No. 16-1005

In the United States Court of Appeals For the Fourth Circuit

VIRGINIA URANIUM, INC., *et al.*
Plaintiffs-Appellants,

v.

JOHN WARREN, in his official capacity as Director of the Virginia Department of Mines, Minerals, and Energy, *et al.*
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT DANVILLE

BRIEF AMICUS CURIAE FOR THE ROANOKE RIVER BASIN ASSOCIATION AND DAN RIVER BASIN ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici Roanoke River Basin Association ("RRBA") and Dan River Basin Association ("DRBA") (collectively the "River Basin Amici") are § 501(c)3 nonprofit organizations dedicated to preserving and enhancing the rivers they protect.

The Roanoke River Basin economy depends on recreation and tourism, hydropower generation, commercial fishing, manufacturing, and agricultural production. RRBA protects those interests by representing almost 50 local governments, non-profit, civic and community organizations, and regional governmental entities over a territory covering 410 miles of the Roanoke River Basin, including the Banister River near the Coles Hill site. RRBA's membership includes individuals who live and recreate on the Dan River downstream from the Coles Hill site.

Formed in 2002, and headquartered in Eden, North Carolina with field offices in Collinsville, Virginia and Danville, Virginia, DRBA preserves and promotes the natural and cultural resources of the Dan River basin through stewardship, recreation, and education such as creating community parks, monitoring water quality, and leading cleanups. DRBA also protects and promotes the Dan River and its major tributaries, including the Banister River near the Coles Hill site. DRBA has members in all 16 counties within the Dan River watershed.

The River Basin Amici have a specific interest in this case because of the incredible adverse impact uranium mining would have on their efforts to preserve the integrity and economic diversity of their region. The River Basin Amici submit this brief pursuant to Fed. R. App. P. 29(a). The River Basin Amici further state that none of the statements included in Rule 29(c)(5)(A) – (C) is applicable.

FACTUAL SUMMARY

In 1982, the Virginia General Assembly banned uranium mining in the Commonwealth, prohibiting state agencies from accepting permit applications or expending state resources to process applications for proposed uranium mines. (*See* Appellants' Br. 9). In 1983, the General Assembly extended the ban until the legislature statutorily established a specific uranium mining regulatory program. (Appellants' Br. 9–10); VA. CODE § 45.1-283. At roughly the same time, the market for uranium 'yellowcake' collapsed, and the push to develop a state uranium mining scheme sharply declined. (Exh. 40 to Ohlendorf Decl., JA 668; *see also* Appellants' Br. 12).

In 2007, owners of the Coles Hill uranium deposit formed Virginia Uranium, Inc. and began lobbying the Virginia General Assembly to repeal the law. (Appellants' Br. 13); (*see also* Compl. ¶¶ 9, 75, JA 17, 36). In direct contrast to their current arguments, Appellants at that time recognized Virginia's authority to regulate uranium mining. In a March 2011 opinion-editorial published in the *Danville Register & Bee*, Mr. Walter Coles, Sr., CEO of both Appellant Virginia Uranium, Inc. and Appellant Virginia Energy Resources, pledged that Virginia Uranium was "prepared to work with the members of the General Assembly in 2012" on the issue. (Attac. A to Br. Amicus Curiae, Dkt. No. 69-1).

In 2013, State Senator John C. Watkins introduced a bill to lift the moratorium, which he later withdrew without a vote. (Appellants' Br. 17; Compl. ¶¶ 87–89, JA 41). Delegate Jackson H. Miller introduced an identical bill in the House of Delegates, but that bill never left the House Commerce and Labor Committee.[1] All told, since 1983, the Virginia General Assembly has not made any amendments or changes to the uranium mining ban.

PROCEDURAL HISTORY

On October 29, 2015, Appellants brought suit challenging the mining ban and seeking declaratory judgment that the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (2012) ("AEA"), preempts Virginia's law under the Supremacy Clause of the United States Constitution. (Compl. ¶ 111, JA 47–48). Despite claiming the AEA preempted state law, Appellants also sought an injunction directing Virginia's Department of Mines, Minerals, and Energy to process Appellants' state permit applications for mining (Compl. ¶ 111, JA 47–48) because no federal laws or regulations exist for conventional uranium mining on nonfederal lands. On August 25, 2015, Defendants moved to dismiss the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Mem. Op., JA 918).

The Basin Association Amici moved to intervene in the district court proceeding. (Mot. to Intervene, Dkt. No. 40). The district court denied their motion

[1] House Bill 2330, Left in Commerce and Labor, Feb. 05, 2013, *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+HB2330 (*last visited* Apr. 25, 2016).

but granted them leave to file an amicus brief and leave to renew their motion to intervene should circumstances warrant. (Mem. Op. Denying Mot. to Intervene, Dkt. No. 64). Pursuant to the district court's order, the Basin Association Amici filed a brief amicus curiae. (Br. Amicus Curiae, Dkt. No. 69).

