

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.

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P R O C E E D I N G S

(11:07 a.m.)

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

Mr. Cooper.

ORAL ARGUMENT OF CHARLES J. COOPER
ON BEHALF OF THE PETITIONERS

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

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

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

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

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 -- Your Honor, as I say,
17 in -- 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: -- that -- that --
23 I'm sorry to interrupt, but I just want to
24 narrow the question so that we -- we might be
25 more productive, for -- for me, helpfully for

1 me.

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

6 MR. COOPER: Yes.

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

9 (Laughter.)

10 MR. COOPER: Yes.

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

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

1 agreement on how to regulate mining?

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

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

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

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

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

24 Then I take it you would lose, right?

25 MR. COOPER: I would lose, Your Honor,

1 yes. I would lose if that was the State of
2 Virginia's genuine purpose.

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

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

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

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

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

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

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

25 So the -- the courts really have to

1 look behind to see if, in fact, the -- the
2 legislature is motivated and its purpose is a
3 prohibited radiation hazard.

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

7 MR. COOPER: No, Your Honor.

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

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

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

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

1 about that.

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

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

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

19 Yes, that -- that is --

20 JUSTICE KAVANAUGH: Is that --

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

25 MR. COOPER: Your Honor, and we've

1 seen that -- we've seen that in -- in cases
2 that have been decided in -- in this line. As
3 I was saying, the -- the Entergy case itself,
4 the legislature was very careful to attempt to
5 obscure what was, and the courts determined
6 quite properly, what was genuinely animating
7 the legislative body in that case.

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

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

23 JUSTICE KAVANAUGH: But how are we
24 going to tell that in most cases? Justice
25 Kagan's question about two state laws are going

1 to be treated differently based on our inquiry
2 or the federal court's inquiry into the
3 subjective motive seems very odd.

4 The thing that concerns me about this
5 is, how is this going to work?

6 MR. COOPER: Your Honor --

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

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

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

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

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

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

24 MR. COOPER: Your Honor, I think if --
25 if you're -- if you're groping, if you were,

1 for a framework for courts to analyze this, it
2 seems to me the Court in Arlington Heights
3 produced a perfectly apt way for courts to
4 approach this.

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

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

22 This actually takes -- takes the
23 standard preemption doctrine and its state --
24 it's friendlier to the state's interests
25 because it allows states, as (k) explicitly

1 says, to regulate the materials at issue --
2 source, byproduct, and special nuclear
3 materials -- for purposes other than protection
4 against radiation hazards.

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

11 If I may reserve the balance of my
12 time, Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 General Francisco.

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

19 GENERAL FRANCISCO: Mr. Chief Justice,
20 and may it please the Court:

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

24 JUSTICE GINSBURG: Because it thinks
25 mining is what?

1 GENERAL FRANCISCO: Because mining
2 isn't safe. But what it can't do is ban
3 uranium mining because uranium processing isn't
4 safe.

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

8 GENERAL FRANCISCO: No, Your Honor, I
9 don't think so.

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

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

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

19 GENERAL FRANCISCO: Right. And if
20 Virginia --

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

1 GENERAL FRANCISCO: Not in the
2 slightest, Your Honor, because, if Virginia's
3 mining ban were preempted, Virginia wouldn't
4 have to do anything. It could apply its
5 existing mining laws, it could adopt a new
6 mining law if it wanted, or it could leave the
7 entire area completely unregulated.

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

13 JUSTICE KAGAN: May --

14 GENERAL FRANCISCO: -- to the federal
15 government.

16 JUSTICE KAGAN: -- may -- may I go
17 back to Justice Gorsuch's question --

18 GENERAL FRANCISCO: Yes, Your Honor.

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

1 government and the states.

2 2018 gives a lot of authority to the
3 states, and then 2021(c) clearly makes this a
4 part of what the Commission looks at.

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

12 GENERAL FRANCISCO: Sure.

13 JUSTICE SOTOMAYOR: -- materials are
14 extracted from the earth and has nothing to do
15 --

16 GENERAL FRANCISCO: Right.

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

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

1 Take Skull Valley, for example.
2 There, the state, everyone agreed, had complete
3 authority over the use of the roadways. But
4 what the state couldn't do was effectively shut
5 down a spent nuclear fuel facility by
6 preventing any fuel from reaching the facility
7 in the first place by way of the roads.

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

11 (Laughter.)

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

17 (Laughter.)

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

21 GENERAL FRANCISCO: Sure.

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

25 GENERAL FRANCISCO: Right.

1 JUSTICE GORSUCH: And California was
2 regulating construction in some fashion.

3 GENERAL FRANCISCO: Right. And I --

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

8 GENERAL FRANCISCO: Yeah.

9 JUSTICE GORSUCH: So why isn't that
10 the end of the case?

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

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

23 Here, the purpose inquiry actually
24 narrows the scope of preemption because not
25 only does the state have to use the authority

1 that it does have to reach into and indirectly
2 touch upon something that the federal
3 government regulates, it has to do so for a
4 very specific and impermissible purpose.

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

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

20 JUSTICE KAGAN: But a problem --

21 JUSTICE ALITO: Well, purpose is
22 usually a subjective concept, but -- and that's
23 what Congress -- that's the term Congress chose
24 to use in 2021(k), but is there a way of
25 understanding that as applying an objective

1 standard that doesn't boil down to rational
2 basis review? So the inquiry wouldn't be what
3 was in the minds of these particular
4 legislators, but would a reasonable
5 legislator -- is -- do -- enact this particular
6 prohibition if its objective was not
7 disagreement with the federal regulations?

