It's the Hydro
14 Resources decision of NRC. So this is a case
15 in which NRC is regulating an activity that
16 they have the authority to regulate. It's a
17 milling process. Right?

18 And NRC has argued that, as part of
19 their regulation of milling, they should take
20 into account background radiation that exists
21 because of previously un-NRC regulated mining.

22 And NRC says we can't do that. We're
23 not allowed to take into account the
24 consequences of previous mining activities
25 because we, NRC, have no authority to regulate

1 mining. Even though we have authority to
2 regulate milling, we, NRC, can't regulate
3 mining. And even taking into account radiation
4 that exists because of that previous mining
5 would constitute impermissible NRC regulation
6 of mining.

7 And so I think regardless of whether
8 as a metaphysical level we could say milling
9 and mining are so inextricably intertwined that
10 the regulation of one is necessarily the
11 regulation of the other, I think both Congress
12 and the text of the statute, right, I mean, so
13 that's the other point, this statute from the
14 beginning has given NRC the ability to regulate
15 milling.

16 And in the entire history of this Act,
17 NRC has never once advanced the argument, as
18 far as we're aware, that says because we can
19 regulate milling, a fortiori we can regulate
20 mining because mining is inextricably
21 intertwined with milling.

22 In fact, NRC has aggressively
23 disclaimed that argument in a decision where a
24 great deal actually turned on that argument.

25 But the second question to raise,

1 Justice Breyer -- to go back to Justice Breyer.
2 So I think the first reason that Justice
3 Breyer's example isn't covered by this
4 situation is that we concede, once we're
5 dealing with an NRC-regulated activity, a
6 tailings facility, 2021(k) requires some sort
7 of purpose analysis. That's why the court did
8 a purpose analysis in Pacific Gas.

9 JUSTICE KAGAN: And that's also why
10 Skull Valley is right?

11 MR. HEYTENS: Yes, Justice Kagan,
12 because the vast majority of the activities in
13 Skull Valley were NRC-regulated activities.
14 And we have no quarrel with that decision
15 whatsoever.

16 But the other reason is even if -- so,
17 to go back to Justice Alito's hypothetical,
18 excuse me -- even if it appeared on the face of
19 the statute, the first reason we think that
20 that law is not preempted, and if that law's
21 not preempted, this law is obviously not
22 preempted, but even if the Court were inclined
23 to reserve judgment or to carve out an
24 exception for a law where that sort of purpose
25 is stated on the text or the face of the

1 statute, there would be no justification for
2 unleashing the, all things considered,
3 subjective motivations of the state legislature
4 that we see in the blue brief and the yellow
5 brief.

6 And, here, I think what --

7 JUSTICE BREYER: Now the motives in my
8 opinion is a bad word because you don't know
9 people's motives. You don't normally look into
10 that. Motives can be backward-looking. He did
11 it out of revenge. They can be referring
12 solely to a past fact. He hit my sister,
13 that's why.

14 But we're concerned with the subset of
15 that where we're looking to the future. And I
16 think you're right to say that's purpose. When
17 we talk about -- and every judge, as far as I
18 know, including Justice Scalia, whom we used to
19 talk about this, sometimes will look to a
20 statute's purpose. Go back to Lord Cooke. Go
21 back as far as you want.

22 Name any judge in American history,
23 and who's been heard of, of course, we have a
24 dozen ways of looking at purpose. So what's
25 wrong with looking at purpose here? I grant

1 you a state legislature, unlike Congress, is
2 less likely to hold on the record hearings
3 about a statute, but then that would be a
4 reason for saying, when we try to determine
5 purpose, we do not look necessarily to
6 legislative history as written in committee
7 reports because there aren't any.

8 Now there Justice Scalia and I could
9 have a lot of arguments about whether you do,
10 whether you don't, but that's beside the point.
11 When you say don't look at purpose, there I get
12 off the boat because I think that's our job as
13 a court in -- in a relevant case to determine
14 what the purpose of the statute is. Sometimes
15 it's easy. Sometimes it's tough.

16 So what's wrong with what I just said?

17 MR. HEYTENS: I think I have two
18 answers, Justice Breyer.

19 The first one is that when we're
20 dealing with a state legislature, which is
21 fundamentally, as you say, unlike Congress, and
22 it's unlike Congress in a different way. A
23 state legislature does not have to show its
24 authority to do something.

