



1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   VIRGINIA URANIUM, INC., ET AL.,       )  
4                            Petitioners,        )  
5                            v.                    ) No. 16-1275  
6   JOHN WARREN, ET AL.,                )  
7                            Respondents.        )  
8   - - - - -

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  
18   CHARLES J. COOPER, ESQ., Washington, D.C.; on behalf  
19                   of the Petitioners.

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21           Department of Justice, Washington, D.C.;  
22           For the United States, as amicus curiae,  
23           supporting the Petitioners.

24   TOBY J. HEYTENS, Solicitor General of Virginia,  
25           Richmond, Virginia; on behalf of the Respondents.

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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 a  
5 Fourteenth -- Fourteenth Amendment context, for  
6 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 it  
11 couldn't do was use that de jure authority over  
12 whether to effectively and indirectly regulate  
13 the nuclear safety of the operation of the  
14 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 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: How are we going  
22 to tell that in most cases? Justice Kagan's  
23 question about two state laws are going to be  
24 treated differently based on our inquiry or the  
25 federal court's inquiry into the subjective

1 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: That's too low, I  
15 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 --  
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 -- the purpose is actually in  
12 this a narrowing preemption because, typically,  
13 if -- if the state enacts a measure, regardless  
14 of 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 -- the materials at  
25 issue, 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 JUSTICE SOTOMAYOR: Or to apply safety  
19 reasons. So, if you can't order them to do it,  
20 wouldn't we be, in effect, doing that if we  
21 said your purpose for not wanting to do this is  
22 preempted, now you must?

23 GENERAL FRANCISCO: Not in the  
24 slightest, Your Honor, because, if Virginia's  
25 mining ban were preempted, Virginia wouldn't

1 have to do anything. It could apply its  
2 existing mining laws, it could adopt a new  
3 mining law if it wanted, or it could leave the  
4 entire area completely unregulated.

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

10 JUSTICE KAGAN: May -- may I go back  
11 to Justice Gorsuch's question about PG&E and  
12 whether it's the same as or different from this  
13 case?

14 GENERAL FRANCISCO: Yes.

15 JUSTICE KAGAN: And it seems -- this  
16 might be just a different way of saying what he  
17 said, but it does seem to me that when you're  
18 talking about construction of a nuclear plant,  
19 there's obvious dual authority between the  
20 federal government and the states.

21 2018 gives a lot of authority to the  
22 states, and then 2021(c) clearly makes this a  
23 part of what the Commission looks at.

24 And, you know, Mr. Cooper said there's  
25 the whether question and the how question.

1 But, honestly, if you think about the thing,  
2 they are -- if there's dual authority in one  
3 area, and it seems to me that that's not true  
4 here, where the Act specifically says that the  
5 Commission's authority starts when the --

6 GENERAL FRANCISCO: Sure.

7 JUSTICE SOTOMAYOR: -- materials are  
8 extracted from the earth and has nothing to do  
9 --

10 GENERAL FRANCISCO: Right.

11 JUSTICE KAGAN: -- with what happens  
12 prior to that. So isn't the separation  
13 involved in these two activities very different  
14 from the separation involved in the PG&E  
15 context?

16 GENERAL FRANCISCO: So my -- my answer  
17 to your question is no. And if I could explain  
18 by reference also to the facts of some other  
19 cases.

20 Take Skull Valley, for example.  
21 There, the state, everyone agreed, had complete  
22 authority over the use of the roadways. But  
23 what the state couldn't do was effectively shut  
24 down a spent nuclear fuel facility by  
25 preventing any fuel from reaching the facility

1 in the first place by way of the roads.

2 JUSTICE GORSUCH: General, I -- I -- I  
3 understand that's a nice Tenth Circuit case, so  
4 well done.

5 (Laughter.)

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

11 (Laughter.)

12 JUSTICE GORSUCH: But I -- I want to  
13 know from first principles why PG&E isn't  
14 simply explained as a construction case?

15 GENERAL FRANCISCO: Sure.

16 JUSTICE GORSUCH: And construction, I  
17 don't see whether and how in the statute in  
18 (c). I see construction. Period.