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

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

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

23 The problem in this case is that the
24 Fourth Circuit effectively assumed that the
25 purpose of this law was to prohibit uranium

1 processing because uranium processing was
2 unsafe. But it held that that was simply
3 irrelevant to the disposition of the case.

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

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

14 GENERAL FRANCISCO: Right.

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

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

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

1 Circuit refused to apply any purpose inquiry at
2 all.

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

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

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

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

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

1 GENERAL FRANCISCO: I think that
2 plausible non-safety rationale has to be
3 sufficient to sustain the law.

4 JUSTICE KAVANAUGH: What does that --

5 GENERAL FRANCISCO: So, for --

6 JUSTICE KAVANAUGH: -- what does that
7 mean?

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

16 CHIEF JUSTICE ROBERTS: I thought they
17 just said we don't want -- we've got too many
18 --

19 JUSTICE GORSUCH: They've got too many
20 --

21 CHIEF JUSTICE GORSUCH: -- but don't
22 want any more.

23 JUSTICE GORSUCH: Yeah.

24 GENERAL FRANCISCO: Well, Your Honor
25 -- and I think that that's exactly the type of

1 analysis that the statute itself requires when
2 it required that type of purpose inquiry,
3 because I do think otherwise -- otherwise, you
4 really are giving state and local governments a
5 road map for undermining a multibillion-dollar
6 industry. Just one other example.

7 JUSTICE KAGAN: Well, General, you --
8 you -- you've been talking about the
9 undermining of this industry, but I guess a
10 couple of things is, one is that as long as
11 there is this other purpose or as long as the
12 state can say that there's this other purpose,
13 it will just as successfully be able to
14 undermine the industry.

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

1 GENERAL FRANCISCO: Sure.

2 JUSTICE KAGAN: So there's a limit to
3 how far any state is able to undermine the
4 federal goal here if the federal goal is real
5 enough.

6 GENERAL FRANCISCO: I -- I agree, Your
7 Honor, but two responses to the first part of
8 your question, and then I'd like to address the
9 second part of your question as well.

10 On the first part of your question, we
11 assume that the states engage in good faith,
12 and we assume that the states aren't going to
13 misstate their reasons for doing something.

14 But I will tell you that it is a lot
15 more difficult for a state to, for example,
16 rezone all land that nuclear activity is taking
17 place on as residential, even if it's totally
18 unsuitable for residential dwelling, if they
19 know they're going to have to come forward and
20 justify that.

21 And may I finish the second point,
22 Your Honor?

23 CHIEF JUSTICE ROBERTS: Briefly.

24 GENERAL FRANCISCO: Yes. In my -- in
25 -- in response to the second part of your

1 question, Justice Kagan, yes, the federal
2 government can in certain circumstances condemn
3 land. But take not something like this case,
4 but take something like an ongoing nuclear
5 facility where the state is using, under the
6 Fourth Circuit's rule, its authority to rezone
7 that land as residential to completely obstruct
8 it and shut it down.

9 It is a lot more difficult for the
10 federal government to come in and condemn an
11 entire operating nuclear power plant.

12 Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Heytens.

16 ORAL ARGUMENT OF TOBY J. HEYTENS

17 ON BEHALF OF THE RESPONDENTS

18 MR. HEYTENS: Mr. Chief Justice, and
19 may it please the Court:

20 This is an obstacle preemption case
21 masquerading as a field preemption case. There
22 is no field preemption here because of the
23 undisputed fact that the Nuclear Regulatory
24 Commission does not and cannot regulate any
25 aspect of uranium mining, including the safety

1 aspects of uranium mining.

2 And there is no obstacle preemption
3 here because the Atomic Energy Act and the
4 Nuclear Regulatory Commission have repeatedly
5 reaffirmed that states have the ability to
6 regulate mining up to and including by banning
7 it altogether.

8 JUSTICE KAVANAUGH: They -- they --
9 they can regulate milling, correct?

10 MR. HEYTENS: Excuse me, I want to
11 make -- the federal government regulates
12 milling --

13 JUSTICE KAVANAUGH: Right.

14 MR. HEYTENS: -- Justice Kavanaugh,
15 yes.

16 JUSTICE KAVANAUGH: Yeah. So the
17 mining and milling occur together, correct? In
18 other words, they occur -- you don't have
19 mining without milling; you don't have milling
20 without mining.

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

24 JUSTICE KAVANAUGH: If you have
25 conventional mining.

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

3 JUSTICE KAVANAUGH: Right.

4 MR. HEYTENS: But -- but I think in
5 many ways what this case boils down to is two
6 questions about Pacific Gas, either one of
7 which is sufficient to resolve this case in our
8 favor.

9 The first question is why the Court
10 conducted a purpose analysis in Pacific Gas,
11 and the second question is what is the nature
12 of the purpose analysis that Pacific Gas did?
13 So let me take the first question: why did the
14 Court do it?

15 The reason the Court did it is
16 because, as several members of this Court have
17 already flagged, Pacific Gas was dealing with
18 an area of overlapping shared authority between
19 the federal and state government. And I know
20 the yellow brief dwells on this, so I want to
21 quote some of the language in the Court's
22 opinion that addresses this.

23 The Court said at page 194 of its
24 opinion that that case arose at an issue
25 involving the intersection of federal and state

1 authority. The Court said at pages 211 and 212
2 of its opinion that it was involving the dual
3 regulation of nuclear-powered energy
4 generation, and the --

5 JUSTICE ALITO: Before you get too
6 deeply into that decision, which you have
7 addressed very extensively and well in your
8 brief, could I just ask you this?