25 Under our federal system, the

1 challenger has to show why a state legislature
2 may not do something. So the first thing I'd
3 say is we'd have to know why would the purpose
4 of this law matter. And to go back to, I
5 think, something that was brought up by Justice
6 Gorsuch, our fundamental view is, because
7 Congress does not regulate mining in any way,
8 in any shape, or any form, it does not matter
9 the purpose for which Virginia has chosen to
10 forbid mining.

11 But even if the Court wanted to carve
12 out an exception for the case that we've talked
13 about earlier, I think -- I think, Justice
14 Breyer, you're absolutely right. I think the
15 purpose of the statute is an Orthodox question
16 of statutory interpretation and should be
17 determined the way the Court normally does.

18 The face of this statute regulates
19 mining. The face of this statute cites
20 environmental and natural resources
21 consequences that flow from mining.

22 JUSTICE ALITO: And what does that
23 mean?

24 JUSTICE GINSBURG: Now what do you
25 mean by that? You had it in your brief. Let's

1 see. You said there was a plausible purpose
2 other than to prevent nuclear development.

3 And you say the possibility that
4 certain impacts of uranium development activity
5 may reduce or potentially limit certain uses of
6 Virginia environmental resources, and -- and I
7 -- I don't know what that means.

8 MR. HEYTENS: Fair enough, Justice
9 Ginsburg. I mean, I think -- we think it's
10 fairly apparent what those would mean in the
11 context of this situation.

12 This would be a massive earth-moving
13 mine operation. There's a statistic that's in
14 the federal government's cert stage amicus
15 brief where they say that, to get one to five
16 pounds of uranium, you have to displace one ton
17 of dirt to get one to five pounds of uranium.

18 This would be a massive disruption of
19 Virginia's stated view. We're talking about a
20 fundamentally profoundly rural area of Virginia
21 that's building its economy based on
22 agriculture and tourism. And I think it's
23 fairly obvious how that would have a
24 significant impact on Virginia's environment
25 and natural resources, which is why this --

1 CHIEF JUSTICE ROBERTS: Well, how much
2 is -- I'm trying to envision -- you know, one
3 ton sounds like a lot, but a ton of dirt, how
4 -- how much is that? That's not -- it's
5 probably not that much. I mean, are you
6 talking a truckload or what?

7 MR. HEYTENS: Perhaps, Mr. Chief
8 Justice, but our friends on the other side --
9 it's also not one pound of uranium. Our
10 friends on the other side say this deposit is
11 100 -- I believe it's 119 -- it's either tons
12 -- it's an enormous quantity.

13 They're not -- they don't want to mine
14 one to five pounds of uranium. They want to
15 mine what they themselves describe as the
16 largest deposits of uranium in the continental
17 United -- in the United States.

18 JUSTICE ALITO: Well, Virginia allows
19 coal mining and has a fair amount of coal
20 mining in the western part of the state. So
21 could a court compare coal mining with uranium
22 mining and see if there's something that if one
23 is more disruptive to the scenery than the
24 other or one is more dangerous to miners than
25 the other, something like that?

1 So you could ask whether it's
2 plausible that this was done for some reason
3 other than just the fact that Virginia
4 disagrees with the NRC that the tailings can be
5 dealt with in a safe way.

6 MR. HEYTENS: And, Justice Alito, I
7 think there is an apparent and obvious
8 explanation that is all -- that the Court
9 doesn't need to do anything beyond -- it's
10 something the Chief Justice flagged.

11 There is -- Virginia could easily
12 decide that there is a world of difference. I
13 mean, the analogy I've thought of here is the
14 removal of Ten Commandments monuments, right,
15 where Virginia could easily decide that there
16 is a world of difference between telling people
17 and companies and communities that have built
18 their economic livelihood around coal mining
19 that we are not going to shut those down and
20 disrupt the entire way of life in an area.

21 There's a world of difference between
22 saying that, and we do not intend to start a
23 massive mining operation in a part of the state
24 that has never had such a mining operation.

25 JUSTICE ALITO: Well, that may be.

1 You could have a moratorium on mining, period.
2 You could have a mora -- no more mining of
3 anything in Virginia. You could have that.