19 GENERAL FRANCISCO: Right.

20 JUSTICE GORSUCH: And California was  
21 regulating construction in some fashion.

22 GENERAL FRANCISCO: Right. And I --

23 JUSTICE GORSUCH: Here -- here, it's  
24 mining. And maybe Congress should have  
25 preempted in mining, instead of just starting

1 with milling, but it didn't.

2 GENERAL FRANCISCO: Yeah.

3 JUSTICE GORSUCH: So why isn't that  
4 the end of the case?

5 GENERAL FRANCISCO: Because I think  
6 the answer to your question is that neither  
7 PG&E nor anything that we're arguing here is  
8 really a nuclear-specific rule.

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

17 Here, the purpose inquiry actually  
18 narrows the scope of preemption because not  
19 only does the state have to use the authority  
20 that it does have to reach into and indirectly  
21 touch upon something that the federal  
22 government regulates, it has to do so for a  
23 very specific and impermissible purpose.

24 And I think that if you adopted a  
25 contrary rule, and like the one adopted by the

1 Fourth Circuit, it really is a road map for  
2 completely undermining a multibillion-dollar  
3 industry.

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

14 JUSTICE KAGAN: But a problem --

15 JUSTICE ALITO: Well, purpose is  
16 usually a subjective concept, but -- and that's  
17 what Congress -- that's the term Congress chose  
18 to use in 2021(k), but is there a way of  
19 understanding that as applying an objective  
20 standard that doesn't boil down to rational  
21 basis or review? So the inquiry wouldn't be  
22 what was in the minds of these particular  
23 legislators, but would a reasonable  
24 legislator -- is -- do -- enact this particular  
25 prohibition if its objective was not



1 disagreement with the federal regulations?

2 GENERAL FRANCISCO: Yes, Your Honor, I  
3 think there is. And -- and, Justice Kavanaugh,  
4 I think this also goes to the concern that you  
5 were raising as well.

6 I think that the way you would analyze  
7 this is by looking at the text, the legislative  
8 history, the historical context in which it was  
9 enacted, and the plausibility of any  
10 permissible non-safety rationale that the  
11 states puts forward.

12 If the state puts forward a plausible,  
13 non-safety rationale and that rationale is not  
14 otherwise foreclosed by the text, legislative  
15 history, and historical context, then I think  
16 the state wins.

17 The problem in this case is that the  
18 Fourth Circuit effectively assumed that the  
19 purpose of this law was to prohibit uranium  
20 processing because uranium processing was  
21 unsafe. But it held that that was simply  
22 irrelevant to the disposition of the case.

23 JUSTICE GORSUCH: But, General, even  
24 under your standard, we have a problem of mixed  
25 motives because every piece of legislation has

1 a variety of motives behind it. We have a lot  
2 of congressmen with a lot of different  
3 purposes.

4 I'm not sure I understand how you're  
5 going to solve the problem. In Virginia, we  
6 have in this record evidence that they're  
7 concerned both about --

8 GENERAL FRANCISCO: Right.

9 JUSTICE GORSUCH: -- environmental and  
10 economic impacts from mining itself, as well as  
11 with other things.

12 So what do we do with those cases  
13 where at the end of the day it's indeterminate?

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

21 But, secondly, I think that the answer  
22 lies in where the burden of proof is. The  
23 burden of proof is on those challenging state  
24 law. And if they cannot establish that the  
25 principal or predominant purpose of this law

1 was impermissible, then they lose.

2           And so, here, the Fourth Circuit  
3 refused to undertake any inquiry at all because  
4 it effectively assumed that the purpose was in  
5 Petitioners' favor but concluded that that was  
6 irrelevant.

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

9           GENERAL FRANCISCO: I think if it's  
10 not foreclosed by the text, legislative  
11 history, and historical context and they can  
12 establish a plausible rationale at the time  
13 that this was adopted, then, yes, I think that  
14 --

15           JUSTICE KAVANAUGH: So that answers  
16 Justice Gorsuch's question because, if there's  
17 at least one plausible non-safety rationale,  
18 that's good enough or --

19           GENERAL FRANCISCO: I think that  
20 plausible non-safety rationale has to be  
21 sufficient to sustain the law.

22           JUSTICE KAVANAUGH: What does that --

23           GENERAL FRANCISCO: So, for --

24           JUSTICE KAVANAUGH: -- what does that  
25 mean?

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

9           CHIEF JUSTICE ROBERTS:  I thought they  
10    just said we don't want -- we've got too many  
11    but don't want any more.