9 Suppose the Virginia General Assembly
10 enacted a law that reads as follows: The
11 General Assembly disagrees with the federal
12 government that uranium tailings can be safely
13 stored in Virginia and, for that reason and
14 only that reason, we are banning the practice
15 of uranium mining.

16 Would that be preempted?

17 MR. HEYTENS: Justice Alito, we do not
18 think even that mythical statute would be
19 preempted. And let me -- I'll start by
20 explaining why we don't think that, and then
21 I'll explain why I don't think the answer to
22 that matters in this case.

23 JUSTICE ALITO: Yeah, how would that
24 be -- I mean, doesn't that make nonsense of
25 2120 -- 2021(k)?

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

5 2021(k) has to be read in pari materia
6 with 2021(b). 2021(b) also refers to purpose,
7 and it says that in a situation where the state
8 negotiates for the discontinuance of commission
9 authority, the state again gets the right to
10 regulate those activities for purposes of
11 health and safety.

12 And then 2021(k) comes along and says:
13 Just because you haven't gotten a 2021(b)
14 agreement doesn't mean you can't regulate for
15 other purposes.

16 JUSTICE BREYER: So why -- why can't
17 the -- you know, the imagination allows you to
18 think of all kinds of things where they stop
19 the tailing. No one who works in a tailing
20 plant can eat. All right? You know, that's
21 not going to be a real law.

22 But they can't eat, they can't have
23 electricity in the plant, they can't build it
24 in the first place because it's residential.
25 You name it, they have authority in all kinds

1 of places and all they have to do to stop the
2 tailings is they use this other authority
3 solely in order to stop the tailings, and you
4 say that's just fine.

5 MR. HEYTENS: Well -- well, Justice
6 Breyer, I think there are two different reasons
7 why that's distinct from this situation. First
8 --

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

18 MR. HEYTENS: Yes.

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

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

22 JUSTICE BREYER: And that's what they
23 say happened here.

24 MR. HEYTENS: Yes, and I think the
25 answer to your question, Justice Breyer, goes

1 back to a point that Justice Gorsuch made
2 earlier. In that situation, if we're talking
3 about a plant, we are talking about dual
4 overlapping federal and state authority under
5 2021.

6 JUSTICE BREYER: But that's not my
7 question. It's the tailings they can't
8 regulate. You get my question?

9 MR. HEYTENS: Yes, Justice Breyer.

10 JUSTICE BREYER: A good lawyer, like
11 you, and he finds a different area, and it just
12 turns out that the regulation in this different
13 area will stop them from ever having tailings.
14 And that's why they did it. Okay? So -- so
15 that's my problem.

16 MR. HEYTENS: Just -- let me try this
17 again, Justice Breyer.

18 When we're talking about a tailings
19 facility, we're in an area of overlapping
20 authority because NRC regulates tailings
21 management. And at that point, you are covered
22 by 2021(k). And the Court has to conduct the
23 sort of purpose analysis that's mandated by
24 2021(k).

25 Our submission is that this case is

1 fundamentally different because we are
2 regulating mining --

3 JUSTICE KAVANAUGH: But, when you're
4 regulating mining, you're always regulating
5 milling because you have the two together, but
6 you can't regulate milling, as you acknowledge,
7 but the two are interlinked in a way that I'm
8 not sure you can disaggregate in the way you're
9 doing.

10 MR. HEYTENS: Justice Kavanaugh, I
11 understand that conceptually we -- we could
12 have a metaphysical debate about whether you
13 can separate mining and milling and whether --

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

16 MR. HEYTENS: Well, Justice Kavanaugh,
17 in the statute, it's separated. And in NRC's
18 judgment, they're separated.

19 I think the best evidence of that is
20 discussed in our brief. It's the Hydro
21 Resource -- Resources decision of NRC. So this
22 is a case in which NRC is regulating an
23 activity that they have the authority to
24 regulate. It's a milling process. Right?

25 And NRC has argued that, as part of

1 their regulation of milling, they should take
2 into account background radiation that exists
3 because of previously un-NRC regulated mining.

4 And NRC says we can't do that. We're
5 not allowed to take into account the
6 consequences of previous mining activities
7 because we, NRC, have no authority to regulate
8 mining. Even though we have authority to
9 regulate milling, we, NRC, can't regulate
10 mining. And even taking into account radiation
11 that exists because of that previous mining
12 would constitute impermissible NRC regulation
13 of mining.

14 And so I think regardless of whether
15 as a metaphysical level we could say milling
16 and mining are so inextricably intertwined that
17 the regulation of one is necessarily the
18 regulation of the other, I think both Congress
19 and the text of the statute, right, I mean, so
20 that's the other point, this statute from the
21 beginning has given NRC the ability to regulate
22 milling.

23 And in the entire history of this Act,
24 NRC has never once advanced the argument, as
25 far as we're aware, that says because we can

1 regulate milling, a fortiori we can regulate
2 mining because mining is inextricably
3 intertwined with milling.

4 In fact, NRC has aggressively
5 disclaimed that argument in a decision where a
6 great deal actually turned on that argument.

7 But the second question to raise,
8 Justice Breyer -- to go back to Justice Breyer.
9 So I think the first reason that Justice
10 Breyer's example isn't covered by this
11 situation is that we concede, once we're
12 dealing with an NRC-regulated activity, a
13 tailings facility, 2021(k) requires some sort
14 of purpose analysis. That's why the court did
15 a purpose analysis in Pacific Gas.