The district court dismissed Appellants' suit, holding that the AEA does not preempt Virginia's moratorium on uranium mining. (Order, JA 918). The district court found that the AEA confers no regulatory or licensing authority over non-federal uranium deposits or their conventional mining and rejected Appellants' preemption theory, finding that they misread both the AEA and Supreme Court precedent. (Mem. Op. 14–19, JA 910–15). Appellants noticed this appeal from the district court's order on December 31, 2015. (Not. of Appeal, Dkt. No. 80, JA 920).

SUMMARY OF ARGUMENT

Appellants ask this Court to radically expand the AEA's preemptive scope in a wholly new and unsupported manner. First, Appellants' preemption theory misapprehends all prior precedent by inverting the legal analysis, focusing only on Appellants' alleged version of legislative history and political debate while wholly ignoring the ban's actual text and its actual, real-world effects. No case law supports this theory. In fact, the ban's actual text and its real world effects demonstrate why preemption does not apply here. General Assembly politics and

legislators' theoretical motives do not trump those factors. Second, Appellants argue with even less support that Virginia may not prohibit uranium mining *for any reason*. This argument fails because mining is an area of traditional state control, and the AEA – though intended to encourage nuclear power – does not do so at all costs or at the expense of traditional state authority.

ARGUMENT

I. Federal preemption of traditional state police powers is extraordinary and does not apply to Virginia's moratorium on uranium mining.

In matters of traditional state police powers, courts presume federal law does not preempt state law. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("[I]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start 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.") (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citation marks omitted); *City of Falls Church v. Fairfax Cnty. Water Auth.*, 272 F. App'x 252, 256 (4th Cir. 2008) ("The presumption against preemption has particular force in the areas . . . that have traditionally been regulated by the states.") (citing *Pinney v. Nokia, Inc.*, 402 F.3d 430, 457 (4th Cir. 2005) *cert. denied* 546 U.S. 998 (2005)); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start 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."). Here, Appellants cannot overcome this presumption.

To overcome this presumption, courts consider three potential types of preemption: (1) *express preemption*, when Congress expressly states in a federal statute its intention to preempt state law, (2) *field preemption*, when federal law completely occupies a field as to leave no room for state involvement, and (3) *conflict preemption*, when a conflict between parallel state and federal laws makes compliance with both impossible. *See Oneok, Inc. v. Learjet, Inc.*, __ U.S. __, 135 S. Ct. 1591, 1595 (2015) (federal Natural Gas Act does not preempt state-law antitrust claims); *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm.*, 461 U.S. 190, 204 (1983). While Appellants do not plead express preemption, they do plead both field and conflict preemption. Under either analysis, however, their claims fail.

1. Field preemption does not apply to the Virginia mining ban.

Field preemption requires a three-step approach. *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 414–15 (2d Cir. 2013). First, courts analyze a statute's actual text to determine whether it intrudes upon federal law. *Entergy*, 733 F.3d at 414 ("proper place to begin the analysis of a statute is its text") (citing *U.S. v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Second, courts look to a law's actual effect to find whether it achieves its textual purpose or

achieves a different (and potentially preempted) result. *English v. Gen. Elec. Co*., 496 U.S. 72, 84–85 (1990) ("[P]art of the preempted field is defined by reference to the purpose of the state statute . . . [and] another part of the field is defined by the state law's actual effect on nuclear safety."). Finally, as a backstop measure, courts may look to legislative history, although "inquiry into legislative motive is often an unsatisfactory venture." *PG&E,* 461 U.S. at 216. Appellants' theory of preemption fails under the proper analysis.

Mining regulation is an area traditionally reserved for state control, as Appellants concede. (Compl. ¶ 37, JA 24) ("Congress has left safety regulation of the *mining* process to the States . . . ."); (Appellants' Br. 49) (Uranium mining is "an activity that Congress has chosen not to regulate."). In such instances, courts hesitate to find preemption absent clear congressional intent. *English* 496 U.S. at 79 ("Where . . . the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest.") (citing *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977). Nothing in the AEA reveals a congressional intent to supersede Virginia's authority to regulate conventional uranium mining on private lands.

The AEA "stemmed from Congress' belief that the national interest would be served if the [g]overnment encouraged the private sector to develop atomic

energy" by establishing a system of federal regulation and licensing. *English*, 496 U.S. at 81 ("The Act implemented this policy decision by opening the door to private construction, ownership, and operation of commercial nuclear-power reactors"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249–50 (1984) (Congress' decision was premised on the belief that federal regulators were more qualified in a complex area formerly subject to federal monopoly and now open to the private sector); *PG&E*, 461 U.S. at 205 ("[T]he Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant . . . .").

Under the AEA's limited scope, the Nuclear Regulatory Commission ("NRC") does not regulate uranium mining. As the district court noted, the "Commonwealth of Virginia is the 'paramount proprietor' over its mineral lands." (Mem. Op. 9–10, JA 905–06) ("[T]he Virginia General Assembly has enacted schemes by which one must apply to an appropriate state agency for a permit to mine in the Commonwealth") (citations omitted). Appellants' tacitly concede this fact by seeking mining permits from Virginia through injunctive relief. (Compl. ¶ 111, JA 47–48).

a. The mining ban does not intrude on any preempted field.