12           JUSTICE BREYER:  Yeah.

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

21           JUSTICE KAGAN:  Well, General, you --  
22    you've been talking about the undermining of  
23    this industry, but I guess a couple of things  
24    is, one is that as long as there is this other  
25    purpose or as long as the state can say that

1 there's this other purpose, it will just as  
2 successfully be able to undermine the industry.

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

14 GENERAL FRANCISCO: Sure.

15 JUSTICE KAGAN: So there's a limit to  
16 how far any state is able to undermine the  
17 federal goal here if the federal goal is real  
18 enough.

19 GENERAL FRANCISCO: I agree, Your  
20 Honor, but two responses to the first part of  
21 your question, and then I'd like to address the  
22 second part of your question as well.

23 On the first part of your question, we  
24 assume that the states engage in good faith,  
25 and we assume that the states aren't going to

1 misstate their reasons for doing something.

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

9 And may I finish the second point,  
10 Your Honor?

11 CHIEF JUSTICE ROBERTS: Briefly.

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

22 It is a lot more difficult for the  
23 federal government to come in and condemn an  
24 entire operating nuclear power plant.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Heytens.

4 ORAL ARGUMENT OF TOBY J. HEYTENS  
5 ON BEHALF OF THE RESPONDENTS

6 MR. HEYTENS: Mr. Chief Justice, and  
7 may it please the Court:

8 This is an obstacle preemption case  
9 masquerading as a field preemption case. There  
10 is no field preemption here because of the  
11 undisputed fact that the Nuclear Regulatory  
12 Commission does not and cannot regulate any  
13 aspect of uranium mining, including the safety  
14 aspects of uranium mining.

15 And there is no obstacle preemption  
16 here because the Atomic Energy Act and the  
17 Nuclear Regulatory Commission have repeatedly  
18 reaffirmed that states have the ability to  
19 regulate mining up to and including by banning  
20 it altogether.

21 JUSTICE KAVANAUGH: They -- they can  
22 regulate milling, correct?

23 MR. HEYTENS: Excuse me, I want to  
24 make -- the federal government regulates  
25 milling --

1 JUSTICE KAVANAUGH: Right.

2 MR. HEYTENS: -- Justice Kavanaugh,  
3 yes.

4 JUSTICE KAVANAUGH: Yeah. So the  
5 mining and milling occur together, correct? In  
6 other words, they occur -- you don't have  
7 mining without milling; you don't have milling  
8 without mining.

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

12 JUSTICE KAVANAUGH: If you have  
13 conventional mining.

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

16 JUSTICE KAVANAUGH: Right.

17 MR. HEYTENS: But -- but I think in  
18 many ways what this case boils down to is two  
19 questions about Pacific Gas, either one of  
20 which is sufficient to resolve this case in our  
21 favor.

22 The first question is why the Court  
23 conducted a purpose analysis in Pacific Gas,  
24 and the second question is what is the nature  
25 of the purpose analysis that Pacific Gas did.



1 So let me take the first question: Why did the  
2 Court do it.

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

11 The Court said at page 194 of its  
12 opinion that that case arose at an issue  
13 involving the intersection of federal and state  
14 authority. The Court said at pages 211 and 212  
15 of its opinion that it was involving the dual  
16 regulation of nuclear-powered energy  
17 generation, and --

18 JUSTICE ALITO: Before you get too  
19 deeply into that decision, which you have  
20 addressed very extensively and well in your  
21 brief, could I just ask you this:

22 Suppose the Virginia General Assembly  
23 enacted a law that reads as follows: The  
24 General Assembly disagrees with the federal  
25 government that uranium tailings can be safely

1 stored in Virginia and, for that reason and  
2 only that reason, we are banning the practice  
3 of uranium mining.

4 Would that be preempted?

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

11 JUSTICE ALITO: Yeah, how would that  
12 be -- I mean, doesn't that make nonsense of  
13 2120 -- 2021(k)?

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

18 2021(k) has to be read in pari materia  
19 with 2021(b). 2021(b) also refers to purpose,  
20 and it says that in a situation where the state  
21 negotiates for the discontinuance of commission  
22 authority, the state again gets the right to  
23 regulate those activities for purposes of  
24 health and safety.