16 JUSTICE KAGAN: And that's also why
17 Skull Valley is right?

18 MR. HEYTENS: Yes, Justice Kagan,
19 because the vast majority of the activities in
20 Skull Valley were NRC-regulated activities.
21 And we have no quarrel with that decision
22 whatsoever.

23 But the other reason is even if -- so,
24 to go back to Justice Alito's hypothetical,
25 excuse me -- even if it appeared on the face of

1 the statute, the first reason we think that
2 that law is not preempted, and if that law's
3 not preempted, this law is obviously not
4 preempted, but even if the Court were inclined
5 to reserve judgment or to carve out an
6 exception for a law where that sort of purpose
7 is stated on the text or the face of the
8 statute, there would be no justification for
9 unleashing the, all things considered,
10 subjective motivations of the state legislature
11 that we see in the blue brief and the yellow
12 brief.

13 And, here, I think what --

14 JUSTICE KAVANAUGH: If we --

15 JUSTICE BREYER: Now the motives in my
16 opinion is a bad word because you don't know
17 people's motives. You don't normally look into
18 that. Motives can be backward-looking. He did
19 it out of revenge. They can be referring
20 solely to a past fact. He hit my sister,
21 that's why.

22 But we're concerned with the subset of
23 that where we're looking to the future. And I
24 think you're right to say that's purpose. When
25 we talk about -- and every judge, as far as I

1 know, including Justice Scalia, whom we used to
2 talk about this, sometimes will look to a
3 statute's purpose. Go back to Lord Cooke. Go
4 back as far as you want.

5 Name any judge in American history,
6 and who's been heard of, of course, we have a
7 dozen ways of looking at purpose. So what's
8 wrong with looking at purpose here? I grant
9 you a state legislature, unlike Congress, is
10 less likely to hold on the record hearings
11 about a statute, but then that would be a
12 reason for saying, when we try to determine
13 purpose, we do not look necessarily to
14 legislative history as written in committee
15 reports because there aren't any.

16 Now there Justice Scalia and I could
17 have a lot of arguments about whether you do,
18 whether you don't, but that's beside the point.
19 When you say don't look at purpose, there I get
20 off the boat because I think that's our job as
21 a court in -- in a relevant case to determine
22 what the purpose of the statute is. Sometimes
23 it's easy. Sometimes it's tough.

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

25 MR. HEYTENS: I think I have two

1 answers, Justice Breyer.

2 The first one is that when we're
3 dealing with a state legislature, which is
4 fundamentally, as you say, unlike Congress, and
5 it's unlike Congress in a different way. A
6 state legislature does not have to show its
7 authority to do something.

8 Under our federal system, the
9 challenger has to show why a state legislature
10 may not do something. So the first thing I'd
11 say is we'd have to know why would the purpose
12 of this law matter. And to go back to, I
13 think, something that was brought up by Justice
14 Gorsuch, our fundamental view is, because
15 Congress does not regulate mining in any way,
16 in any shape, or any form, it does not matter
17 the purpose for which Virginia has chosen to
18 forbid mining.

19 But even if the Court wanted to carve
20 out an exception for the case that we've talked
21 about earlier, I think -- I think, Justice
22 Breyer, you're absolutely right. I think the
23 purpose of the statute is an Orthodox question
24 of statutory interpretation and should be
25 determined the way the Court normally does.

1 The face of this statute regulates
2 mining. The face of this statute cites
3 environmental and natural resources
4 consequences that flow from mining.

5 JUSTICE ALITO: And what does that
6 mean? Yeah.

7 JUSTICE GINSBURG: Now what do you
8 mean by that? You had it in your brief. Let's
9 see. You said there was a plausible purpose
10 other than to prevent nuclear development.

11 And you say the possibility that
12 certain impacts of uranium development activity
13 may reduce or potentially limit certain uses of
14 Virginia environmental resources, and -- and I
15 -- I don't know what that means.

16 MR. HEYTENS: Fair enough, Justice
17 Ginsburg. I mean, I think -- we think it's
18 fairly apparent what those would mean in the
19 context of this situation.

20 This would be a massive earth-moving
21 mine operation. There's a statistic that's in
22 the federal government's cert stage amicus
23 brief where they say that, to get one to five
24 pounds of uranium, you have to displace one ton
25 of dirt to get one to five pounds of uranium.

1 This would be a massive disruption of
2 Virginia's seated view. We're talking about a
3 fundamentally profoundly rural area of Virginia
4 that's building its economy based on
5 agriculture and tourism. And I think it's
6 fairly obvious how that would have a
7 significant impact on Virginia's environment
8 and natural resources, which is why this --

9 CHIEF JUSTICE ROBERTS: Well, how much
10 is -- I'm trying to envision -- you know, one
11 ton sounds like a lot, but a ton of dirt, how
12 -- how much is that? That's not -- it's
13 probably not that much. I mean, are you
14 talking a truckload or what?

15 MR. HEYTENS: Perhaps, Mr. Chief
16 Justice, but our friends on the other side --
17 it's also not one pound of uranium. Our
18 friends on the other side say this deposit is
19 100 -- I believe it's 119 -- it's either tons
20 -- it's an enormous quantity.

21 They're not -- they don't want to mine
22 one to five pounds of uranium. They want to
23 mine what they themselves describe as the
24 largest deposits of uranium in the continental
25 United -- in the United States.

