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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

MARK R. HERRING
Attorney General

STEPHEN A. COBB
Deputy Attorney General

PAUL KUGELMAN
Senior Assistant Attorney General

J. DUNCAN PITCHFORD
Assistant Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Deputy Solicitor General

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
(804) 786-7240
solicitorgeneral@oag.state.va.us

April 23, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

**IN THE
SUPREME COURT
OF THE UNITED STATES**

VIRGINIA URANIUM, INC., ET AL.,
PETITIONERS,

v.

JOHN WARREN, ET AL.,
RESPONDENTS.

SUPPLEMENTAL BRIEF FOR RESPONDENTS

The federal government argues that a 36-year-old Virginia policy that went unchallenged for 33 years might (or might not) be preempted by a federal statute that has been on the books for 54 years based on a construction of that statute given in a 35-year-old decision of this Court—a decision that, like all decisions of this Court interpreting that same federal statute, held that it did not preempt the allegedly usurped state law.

To be clear: This case does not involve whether the Commonwealth of Virginia may impose a moratorium on conventional uranium mining. The federal government acknowledges that it does not, has never, and indeed cannot regulate such mining. U.S. Br. 3, 13, 23. The federal government also admits that, notwithstanding the Atomic Energy Act (AEA), 42 U.S.C. §§ 2011 *et seq.*, States may regulate uranium mining, including by banning it altogether. U.S. Br. 18. Indeed,

the government even agrees that States may ban conventional uranium mining *based on concerns about the safety of the mining process itself*. See U.S. Br. 16 ("State regulation of conventional uranium mining is permissible if that regulation is grounded on concerns about mining itself, which is not subject to NRC regulation."); accord U.S. Br. 12-13, 18.

But even though States have plenary power over conventional uranium mining, the federal government argues that both lower courts erred—and the case should move forward—based on petitioners' allegations about the Virginia legislature's motives and a concession we have never made. As for the former, the government asserts that petitioners "have adequately alleged that . . . the Commonwealth has banned uranium mining not because of concerns about mining per se, but because of fears about radiological hazards associated with the next steps of the uranium-development process, which NRC regulates under the AEA." U.S. Br. 12. The government also suggests we "have conceded that, for purposes of [our] motion to dismiss," U.S. Br. 23, the courts should take as true petitioners' allegations that Virginia's moratorium was motivated "solely" by radiological safety concerns associated with milling and tailings. U.S. Br. 22. As a result, says the government, this Court "need not decide what evidence would be necessary or sufficient to prove those allegations" were the case to proceed beyond the motion-to-dismiss stage. U.S. Br. 23.

These arguments illustrate the weakness of the government's position and the untenable situation it

would create for States. They also highlight why this is a poor case for addressing the preemptive scope of the AEA. As this Court has explained in evaluating that very same statute, "inquiry into legislative motive"—itself always a potentially "unsatisfactory venture"—can be "particularly pointless" where (as here) there are no doubts about a State's ability to achieve a particular result and the only question is whether the State has relied on a proper justification for doing so. *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983) (*Pacific Gas*). The problems will only be compounded if claims about what motivated a particular State's legislature to enact (or fail to repeal) a longstanding state policy are treated as allegations of fact that must be presumed true for purposes of a motion to dismiss. And the problems will only multiply if the list of state policies open to challenge is expanded to include not only those touching on matters regulated by the federal government but also state policies regulating activities that are, themselves, "subject to state rather than federal regulation." U.S. Br. 23.

Fortunately, there is no need for the Court to wade into those matters because there is no need for the Court to take this case. Both lower courts agreed about the proper outcome here, and their decisions upholding Virginia's three-decade-old moratorium on uranium mining do not conflict with either the decisions of this Court or another court of appeals. Nor does this petition for a writ of certiorari raise any issue of general importance. Despite vague expressions of concerns, see

U.S. Br. 22, the government identifies no tangible harms caused by Virginia's moratorium and no actual projects or activities that would be impeded were this Court simply to leave undisturbed the status quo that has prevailed since 1982. In short, "it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective" and "[t]he courts should not assume the role which our system assigns to Congress." *Pacific Gas*, 461 U.S. at 223.