Field preemption first asks "whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *PG&E*, 461

U.S. at 213 (citing *Rice* 331 U.S. at 236). Contrary to Appellants' claims, determining the relative "matter" begins with the mining ban's actual text, not *post hoc* speculation about political motives of legislators or citizens lobbying before the General Assembly. *Entergy*, 733 F.3d at 414 ("proper place to begin the analysis of a statute is its text") (citing *Am. Trucking Ass'ns*, 310 U.S. at 543); *see also CTS Corp. v. Waldburger*, __ U.S. __, 134 S. Ct. 2175, 2185, *reh'g denied*, 135 S. Ct. 23 (2014) ("[I]ntent is discerned primarily from the statutory text.").

The challenged mining ban contains only two sentences, neither of which directly or indirectly addresses uranium milling and tailings management:

> Notwithstanding any other provision of law, permit applications for uranium mining shall not be accepted by any agency of the Commonwealth prior to July 1, 1984, and until a program for permitting uranium mining is established by statute. For the purpose of construing § 45.1-180(a), uranium mining shall be deemed to have a significant effect on the surface.

VA. CODE § 45.1-283. There can be no field preemption here because the federal government, under the AEA, does not regulate any aspect of the only thing the challenged law concerns – uranium mining on nonfederal lands.

In fact, Appellants repeatedly concede that neither AEA nor the NRC's regulations claim any authority over traditional uranium mining on nonfederal land. (Appellants' Br. 49) (uranium mining "an activity that Congress has chosen not to regulate"); (*see also* Compl. ¶¶ 37, 51, JA 24, 28–29). To the contrary, Appellants seek injunctive relief in the form of state-issued mining and mine-safety

permits from the Commonwealth of Virginia (Compl. ¶ 111, JA 47) precisely because there is no federal agency which could issue these permits. Nothing in the state law's text – or the AEA's text – can plausibly support Appellants' preemption argument.

b. The mining ban's effects do not intrude on any preempted field.

Field preemption does not necessarily end with the statute's text. Courts also ask whether a statute that facially concerns non-preempted matters actually intrudes on a preempted field via its real-world impacts. *Entergy*, 733 F.3d at 416 ("[W]e have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.") (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992)). In AEA preemption, the challenged law must affect operation of a nuclear facility. *English*, 496 U.S. at 85("[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*.") (emphasis added). In this analysis, however, the Supreme Court cautions that "not every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field." *English*, 496 U.S. at 85.

Appellants incorrectly claim the mining ban affects nuclear facilities because it allegedly bans uranium milling and tailings management. (Appellants' Br. 56)

("Plaintiffs cannot process uranium and store its tailings safely and legally as allowed by federal law *if they cannot mine the uranium to begin with.*") (emphasis in original); (Compl. ¶ 110, JA 47) "[T]he ban "flat-out prohibits the safe management of uranium tailings, by prohibiting the mining of uranium in the first place."). The ban does nothing of the sort. Provided they seek the proper federal licenses, Appellants may mill uranium and store tailings in Virginia today. Nothing in Virginia's ban affects Appellants' legal rights with respect to milling or tailings management.[2]

In fact, economics, not law, stand between Appellants and a milling operation. Appellants argue that at current prices for uranium 'yellowcake,' it is not economically feasible to import uranium ore for milling on their properties. (Pls.' Reply in Supp. of Summ. J., Dkt. No. 58 at 11) (claiming 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 into the Commonwealth") (emphasis in original). Appellants fail to explain how such an

[2] Not only does the mining ban not prohibit milling and tailings management, it does not even attempt to impose state-specific standards on those activities. *See* VA. CODE § 45.1-283; s*ee also PG&E*, 461 U.S. at 219 (finding no preemption in part because California had not "sought through [the challenged statutes] to impose its own standards on nuclear waste disposal.").

operation is illegal simply because, under current economic conditions, Appellants don't "*want*" to do it.

Appellants' holdings lie in Chatham, Virginia, roughly twenty-five miles from the North Carolina border. (Compl. ¶ 9–11, JA 17). Other milling operations haul ore much farther than that. The Cameco mining company in Canada, for example, hauls ore from its McArthur river mine nearly fifty miles for milling at its Key Lake facility.[3] As noted below (Graph, page 19, *infra*) the spot price of milled uranium has fluctuated from over $160 per pound to below $20 per pound. The spot price of uranium for the week of April 18, 2016, was just $28 per pound, close to its historic low.[4] Such a depressed value might make it a "pointless exercise" to construct a "mill and tailings-management complex in Virginia" *today*, but that economic reality has nothing do with the preemption analysis. If the uranium spot price were to rise again, Appellants may decide that the expense is no longer "pointless." If that happened, Appellants could legally begin such an operation, and the mining ban could not stop them. The constitutionality of Virginia's

[3] Cameco Corp., "Businesses: McArthur River / Key Lake," http://www.cameconorth.com/about/businesses (*last visited* Apr. 21, 2016) (explaining that "ore slurry from McArthur River is trucked in special containers 80 kms southwest to Key Lake where it's milled and blended for processing with low-grade ore stockpiled at the mill."). Cameco also hauls uranium ore slurry from its Cigar Lake mine nearly 70 kms to Areva's McClean Lake mill. *Id.*

[4] *See* https://www.uxc.com/p/prices/UxCPrices.aspx (*last visited* Apr. 21, 2016).

uranium ban cannot possibly change from one day to the next, based on uranium's spot price.