25 And then 2021(k) comes along and says:

1 Just because you haven't gotten a 2021(b)  
2 agreement doesn't mean you can't regulate for  
3 other purposes.

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

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

18 MR. HEYTENS: Well -- well, Justice  
19 Breyer, I think there are two different reasons  
20 why that's distinct from this situation. First  
21 of all --

22 JUSTICE BREYER: I know the eating is  
23 distinct, but what I'm driving at is the  
24 general matter of -- of I were in a state  
25 legislature, and you could think of a thousand

1 ways, my guess, is we stop tailings in our  
2 state how.

3 And then you look to an area you can  
4 regulate and you regulate that area, but you do  
5 it in a way that nobody can build a plant.  
6 Okay?

7 MR. HEYTENS: Yes.

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

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

11 JUSTICE BREYER: And that's what they  
12 say happened here.

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

20 JUSTICE BREYER: But that's not my  
21 question. It's the tailings they can't  
22 regulate. You get my question?

23 MR. HEYTENS: Yes, Justice Breyer.

24 JUSTICE BREYER: A good lawyer, like  
25 you, and he finds a different area, and it just

1 turns out the regulation in this different area  
2 will stop them from ever having tailings. And  
3 that's why they did it. Okay? So -- so that's  
4 my problem.

5 MR. HEYTENS: Just -- let me try this  
6 again, Justice Breyer.

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

14 Our submission is that this case is  
15 fundamentally different because we are  
16 regulating mining --

17 JUSTICE KAVANAUGH: But, when you're  
18 regulating mining, you're always regulating  
19 milling because you have the two together, but  
20 you can't regulate milling, as you acknowledge,  
21 but the two are interlinked in a way that I'm  
22 not sure you can disaggregate in the way you're  
23 doing.

24 MR. HEYTENS: Justice Kavanaugh, I  
25 understand that conceptually we -- we could

1 have a metaphysical debate about whether you  
2 can separate mining and milling and whether --

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

5 MR. HEYTENS: Well, Justice Kavanaugh,  
6 in the statute, it's separated. And in NRC's  
7 judgment, they're separated.

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

14 And NRC has argued that, as part of  
15 their regulation of milling, they should take  
16 into account background radiation that exists  
17 because of previously un-NRC regulated mining.

18 And NRC says we can't do that. We're  
19 not allowed to take into account the  
20 consequences of previous mining activities  
21 because we, NRC, have no authority to regulate  
22 mining. Even though we have authority to  
23 regulate milling, we, NRC, can't regulate  
24 mining. And even taking into account radiation  
25 that exists because of that previous mining

1 would constitute impermissible NRC regulation  
2 of mining.

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

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

18           In fact, NRC has aggressively  
19 disclaimed that argument in a decision where a  
20 great deal actually turned on that argument.

21           But the second question to raise,  
22 Justice Breyer -- to go back to Justice Breyer.  
23 So I think the first reason that Justice  
24 Breyer's example isn't covered by this  
25 situation is that we concede, once we're

1 dealing with an NRC-regulated activity, a  
2 tailings facility, 2021(k) requires some sort  
3 of purpose analysis. That's why the court did  
4 a purpose analysis in Pacific Gas.

5 JUSTICE KAGAN: And that's also why  
6 Skull Valley is right?

7 MR. HEYTENS: Yes, Justice Kagan.  
8 Because the vast majority of the activities in  
9 Skull Valley were NRC-regulated activities.  
10 And we have no quarrel with that decision  
11 whatsoever.

12 But the other reason is even if -- so,  
13 to go back to Justice Alito's hypothetical,  
14 excuse me -- even if it appeared on the face of  
15 the statute, the first reason we think that  
16 that law is not preempted, and if that law is  
17 not preempted, this law is obviously not  
18 preempted, but even if the Court were inclined  
19 to reserve judgment or to carve out an  
20 exception for a law where that sort of purpose  
21 is stated on the text or the face of the  
22 statute, there would be no justification for  
23 unleashing the, all things considered,  
24 subjective motivations of the state legislature  
25 that we see in the blue brief and the yellow



1 brief.