ARGUMENT

A. There is no conflict

The government suggests that the lower courts' resolution of this case conflicts with three others: this Court's decision in *Pacific Gas*; the Tenth Circuit's decision in *Skull Valley*;[1] and the Second Circuit's decision in *Entergy*.[2] U.S. Br. 19-21. But those cases are all distinguishable for the same basic reason: each arose directly out of activities that are themselves identified in the text of the AEA for regulation by the federal government. *Pacific Gas* involved the construction of new nuclear power plants. *Skull Valley* involved storage facilities for spent nuclear fuel. And *Entergy* involved rules governing existing nuclear power plants. This

---

[1] *Skull Valley Band of Goshute Indians* v. *Nielson*, 376 F.3d 1223 (10th Cir. 2004), cert. denied, 546 U.S. 1060 (2005).

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

case, in contrast, involves conventional uranium mining—an entire category of activity that the federal government acknowledges remains "subject to state control." U.S. Br. 9; accord U.S. Br. 13, 16.

That distinction matters for reasons that are both textual and intensely practical. Textual because the clearest statutory basis for preemption based on the underlying "purpose" of a state regulation—42 U.S.C. § 2021(k)—is part of a broader provision whose entire function is to *expand* state regulatory authority by permitting States to regulate in areas that otherwise would be under exclusive federal control. Practical because all of the difficulties with—and disruptions threatened by—judicial inquiries into legislative motive would only be compounded by expanding their scope to include state regulation of "antecedent activit[ies]" (U.S. Br. 9) not otherwise under federal control. See *infra* Part B.

The claimed conflict with *Pacific Gas* also fails for another reason. Like the decision below—and like the two other decisions of this Court that followed it—*Pacific Gas* rejected a preemption claim and upheld the challenged state laws. 461 U.S. at 216; accord *English* v. *General Elec. Co.*, 496 U.S. 72, 90 (1990); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984). It is at least arguable that some of the language in *Pacific Gas* was "unnecessary to the Court's holding" and thus "dictum." *Pacific Gas*, 461 U.S. at 223-24 (Blackmun, J., concurring in part and concurring in the judgment). But regardless of how that question is answered, the fact remains that this Court has never invalidated a

state law based on the preemption theory urged here. For that reason, too, there is no "conflict[ ]" between the decision below and the "relevant decisions of this Court." S. Ct. R. 10(c).

B. This case is a poor vehicle for addressing preemption under the AEA

The government further errs in contending that "[t]his case presents a suitable vehicle to address the question presented." U.S. Br. 23. The linchpin of the government's vehicle analysis is its assertion that we "have conceded . . . for purposes of [our] motion to dismiss [that] the courts should take as true petitioners' allegation that the Virginia moratorium was motivated by radiological-safety concerns." U.S. Br. 23.

1. Because the point may prove critical were this Court to grant review, it is important to be clear about what we have and have not "conceded." Like any party who moves to dismiss for failure to state a claim, we "take all of the factual allegations in the complaint as true." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). In various filings in this case, we also have assumed that "*one of the purposes* behind enacting [the moratorium] was to address potential radiological safety concerns." Resp't Mem. in Supp. of Mot. to Dismiss 15 (emphasis added; footnotes omitted).

That said, we have *never* conceded that legislative purpose is purely a question of fact (historical or otherwise). Nor have we conceded, even for purposes of the underlying motion to dismiss, that the Virginia

legislature's *sole* purpose in imposing a moratorium on conventional uranium mining was based on radiological safety concerns associated with uranium milling and tailings. See, *e.g.*, Reply in Supp. of Mot. to Dismiss & Resp. to Cross-Mot. for Summ. J. 8 n.9 (noting that "much of the evidence highlighted by the [petitioners] speaks not to radiation or radiological issues, but general concerns about health, safety and welfare").[3]

2. The government is similarly wrong in assuring the Court that it could simply assume that Virginia's law was wholly motivated by an allegedly improper purpose, while leaving for another day all thorny questions about "what evidence would be necessary or sufficient" to prove such allegations. U.S. Br.