Appellants' *economic* decision not to import uranium for milling and tailing management does not convert the mining law into a *legal* ban on such activities, and the Supreme Court has expressly rejected such economic-based theories. *English*, 496 U.S. at 85 (finding plaintiffs' professed economic concerns were "neither direct nor substantial enough to place petitioner's claim in the pre-empted field."). The district court here made this precise point. (Mem. Op. 19, JA 915) ("The inability to conventionally mine a nonfederal uranium deposit might obviate one's decision to mill and manage the mill tailings on an active uranium-mining site; however, such a consequence is too far attenuated from the matter on which the General Assembly has asserted the right to act and on which Congress, by the AEA, has not."). Simply put, individual economic motivations, not legal impediments, prevent Appellants from milling uranium in the Commonwealth. The mining ban's actual, real-world effects are too remote from milling and tailings management to warrant an extraordinary finding of AEA preemption.

c. Appellants' improperly ask the Court to find preemption based exclusively on alleged legislative history rather than the mining ban's text or effects.

Appellants ask this Court to upend the field preemption analysis by skipping over the ban's text and its real-world impacts and focus exclusively on Appellants'

tortured version of Virginia legislative history and politics. Legislative history plays only a minor role in the preemption analysis. As the Supreme Court in *PG&E* cautioned:

> First, inquiry into legislative motive is often an unsatisfactory venture. What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it. Second, it would be particularly pointless for us to engage in such inquiry here when it is clear that the states have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a state so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings.

PG&E, 461 U.S. at 216 (internal citations omitted). Accordingly, the Court in *PG&E* accepted "California's avowed economic purpose as the rationale for enacting [the challenged statute]." *PG&E*, 461 U.S. at 216. The Supreme Court's field preemption analysis simply does not proceed down Appellant's rabbit hole of motive inquiry.

Not even the mining ban's legislative history, to the extent it exists, supports Appellants' preemption theory. Appellants claim Resolution 324, passed in 1981, demonstrates the mining ban's concerns with radiological safety at uranium mill operations. (Appellants' Br. 9). On the contrary, differences between the resolution and the ultimate law demonstrate just the opposite. According to Appellants, the legislature "passed Resolution 324, calling for the creation of a Uranium Subcommittee tasked with 'evaluat[ing] the environmental effects of uranium

exploration, mining and milling . . . and any possible detriments to the health, safety, and welfare of Virginia citizens which may result from uranium exploration, mining or milling." (Appellants' Br. 9). Appellants then claim the legislature subsequently passed the mining ban, "which allowed *exploration* for uranium but simultaneously imposed a prohibition against *mining* uranium until July 1, 1983 . . . ." (Appellants' Br. 9) (emphasis in original). While Resolution 324 mentioned milling, the mining ban does not. The legislature consciously excluded milling from the statutory mining ban, and milling activities, to the extent permitted under federal law, remain permissible within the state. Appellants cannot now ask the Court to read into the mining ban language that is not there. *Nichols v. United States*, __ U.S. __, 136 S. Ct. 1113, 1118 (2016) ("[A]n enlargement [of a statute] by the court, so that what was omitted, presumably by inadvertence, may be included within its scope . . . transcends the judicial function"); *see also Baber v. Hosp. Corp. of Amer.*, 977 F.2d 872, 877 (4th Cir. 1992) (declining to vary statutory text to accommodate a perceived legislative intent); *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988) ("[W]hen the terms of a statute are clear, its language is conclusive and courts are 'not free to replace . . . [that clear language] with an unenacted legislative intent.'") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J. concurring)). There is no merit to any argument that the mining ban "shares a common heritage with [Resolution

