No. 16-1275

In The
Supreme Court of the United States

VIRGINIA URANIUM, INC., et al.,

Petitioners,

v.

JOHN WARREN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Atomic Energy Act of 1954 preempts Virginia's moratorium on uranium mining.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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STATEMENT OF THE CASE

Although petitioners disputed it below, they now concede that the district court and court of appeals correctly held that the Atomic Energy Act of 1954 does not regulate conventional uranium mining on nonfederal lands. That concession is dispositive. Because such mining is outside of its purview, nothing in the Act prevents States from regulating or banning such mining, *regardless* of the State's alleged purpose. The cases on which petitioners rely, by contrast, involved activities that were directly regulated by the Nuclear Regulatory Commission, such as the construction of nuclear power plants and the disposal of nuclear waste—activities that, under 42 U.S.C. § 2021(k), States may regulate only for non-radiological safety purposes. Certiorari is unwarranted here because the

decision below conflicts neither with this Court's precedents nor with the decision of any other court.

A. Congress enacts the Atomic Energy Act but consistently declines to regulate conventional uranium mining.

The Atomic Energy Act of 1946 created the Atomic Energy Commission and conferred upon the Commission broad authority over the production of fissionable materials, control of nuclear materials, and the use of atomic energy.[1] The Act defined "source material" to include uranium ore.[2] It treated all source material found on federal lands as the property of the Government[3] and authorized the Commission to purchase or condemn other property as necessary to acquire such source material.[4]

The 1946 Act did not regulate or address the mining of source material on nonfederal land. Instead, it required a license issued by the Commission before any person could "transfer or deliver, receive possession of or title to, or export from the United States any source material *after removal from its place of deposit in nature*."[5] Senator McMahon, the bill's sponsor,

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[1] Atomic Energy Act of 1946, Pub. L. No. 79-585, §§ 1-20, 60 Stat. 755, 759-75.

[2] *Id.* § 5(b)(1), 60 Stat. at 761.

[3] *Id.* § 5(b)(7), 60 Stat. at 762.

[4] *Id.* § 5(b)(5), 60 Stat. at 762.

[5] *Id.* § 5(b)(2), 60 Stat. at 761 (emphasis added). Similarly, while Congress authorized the Commission to require reports from any person concerning "ownership, possession, extraction,

explained that the drafters had "not attempted to take over all the uranium in the United States."[6] Rather, the 1946 Act "provided the Commission with the power to condemn and pay just compensation for any uranium supplies which it is unable to buy in the open market."[7]

The Atomic Energy Act of 1954 superseded the 1946 Act.[8] While the 1946 Act "contemplated that the development of nuclear power would be a Government monopoly," the 1954 Act reflected Congress's conclusion "that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing."[9]

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refining, shipment, or other handling of source materials," it barred the Commission from requiring reports with respect to "any source material prior to removal from its place of deposit in nature." *Id.* § 5(b)(4), 60 Stat. at 761.

[6] 92 Cong. Rec. 6,073, 6,082 (June 1, 1946).

[7] *Id.*; *see also id.* at 6,096 ("[T]he bill enables the Commission to acquire stocks of this material or lands containing deposits of this material by purchase or through exercise of the right of eminent domain.") (statement of Sen. McMahon); S. Rep. No. 79-1211, at 18 (1946) ("The principle of Government monopoly which the committee has adopted as essential in reference to the production and ownership of fissionable materials is not extended to the ownership, mining or refining of source materials."); 92 Cong. Rec. 9,245, 9,268 (July 17, 1946) (statement of Rep. Shafer) (quoting Senate report).

[8] Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. § 2011 et seq.).

[9] *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 63 (1978).

Like its predecessor, the 1954 Act did not address or regulate uranium mining on nonfederal lands. Section 62, now codified at 42 U.S.C. § 2092, retained the language from the earlier law requiring a license from the Commission to transfer source material "*after* removal from its place of deposit in nature."[10] The 1954 Act also reenacted the provisions of the 1946 Act enabling the Commission to sell or lease source material found on federal lands and to acquire lands containing source materials through purchase or condemnation.[11]

Of the numerous amendments to the 1954 Act, three have particular relevance to this case.

First, Congress amended the Act in 1959 by adding § 274, entitled "Cooperation with States," now codified at 42 U.S.C. § 2021.[12] Section 2021 recites that it was intended "to clarify the respective responsibilities . . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials," and "to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect" to those materials and "the assumption thereof by the States."[13]

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[10] 42 U.S.C. § 2092 (emphasis added). The 1954 Act likewise prohibited the Commission from requiring reports of the ownership, possession, extraction, refining, shipment, or other handling of source material "prior to removal from its place of deposit in nature." 42 U.S.C. § 2095.

[11] *Id*. §§ 2096, 2097.

[12] Act of Sept. 23, 1959, Pub. L. No. 86-373, 73 Stat. 688 (codified as amended at 42 U.S.C. § 2021).

[13] 42 U.S.C. § 2021(a)(1), (4).

The 1959 Act sought "generally to increase the States' role."[14]

Section 2021 allows certain activities regulated by the Commission to be regulated by the States instead. Section 2021(b) authorized the Commission to enter into discontinuance-and-assumption agreements with States with respect to source, byproduct, or special nuclear materials to enable States "to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards."[15] A State desiring to assume such authority must certify to the Commission's satisfaction "that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials."[16] The purpose of a discontinuance-and-assumption agreement is "to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both."[17] By contrast, § 2021(c) prohibits the Commission from delegating its authority over "the construction and operation of any production or utilization facility or any uranium enrichment facility," over exports or imports of nuclear materials and facilities, or over the disposal

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[14] *English v. Gen. Elec. Co.*, 496 U.S. 72, 81 (1990).

[15] 42 U.S.C. § 2021(b); *see Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 209 & n.20 (1983) [hereinafter *PG&E*] (discussing subsection (b)).

[16] 42 U.S.C. § 2021(d)(1).