4 MR. HEYTENS: We -- we certainly --

5 JUSTICE ALITO: That's not what the
6 legislature did here.

7 MR. HEYTENS: It's not what they did,
8 and it's also what the court in Pacific Gas
9 said, it's not what California was required to
10 do, because there was an argument that was made
11 in Pacific Gas that, if California really meant
12 their proffered rationale, there are other
13 steps that California could have and perhaps
14 would have taken if they wanted to pursue that
15 goal at all costs.

16 JUSTICE GORSUCH: Once you start --

17 JUSTICE KAVANAUGH: If we don't accept
18 --

19 JUSTICE GORSUCH: I'm sorry, please.
20 No, go ahead.

21 JUSTICE KAVANAUGH: If we don't accept
22 your broader position, what do you think of the
23 Solicitor General's suggestion that we look at
24 whether the state has a plausible non-safety
25 rationale?

1 MR. HEYTENS: We think that that's the
2 language the Court -- once you decide to do
3 purpose, that's the second point I was making
4 earlier. If you decide to do purpose, we think
5 that's the way you should do purpose. It's the
6 way the Court did purpose in Pacific Gas.

7 And we think that, under that, we
8 clearly win because we are materially
9 indistinguishable from California and Pacific
10 Gas. Another --

11 JUSTICE GINSBURG: But you -- you --
12 you, at the pleadings stage, you made a
13 concession that the purpose of the ban was to
14 address radiological safety concerns.

15 Why did you make that concession?

16 MR. HEYTENS: Well, Justice Ginsburg,
17 I want to -- I'm glad to have the opportunity
18 to address that.

19 We didn't concede anything. What we
20 did is we moved to dismiss, and we
21 acknowledged -- all of the quotes they cite
22 from our lower court briefing, what we say is
23 we acknowledge that, as a party who moves to
24 dismiss, we are required to assume the truth of
25 all well-pleaded factual allegations in the

1 complaint.

2 So to the extent that they --

3 JUSTICE KAGAN: Well, why did you even
4 do that? Why is this a factual allegation?

5 MR. HEYTENS: Well, to the extent that
6 what was in someone's mind when they did
7 something, I think that is a factual
8 allegation, but our submission is that's not
9 relevant and that's not how you determine --

10 JUSTICE BREYER: But it's not about
11 what's in their mind. There -- there is a --
12 there is a well-known, sometimes laughed at,
13 sometimes I do think it's great, a reasonable
14 legislator. The reasonable legislator is
15 called a legislative -- a judicial invention.
16 And the reason they invent it is so that they
17 can work out obscure provisions of the statutes
18 and what their real purpose is and what they
19 mean.

20 MR. HEYTENS: Right.

21 JUSTICE BREYER: Now that too has been
22 used for hundreds of -- I don't know if
23 hundreds, but many, many, many years.

24 MR. HEYTENS: Absolutely.

25 JUSTICE BREYER: So we don't have to

1 look in their minds, do we?

2 MR. HEYTENS: Well -- well, Justice
3 Breyer, that is exactly what the Petitioners
4 are asking you to do. The statements that are
5 --

6 JUSTICE BREYER: It may be, but
7 regardless, my question is, why do you have to
8 look in their minds? What you do is the same
9 thing you do with a federal statute, what you
10 do with statutes every day: You get provisions
11 and you say reading the words, reading the
12 applications, dah-dah, dah-dah, dah-dah, you
13 know, fill in the blanks, what would a
14 reasonable legislator have wanted this
15 purpose -- what purpose would it have served?

16 I think I've done that, perhaps
17 wrongly -- I don't think so -- hundreds of
18 times.

19 MR. HEYTENS: Yes, Justice Breyer, we
20 agree with --

21 JUSTICE BREYER: Okay? So all they
22 want is a chance to show that, but, here, you
23 say you don't even get a chance to show it.

24 MR. HEYTENS: Justice Breyer, we agree
25 with everything you just said about purpose.

1 And it brings me back to my answer to Justice
2 Kagan and Justice Ginsburg. Excuse me.

3 The statements in the brief that they
4 are citing before this Court are statements
5 where we say the Court should not consider
6 these hundreds of pages of statements where
7 people offer their subjective perspective on
8 why they did what they did.