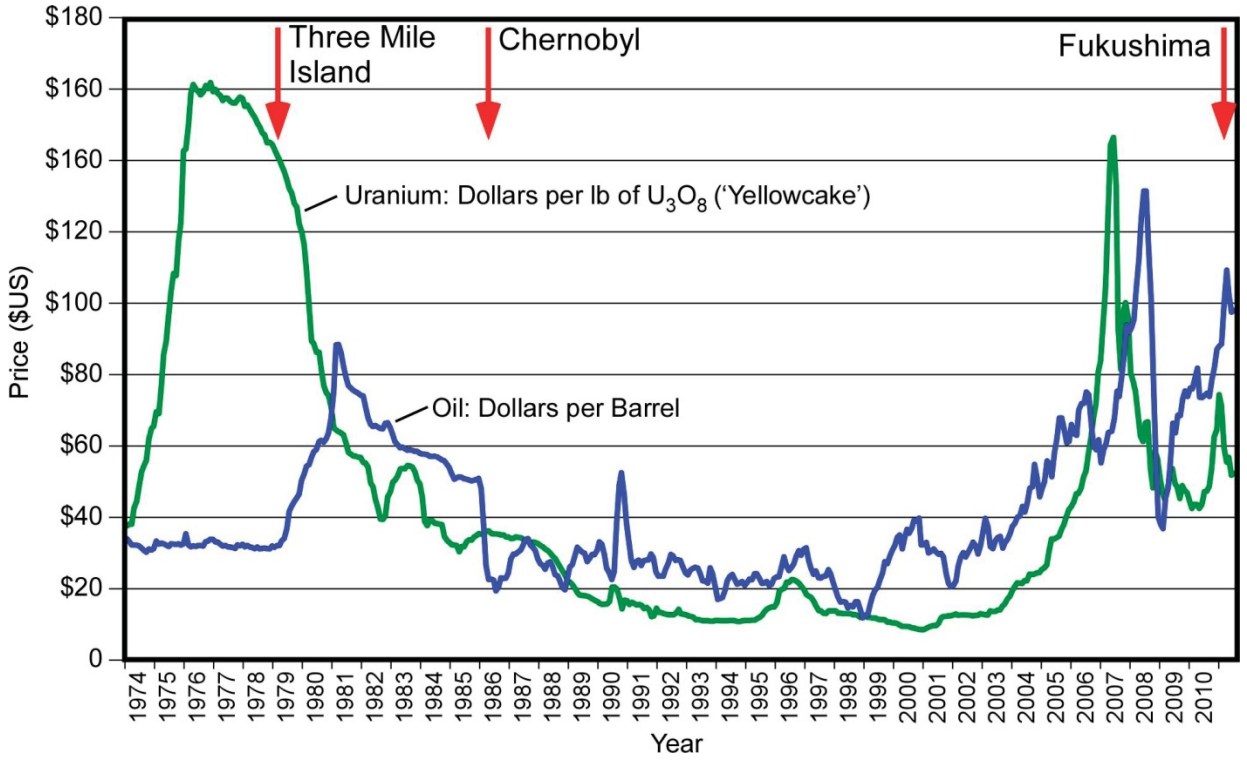
324] and should be presumed to have been enacted for the same purposes." *PG&E*, 461 U.S. at 215–16 (rejecting a similar attempt to conflate challenged law with "other state laws . . . not before the Court.").

Appellants also misrepresent the Uranium Administrative Group ("UAG") and its conclusions. The legislature directed the UAG to "conduct a more in-depth 'evaluation of the costs and benefits' of 'uranium mining and milling activity in the Commonwealth.'" (Compl. ¶ 64, JA 32–33). According to Appellants, the UAG recommended lifting the ban in 1985. (Compl. ¶ 66, JA 33). The UAG was not unanimous, however; Ms. Elizabeth H. Haskell and Mr. Frank E. Wallwork, dissented from the recommendation. (Compl. ¶ 66–67, JA 33–34); (Exh. 16 to Ohlendorf Decl., JA 541, 549–557). After detailing Ms. Haskell's alleged statements on radiological safety, Appellants claim with no evidentiary support that the General Assembly overruled the UAG's recommendation based on her dissent. (Appellants' Br. 12) ("The General Assembly ultimately followed the recommendations of the dissenters . . . ."); (Compl. ¶ 72, JA 35) ("The Assembly adopted Ms. Haskell's recommendation rather than the majority's for the reasons she expressed.").

Appellants' own documents contradict these unsupported conclusions. State Senator John C. Watkins, who sponsored Appellants' legislation, was "a freshman member of the General Assembly in the early 1980s," and "was closely involved in

the decision-making process over whether to allow uranium mining in Virginia." (Exh. 40 to Ohlendorf Decl., JA 669–71.). According to him, "a downturn in the uranium market in the mid-1980s shelved the idea, and a moratorium originally conceived as a temporary measure has remained in place by default for the past 30 years." (*Id.*, JA 669).

Appellants' citation to the National Academy of Sciences report on uranium mining further supports Senator Watkins' statement that economic realities led the General Assembly to abandon efforts in 1985 to revise the moratorium. At that time, the spot price for uranium 'yellowcake,' had fallen from a high of $160 per pound in the late 1970s down to less than $40 per pound by 1984. (Exh. 3 to Ohlendorf Decl. 93, Fig. 3.22, JA 238).



In fact, Mr. Walter Coles, Jr. (Executive Vice President of Appellants Virginia Energy Resources, Inc. and Virginia Uranium, Inc.) has repeatedly stated that the ban exists today, by default, because of economics, not radiological safety concerns. In February 2011, Mr. Coles stated that "unfortunately for us, [in 1984] the price of uranium had declined to the point that Union Carbide had already dropped the project. And so there was no initiative to get the legislation passed in the 1985 legislative session, and that's the way the situation stayed for 25 years until we started our company in 2007." (Attach. C to Br. Amicus Curiae, Dkt. No. 69-3). Likewise, in March 2011, Mr. Coles repeated that economics, not radiological safety concerns, drove Union Carbide and Marline to drop their legislative efforts, which in turn caused the issue to drop off the legislature's radar.