[17] S. Rep. No. 86-870, at 9 (1959); H.R. Rep. No. 86-1125, at 9 (1959) (same).

of such materials.[18] The radiological aspects of those activities remain the exclusive concern of the Commission.

Section 2021(k)—containing the language on which petitioners rely—was a savings clause confirming that States may regulate activities regulated by the Commission as long as such State regulation is not for radiological safety purposes: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[19]

The accompanying Senate and House reports explained that § 2021 "does not attempt to regulate materials which the AEC does not now regulate under the Atomic Energy Act of 1954,"[20] such as uranium mining. In hearings conducted by the Joint Committee on Atomic Energy, Robert Lowenstein, from the Commission's Office of General Counsel, told Congress "that the Commission . . . does not regulate mining."[21] Another Commission representative added that "[t]he Commission does not have regulatory jurisdiction over

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[18] 42 U.S.C. § 2021(c).

[19] *Id.* § 2021(k).

[20] S. Rep. No. 86-870, at 4; *id.* at 10 ("[T]he purpose is clearly limited to the materials already regulated by the Commission under the Atomic Energy Act of 1954; namely, byproduct, source, and special nuclear materials."); H.R. Rep. No. 86-1125, at 4, 10 (same).

[21] *Federal-State Relationships in the Atomic Energy Field: Hearings Before the J. Comm. on Atomic Energy*, 86th Cong. 60 (1959).

such other sources of radiation as X-ray equipment or radium or over the mining of uranium."[22]

Second, the Energy Reorganization Act of 1974 created the Nuclear Regulatory Commission ("NRC"), which "replaced the AEC [Atomic Energy Commission] as the licensing and regulatory authority."[23] (The "AEC and NRC will be referred to as the Commission," unless otherwise noted.[24]) The 1974 Act also transferred the Commission's radiation-standard-setting authority to the Environmental Protection Agency ("EPA"), although enforcement of such standards remains with the NRC.[25]

Third, the Uranium Mill Tailings Radiation Control Act of 1978 closed a gap in the 1954 Act with regard to the regulation and disposal of uranium-mill tailings.[26] Before the 1978 Act, the Commission had concluded that it lacked authority to regulate the radioactive tailings generated when uranium ore is milled.[27]

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[22] *Id.* at 83 (statement of H.L. Price, Dir., Div. of Licensing & Regulation, Atomic Energy Comm'n).

[23] *Duke Power*, 438 U.S. at 63 n.1; *see* Energy Reorganization Act of 1974, Pub. L. No. 93-438, §§ 104, 201, 88 Stat. 1233, 1237, 1242-43 (codified as amended at 42 U.S.C. §§ 5814, 5841).

[24] *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525 n.2 (1978).

[25] *See* 42 U.S.C. §§ 5801(c), 5814(c).

[26] Pub. L. No. 95-604, 92 Stat. 3021 (codified as amended at 42 U.S.C. §§ 2022, 7901-7942).

[27] *E.g.*, *Kerr-McGee Chem. Corp. v. NRC*, 903 F.2d 1, 3 (D.C. Cir. 1990) (noting the Commission's view that, before the 1978 Act, uranium tailings "lay outside the AEC's statutory licensing authority and therefore beyond its regulatory reach").

Title I tasked the Department of Energy and the NRC with cleaning up existing or closed uranium-milling sites; Title II required newer sites to be licensed by the NRC or by a State with licensing authority under an agreement with the NRC.[28] The 1978 Act gave EPA the responsibility "for promulgating the general standards that the implementing agencies must meet."[29]

Significantly for this case, nothing in the 1978 Act addressed conventional uranium mining on nonfederal lands. Indeed, to date, Congress has chosen not to empower the Commission to regulate such mining.

B. The Commission and EPA authoritatively construe the Act to exclude conventional uranium mining.

Without express legislative authority to regulate conventional uranium mining on nonfederal lands, the Commission and EPA have consistently interpreted the Act to deny such authority. As noted above, the Commission repeatedly told Congress in 1959 that the Commission does not regulate uranium mining.[30] The Commission took the same position in its 1961 rulemaking that exempted from any licensing requirement the possession, use, or transfer of unrefined uranium

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[28] *See* U.S. Nuclear Regulatory Comm'n, *Backgrounder on Uranium Mill Tailings* (Oct. 2016), https://goo.gl/G7E4k3.

[29] *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 621 (10th Cir. 1985) (citing 42 U.S.C. §§ 2022(a), 7918(a)).

[30] *See supra* notes 21-22; *see also* Pet. App. 70a n.12 (collecting citations).

ore, an exemption that remains codified at 10 C.F.R. § 40.13(b).[31] The Commission reaffirmed that position in a 2006 adjudication.[32] And EPA took the same position in its 1977 rulemaking that established radiation standards for public exposure to the nuclear fuel cycle, standards that remain codified at 40 C.F.R. § 190.02(b).[33]

"[I]n contrast to conventional mining," the NRC *does* assert authority to regulate *in situ* leach mining.[34] "In situ leaching is a process by which chemicals are pumped through drilled wells into uranium deposits, altering the ore and pumping a uranium solution back

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[31] *See* 26 Fed. Reg. 284, 285 (Jan. 14, 1961) (codified as amended at 10 C.F.R. Part 40 (2016)); Notice of Proposed Rulemaking, Source Material, 25 Fed. Reg. 8,619 (Sept. 7, 1960) ("The Act does not . . . require a license for the mining of source material.").

[32] *In re Hydro Res., Inc.*, 63 N.R.C. 510, 512 (2006) ("The NRC does not regulate conventional uranium mining. The Atomic Energy Act requires an NRC license to transfer or receive in interstate commerce any source material (such as uranium ore) only 'after removal from its place of deposit in nature.' This agency has traditionally viewed this provision as precluding jurisdiction over uranium mining as such. In keeping with this interpretation, the NRC begins its oversight at the mill, rather than at the mine.").