2 And, here, I think what --

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

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

18 Name any judge in American history,  
19 and who's been heard of, of course, we have a  
20 dozen ways of looking at purpose. So what's  
21 wrong with looking at purpose here? I grant  
22 you a state legislature, unlike Congress, is  
23 less likely to hold on the record hearings  
24 about a statute, but then that would be a  
25 reason for saying, when we try to determine

1 purpose, we do not look necessarily to  
2 legislative history as written in committee  
3 reports because there aren't any.

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

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

13 MR. HEYTENS: I think I have two  
14 answers, Justice Breyer.

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

21 Under our federal system, the  
22 challenger has to show why a state legislature  
23 may not do something. So the first thing I'd  
24 say is we'd have to know why would the purpose  
25 of this law matter. And to go back to, I

1 think, something that was brought up by Justice  
2 Gorsuch, our fundamental view is, because  
3 Congress does not regulate mining in any way,  
4 in any shape, or any form, it does not matter  
5 the purpose for which Virginia has chosen to  
6 forbid mining.

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

14 The face of this statute regulates  
15 mining. The face of this statute cites  
16 environmental and natural resources  
17 consequences that flow from mining.

18 JUSTICE ALITO: And what does that  
19 mean?

20 JUSTICE GINSBURG: Now what do you  
21 mean by that? You had it in your brief, let's  
22 see. You said there was a plausible purpose  
23 other than to prevent nuclear development.

24 And you say the possibility that  
25 certain impacts of uranium development activity

1 may reduce or potentially limit certain uses of  
2 Virginia environmental resources, and -- and I  
3 -- I don't know what that means.

4 MR. HEYTENS: Fair enough, Justice  
5 Ginsburg. I mean, I think -- we think it's  
6 fairly apparent what those would mean in the  
7 context of this situation.

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

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

22 CHIEF JUSTICE ROBERTS: Well, how much  
23 is -- I'm trying to envision -- you know, one  
24 ton sounds like a lot, but a ton of dirt, how  
25 -- how much is that? That's not -- it's

1 probably not that much. I mean, are you  
2 talking a truckload or what?

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

9 They're not -- they don't want to mine  
10 one to five pounds of uranium. They want to  
11 mine what they themselves describe as the  
12 largest deposits of uranium in the continental  
13 United -- in the United States.

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

22 So you could ask whether it's  
23 plausible that this was done for some reason  
24 other than just the fact that Virginia  
25 disagrees with the NRC that the tailings can be

1 dealt with in a safe way.

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

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

17 There's a world of difference between  
18 saying that, and we do not intend to start a  
19 massive mining operation in a part of the state  
20 that has never had such a mining operation.

21 JUSTICE ALITO: Well, that may be.  
22 You could have a moratorium on mining, period.  
23 You could have a mora -- no more mining of  
24 anything in Virginia. You could have that.

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

1 JUSTICE ALITO: That's not what the  
2 legislature did here.

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

12 JUSTICE GORSUCH: Once you start --

13 JUSTICE KAVANAUGH: If we don't accept  
14 --

15 JUSTICE GORSUCH: I'm sorry, please.  
16 No, go ahead.

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

22 MR. HEYTENS: We think that that's the  
23 language the Court -- once you decide to do  
24 purpose, that's the second point I was making  
25 earlier. If you decide to do purpose, we think

1 that's the way you should do purpose. It's the  
2 way the Court did purpose in Pacific Gas.

3 And we think that under that, we  
4 clearly win because we are materially  
5 indistinguishable from California and Pacific  
6 Gas. Another --

7 JUSTICE GINSBURG: But you -- you --  
8 you, at the pleadings stage, you made a  
9 concession that the purpose of the ban was to  
10 address radiological safety concerns.

11 Why did you make that concession?

12 MR. HEYTENS: Well, Justice Ginsburg,  
13 I want to -- I'm glad to have the opportunity  
14 to address that.

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

23 So to the extent that they --

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



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

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

16          MR. HEYTENS: Right.

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

20          MR. HEYTENS: Absolutely.

21          JUSTICE BREYER: So we don't have to  
22 look in their minds, do we?

23          MR. HEYTENS: Well -- well, Justice  
24 Breyer, that is exactly what the Petitioners  
25 are asking you to do. The statements that are

1 --

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

12 I think I've done that, perhaps  
13 wrongly -- I don't think so -- hundreds of  
14 times.

15 MR. HEYTENS: Yes, Justice Breyer, we  
16 really --

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

20 MR. HEYTENS: Justice Breyer, we agree  
21 with everything you just said about purpose.  
22 And it brings me back to my answer to Justice  
23 Kagan and Justice Ginsburg. Excuse me.