1 JUSTICE KAVANAUGH: If we --

2 JUSTICE ALITO: Well, Virginia allows
3 coal mining and has a fair amount of coal
4 mining in the western part of the state. So
5 could a court compare coal mining with uranium
6 mining and see if there's something that if one
7 is more disruptive to the scenery than the
8 other or one is more dangerous to miners than
9 the other, something like that?

10 So you could ask whether it's
11 plausible that this was done for some reason
12 other than just the fact that Virginia
13 disagrees with the NRC that the tailings can be
14 dealt with in a safe way.

15 MR. HEYTENS: And, Justice Alito, I
16 think there is an apparent and obvious
17 explanation that is all -- that the Court
18 doesn't need to do anything beyond -- it's
19 something the Chief Justice flagged.

20 There is -- Virginia could easily
21 decide that there is a world of difference. I
22 mean, the analogy I've thought of here is the
23 removal of Ten Commandments monuments, right,
24 where Virginia could easily decide that there
25 is a world of difference between telling people

1 and companies and communities that have built
2 their economic livelihood around coal mining
3 that we are not going to shut those down and
4 disrupt the entire way of life in an area.

5 There's a world of difference between
6 saying that, and we do not intend to start a
7 massive mining operation in a part of the state
8 that has never had such a mining operation.

9 JUSTICE ALITO: Well, that may be.
10 You could have a moratorium on mining, period.
11 You could have a mora -- no more mining of
12 anything in Virginia. You could have that.

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

14 JUSTICE ALITO: That's not what the
15 legislature did here.

16 MR. HEYTENS: It's not what they did,
17 and it's also what the court in Pacific Gas
18 said, it's not what California was required to
19 do, because there was an argument that was made
20 in Pacific Gas that, if California really meant
21 their proffered rationale, there are other
22 steps that California could have and perhaps
23 would have taken if they wanted to pursue that
24 goal at all costs.

25 JUSTICE GORSUCH: Once you start --

1 JUSTICE KAVANAUGH: If we don't accept

2 --

3 JUSTICE GORSUCH: I'm sorry, please.

4 No, go ahead.

5 JUSTICE KAVANAUGH: If we don't accept
6 your broader position, what do you think of the
7 Solicitor General's suggestion that we look it
8 up whether the state has a plausible non-safety
9 rationale?

10 MR. HEYTENS: We -- we think that
11 that's the language the Court -- once you
12 decide to do purpose, that's the second point I
13 was making earlier. If you decide to do
14 purpose, we think that's the way you should do
15 purpose. It's the way the Court did purpose in
16 Pacific Gas.

17 And we think that, under that, we
18 clearly win because we are materially
19 indistinguishable from California and Pacific
20 Gas. Another --

21 JUSTICE GINSBURG: But you -- you --
22 you, at the pleadings stage, you made a
23 concession that the purpose of the ban was to
24 address radiological safety concerns.

25 Why did you make that concession?

1 MR. HEYTENS: Well, Justice Ginsburg,
2 I want to -- I'm glad to have the opportunity
3 to address that.

4 We didn't concede anything. What we
5 did is we moved to dismiss, and we
6 acknowledged -- all of the quotes they cite
7 from our lower court briefing, what we say is
8 we acknowledge that, as a party who moves to
9 dismiss, we are required to assume the truth of
10 all well-pleaded factual allegations in the
11 complaint.

12 So to the extent they --

13 JUSTICE KAGAN: But, why did you even
14 do that? Why is this a factual allegation?

15 MR. HEYTENS: Well, to the extent that
16 what was in someone's mind when they did
17 something, I think that is a factual
18 allegation, but our submission is that's not
19 relevant and that's not how you determine --

20 JUSTICE BREYER: But it's not about
21 what's in their mind.

22 MR. HEYTENS: But --

23 JUSTICE BREYER: There -- there is a
24 -- there is a well-known, sometimes laughed at,
25 sometimes I do think it's great, a reasonable

1 legislator. The reasonable legislator is
2 called a legislative -- a judicial invention.
3 And the reason they invent it is so that they
4 can work out obscure provisions of the statutes
5 and what their real purpose is and what they
6 mean.

7 MR. HEYTENS: Right.

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

11 MR. HEYTENS: Absolutely.

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

14 MR. HEYTENS: Well -- well, Justice
15 Breyer, that is exactly what the Petitioners
16 are asking you to do. The statements that are
17 --

18 JUSTICE BREYER: It may be, but
19 regardless, my question is, why do you have to
20 look in their minds? What you do is the same
21 thing you do with a federal statute, what you
22 do with statutes every day: You get provisions
23 and you say reading the words, reading the
24 applications, dah-dah, dah-dah, dah-dah, you
25 know, fill in the blanks, what would a

1 reasonable legislator have wanted this
2 purpose -- what purpose would it have served?

3 I think I've done that, perhaps
4 wrongly -- I don't think so -- hundreds of
5 times.

6 MR. HEYTENS: Yes, Justice Breyer, we
7 agree with --

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

11 MR. HEYTENS: Justice Breyer, we agree
12 with everything you just said about purpose.
13 And it brings me back to my answer to Justice
14 Kagan and Justice Ginsburg. Excuse me.

15 The statements in the brief that they
16 are citing before this Court are statements
17 where we say the Court should not consider
18 these hundreds of pages of statements where
19 people offer their subjective perspective on
20 why they did what they did.