[33] 42 Fed. Reg. 2,858, 2,861 (Jan. 13, 1977) (codified at 40 C.F.R. § 190.02(b) (2016)); *see* Proposed Standards, Environmental Radiation Protection for Nuclear Power Operations, 40 Fed. Reg. 23,420 (May 29, 1975) ("[S]ince these standards are proposed under authority derived from the Atomic Energy Act of 1954, as amended, they do not apply to radioactive materials and exposures in the general environment that are the result of effluents from mining operations because that Act does not provide authority over such effluents.").

[34] *In re Hydro Res.*, 63 N.R.C. at 512-13.

to the surface."[35] "[D]uring that procedure, the uranium is 'remov[ed] from its place of deposit in nature' at the time the uranium dissolves into the lixiviant underground and the miner only takes possession of it after it is then pumped to the surface."[36] The NRC regulates *in situ* leach mining because it considers it to be "the first step of processing."[37]

This case involves only conventional uranium mining, however, not *in situ* leach mining. "Because of the geology in the Commonwealth of Virginia, it is very unlikely that [*in situ* recovery] can be used to extract uranium from the Coles Hill deposit or anywhere else in Virginia."[38]

C. Virginia imposes a moratorium on uranium mining in 1982.

In 1982, the Virginia General Assembly enacted legislation governing the exploration for and mining of uranium ore.[39] It allowed uranium-exploration

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[35] Pet. App. 4a n.1.

[36] *Morris v. U.S. N.R.C.*, 598 F.3d 677, 685 n.5 (10th Cir. 2010) (citation omitted); *see also N.M. Mining Comm'n v. United Nuclear Corp.*, 57 P.3d 862, 864 n.2 (N.M. Ct. App. 2002) ("Unlike conventional mining, *in situ* mining combines extraction of the ore with processing; consequently, a license may be required to engage in *in situ* mining.") (citations omitted).

[37] *In re Hydro Res.*, 63 N.R.C. at 512-13.

[38] Pet. App. 23a n.2 (Traxler, J., dissenting) (citation and quotation marks omitted).

[39] 1982 Va. Acts ch. 269 (codified as amended at Va. Code Ann. §§ 45.1-272 to 45.1-285 (2013)).

activities on private lands pursuant to permits issued by the Department of Mines.[40] Petitioner Virginia Uranium received such an exploration permit in 2007 and has used it to gather information about the Coles Hill uranium deposit at issue in this case.[41]

The 1982 legislation required a separate permit to engage in uranium mining but stated, in Code § 45.1-283, that such applications "shall not be accepted by any agency of the Commonwealth prior to July 1, 1983."[42] In 1983, that mining moratorium was extended "until a program for permitting uranium mining is established by statute."[43] The moratorium remains in effect.

D. Virginia enters into a discontinuance-and-assumption agreement with the NRC in 2009.

In 2009, the NRC entered into a § 2021 agreement with Virginia under which the Commonwealth assumed the authority to regulate the radiological hazards of "source material" and most byproduct material.[44] The agreement excluded the regulation of tailings.[45] Article VIII of the agreement empowered the Commission to

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[40] *Id.* § 45.1-274.

[41] Pet. App. 222a (Compl. ¶ 75).

[42] 1982 Va. Acts ch. 269, § 45.1-283.

[43] 1983 Va. Acts ch. 3, § 45.1-283.

[44] 74 Fed. Reg. 14,821, 14,822 (Apr. 1, 2009) (Art. I).

[45] 74 Fed. Reg. at 14,823 (Art. II(6)) (reserving Commission authority over byproduct material defined in § 11(e)(2) of the Atomic Energy Act, 42 U.S.C. § 2014(e)(2)).

revoke the delegation if Virginia "has not complied with one or more of the requirements of [§ 2021]."[46] That agreement has not been revoked and remains in effect.

E. After unsuccessfully lobbying the Virginia legislature, petitioners claim in 2015 that the uranium-mining moratorium is preempted.

Petitioners own and seek to mine land in Chatham, Virginia that they contend contains a deposit of 119 million pounds of uranium ore (the "Coles Hill deposit").[47] "For a period of almost twenty years after 1986, [petitioners'] plans to develop the Coles Hill deposit were not pursued because uranium prices had fallen steeply."[48] After the price of uranium rebounded, however, "Virginia Uranium . . . began to engage the political process, urging lawmakers to reconsider the ban on uranium mining."[49]

When their lobbying efforts failed, petitioners filed suit in the United States District Court for the Western District of Virginia, seeking a declaratory judgment that the Atomic Energy Act preempts Virginia Code § 45.1-283; they sought an injunction compelling Virginia's permitting authorities "to ignore" the

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[46] *Id*. (Art. VIII).

[47] Pet. App. 201a (Compl. ¶¶ 24-25).

[48] Pls.-Appellants' Opening Br. 12, *Va. Uranium, Inc. v. Warren*, No. 16-1005 (4th Cir. Mar. 17, 2016), ECF No. 19.

[49] *Id.* at 13.

mining moratorium.[50] Petitioners alleged that (1) "Virginia's ban on uranium mining was from the outset grounded in . . . radiological safety concerns"; and (2) "in the decades since, Virginia has extended and then repeatedly refused to lift its ban, actions that were motivated by those same . . . radiological safety concerns."[51]

F. The district court dismisses the complaint for failure to state a claim, and the Fourth Circuit affirms.

Defendants moved to dismiss under Federal Rule 12(b)(6) for failure to state a claim, arguing that, even assuming the mining ban was based on radiological safety concerns, it was not preempted. The district court agreed and dismissed the complaint with prejudice.

Noting the presumption against preemption,[52] the district court found that "[t]he AEA confers no federal regulatory or licensing authority over nonfederal uranium deposits or their conventional mining. It has never done so."[53] The district court rejected petitioners' argument that § 2021(k), added by the 1959 amendment, showed that Congress intended to occupy the field of radiological safety concerns with regard to

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[50] Pet. App. 193a (Compl. intro.).