24 The statements in the brief that they  
25 are citing before this Court are statements

1 where we say the Court should not consider  
2 these hundreds of pages of statements where  
3 people offer their subjective perspective on  
4 why they did what they did.

5 We say all of those materials are  
6 beside the point. So -- so what happened here  
7 is --

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

20 And if we start looking at this  
21 statute, I don't even know where to begin,  
22 because it talks about the environmental and  
23 local resource impacts of mining and milling  
24 and tailings and everything else.

25 Now could a rational legislator have

1 done this only for concern about mining?  
2 Maybe. If I'm going to start going down the  
3 road of what's in somebody's head and  
4 subjective intentions of even an imaginary,  
5 hypothetical, reasonable legislator, I don't  
6 know.

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

13 That -- our primary submission is that  
14 exactly what you just said, Justice Gorsuch,  
15 that there's no warrant to do that, there's no  
16 need to do that, and the Court shouldn't do it.

17 JUSTICE SOTOMAYOR: Well, except where  
18 do we draw the line or how do we draw it  
19 between the Skull decision and the Second  
20 Circuit Vermont decision? There, activities  
21 that the state were -- were alleged to be doing  
22 were intended and did, in fact, affect  
23 regulated conduct by the federal government.

24 But one could say here, if you  
25 prohibit mining, you're affecting milling or

1 disposal.

2 MR. HEYTENS: Right.

3 JUSTICE SOTOMAYOR: So how -- where  
4 and how do we draw the line between that  
5 regulation that we're permitted to look to  
6 purpose for and that which we're not?

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

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

20 They say there's this one provision of  
21 the law at issue in Skull Valley that turns a  
22 county road into a state road.

23 Well, I'D say two things about that  
24 provision. First, if that's literally all that  
25 Utah did, all Utah did was to convert a road

1 from a county road to a state road, and that's  
2 the only thing they did, there would be no  
3 basis whatsoever for finding that law standing  
4 alone was preempted by the Atomic Energy Act.

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

16 And here's what the Court actually  
17 said in National Meat. That argument ignores  
18 the way that the sales provision operates  
19 within state law as a whole.

20 California didn't enact the sales  
21 provision as a free-standing provision. They  
22 enacted the sales provision as part of an  
23 interrelated series of laws that in the court's  
24 language regulated the same thing as the  
25 federal government, just in a different way.

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

8           You have to look at the scheme as a  
9           whole and you have to look at how the entirety  
10          of the series of interrelated laws work.

11          JUSTICE KAGAN: Suppose --

12          JUSTICE ALITO: 2021, Section (c),  
13          2021(c)(4) says that the Commission shall  
14          retain the authority to regulate the disposal  
15          of byproduct. And then (k) says nothing. And  
16          that is -- it's that regulatory authority, I  
17          take it, which is the statutory basis of the  
18          preemption argument.

19          And (k) says nothing in this section  
20          shall be construed to affect the authority of  
21          the state or local agencies and so forth. So  
22          how do you --

23          MR. HEYTENS: Sure.

24          JUSTICE ALITO: Why is it tied -- why  
25          do you -- why do you say (k) is tied --

1 MR. HEYTENS: Sure.

2 JUSTICE ALITO: -- solely to  
3 licensing?

4 MR. HEYTENS: Well, Justice Alito,  
5 first, in this case, we're not talking about  
6 byproduct. We're talking about source  
7 material.

8 And -- and the reason that that is  
9 critically important -- I don't think I'm just  
10 quibbling over terminology -- is because when  
11 we're talking about source material, both 2090  
12 --

13 JUSTICE ALITO: Well, it goes on to  
14 say the disposal of such other byproducts  
15 source or special nuclear material.

16 MR. HEYTENS: Correct. But it -- but  
17 you have to read that in conjunction with 20 --  
18 2092 and 20 -- 2095, both of which specifically  
19 say that NRC jurisdiction over source material  
20 does not even begin or commence until after  
21 that source material is removed from the  
22 ground.

23 Congress was very clear. They have a  
24 belt-and-suspenders approach. They don't just  
25 say that NRC can't regulate the transfer of



1 source material. That's 2092.