(Attach. D to Br. Amicus Curiae, Dkt. No. 69-4, at 14) ("Basically, [Union Carbide and Marline] thought the price is so low they didn't see any reason to keep spending the money to push their legislative agenda and they were correct because the price stayed low for the next 25 years. It isn't until now that the price is back up to a level where it makes sense to get back in here and start mining."). Nothing in Appellants' evidence supports the fictional conclusion that the General Assembly "adopted" Ms. Haskell's dissent. The General Assembly dropped uranium mining because even the mining companies saw no profit in the process.

Appellants also attempt to salvage their concocted legislative history by citing numerous statements from the late 2000s. (Appellants' Br. 12–18); (Compl. ¶¶ 77–97, JA 36–44). This evidence is irrelevant. Appellants fundamentally misrepresent what happened at the General Assembly in 2013, claiming that the legislature "recently reaffirmed this ban . . . ." (Appellants' Br. 26). Since 1983, the General Assembly has not cast a single vote on the uranium mining ban. VA. CODE § 45.1-283 (no amendment since 1983); *see also* Katherine Slaughter, *Will Uranium Get a Glowing Welcome in Virginia?*, 28 VA. ENVTL. L.J. 483, 489–97 (2010) (discussing Appellants' extensive but failed lobbying efforts to obtain favorable studies and a vote to lift the ban). Appellants cannot seriously convert legislative inaction into legislative intent. *Helvering v. Hallock*, 309 U.S. 106, 120 (1940) ("To explain the cause of non-action by Congress when Congress itself

sheds no light is to venture into speculative unrealities."). This is especially true since most of Appellants' actual evidence derives from statements made by third parties. (*See*, *e.g.*, Appellants' Br. 15–16); (Compl. ¶¶ 79–86, JA 37–40) (citing, among others, local governments such as the City of Virginia Beach and private conservation groups). Preemption cannot hinge on private citizens' personal opinions,[5] and preemption does not apply in this case.

d. None of the cases Appellants cite support their inverted theory of field preemption.

The Supreme Court of the United States has never found a state law preempted under the Atomic Energy Act. *English*, 496 U.S. at 90 (state law claims for intentional infliction of emotional distress not preempted); *Silkwood*, 464 U.S. at 258 (state law tort claims for punitive damages caused by escape of plutonium from federally-licensed nuclear facility not preempted); *PG&E*, 461 U.S. at 222–23 (state law regarding operation of nuclear reactor not preempted). As in those cases, the AEA's preemptive scope does not reach the statute at issue here.

In each of Appellants' cited circuit court cases, the challenged state laws targeted spent nuclear fuel storage facilities or nuclear power plants, *i.e.*, the very activities actually covered by the AEA. Uranium mining is an area of traditional

[5] If it did, Appellants could manufacture legislative history by writing op-eds and letters to editors on uranium mining and then submit those clippings as "proof" of the Commonwealth's motivations.

state control, (Appellants' Br. 34–40), and none of the challenged statutes in these cases targeted uranium mining.

In *Entergy*, a Vermont statute required a nuclear plant to comply with a state permitting process above and beyond the NRC's existing process. *Entergy*, 733 F.3d at 403 (discussing the requirements levied by the Vermont legislature with passage of Act 160). Although the Second Circuit found the AEA preempted that state law, the court's analysis does not support Appellants' preemption theory for several reasons. Most obviously, the Second Circuit noted that the law expressly targeted a nuclear power plant regulated by the NRC. *Entergy*, 733 F.3d at 414. Virginia's moratorium, in contrast, does not target any activity regulated by the NRC, as the district court properly concluded. (Mem. Op. 14, n. 13, JA 910) ("[T]he General Assembly did not extend its traditional authority so as to reach activities subject to the NRC's regulation."). Further, the court in *Entergy* found that the state process would directly and substantially affect plant operators' decisions because they would need to seek additional approval for continued nuclear operations already covered by the AEA. *Entergy*, 733 F.3d at 414–15. With the Virginia statute, there is no such duplication or overlap. Finally, the record in *Entergy* revealed the Vermont legislature's deliberate and surreptitious attempt to avoid preemption under *PG&E*. *Entergy*, 733 F.3d at 416. Appellants do not and cannot argue that the General Assembly phrased the mining ban with such

subversive intent. The General Assembly could not have written the mining ban to skirt *PG&E* because the mining ban predates *PG&E*. Moreover, the Second Circuit properly limited its review of legislative history to records preceding the statute, as opposed to Appellants who implicitly recognize the weakness of their pre-1983 legislative history and attempt to buttress it with statements made decades after the state law was passed.

Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223 (10th Cir. 2004) also fails to support Appellants' preemption claims. There, the Utah legislature targeted a proposed spent nuclear fuel storage facility by regulating the use of roads and municipal services. *Skull Valley*, 376 F.3d at 1245–48, 1251–53. The laws at issue ran afoul of preemption for two reasons, neither of which apply here. First, the laws expressly targeted storage of spent nuclear fuel, which the NRC directly regulates. *Skull Valley*, 376 F.3d at 1252 (the road provisions at issue only applied to those around a proposed spent nuclear storage facility permitted by the NRC). Second, the Utah legislature over-extended their traditional use of the police power over state roads (which Appellants equate to Virginia's traditional police power over mining) to directly and substantially impact the safety decisions regarding how to operate that nuclear facility. *Skull Valley*, 376 F.3d at 1253 (restricting transit options would force nuclear facility operators to use alternate, potentially longer and more hazardous, routes for storage of nuclear power plant

waste). The district court properly distinguished this case for these very reasons. (Mem. Op. 14, n. 13, JA 910) ("The statute [in *Skull* Valley] plainly targeted nuclear-waste facilities and only 'regulate[d] law enforcement and other similar matters as a means of regulating radiological safety hazards."). As discussed above, the uranium mining ban has no direct or substantial impact on the radiological safety decisions at a uranium milling and tailings operation. *Skull Valley* makes clear that, in the absence of any textual intrusion onto a preempted field or any direct and substantial effect on radiological safety decisions, AEA preemption cannot apply.

Similarly, the other court cases that Appellants cite found direct and substantial effects on nuclear plant safety and operation decisions requisite to preemption. *United States v. Manning*, 527 F.3d 828, 840 (9th Cir. 2008) ("Legislation geared to effectively close [nuclear plant] for an extended period of time directly affects the DOE's ability to make decisions"); *Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1112 (3d Cir. 1985) (agreeing with lower court that "the Township ordinances were preempted because they regulate the *operation* of the Oyster Creek nuclear plant and because they are predicated on safety concerns . . . .") (emphasis added); *N. States Power Co. v. Minnesota*, 447 F.2d 1143, 1153 (8th Cir. 1971), *aff'd sub nom. Minnesota v. N. States Power Co.*, 405 U.S. 1035 (1972) ("[R]egulation of the radioactive effluents discharged from a

nuclear power plant is inextricably intertwined with the planning, construction and entire operation of the facility . . . .").

In each of those cases, states intruded into the AEA's field by regulating a nuclear safety decision that was unquestionably under the NRC's direct jurisdiction. Appellants cannot extend these cases to the far more attenuated situation in Virginia on the novel theory that the AEA extends to cover all "downstream activities" – that is, every mundane, state-controlled activity that might have some theoretical impact on availability of ore for processing into nuclear fuel, which in turn would affect the NRC's role in nuclear power generation. Appellants are on especially weak ground given that the AEA explicitly leaves regulation of uranium mining on nonfederal lands in the hands of the States. (*See* Appellants' Br. 41) (NRC "lacks control over conventional uranium mining" under the AEA); (Compl. ¶ 37, JA 24) ("Congress has left safety regulation of the *mining* process to the States . . . .").

II. Appellants' Obstacle Preemption Reading of the Atomic Energy Act Would Render the Atomic Energy Act Unconstitutional On Commandeering Grounds.

In addition to field preemption, Appellants also argue that the AEA preempts the uranium mining ban on "obstacle preemption" grounds. Not only are Appellants wrong, but their theory of obstacle preemption renders the entire AEA unconstitutional on commandeering grounds.

1. Appellants' obstacle preemption theory directly contradicts *PG&E*.

Appellants' theory of obstacle preemption directly contradicts *PG&E*. Appellants' claim follows a connect-the-dots argument that Virginia's law, although facially limited to uranium *mining*, acts as a de facto ban on uranium *milling and tailings management.* (Appellants' Br. at 57) (mining ban also an "*outright ban* on milling and the storage of tailings – for that is both the *purpose* and *effect* of its ban on uranium mining . . . .") (emphasis in original). This alleged "ban" on milling, in turn, impairs the industry's ability to enrich uranium for use as nuclear fuel, which allegedly impacts the availability of fuel for nuclear facilities subject to regulation under the AEA, which in turn frustrates Congress' goal to promote nuclear energy. (Pls.' Summ. J. Br., Dkt. No. 47, at 52) (The ban has "choked off the very *existence* of the federally-regulated "downstream" activities that Congress sought to encourage."). Appellants further argue that one state may not prohibit uranium mining because that would allow all states to do so, which would threaten Congress' goal to promote nuclear power. (Appellants' Br. 56) ("[O]ne need only imagine what would become of Congress's desire to encourage the development and use of uranium if *all 50 states* enacted similar legislation."). It is easy to imagine what would happen – nothing. Nuclear power in the United States simply does not depend on domestic uranium production because "over 90

percent of the uranium used to supply the Nation's atomic energy needs is imported." (Appellants' Br. 3).