9 We say all of those materials are
10 beside the point. So -- so what happened here
11 is --

12 JUSTICE GORSUCH: But, counsel, what
13 I'm hearing is rationale basis review. Is
14 there any rationale basis on which a legislator
15 could vote for that? Okay, fine, if that's
16 what you're asking. But to layer purpose on
17 top of it introduces all of the complications
18 that Justice Kagan has alluded to, which is, if
19 we're going to start inquiring into purpose,
20 one state may not be able to do the same thing
21 another state may be able to do simply because
22 of our assessment of what was in somebody's
23 mind.

24 And if we start looking at this
25 statute, I don't even know where to begin,

1 because it talks about the environmental and
2 local resource impacts of mining and milling
3 and tailings and everything else.

4 Now could a rational legislator have
5 done this only for concern about mining?
6 Maybe. If I'm going to start going down the
7 road of what's in somebody's head and
8 subjective intentions of even an imaginary,
9 hypothetical reasonable legislator, I don't
10 know.

11 MR. HEYTENS: Well, Justice Gorsuch,
12 we absolutely agree with you, which is why our
13 primary submission is that, because this is not
14 an area that's regulated by the federal
15 government at all, you don't do any sort of
16 purpose analysis.

17 That -- our primary submission is that
18 exactly what you just said, Justice Gorsuch,
19 that there's no warrant to do that, there's no
20 need to do that, and the Court shouldn't do it.

21 JUSTICE SOTOMAYOR: Well, except where
22 do we draw the line or how do we draw it
23 between the Skull decision and the Second
24 Circuit Vermont decision? There, activities
25 that the state were -- were alleged to be doing

1 were intended and did, in fact, affect
2 regulated conduct by the federal government.

3 But one could say here, if you
4 prohibit mining, you're affecting milling or
5 disposal.

6 MR. HEYTENS: Right.

7 JUSTICE SOTOMAYOR: So how -- where
8 and how do we draw the line between that
9 regulation that we're permitted to look to
10 purpose for and that which we're not?

11 MR. HEYTENS: Right. The line, we
12 think, is straightforward. It's based on the
13 text of the statute. It's NRC-regulated
14 activity, because, in both the Skull Valley
15 decision and in the Entergy decision, the state
16 law was directly acting upon and regulating
17 something that is itself regulated by NRC.

18 The spent nuclear fuels facility in
19 Skull Valley was regulated by NRC. The Vermont
20 Yankee nuclear power plant was certainly
21 regulated by NRC. And the Court would do --
22 now I want to bring up the roads provision
23 because Mr. Cooper mentioned them.

24 They say there's this one provision of
25 the law at issue in Skull Valley that turns a

1 county road into a state road.

2 Well, I'D say two things about that
3 provision. First, if that's literally all that
4 Utah did, all Utah did was to convert a road
5 from a county road to a state road, and that's
6 the only thing they did, there would be no
7 basis whatsoever for finding that law standing
8 alone was preempted by the Atomic Energy Act.

9 And to the extent that it operated --
10 I think there was also discussion of the
11 National Meats case, which I think is
12 affirmatively helpful for us because, at the
13 end of the opinion in National Meat, the Court
14 got to the sales provision of the California
15 law and the Court said: You know, this doesn't
16 directly act upon the conduct that's regulated
17 by federal law. And so I guess you could make
18 an argument, and the Humane Society made the
19 argument, that's not preempted.

20 And here's what the Court actually
21 said in National Meat. That argument ignores
22 the way that the sales provision operates
23 within state law as a whole.

24 California didn't enact the sales
25 provision as a free-standing provision. They

1 enacted the sales provision as part of an
2 interrelated series of laws that in the court's
3 language regulated the same thing as the
4 federal government, just in a different way.

5 And we think that's directly on point,
6 because when this Court CVSG'd in Skull Valley,
7 the Solicitor General's CVSG brief adopted that
8 precise rationale when it came to the roads
9 provision. It said the roads provision has to
10 be analyzed as part of how Utah's entire scheme
11 is regulating the spent nuclear fuels facility.

12 You have to look at the scheme as a
13 whole and you have to look at how the entirety
14 of the series of interrelated laws work.