---

[3] The Fourth Circuit identified no basis for saying we "concede[d]" that the Commonwealth "lacks a non-safety rationale for banning uranium mining." Pet. App. 10a. Such a concession would be irrelevant in any event because the federal government acknowledges that Virginia may ban uranium mining based on safety concerns—even radiological safety concerns—so long as those concerns are grounded in the safety of the mining process rather than milling and tailings. See U.S. Br. 16.

As Judge Traxler noted in dissent, a footnote in our court of appeals' brief states—in response to a claim about what would happen if this case reached the summary judgment stage—that we have "conceded the truth of [petitioners'] claims about legislative motive only for purposes of their Rule 12(b)(6) motion." Resp. C.A. Br. 15 n.58 (cited in Pet. App. 29a n.9). Even if this statement could reasonably be construed as broader than others we have made about how Rule 12 operates—and it should not—this Court is not bound by "concessions" involving the proper operation of Rule 12(b)(6). See, *e.g.*, *Massachusetts* v. *United States*, 333 U.S. 611, 624 n.23 (1948) (explaining that this Court is "not bound to accept [a legal concession] as either sound or conclusive of the litigation. It is not, even in terms, a confession of error.").

23. For one thing, as explained above, respondents vigorously challenge the assumption that provides the predicate for those assurances.

But the government's assurances also are wrong because they attempt to skate over several difficult questions about how analysis of legislative purpose works in this context. For now, consider just two:

In this context, is legislative "purpose" a question of fact, a question of law, or a mixed question? In *Wyeth* v. *Levine*, 555 U.S. 555 (2009), for example, this Court analyzed Congress's purpose in a preemption case without giving any deference to (or even referencing) any trial court findings. *Id.* at 566-68, 573-81. In the voting rights context, however, this Court has treated legislative intent in drawing electoral districts as a factual question that is reviewed for clear error, and, as a result, state legislators often are deposed and forced to testify. See, *e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1466, 1473-75 (2017). The government's brief simply assumes that this context falls into the question-of-fact bucket. But none of this Court's previous decisions clearly answers that question.[4]

---

[4] The government errs in describing *Pacific Gas* as "deferring to lower court's *factual* assessments" of the purpose of the challenged state law. U.S. Br. 15 (emphasis added). What this Court actually said was that its "general practice is to place considerable confidence in the *interpretations* of state law reached by *the federal courts of appeals*." *Pacific Gas*, 461 U.S. at 214 (emphasis added). Courts of appeals, of course, have no power to make factual findings.

Or take another question: What is the required relationship between an allegedly invalid purpose and any other purposes that may also have motivated the challenged state action? Does the challenger need to prove: (a) that the alleged improper purpose was the but-for cause of the legislative enactment, cf. *Hartman* v. *Moore*, 547 U.S. 250, 260 (2006); (b) that the improper purpose predominated over other valid purposes, cf. *Easley* v. *Cromartie*, 532 U.S. 234, 241 (2001); (c) that there is no rational purpose for the law other than the improper purpose, cf. *Nordlinger* v. *Hahn*, 505 U.S. 1, 6 (1992); or (d) something else? None of the Court's previous decisions in this area squarely address that question—though *Pacific Gas* says that where (as here) it is clear that Congress did not displace the States' traditional authority to reach a given outcome (here, a moratorium on conventional uranium mining) "it should be up to Congress to determine whether a State has misused the authority left in its hands." *Pacific Gas*, 461 U.S. at 216.