[51] Pet. App. 194a (Compl. ¶ 3).

[52] Pet. App. 61a-62a.

[53] Pet. App. 66a.

uranium mining.[54] The court explained that § 2021 permitted the Commission to enter into discontinuance-and-assumption agreements with States only with respect to certain specific aspects of the Commission's regulatory authority, but the Commission's regulatory authority has never encompassed conventional uranium mining on nonfederal lands.[55] Citing the 1959 hearings, the district court found that, when § 2021 was enacted, "Congress was aware that the AEA did not regulate nonfederal uranium deposits or their conventional mining."[56] The court concluded that "Congress did not intend [§ 2021] to broaden the preemptive field respecting source materials so as to include materials outside of the NRC's regulatory authority."[57]

The district court distinguished the cases cited by petitioners in support of their field-preemption claim, particularly this Court's 1983 decision in *PG&E*. The court explained that those cases involved fields plainly within the Commission's regulatory authority, such as "the construction or operation of nuclear-power facilities," not conventional mining of "source materials" over which the Commission has no authority.[58] The district court likewise found no conflict to support petitioners' conflict-preemption claim. The court noted that, "[s]hould the NRC wish that a nonfederal

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[54] Pet. App. 68a-72a.

[55] Pet. App. 69a-70a & n.11.

[56] Pet. App. 70a-71a & n.12.

[57] Pet. App. 71a-72a.

[58] Pet. App. 72a-73a.

uranium deposit be conventionally mined, it has unobstructed means for seeing that it occur," citing § 2096, which authorizes the Commission to purchase or condemn any land containing necessary source materials.[59]

The Fourth Circuit affirmed in a 2-1 decision. Writing for the court, Judge Diaz rejected petitioners' broad argument that conventional uranium mining was an "activity" regulated by the Commission under § 2021(k) that States could regulate only for non-radiological safety purposes.[60] The court said that the Commission had reasonably interpreted the Act to preclude the regulation of conventional uranium mining.[61] Indeed, the court noted that if States could not regulate uranium mining for radiological safety purposes, then neither a State nor the NRC could exercise such regulatory control and companies "could mine free of [any] government oversight."[62]

The court of appeals next considered and rejected petitioners' fallback argument: that even if States may regulate the radiological safety aspects of conventional uranium mining, they may not do so if the driving consideration is concern over uranium milling and tailings activities.[63] The court noted that the moratorium on uranium mining "does not mention uranium milling

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[59] Pet. App. 81a & n.20.

[60] Pet. App. 8a-11a.

[61] Pet. App. 11a-12a.

[62] Pet. App. 13a.

[63] Pet. App. 14a.

or tailings storage."[64] Petitioners' argument that the ban "has the effect of prohibiting those activities" was premised on the assumption that banning uranium mining would reduce the demand for milling and tailings activities. As petitioners put it, "no one 'would want to undertake the pointless expense of constructing a mill and tailings management complex in Virginia and transporting out-of-state uranium [ore] into the Commonwealth.' "[65] But the court declined petitioners' invitation to parse the legislature's radiological safety justification for the mining ban that closely. The court distinguished the cases on which petitioners relied as involving direct restrictions on NRC-regulated activities.[66]

Finally, the court of appeals rejected petitioners' conflict-preemption argument. The court concluded that "Congress's purposes and objectives in passing the Act are not materially affected by the Commonwealth's ban on conventional uranium mining."[67]

Judge Traxler dissented.[68] He reasoned that Virginia had to concede for purposes of its Rule 12(b)(6) motion that the uranium ban was motivated by radiological safety considerations that were principally based on concerns about milling and tailings activities,

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[64] *Id*.

[65] Pet. App. 13a-14a (quoting petitioners' reply brief).

[66] Pet. App. 14a-18a.

[67] Pet. App. 19a.

[68] Pet. App. 20a.

activities that Virginia could not regulate.[69] He concluded that "any state statute grounded in protecting citizens from the radiological dangers of activities regulated by the Act is preempted, regardless of the statute's effect."[70] Judge Traxler also would have invalidated Virginia's uranium-mining moratorium based on conflict preemption. He reasoned that the moratorium frustrates the purpose of the Atomic Energy Act "to *maximize* our country's ability to develop nuclear power."[71]

Petitioners filed a timely petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Although they disputed it below, petitioners now concede that nothing in the Atomic Energy Act of 1954 regulates the conventional mining of uranium on nonfederal lands. That concession is dispositive because it means, as far as field preemption is concerned, that States can regulate or prohibit such mining for *any* reason, including radiological safety concerns. Conventional uranium mining on nonfederal lands is simply not within the preempted field.

Certiorari is unwarranted because the court of appeals' decision upholding Virginia's authority over

[69] Pet. App. 40a-41a.

[70] Pet. App. 40a n.12.

[71] Pet. App. 52a.

such mining does not conflict with the decisions of this Court or of other circuits that have addressed field preemption under the Atomic Energy Act. And although petitioners also appear to have abandoned the conflict-preemption argument they advanced below, Virginia's uranium-mining moratorium likewise does not conflict with the Act because the Act does not require States to permit the mining of uranium ore in the first place.

I. The decision below does not conflict with this Court's decisions or with those of the Second and Tenth Circuits.

A. The Atomic Energy Act preempts a State law only if the State regulates an NRC-regulated activity based on radiological safety concerns or has a direct and substantial effect on NRC licensees.

Petitioners bear the burden of proving preemption,[72] and the presumption against preemption is a "considerable burden" to overcome.[73] This Court applied the presumption against preemption in *PG&E*

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[72] *Wyeth v. Levine*, 555 U.S. 555, 569 (2009) (stating that the challenger bears the "burden in establishing a pre-emption defense"); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661-62 (2003) (plurality opinion) ("We start . . . with a presumption that the state statute is valid, and ask whether petitioner has shouldered the burden of overcoming that presumption.") (citation omitted); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (imposing burden on challenger to prove preemption under the Atomic Energy Act).