15 JUSTICE KAGAN: Suppose --

16 JUSTICE ALITO: 2021, Section (c),
17 2021(c)(4) says that the Commission shall
18 retain the authority to regulate the disposal
19 of byproduct. And then (k) says nothing. And
20 that is -- it's that regulatory authority, I
21 take it, which is the statutory basis of the
22 preemption argument.

23 And (k) says nothing in this section
24 shall be construed to affect the authority of
25 the state or local agencies and so forth. So

1 how do you --

2 MR. HEYTENS: Sure.

3 JUSTICE ALITO: Why is it tied -- why
4 do you -- why do you say (k) is tied solely
5 to --

6 MR. HEYTENS: Sure.

7 JUSTICE ALITO: -- licensing?

8 MR. HEYTENS: Well, Justice Alito,
9 first, in this case, we're not talking about
10 byproduct. We're talking about source
11 material. And -- and the reason that that is
12 critically important -- I don't think I'm just
13 quibbling over terminology -- is because, when
14 we're talking about source material, both 2090
15 --

16 JUSTICE ALITO: Well, it goes on to
17 say the disposal of such other byproducts
18 source or special nuclear material.

19 MR. HEYTENS: Correct. But it -- but
20 you have to read that in conjunction with 20 --
21 2092 and 20 -- 2095, both of which specifically
22 say that NRC jurisdiction over source material
23 does not even begin or commence until after
24 that source material is removed from the
25 ground.

1 Congress was very clear. They have a
2 belt-and-suspenders approach. They don't just
3 say that NRC can't regulate the transfer of
4 source material. That's 2092.

5 They go even further in 2095, and this
6 is an extraordinary provision. It prohibits
7 NRC from even requesting reports about source
8 material until after it's out of the ground.
9 NRC has literally no authority over source
10 material until it leaves the ground.

11 JUSTICE ALITO: But do you dispute the
12 fact that the NRC has -- occupies the field of
13 regulation of source material?

14 MR. HEYTENS: After it leaves the
15 ground.

16 JUSTICE ALITO: After it leaves the
17 ground.

18 MR. HEYTENS: Well, but -- but that's
19 the critical distinction in this case because
20 our whole point that -- the predicate of our
21 argument --

22 JUSTICE ALITO: Yeah, but if the -- if
23 -- if a state law indirectly, surreptitiously
24 regulates the same thing, it would fall within
25 the prohibited field.

1 MR. HEYTENS: Justice Alito, I guess
2 I'd have to know -- I'd have to have a little
3 more information about what we mean by
4 "indirectly or surreptitiously regulates the
5 same thing," because it's certainly -- if -- if
6 we're talking about Petitioners' strong version
7 of that argument, that is completely
8 inconsistent with this Court's rejection of a
9 field preemption argument in *Pacific Gas*,
10 because think about the argument that
11 California -- excuse me, not California -- that
12 *Pacific Gas* and the federal government made for
13 preemption in that case.

14 Of course, allowing the nation's
15 largest state to prevent nuclear power
16 construction -- nuclear power plant
17 construction, of course, that is going to have
18 a profound impact on the civilian nuclear power
19 industry in the United States. And the Court
20 acknowledged that, and the Court said: No, we
21 understand, California could do that, but we've
22 concluded that Congress has nonetheless given
23 California the right to regulate for economic
24 safety reasons. And it is for Congress, not
25 for this Court -- this is what the Court

1 specifically said in Pacific Gas -- if Congress
2 concludes that California is misusing the
3 authority that has been left to them, it is for
4 Congress to tell the state that.

5 And I'll just go back to the point
6 that --

7 JUSTICE KAGAN: But, of course, Mr.
8 Heytens, not for reasons having to do with
9 radiological safety.

10 MR. HEYTENS: Yes.

11 JUSTICE KAGAN: And I suppose one way
12 to understand this -- the preemptive field here
13 is that it surely extends to various kinds of
14 activities, and this is not one of those
15 activities, the mining.

16 But, in addition, it extends to
17 judgments about radiological safety, even
18 outside those activities, on the theory that
19 the NRC is the proper body to make judgments
20 about radiological safety and we don't want 50
21 states to be making their own.