21 We say all of those materials are
22 beside the point. So -- so what happened here
23 is --

24 JUSTICE GORSUCH: But, counsel, what
25 I'm hearing is rationale basis review. Is

1 there any rationale basis on which a legislator
2 could vote for that? Okay, fine, if that's
3 what you're asking. But to layer purpose on
4 top of it introduces all of the complications
5 that Justice Kagan has alluded to, which is, if
6 we're going to start inquiring into purpose,
7 one state may not be able to do the same thing
8 another state may be able to do simply because
9 of our assessment of what was in somebody's
10 mind.

11 And if we start looking at this
12 statute, I don't even know where to begin,
13 because it talks about the environmental and
14 local resource impacts of mining and milling
15 and tailings and everything else.

16 Now could a rational legislator have
17 done this only for concern about mining?
18 Maybe. If I'm going to start going down the
19 road of what's in somebody's head and
20 subjective intentions of even an imaginary,
21 hypothetical reasonable legislator, I don't
22 know.

23 MR. HEYTENS: Well, Justice Gorsuch,
24 we absolutely agree with you, which is why our
25 primary submission is that, because this is not

1 an area that's regulated by the federal
2 government at all, you don't do any sort of
3 purpose analysis.

4 That -- our primary submission is that
5 exactly what you just said, Justice Gorsuch,
6 that there's no warrant to do that, there's no
7 need to do that, and the Court shouldn't do it.

8 JUSTICE SOTOMAYOR: Well, except where
9 do we draw the line or how do we draw it
10 between the Skull decision and the Second
11 Circuit Vermont decision? There, activities
12 that the state were -- were alleged to be doing
13 were intended and did, in fact, affect
14 regulated conduct by the federal government.

15 But one could say here, if you
16 prohibit mining, you're affecting milling or
17 disposal.

18 MR. HEYTENS: Right.

19 JUSTICE SOTOMAYOR: So how -- where
20 and how do we draw the line between that
21 regulation that we're permitted to look to
22 purpose for and that which we're not?

23 MR. HEYTENS: Right. The line, we
24 think, is straightforward. It's based on the
25 text of the statute. It's NRC-regulated

1 activity, because, in both the Skull Valley
2 decision and in the Entergy decision, the state
3 law was directly acting upon and regulating
4 something that is itself regulated by NRC.

5 The spent nuclear fuels facility in
6 Skull Valley was regulated by NRC. The Vermont
7 Yankee nuclear power plant was certainly
8 regulated by NRC. And the Court would do --
9 now I want to bring up the roads provision
10 because Mr. Cooper mentioned them.

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

14 Well, I'D say two things about that
15 provision. First, if that's literally all that
16 Utah did, all Utah did was to convert a road
17 from a county road to a state road, and that's
18 the only thing they did, there would be no
19 basis whatsoever for finding that law standing
20 alone was preempted by the Atomic Energy Act.

21 And to the extent that it operated --
22 I think there was also discussion of the
23 National Meats case, which I think is
24 affirmatively helpful for us because, at the
25 end of the opinion in National Meat, the Court

1 got to the sales provision of the California
2 law and the Court said: You know, this doesn't
3 directly act upon the conduct that's regulated
4 by federal law. And so I guess you could make
5 an argument, the Humane Society made the
6 argument, that's not preempted.

7 And here's what the Court actually
8 said in National Meat. That argument ignores
9 the way that the sales provision operates
10 within state law as a whole.

11 California didn't enact the sales
12 provision as a free-standing provision. They
13 enacted the sales provision as part of an
14 interrelated series of laws that in the court's
15 language regulated the same thing as the
16 federal government, just in a different way.

17 And we think that's directly on point,
18 because when this Court CVSG'd in Skull Valley,
19 the Solicitor General's CVSG brief adopted that
20 precise rationale when it came to the roads
21 provision. It said the roads provision has to
22 be analyzed as part of how Utah's entire scheme
23 is regulating the spent nuclear fuels facility.

24 You have to look at the scheme as a
25 whole and you have to look at how the entirety

1 of the series of interrelated laws work.

2 JUSTICE KAGAN: Suppose --

3 JUSTICE ALITO: 2021, Section (c),
4 2021(c)(4) says that the Commission shall
5 retain the authority to regulate the disposal
6 of byproduct. And then (k) says nothing. And
7 that is -- it's that regulatory authority, I
8 take it, which is the statutory basis of the
9 preemption argument.

10 And (k) says nothing in this section
11 shall be construed to affect the authority of
12 the state or local agencies so forth. So how
13 do you --

14 MR. HEYTENS: Sure.

15 JUSTICE ALITO: Why is it tied -- why
16 do you -- why do you say (k) is tied solely
17 to --

18 MR. HEYTENS: Sure.

19 JUSTICE ALITO: -- licensing?

20 MR. HEYTENS: Well, Justice Alito,
21 first, in this case, we're not talking about
22 byproduct. We're talking about source
23 material. And -- and the reason that that is
24 critically important -- I don't think I'm just
25 quibbling over terminology -- is because, when

1 we're talking about source material, both 2090
2 --

3 JUSTICE ALITO: Well, it goes on to
4 say the disposal of such other byproducts
5 source or special nuclear material.

6 MR. HEYTENS: Correct. But it -- but
7 you have to read that in conjunction with 20 --
8 2092 and 20 -- 2095, both of which specifically
9 say that NRC jurisdiction over source material
10 does not even begin or commence until after
11 that source material is removed from the
12 ground.

13 Congress was very clear. They have a
14 belt-and-suspenders approach. They don't just
15 say that NRC can't regulate the transfer of
16 source material. That's 2092.