In our view, the better answers are that this type of inquiry is more akin to a legal question than a factual one and that the relevant materials show that the Virginia legislature had a variety of concerns in mind when enacting the moratorium. Pet. App. 178a, 182a-88a. The government's question-of-fact position ignores the profound difficulties posed by attempting to discover facts underlying a nearly 40-year-old enactment by a state legislature that maintains a paucity of legislative history. Even more troublingly, the question-of-fact view could create the untenable situation

where district courts reach different conclusions about whether a given state law is preempted and those differing conclusions are then subject to clear-error review on appeal. Cf. *U.S. Bank N.A.* v. *Vill. at Lakeridge, LLC*, No. 15-1509, slip op. at 8 (Mar. 5, 2018) ("[W]hen applying the law involves developing auxiliary legal principles of use in other cases[,] appellate courts should typically review a decision *de novo*."). But regardless of whether this Court agrees with our assessment, those are the types of questions that would need to be answered before petitioners could be granted any relief.

3. It also is worth noting the breadth of the federal government's position. In its view, a preemption challenge to a state law regulating an activity committed entirely to the States' control could survive a motion to dismiss as long as the plaintiff alleges an improper legislative motive for passing an otherwise facially valid law. Such a rule would permit virtually any preemption challenge to advance to discovery, subjecting the State and its officials to potentially intrusive inquiries about what motivated a state legislature to adopt a law regulating activities that are themselves entirely unregulated by the federal government. But "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States," *Bond* v. *United States*, 564 U.S. 211, 221 (2011), and the federal government offers nothing but speculation to justify why such an intrusion in state sovereignty is necessary. This is especially true given that Congress retains ample authority "to rethink the

division of regulatory authority" if it disagrees with Virginia's longstanding policies about conventional uranium mining. *Pacific Gas*, 461 U.S. at 223.[5]

C. This case raises no issue of general or urgent importance

It bears repeating that Virginia's moratorium on conventional uranium mining has been in place since President Reagan's first term and went completely unchallenged until the end of the second Obama Administration. At worst, that sort of delay could give rise to a defense of laches or the like. But even at best, it badly undermines any claim about the urgency of this issue.

The federal government has not identified any pressing need for this Court's intervention. The government makes no claim that the actual policy at issue in this case—Virginia's moratorium on conventional uranium mining—is, has, or can be expected to cause any harm whatsoever to the national interest. Tellingly, the government offers no support to petitioners' overheated claims of dire harm to "our economy [and]

[5] As we pointed out to both courts below, Congress undertook a substantial revision of the AEA early this century with the passage of the 2005 Energy Policy Act without disturbing the uranium mining moratorium in Virginia or any other State. See, *e.g.*, Resp't Mem. in Supp. of Mot. to Dismiss 11. This too undermines the federal government's implicit contention that the "clear and manifest purpose of Congress" was to displace Virginia's exercise of its sovereign police power. *Pacific Gas*, 461 U.S. at 206.

national security." Compare Pet. Cert. Reply 10-12, with U.S. Br. 22.[6]

The government vaguely suggests that the question presented here is "likely to recur in other nuclear-safety contexts," U.S. Br. 9, and that "the Fourth Circuit's analysis" *might* permit other States to take other steps that *might* be harmful to federal interests. U.S. Br. 22. But the government fails to identify any concrete state policies that have been enacted—or even general proposals that have been made—during the 14 months since the Fourth Circuit's decision in this case or the 28 months since the district court's decision. Better to let sleeping dogs lie.

[6] Nor could it, given the Nuclear Regulatory Commission's plenary power to conduct mining operations to meet national security needs. See 42 U.S.C. § 2096.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK R. HERRING
Attorney General

STEPHEN A. COBB
Deputy Attorney General

PAUL KUGELMAN
Senior Assistant Attorney General

J. DUNCAN PITCHFORD
Assistant Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Deputy Solicitor General

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
(804) 786-7240
solicitorgeneral@oag.state.va.us

April 23, 2018