[73] *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (citation omitted).

and *English*, finding that the State law in question was not preempted by the Atomic Energy Act.[74] The Court " 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "[75] The presumption against pre-emption applies not only to the "question *whether* Congress intended any pre-emption at all," but also "to questions concerning the *scope* of its intended invalidation of state law."[76]

It bears mention at the outset that while "the purpose of Congress is the ultimate touchstone in every pre-emption case,"[77] this Court has "never meant that to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text."[78] "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it."[79] There is no such text here.

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[74] *See English*, 496 U.S. at 79, 83; *PG&E*, 461 U.S. at 203, 206; *id.* at 225 (Blackmun, J., concurring in part and concurring in the judgment).

[75] *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[76] *Medtronic*, 518 U.S. at 485 (first emphasis added).

[77] *Wyeth*, 555 U.S. at 565 (quoting *Medtronic*, 518 U.S. at 485).

[78] *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

[79] *Id.* at 503.

Indeed, the Atomic Energy Act does not contain an express preemption provision applicable to this case,[80] and petitioners have never claimed that the Act expressly preempts Virginia's uranium-mining moratorium. The statutory text on which they rely is actually the savings clause in § 2021(k). That savings clause makes clear that "[n]othing in this section [2021] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[81]

As noted above, § 2021 was added in 1959 to allow the Commission to delegate some of its regulatory authority to the States. As *PG&E* put it, "the point of the 1959 Amendments was to *heighten* the States' role."[82]

Thus, a State can enter into a discontinuance-and-assumption agreement with the NRC under § 2021(b) that empowers the State to regulate NRC licensees with regard to the radiological hazards posed by by-product materials, source materials, or special nuclear materials. Even if a State does not do so, however, § 2021(k) allows that State to regulate such activities for purposes *other* than controlling radiation hazards. And for those activities specified in subsection (c), the regulation of which the NRC is forbidden to delegate to States—the construction and operation of nuclear

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[80] *See, e.g.*, *PG&E*, 461 U.S. at 205 (finding no express preemption provision requiring States to permit the construction of nuclear power plants); *English*, 496 U.S. at 80 (finding no express preemption provision barring State intentional-infliction-of-emotional-distress claims).

[81] 42 U.S.C. § 2021(k).

[82] 461 U.S. at 209 (emphasis added).

facilities, the export or import of nuclear materials, and the disposal of nuclear waste—States likewise may regulate those activities for purposes other than controlling radiation hazards.[83]

Petitioners have rightly abandoned their aggressive claim in the lower courts that the term "activities" in § 2021(k) should be read to mean *any* activities of the States, rather than activities of NRC licensees. Under that theory, the States would be prohibited from regulating *anything* for the purpose of protecting against radiation hazards. That interpretation was plainly untenable because there are numerous activities involving radiation hazards that have always been outside the Commission's bailiwick. Virginia, for example, regulates and licenses radioactive materials and devices using such materials that are "not under the authority of the" Commission,[84] including x-ray equipment,[85] radon-screening companies,[86] radiopharmaceuticals,[87] and radiological weapons.[88] Conventional uranium mining on nonfederal lands, like those other

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[83] *See, e.g.*, *id*. at 205 ("Congress, in passing the 1954 Act and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.").

[84] Va. Code Ann. § 32.1-229.3 (2015).

[85] Va. Code Ann. § 32.1-229.1 (Supp. 2016).

[86] Va. Code Ann. § 32.1-229.01 (2015).

[87] Va. Code Ann. § 54.1-3410.1 (2013).

[88] Va. Code Ann. § 18.2-52.1 (2014).

fields, has always remained outside of the Commission's regulatory authority.

The Fourth Circuit was thus plainly correct that, if States could not regulate the radiological hazards of conventional uranium mining, then "entities could mine free of government oversight" altogether.[89] That could not have been Congress's intent. "It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments."[90] And even if the term "activities" in § 2021(k) were "susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[91] "That approach is 'consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.'"[92]

This Court's three decisions restricting the preemptive sweep of the Atomic Energy Act—*PG&E*, *Silkwood*, and *English*—confirm that the preemptive focus of the Act is fixed on NRC-regulated activities and NRC licensees.

PG&E upheld a California law that imposed a moratorium on the certification of new nuclear reactors until the State energy commission certified the

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[89] Pet. App. 13a.

[90] *PG&E*, 461 U.S. at 207-08.

[91] *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014) (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)).

[92] *Id*. (quoting *Medtronic*, 518 U.S. at 485).

existence of adequate nuclear-waste facilities.[93] The moratorium addressed matters that § 2021(c) prohibited the NRC from assigning to States: "the construction and operation" of nuclear facilities and the "disposal" of nuclear waste.[94] PG&E, an NRC licensee, claimed that the moratorium was preempted by the Atomic Energy Act.[95] Applying the savings clause in § 2021(k), however, the Court held that the moratorium was not preempted because the purpose was grounded in economic concerns about the lack of available waste disposal, not safety concerns about "radiation hazards."[96]

Silkwood held that the Atomic Energy Act did not preempt the recovery of punitive damages under State tort law for radiation damage caused by the release of plutonium from a nuclear facility.[97] Even though § 2021(c) vests in the Commission the "exclusive regulatory authority over 'the disposal of such'" material,[98] the Supreme Court found evidence in the Price-Anderson Act that Congress assumed the existence of—and therefore did not intend to preempt—State tort-law remedies for the improper handling of nuclear material regulated by the Commission.[99] The Court recognized that "there is tension between the conclusion

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[93] 461 U.S. at 203.

[94] *Id.* at 198, 209 (quoting 42 U.S.C. §§ 2021(c)(1), (c)(4)).

[95] *Id*. at 198.

[96] *Id*. at 212-15.

[97] 464 U.S. at 258.

[98] *Id.* at 250 (quoting 42 U.S.C. § 2021(c)(4)).