17 They go even further in 2095, and this
18 is an extraordinary provision. It prohibits
19 NRC from even requesting reports about source
20 material until after it's out of the ground.
21 NRC has literally no authority over source
22 material until it leaves the ground.

23 JUSTICE ALITO: But do you dispute the
24 fact that the NRC has -- occupies the field of
25 regulation of source material?

1 MR. HEYTENS: After it leaves the
2 ground.

3 JUSTICE ALITO: After it leaves the
4 ground.

5 MR. HEYTENS: Well, but -- but that's
6 the critical distinction in this case because
7 our whole point that -- the predicate of our
8 argument --

9 JUSTICE ALITO: Yeah, but if the -- if
10 -- if a state law indirectly, surreptitiously
11 regulates the same thing, it would fall within
12 the prohibited field.

13 MR. HEYTENS: Justice Alito, I guess
14 I'd have to know -- I'd have to have a little
15 more information about what we mean by
16 "indirectly or surreptitiously regulates the
17 same thing," because it's certainly -- if -- if
18 we're talking about Petitioners' strong version
19 of that argument, that is completely
20 inconsistent with this Court's rejection of a
21 field preemption argument in *Pacific Gas*,
22 because think about the argument that
23 California -- excuse me, not California -- that
24 *Pacific Gas* and the federal government made for
25 preemption in that case.

1 Of course, allowing the nation's
2 largest state to prevent nuclear power
3 construction -- nuclear power plant
4 construction, of course, that is going to have
5 a profound impact on the civilian nuclear power
6 industry in the United States. And the Court
7 acknowledged that, and the Court said: No, we
8 understand, California could do that, but we've
9 concluded that Congress has nonetheless given
10 California the right to regulate for economic
11 safety reasons. And it is for Congress, not
12 for this Court -- this is what the Court
13 specifically said in Pacific Gas -- if Congress
14 concludes that California is misusing the
15 authority that has been left to them, it is for
16 Congress to tell the state that.

17 And -- but I'll just go back to the
18 point that --

19 JUSTICE KAGAN: But, of course, Mr.
20 Heytens, not for reasons having to do with
21 radiological safety.

22 MR. HEYTENS: Yes.

23 JUSTICE KAGAN: And I suppose one way
24 to understand this -- the preemptive field here
25 is that it surely extends to various kinds of

1 activities, and this is not one of those
2 activities, the mining.

3 But, in addition, it extends to
4 judgments about radiological safety, even
5 outside those activities, on the theory that
6 the NRC is the proper body to make judgments
7 about radiological safety and we don't want 50
8 states to be making their own.

9 So I suppose that's a -- a way to
10 explain the opposite position.

11 MR. HEYTENS: I agree with that,
12 Justice Kagan, but I think the very last thing
13 you said shows why that argument can't possibly
14 be right.

15 NRC lacks the authority to regulate
16 even the radiological safety aspects of mining.
17 So the logical -- if you define the field that
18 way, the logical implication of that argument
19 is that there is literally no one who has the
20 authority to regulate radiological safety
21 aspects of uranium mining, because the NRC
22 can't do it, because the NRC has repeatedly
23 reaffirmed that they have no power to do
24 anything.

25 JUSTICE KAVANAUGH: Aren't the

1 radiological safety issues posed by the milling
2 far more than the mining? I thought that was
3 why you're concerned about the milling. To
4 Justice Alito's point, it's a way to prohibit
5 the milling, you can't do that; let's prohibit
6 the mining, that way we prohibit the milling,
7 which has the radiological safety concerns. I
8 think that's the --

9 MR. HEYTENS: Sure.

10 JUSTICE KAVANAUGH: -- that's the
11 point.

12 MR. HEYTENS: Justice Kavanaugh, I
13 think -- I think that's right, and I think part
14 of the reason that Congress has given NRC
15 jurisdiction over the milling is because of
16 those various concerns. But I --

17 JUSTICE KAVANAUGH: Just one technical
18 point --

19 MR. HEYTENS: I'm sorry.

20 JUSTICE KAVANAUGH: -- on phrasing.
21 The Solicitor General said plausible non-safety
22 rationale. I assume you would amend that to
23 say plausible non-radiological safety
24 rationale?

25 MR. HEYTENS: Yes, I would, Justice

1 Kavanaugh, and I think that's consistent with
2 what they've said in their briefing. I think,
3 at the cert stage, they said we could regulate
4 mining, even the safety aspects of mining, as
5 long as we're doing it based on the mining.

6 And -- and to take your point, Justice
7 Kavanaugh, I think there's three possibilities.
8 There's the radiological safety aspects of
9 uranium sitting in the ground.

10 JUSTICE KAVANAUGH: Right.

11 MR. HEYTENS: There's the radiological
12 safety aspects of the mining process. And
13 there's the radiological safety aspects of the
14 milling. I -- I agree with you completely the
15 reason you give NRC jurisdiction over the third
16 is the conclusion that that poses special
17 concerns.

18 JUSTICE KAVANAUGH: It's all of the
19 concerns, isn't it, on radiological safety?
20 Almost all?

21 MR. HEYTENS: I -- I want to amend it
22 to almost all, Justice Kavanaugh. I know
23 there's discussion in some of the briefing in
24 this case that suggests that there are
25 radiological concerns associated with the

1 mining process itself. Congress said that
2 sitting in the -- excuse me -- a committee
3 report from 1946 says that, sitting in the
4 ground, uranium does not create radiological
5 safety concerns. But there's the separate
6 question of whether the process of digging it
7 out of the ground raises any radiological
8 safety concerns.