22 So I suppose that's a -- a way to
23 explain the opposite position.

24 MR. HEYTENS: I agree with that,
25 Justice Kagan, but I think the very last thing

1 you said shows why that argument can't possibly
2 be right.

3 NRC lacks the authority to regulate
4 even the radiological safety aspects of mining.
5 So the logical -- if you define the field that
6 way, the logical implication of that argument
7 is that there is literally no one who has the
8 authority to regulate radiological safety
9 aspects of uranium mining, because the NRC
10 can't do it, because the NRC has repeatedly
11 reaffirmed that they have no power to do
12 anything.

13 JUSTICE KAVANAUGH: Aren't the
14 radiological safety issues posed by the milling
15 far more than the mining? I thought that was
16 why you're concerned about the milling. To
17 Justice Alito's point, it's a way to prohibit
18 the milling, you can't do that; let's prohibit
19 the mining, that way we prohibit the milling,
20 which has the radiological safety concerns. I
21 think that's the --

22 MR. HEYTENS: Sure.

23 JUSTICE KAVANAUGH: -- that's the
24 point.

25 MR. HEYTENS: Justice Kavanaugh, I

1 think -- I think that's right, and I think part
2 of the reason that Congress has given NRC
3 jurisdiction over the milling is because of
4 those various concerns. But I --

5 JUSTICE KAVANAUGH: Just one technical
6 point --

7 MR HEYTENS: I'm sorry.

8 JUSTICE KAVANAUGH: -- on phrasing.
9 The Solicitor General said plausible non-safety
10 rationale. I assume you would amend that to
11 say plausible non-radiological safety
12 rationale?

13 MR. HEYTENS: Yes, I would, Justice
14 Kavanaugh, and I think that's consistent with
15 what they've said in their briefing. I think,
16 at the cert stage, they said we could regulate
17 mining, even the safety aspects of mining, as
18 long as we're doing it based on the mining.

19 And -- and to take your point, Justice
20 Kavanaugh, I think there's three possibilities.
21 There's the radiological safety aspects of
22 uranium sitting in the ground.

23 JUSTICE KAVANAUGH: Right.

24 MR. HEYTENS: There's the radiological
25 safety aspects of the mining process. And

1 there's the radiological safety aspects of the
2 milling. I -- I agree with you completely the
3 reason you give NRC jurisdiction over the third
4 is the conclusion that that poses special
5 concerns.

6 JUSTICE KAVANAUGH: It's all of the
7 concerns, isn't it, on radiological safety?
8 Almost all?

9 MR. HEYTENS: I -- I want to amend it
10 to almost all, Justice Kavanaugh. I know
11 there's discussion in some of the briefing in
12 this case that suggests that there are
13 radiological concerns associated with the
14 mining process itself. Congress said that
15 sitting in the -- excuse me -- a committee
16 report from 1946 says that, sitting in the
17 ground, uranium does not create radiological
18 safety concerns. But there's the separate
19 question of whether the process of digging it
20 out of the ground raises any radiological
21 safety concerns.

22 And I think there's at least some
23 evidence in some of the briefing that there may
24 be at least some radiological safety concerns
25 associated with doing that. Without saying

1 they're the same as milling.

2 And there -- regardless of whether
3 there are radiological safety concerns, there
4 are clearly a wide variety of health and safety
5 concerns associated with extracting massive
6 amounts of material out of the ground.

7 And so we think that, at the end of
8 the day, the purpose -- this Court has
9 reaffirmed repeatedly that the purpose of a
10 statute includes not only what it sets out to
11 change but also what it resolves to leave
12 alone.

13 And we think the single clearest and
14 completely dispositive decision by Congress in
15 this case was the decision it made in 1946 that
16 it reaffirmed in 1954 and has left undisturbed
17 until the present day, that the federal
18 government does not regulate uranium mining.

19 For that reason, Virginia's inherent
20 sovereign ability to control something as
21 fundamental as what material gets pulled out of
22 the ground remains fully intact, its ban should
23 not be preempted, and this Court should affirm.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Four minutes, Mr. Cooper.