[99] *Id.* at 251-56.

that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability."[100] But "Congress intended to stand by both concepts and to tolerate whatever tension there was between them."[101]

Finally, the Court held in *English* that the Atomic Energy Act did not preempt a common law intentional-infliction-of-emotional-distress claim brought by an employee of a nuclear-fuels production facility who claimed that she was fired "in retaliation for [her] nuclear-safety complaints."[102] The Court noted that, under *PG&E* and § 2021(k), the preempted field is defined, "in part, by reference to the motivation behind the state law."[103] It is also defined, in part, "by the state law's actual effect on nuclear safety."[104] Because the intentional-infliction-of-emotional-distress claim was "not motivated by [nuclear] safety concerns," that part of the field preemption inquiry was "not relevant."[105] On the effects prong, a State-law tort claim might be "so related to the 'radiological safety aspects involved in the . . . operation of a nuclear [facility],' that it falls within the pre-empted field."[106] But numerous State laws could "tangentially" affect nuclear

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[100] *Id*. at 256.

[101] *Id*.

[102] 496 U.S. at 74, 85.

[103] *Id*. at 84.

[104] *Id*.

[105] *Id*.

[106] *Id*. at 85 (alteration in original) (citation omitted).

safety decisions without being preempted, such as State minimum-wage laws.[107]

The Court held that, "[f]or a state law to fall within the pre-empted zone, it must have some *direct and substantial* effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels."[108] The Court concluded that, while imposing liability on NRC licensees for retaliatory employment practices could cause them to "alter[] their radiological safety policies," the effect was "neither direct nor substantial enough to place [the] claim in the pre-empted field."[109]

B. Virginia's uranium-mining moratorium does not regulate an NRC-regulated activity and has no direct and substantial effect on NRC licensees.

PG&E, *Silkwood*, and *English* provide no support for petitioners' field-preemption claim because the State law in question here neither regulates the activities of an NRC licensee nor has a direct and substantial effect on the decisions by any such licensee concerning radiation hazards. Each of those cases involved nuclear facilities regulated by the NRC. Indeed, each involved the regulation of an activity listed under § 2021(c) that the NRC is barred from delegating to the States. By contrast, as the district court correctly

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[107] *Id.*

[108] *Id.* (emphasis added).

[109] *Id.*

ruled, the Atomic Energy Act "confers no federal regulatory or licensing authority over nonfederal uranium deposits or their conventional mining. It has never done so."[110] So even assuming for purposes of a Rule 12(b)(6) motion that Virginia's uranium-mining moratorium was based on radiological safety concerns, nothing in the Atomic Energy Act barred Virginia from relying on such concerns to prohibit mining.

Nor does Virginia's uranium-mining moratorium have, in the words of *English*, "a direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels."[111] To be sure, "uranium milling and tailings storage are 'activities' under Section 2021(k) because they are regulated by the NRC, and [S]tates may therefore not regulate them except for purposes other than protection against radiation hazards."[112] But Virginia has not prohibited or otherwise regulated milling facilities or tailings storage.

Although petitioners posit that Virginia's moratorium on uranium mining reduces the demand for uranium milling and tailings management by reducing the supply of native ore for processing,[113] that alleged supply-and-demand response is, at best, indirect. Under *Silkwood* and *English*, that indirect effect is not enough to bring the regulation of uranium mining into

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[110] Pet. App. 66a. *See supra* at 4-9.

[111] 496 U.S. at 85.

[112] Pet. App. 13a-14a.

[113] Pet. 29.

the preempted field. Indeed, if the imposition of a $10 million punitive award for radiation-safety violations did not have a direct and substantial effect on the NRC licensee in *Silkwood*,[114] then Virginia's uranium-mining moratorium has no such direct and substantial effect on any such licensee either.

C. There is no circuit split because *Skull Valley* and *Entergy* involved State laws that, unlike this case, foreclosed NRC-regulated activities and had a direct and substantial effect on NRC licensees.

Petitioners are wrong that the decision below conflicts with decisions of the Tenth Circuit in *Skull Valley*[115] and the Second Circuit in *Entergy*.[116] Those cases are distinguishable because they involved a State's direct regulation of an NRC-licensed activity based on radiation concerns, something absent in this case.

The Tenth Circuit in *Skull Valley* held that a suite of laws enacted by the State of Utah between 1998 and 2001 were preempted by the Atomic Energy Act because, out of radiological safety concerns, Utah sought

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[114] *See English*, 496 U.S. at 85-86 (explaining that allowing State-law claims by whistleblowers would have less effect on NRC licensees than *Silkwood*'s permitting punitive damage claims by persons injured by radiation caused by safety violations).

[115] *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004), *cert. denied sub nom. Nielson v. Private Fuel Storage, LLC*, 546 U.S. 1060 (2005).

[116] *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013).

to systematically block the plaintiff, an NRC licensee, from storing spent nuclear fuel ("SNF") in an NRC-licensed facility on the Skull Valley Indian reservation. The preempted laws consisted of:

> (1) amendments to Utah's Radiation Control Act, which establish state licensing requirements for the storage of SNF, and which revoke statutory and common law grants of limited liability to stockholders in companies engaged in storing SNF; (2) "the County Planning Provisions," which require county governments to impose regulations and restrictions on SNF storage; [and] (3) "the Road Provisions," which vest the Governor and the state legislature with authority to regulate road construction surrounding the proposed SNF storage site on the Skull Valley reservation.[117]

Because § 2021(c) prohibits the NRC from delegating to States the regulation of the radiological aspects of SNF storage, Utah could regulate that NRC-regulated activity, under § 2021(k), only "for purposes other than protection against radiation hazards."[118] The Tenth Circuit found that the Utah laws were preempted because they regulated SNF storage specifically because of its radiation hazards.[119]

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[117] 376 F.3d at 1228 (citations omitted). A fourth set of laws, the "Miscellaneous Provisions," were challenged on grounds other than preemption. *Id*.

[118] 42 U.S.C. § 2021(k).

[119] 376 F.3d at 1245-53.