9 And I think there's at least some
10 evidence in some of the briefing that there may
11 be at least some radiological safety concerns
12 associated with doing that. Without saying
13 they're the same as milling.

14 And there -- regardless of whether
15 there are radiological safety concerns, there
16 are clearly a wide variety of health and safety
17 concerns associated with extracting massive
18 amounts of material out of the ground.

19 And so we think that, at the end of
20 the day, the purpose -- this Court has
21 reaffirmed repeatedly that the purpose of a
22 statute includes not only what it sets out to
23 change but also what it resolves to leave
24 alone.

25 And we think the single clearest and

1 completely dispositive decision by Congress in
2 this case was the decision it made in 1946 that
3 it reaffirmed in 1954 and has left undisturbed
4 until the present day, that the federal
5 government does not regulate uranium mining.

6 For that reason, Virginia's inherent
7 sovereign ability to control something as
8 fundamental as what material gets pulled out of
9 the ground remains fully intact, its ban should
10 not be preempted, and this Court should affirm.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Four minutes, Mr. Cooper.

15 REBUTTAL ARGUMENT OF CHARLES J. COOPER

16 ON BEHALF OF THE PETITIONERS

17 MR. COOPER: Thank you, Mr. Chief
18 Justice.

19 And, Justice Kavanaugh, I want to come
20 straight to your point that you cannot mill
21 mining unless you have -- mill uranium unless
22 you have mined it in the first place.

23 There were two ways for Virginia to
24 prohibit milling and tailings management, both
25 of which they were concerned about. They

1 weren't concerned about radiological aspects of
2 -- of mining qua mining any more than the NRC
3 is. It's the milling and the tailings that
4 represent the threat of nuclear safety.

5 And there were two ways they could do
6 it. They could do it directly. We prohibit
7 milling in this state. But that would have run
8 straight into a stop sign, Your Honor, of
9 preemption. There's no way it could do --

10 JUSTICE GINSBURG: Suppose -- suppose
11 -- suppose they say our rationale does have to
12 do with the mining, not the milling; we think
13 there are radiological hazards from -- from the
14 unearthing the -- the uranium. Suppose they
15 said that.

16 MR. COOPER: Your Honor, they could
17 say that, but a court would have to look behind
18 it, would have to look behind at using all the
19 techniques that my friend, the Solicitor
20 General, has mentioned, including plausibility.

21 But, to come back, Justice Kavanaugh,
22 I want to make clear that the Court understand,
23 as Justice Gorsuch has referenced, that the
24 statute that banned mining had sister
25 provisions. In the very same breath, Virginia

1 enacted a -- a uranium administrative group,
2 tasking it with the -- with the responsibility
3 to study uranium mining in -- in Virginia and
4 milling and tailings. On page 185 -- I would
5 refer the Court to 185 through 187.

6 With respect to milling activity, the
7 capacity -- these are things that they're
8 supposed to study -- the capacity of the mill,
9 the process to be used in milling and ore
10 extraction, the reagents in processing
11 material, the method for conveying tailings and
12 wastewater from milling.

13 The next paragraph, with respect to
14 tailings management, the quantity and
15 characteristics of the tailings, the method of
16 disposal, treatment systems for the removal of
17 solids, radionuclides, on and on for the next
18 several pages -- pages.

19 The -- the -- the courts below and my
20 friends for the Commonwealth have focused
21 myopically on the one sentence that is the ban.
22 What was really happening here and the purpose
23 of this was to prohibit milling and tailings
24 management, the only thing that really
25 represents serious radiological hazards.

1 Second point, dual regulation. My
2 friend quotes from PG&E, Justice Gorsuch, and I
3 want to -- I want to finish his quote. He
4 didn't get to finish it. "Congress has
5 preserved the dual regulation of
6 nuclear-powered electricity generation." This
7 is from 212, 211, 212. Colon: "The Federal
8 Government maintains complete control of the
9 safety and "nuclear" aspects of energy
10 generation ... the States exercise that --
11 their traditional authority." Justice Gorsuch,
12 traditional authority, which they've always
13 exercised over the generation, transmission,
14 and sale of electricity, over the -- over the
15 need for additional generation, generating
16 capacity, the type of generating facilities to
17 be licensed, are they going to be coal or
18 nuclear.

19 Your -- Your Honor, in California --
20 in -- in PG&E, California had the antecedent
21 authority, its and its alone, to decide whether
22 there would be a plant of any kind, including a
23 nuclear plant. And if there was no nuclear
24 plant, there could be no NRC authority or
25 regulation over how that thing was constructed

1 or how it was operated.

2 My final point here, plausible
3 non-safety rationale. This is the one place
4 where I guess I do disagree with my friend, the
5 Solicitor General. That sounds too much to me
6 like rational basis review, like any
7 conceivable thing that -- that the state could
8 bring forward or a judge could even conceive of
9 will do the trick.

10 That's not what Congress had in mind
11 when it said: Courts, look at the purpose. Is
12 the purpose for the protection against
13 radiological hazards? That's what Congress
14 wants you to decide.

15 And not just is it any plausible
16 purpose, is it -- is -- is it -- is that the
17 purpose? And you have to do your best. It's
18 not easy. But that's -- that's the question
19 that -- that Congress has said is before the
20 courts.

21 And if the courts conclude in their
22 best efforts that that's the purpose, well,
23 then it's preempted.

24 Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:07 p.m., the case
3 was submitted.)

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