3 REBUTTAL ARGUMENT OF CHARLES J. COOPER

4 ON BEHALF OF THE PETITIONERS

5 MR. COOPER: Thank you, Mr. Chief
6 Justice.

7 And, Justice Kavanaugh, I want to come
8 straight to your point that you cannot mill
9 mining unless you have -- mill uranium unless
10 you have mined it in the first place.

11 There were two ways for Virginia to
12 prohibit milling and tailings management, both
13 of which they were concerned about. They
14 weren't concerned about radiological aspects of
15 -- of mining qua mining any more than the NRC
16 is. It's the milling and the tailings that
17 represent the threat of nuclear safety.

18 And there were two ways they could do
19 it. They could do it directly. We prohibit
20 milling in this state. But that would have run
21 straight into a stop sign, Your Honor, of
22 preemption. There's no way it could do --

23 JUSTICE GINSBURG: Suppose -- suppose
24 -- suppose they say our rationale does have to
25 do with the mining, not the milling; we think

1 there are radiological hazards from -- from the
2 unearthing the -- the uranium. Suppose they
3 said that.

4 MR. COOPER: Your Honor, they could
5 say that, but a court would have to look behind
6 it, would have to look behind at using all the
7 techniques that my friend, the Solicitor
8 General, has mentioned, including plausibility.

9 But, to come back, Justice Kavanaugh,
10 I want to make clear that the Court understand,
11 as Justice Gorsuch has referenced, that the
12 statute that banned mining had sister
13 provisions. In the very same breath, Virginia
14 enacted a -- a uranium administrative group,
15 tasking it with the -- with the responsibility
16 to study uranium mining in -- in Virginia and
17 milling and tailings. On page 185 -- I would
18 refer the Court to 185 through 187.

19 With respect to milling activity, the
20 capacity -- these are things that they're
21 supposed to study -- the capacity of the mill,
22 the process to be used in milling and ore
23 extraction, the reagents in processing
24 material, the method for conveying tailings and
25 wastewater from milling.

1 The next paragraph, with respect to
2 tailings management, the quantity and
3 characteristics of the tailings, the method of
4 disposal, treatment systems for the removal of
5 solids, radionuclides, on and on for the next
6 several pages -- pages.

7 The -- the courts below and my friends
8 for the Commonwealth have focused myopically on
9 the one sentence that is the ban. What was
10 really happening here and the purpose of this
11 was to prohibit milling and tailings
12 management, the only thing that really
13 represents serious radiological hazards.

14 Second point, dual regulation. My
15 friend quotes from PG&E, Justice Gorsuch, and I
16 want to -- I want to finish his quote. He
17 didn't get to finish it. "Congress has
18 preserved the dual regulation of
19 nuclear-powered electricity generation." This
20 is from 212, 211, 212. Colon: "The Federal
21 Government maintains complete control of the
22 safety and "nuclear" aspects of energy
23 generation ... the States exercise that --
24 their traditional authority." Justice Gorsuch,
25 traditional authority, which they've always

1 exercised over the generation, transmission,
2 and sale of electricity, over the -- over the
3 need for additional generation, generating
4 capacity, the type of generating facilities to
5 be licensed, are they going to be coal or
6 nuclear.

7 Your -- Your Honor, in California --
8 in PG&E, California had the antecedent
9 authority, its and its alone, to decide whether
10 there would be a plant of any kind, including a
11 nuclear plant. And if there was no nuclear
12 plant, there could be no NRC authority or
13 regulation over how that thing was constructed
14 or how it was operated.

15 My final point here, plausible
16 non-safety rationale. This is the one place
17 where I guess I do disagree with my friend, the
18 Solicitor General. That sounds too much to me
19 like rational basis review, like any
20 conceivable thing that -- that the state could
21 bring forward or a judge could even conceive of
22 will do the trick.

23 That's not what Congress had in mind
24 when it said: Courts, look at the purpose. Is
25 the purpose for the protection against

1 radiological hazards? That's what Congress
2 wants you to decide.

3 And not just is it any plausible
4 purpose, is it -- is -- is it -- is that the
5 purpose? And you have to do your best. It's
6 not easy. But that's -- that's the question
7 that -- that Congress has said is before the
8 courts.

9 And if the courts conclude in their
10 best efforts that that's the purpose, well,
11 then it's preempted.

12 Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 12:07 p.m., the case
16 was submitted.)

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