Petitioners attempt to fit this case into the facts of *Skull Valley* by singling out the Road Provisions at issue there and arguing that those provisions did not specifically mention SNF storage. That is not entirely accurate. One provision required approval of both the Governor and the Legislature if the operator of an SNF facility sought to challenge the State transportation agency's decision to deny a permit for the disposal of "high level radioactive waste."[120] While it is true that other road provisions did not mention SNF activities by name, they targeted the specific roads leading to the SNF facility and prevented their use without State approval.[121] Indeed, the sponsor testified that those provisions "established a 'moat' around the proposed SNF site, and the Governor added that the Road Provisions 'will add substantially to our ability as a state to protect the health and safety of our citizens against the storage of high-level nuclear waste.' "[122]

Moreover, the Road Provisions on which petitioners here rely were part of an integrated package of

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[120] *See* Utah Code Ann. § 54-4-15(4)(b) (referencing petition filed under § 19-3-318); *Skull Valley*, 376 F.3d at 1230 ("Although the discretion to grant petitions for railroad crossings is generally vested in the State Department of Transportation, the Utah legislature added a provision in 1999 that states that the resolution of any dispute regarding a petition filed by an entity engaged in SNF storage and transportation 'requires the concurrence of the governor and the legislature in order to take effect.' " (citing Utah Code § 54-4-15(4)(b)).

[121] 376 F.3d at 1252.

[122] *Id*.

laws specifically targeting and blocking the SNF facility itself. As the United States pointed out when recommending that this Court deny certiorari in *Skull Valley*, "the *entirety* of the series of interrelated laws at issue . . . were targeted specifically to regulate the safety aspects of the proposed waste facility and were designed to halt the construction and operation of the proposed facility based on radiation hazard concerns."[123] That package included laws, for example, imposing a $5 million licensing fee on the NRC licensee, requiring a minimum $2 billion bond, and eliminating limited-liability protection for investors—measures designed to block the facility.[124]

This case is nothing like *Skull Valley*. The restrictions there had a "direct and substantial effect on the decisions" of an NRC licensee regarding the "radiological safety levels of SNF in Utah."[125] In this case, by contrast, uranium mining is not an NRC-licensed activity. Nothing in Virginia's uranium-mining moratorium restricts or prohibits any milling or tailings activities from taking place in Virginia. And the mining

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[123] Br. for the United States as Amicus Curiae 10-11, *Nielson v. Private Fuel Storage, LLC*, 546 U.S. 1060 (2005) (No. 04-575) (emphasis added); *id*. at 13-14 ("Utah's comprehensive licensing scheme *as a whole* was targeted at the preempted field of nuclear safety and attempts to regulate within the NRC's exclusive jurisdiction. . . . Utah's statutes exclusively target a proposed nuclear waste storage facility. . . . ") (citation and quotation omitted).

[124] *Id*. at 4.

[125] *Id*. at 14 (quoting *English*, 496 U.S. at 85).

moratorium does not have a direct and substantial effect on any NRC licensee regarding radiological safety decisions.

Entergy is likewise distinguishable. The Second Circuit affirmed the lower court's decision that the Atomic Energy Act preempted two Vermont laws that shut down the Vermont Yankee nuclear plant by enabling the Vermont legislature to withhold permission for its continued operation. The court of appeals upheld the district court's finding that the Vermont "legislature's primary purpose" was based on radiological safety concerns regarding the operation of the plant and the disposal of nuclear waste.[126] *Entergy* is a straightforward application of *PG&E*, except that Vermont, unlike California, lacked a non-radiological safety justification for blocking the nuclear plant. In this case, by contrast, conventional uranium mining is not regulated by the Atomic Energy Act, and Virginia's mining moratorium has no direct and substantial effect on any NRC licensee. So unlike in *Entergy*, it is irrelevant here whether Virginia had a non-radiological safety justification under § 2021(k) for imposing the moratorium on uranium mining.

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[126] *Entergy*, 733 F.3d at 420; *id.* at 421 ("impermissible primary purpose"); *id.* at 424 ("impermissible concerns about the radiological safety of spent nuclear fuel storage").

II. Virginia's moratorium on uranium mining does not conflict with the Atomic Energy Act and poses no threat to national security.

The Fourth Circuit rejected petitioners' alternative argument—that Virginia's uranium-mining moratorium is preempted on the theory that it conflicts with the policy of the Atomic Energy Act to promote the development of nuclear energy.[127] Although the conflict-preemption issue falls within the scope of the question presented, petitioners conspicuously fail to raise or develop it as a reason for granting certiorari.

That omission is understandable because this Court rejected the same type of conflict-preemption claim in *PG&E* and *Silkwood*. In *PG&E*, the Court said "[t]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power."[128] But the Court cautioned that Congress did not seek to promote nuclear power "at all costs."[129] Even for an activity squarely within the Commission's exclusive regulatory authority—the construction of a nuclear power plant—"Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons."[130] Likewise in *Silkwood*, the Court found no conflict preemption in the imposition of a $10 million punitive damage

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[127] Pet. App. 18a-19a.

[128] 461 U.S. at 221.

[129] *Id*.

[130] *Id*. at 223.

award under State law for the violation of nuclear safety standards. The Court reasoned that Congress did not clearly displace State common-law tort remedies. So while the Court acknowledged the "tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability," that "regulatory consequence was something that Congress was quite willing to accept."[131]

The conflict-preemption argument fails here for the same reason. Congress has consistently chosen *not* to regulate conventional uranium mining on non-federal lands, leaving the regulation of that field entirely to the States. Congress believed from the outset that sufficient uranium ore could be purchased on the open market and that, if not, the Commission could condemn and pay just compensation for "any uranium supplies which it is unable to buy in the open market."[132] Even when Congress amended the Atomic Energy Act in 1978 to empower the Commission to regulate uranium milling and tailings disposal, it did not give the Commission authority to regulate conventional uranium mining.[133]

Because the Act leaves the regulation of conventional uranium mining to States, a State's decision *not*

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[131] 464 U.S. at 256.