Appellants' obstacle preemption theory ignores fundamental aspects of the Supreme Court's *PG&E* holding and utterly fails. While the AEA aims to promote nuclear power, "the promotion of nuclear power is not to be accomplished 'at all costs.'" *PG&E*, 461 U.S. at 222. In fact, states may categorically forbid new nuclear power plants, and "the decision of [a state] to exercise that authority does not, in itself, constitute a basis for preemption." *PG&E*, 461 U.S. at 222. Appellants now claim that such an exercise does constitute a separate basis for preemption. According to Appellants, a uranium mining moratorium, regardless of motive, "flat-out *prohibit[s]* the achievement of one of Congress's 'primary purpose[s]': 'the promotion of nuclear power.'" (Appellants' Br. 55–56) (emphasis in original). Such frustration, they argue, warrants preemption. (Appellants' Br. 56). Under Appellants' obstacle preemption theory, the AEA's preemptive scope is broader when applied to uranium mining than it is when applied directly to construction of nuclear power plants, even though the NRC directly regulates nuclear plant construction and plays no role in uranium mining. This preemption theory leads to an untenable result – where the AEA preserves state authority to completely ban new nuclear power plants but destroys state authority to ban

uranium mining. The AEA's preemptive scope is not nearly so broad, and the mining ban does not frustrate Congressional goals to promote nuclear power.

2. Appellants' obstacle preemption theory violates fundamental principles of commandeering.

Appellants' theory violates commandeering principles. The federal government "'may not compel states to enact or administer a federal regulatory program.'" *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)). Congress may "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 167 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). Appellants' view of the AEA does not offer these choices.

Instead, Appellants essentially argue that by preempting mining bans, regardless of intent, the AEA *requires* uranium mining. (*See* Appellants' Br. 58–59). Appellants' theory creates a regulatory vacuum where the federal government requires an activity but refuses to regulate it. (S*ee* Appellants' Br. 8, 41–42) (noting that the NRC regulates milling and tailings but identifying no federal regulatory framework for uranium mining beyond existential questions about mining metaphysics). Such a vacuum violates *New York v. United States* and improperly commandeers state legislative authority. *New York*, 505 U.S. at 188.

The federal government's absence from the field forces Virginia to incur significant costs and risks. Although Appellants claim mining might generate "$4.8 billion of net revenue for Virginia businesses" (Compl. ¶ 27, JA 21), the source of that claim also found that in a worse-case scenario, "the net loss [to Virginia's economy] would top $10.3 billion to Virginia."[6] Facing a potential $10.3 billion loss, the Commonwealth may determine the costs of developing uranium mining regulations, administering permits, and enforcing the program are too great and may therefore choose not to impose those costs on state taxpayers by prohibiting uranium mining on nonfederal lands.

The Constitution does not authorize Congress to impose such costs, *New York*, 505 U.S. at 188, and this Court should avoid such a reading. *Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005) ("when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail"). Appellants' theory directly violates the anti-commandeering principles of cooperative federalism[7].

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[6] Chmura Economics & Analytics, Prepared for Virginia Coal and Energy Commission, "The Socioeconomic Impact of Uranium Mining and Milling in the Chatham Labor Shed, Virginia," at 149 (Nov. 29, 2011) (the "Chmura Study"), *available at* http://lis.virginia.gov/111/oth/Uranium.120611.pdf (*last visited* Apr. 21, 2016).

[7] If Congress had wanted to compel states to permit uranium mines on private lands, it could have and would have done so. *See, e.g.*, *Virginia v. Browner*, 80

CONCLUSION

The Atomic Energy Act does not preempt Virginia's mining ban. The ban's text demonstrates the legislature's limited intention to suspend uranium mining on private lands. Likewise, the ban only affects uranium mining and creates no legal impediment to uranium milling and tailings management. Appellants' preemption claim fails because it relies on an unsupported version of legislative history and alleged theory of state politics and motivations, and it improperly equates uranium mining with uranium milling and tailings storage.

Appellants further claim the AEA's preemptive scope is greater over uranium mining than it is over nuclear power plant construction, even though the NRC directly regulates nuclear power plants and has no regulations for uranium mining on nonfederal lands. Taken to its logical conclusion, Appellants' obstacle preemption theory also renders the AEA unconstitutional by requiring states like Virginia to regulate uranium mining to provide ore for "federally-regulated downstream activities." (Pls.' Summ. J. Br., Dkt. No. 47, at 52). This reading violates anti-commandeering principles. For the foregoing reasons, the Basin Association Amici respectfully request that this Court affirm the holding of the United States District Court for the Western District of Virginia granting the

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F.3d 869, 882 (4th Cir. 1996) (upholding portions of the federal Clean Air Act because "Virginia [was] not commanded to regulate; the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia.").

Commonwealth's motion to dismiss and denying Appellants' motion for summary judgment.

April 25, 2016

s/ William C. Cleveland

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April 25, 2016

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COUNSEL FOR: Roanoke River Basin Association and Dan River Basin Association

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