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

8 JUSTICE ALITO: But the -- do you  
9 dispute the fact that the NRC has -- occupies  
10 the field of regulation of source material?

11 MR. HEYTENS: After it leaves the  
12 ground.

13 JUSTICE ALITO: After it leaves the  
14 ground.

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

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

23 MR. HEYTENS: Justice Alito, I guess  
24 I'd have to know -- I'd have to have a little  
25 more information about what we mean by

1 "indirectly or surreptitiously regulates the  
2 same thing," because it's certainly -- if -- if  
3 we're talking about Petitioners' strong version  
4 of that argument, that is completely  
5 inconsistent with this Court's rejection of a  
6 field preemption argument in *Pacific Gas*,  
7 because think about the argument that  
8 California -- excuse me, not California -- that  
9 *Pacific Gas* and the federal government made for  
10 preemption in that case.

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

1 Congress to tell the state that.

2 And I'll just go back to the point  
3 that --

4 JUSTICE KAGAN: Of course, Mr.  
5 Heytens, not for reasons having to do with  
6 radiological safety.

7 MR. HEYTENS: Yes.

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

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

19 So I suppose that's a -- a way to  
20 explain the opposite position.

21 MR. HEYTENS: I agree with that,  
22 Justice Kagan, but I think the last thing you  
23 said shows why that argument can't possibly be  
24 right.

25 NRC lacks the authority to regulate

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

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

19 MR. HEYTENS: Sure.

20 JUSTICE KAVANAUGH: -- that's the  
21 point.

22 MR. HEYTENS: Justice Kavanaugh, I  
23 think -- I think that's right, and I think part  
24 of the reason that Congress has given NRC  
25 jurisdiction over the milling is because of

1 those various concerns. But I --

2 JUSTICE KAVANAUGH: Just one technical  
3 point --

4 MR HEYTENS: I'm sorry.

5 JUSTICE KAVANAUGH: -- on phrasing.  
6 The solicitor general said plausible non-safety  
7 rationale. I assume you would amend that to  
8 say plausible non-radiological safety  
9 rationale?

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

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

20 JUSTICE KAVANAUGH: Right.

21 MR. HEYTENS: There's the radiological  
22 safety aspects of the mining process. And  
23 there's the radiological safety aspects of the  
24 milling. I -- I agree with you completely the  
25 reason you give NRC jurisdiction over the third

1 is the conclusion that that poses special  
2 concerns.

3 JUSTICE KAVANAUGH: It's all of the  
4 concerns, isn't it, on radiological safety?  
5 Almost all?

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

19 And I think there's at least some  
20 evidence in some of the briefing that there may  
21 be at least some radiological safety concerns  
22 associated with doing that. Without saying  
23 they're the same as milling.

24 And there -- regardless of whether  
25 there are radiological safety concerns, there

1 are clearly a wide variety of health and safety  
2 concerns associated with extracting massive  
3 amounts of material out of the ground.

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

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

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

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Four minutes, Mr. Cooper.

24

25

1 REBUTTAL ARGUMENT OF CHARLES J. COOPER  
2 ON BEHALF OF THE PETITIONERS

3 MR. COOPER: Thank you, Mr. Chief  
4 Justice.

5 And Justice Kavanaugh, I want to come  
6 straight to your point that you can't mill  
7 mining unless you have -- mill uranium unless  
8 you have mined it in the first place.

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

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

21 JUSTICE GINSBURG: Suppose -- suppose  
22 -- suppose they say our rationale does have to  
23 do with the mining, not the milling; we think  
24 there are radiological hazards from the -- from  
25 the unearthing the -- the uranium. Suppose



1 they said that.

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

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

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

24 The next paragraph, with respect to  
25 tailings management, the quantity and

1 characteristics of the tailings, the method of  
2 disposal, treatment systems for removal of  
3 solids, radio-nucleides, on and on for the next  
4 several pages -- pages.

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

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

1 need for additional generation, generating  
2 capacity, the type of generating facilities to  
3 be licensed, are they going to be coal or  
4 nuclear.

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

13           My final point here, plausible  
14 non-safety rationale.

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

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

1 wants you to decide.

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

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

11 Thank you, Your Honor.

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

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

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## Official - Subject to Final Review

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