[132] 92 Cong. Rec. 6,073, 6,082 (June 1, 1946); *see also supra* note 7.

[133] *See supra* notes 26-29 and accompanying text.

to allow such mining poses no obstacle to achieving the Act's purpose. As in *PG&E* and *Silkwood*, if there is any tension between allowing States to ban conventional uranium mining and the promotion of nuclear power, it is a tension that Congress was willing to tolerate. There is thus no merit to petitioners' claim that the Fourth Circuit's decision might jeopardize national security by reducing the supply of domestic uranium ore; Congress empowered the Commission to deal with that situation if it ever arises.

Petitioners' claim that the Fourth Circuit's decision poses a threat to domestic uranium markets is also based on factual distortions and omissions. Although domestic uranium production is nearing a historic low, it is not because the United States has failed to adequately develop its uranium resources. Rather, domestic uranium production has decreased in response to "persistent oversupply that has driven market prices below production costs."[134] Domestic uranium producers complain that they have been "struggling to survive" the glutted market, a glut that has forced them to cut production, cancel exploration projects, and reduce their workforces by more than half since 2012.[135]

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[134] Uranium Producers of Am., Comment Letter on Excess Uranium Management: Effects of Potential DOE Transfers of Excess Uranium on Domestic Uranium Mining, Conversion, and Enrichment Industries, Notice of Issues for Public Comment, 16 (Mar. 9, 2017), https://goo.gl/YkV1uK.

[135] *Id.* at 1, 3-4.

The domestic uranium market is glutted in part because the Department of Energy manages a stockpile of the equivalent of about 100,000 metric tons of natural uranium that is suitable for atomic energy generation.[136] The Department's 2013 Excess Management Plan projected that final disposition of that inventory "could take at least 20 years."[137] Domestic uranium producers complain that the Department "is now the largest uranium supplier in the U.S., with annual transfers that are nearly two times what the entire domestic industry produces."[138] In light of the oversupply problem, federal law restricts the Secretary of Energy from selling excess uranium inventory from the national stockpile unless he first determines that "sales will not have a substantial adverse impact on the domestic uranium mining industry."[139] Petitioners do not mention the stockpile and are conspicuously silent about those oversupply problems.

Petitioners also try to stoke unwarranted fears about overdependence on Russian uranium without mentioning that the United States intentionally favored Russian imports for twenty years as a matter of nonproliferation policy. The Russia Highly Enriched Uranium ("HEU") Agreement of 1993 obligated the United States to purchase 500 tons of Russian uranium as an incentive for Russia to significantly reduce

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[136] 82 Fed. Reg. 21,594, 21,597 (May 9, 2017) (Table 1).

[137] U.S. Dep't of Energy, *Excess Uranium Inventory Management Plan*, 3 (2013), https://goo.gl/WEQTn9.

[138] UPA Letter, *supra* note 134, at 17.

[139] 42 U.S.C. § 2296b-2.

its nuclear arsenal.[140] The HEU Agreement converted uranium that was "enough for approximately 20,000 Russian nuclear warheads"[141] into American civilian use, providing enough fuel to supply 10% of all electricity consumed in the United States for two decades.[142]

Indeed, it was the importance of preserving the effectiveness of the Russian HEU Agreement—by preventing the circumvention of anti-dumping laws—that led the Government to urge review in *United States v. Eurodif, S.A.*[143] Petitioners take the Government's petition for writ of certiorari in that case out of context. They misstate (at 7) that the Government argued for protecting "the domestic supply of uranium," which is simply not what the Government claimed.[144]

Petitioners also exaggerate the amount of uranium imported from Russia relative to other sources. Last year, for instance, uranium sourced from the

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[140] *See* Agreement Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons, U.S.-Russ., Feb. 18, 1993, 1993 WL 152921; 82 Fed. Reg. 21,598.

[141] Pet. App. 343a.

[142] Geoff Brumfiel, *Megatons To Megawatts: Russian Warheads Fuel U.S. Power Plants*, NPR (Dec. 11, 2013), https://goo.gl/wbcA99.

[143] *See* Pet. for Writ of Cert., *United States v. Eurodif, S.A.*, 555 U.S. 305 (2009) (No. 07-1059) (Pet. App. 343a).

[144] The actual quotation from the Government's petition in *Eurodif* reads: "the court of appeals' decision threatens the ongoing economic viability of USEC, the only domestic entity that *enriches* uranium. . . . *Its* continued survival is, accordingly, a matter of compelling importance to U.S. national security interests." Pet. App. 347a (emphasis added).

United States, Australia, and Canada accounted for 51% of the uranium used for domestic energy production; uranium from Russia, Kazakhstan, and Uzbekistan accounted for only 38%.[145]

Finally, petitioners misstate the effect of the Fourth Circuit's ruling on the ability of States to ban all uranium mining. As the court of appeals pointed out, "as of 2015, eighteen domestic uranium recovery facilities—those that either use *in situ* leaching or are located on federal lands—are licensed by the NRC and thus beyond the reach of any state bans."[146] Indeed, the *in situ* method is far more prevalent nationwide,[147] even though it is unsuitable in Virginia.[148] Thus, the Fourth Circuit was correct that, even if every State in the country were to ban conventional uranium mining on nonfederal lands, it "would have little effect"[149] on the domestic uranium market.

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[145] U.S. Dep't of Energy, Energy Info. Admin., *2016 Uranium Marketing Annual Report*, 1 (June 2017), https://goo.gl/1JmnH7.

[146] Pet. App. 19a.

[147] U.S. Dep't of Energy, Energy Info. Admin., *2016 Domestic Uranium Production Report*, 5 (Table 2) (May 2017), https://goo.gl/dTSxAA.

[148] Pet. App. 23a n.2 (Traxler, J., dissenting).

[149] Pet. App. 19a.

CONCLUSION

The petition for a writ of certiorari should be denied.

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