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NUCLEAR REGULATORY COMMISSION

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33RD REGULATORY INFORMATION CONFERENCE (RIC)

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TECHNICAL SESSION - W21

VIRGINIA URANIUM v. WARREN: WHAT THE SUPREME COURT'S DECISION MEANS FOR INTERIM STORAGE, YUCCA MOUNTAIN, AND REACTORS

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WEDNESDAY,

MARCH 10, 2021

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The technical session convened via Video Teleconference, at 1:30 p.m. EST, Judge William Froehlich, Co-Chair, presiding.

PRESENT:

WILLIAM FROEHLICH, Administrative Judge, Atomic Safety & Licensing Board Panel, NRC

ANDREW AVERBACH, Solicitor, Office of the General Counsel, NRC

CALE JAFFE, Associate Professor, University of Virginia School of Law

JAY SILBERG, Pillsbury Winthrop Shaw Pittman

P R O C E E D I N G S

(1:34 p.m.)

JUDGE FROEHLICH: Good afternoon. Welcome to the 2021 Regulatory Information Conference, RIC. This is session W-21, sponsored by the ASLBP, and is entitled Virginia Uranium v. Warren: What the Supreme Court's Decision Means for Interim Storage, Yucca Mountain, and Reactors.

This session has been in the planning stage for over a year. It was originally scheduled to be part of the 2020 RIC, which was cancelled because of the COVID-19 global pandemic. While part of me wishes that this session could be in-person, I am thankful that each of you have elected to attend this virtual session.

On June 17, 2019, the U.S. Supreme Court issued a decision in Virginia Uranium v. Warren. The case involved a landowner's challenge to the State of Virginia's ban on uranium mining on private land.

The United States, including the NRC, submitted an amicus brief asserting that, if Virginia Uranium's allegations concerning the motivation for the ban were true, the ban constituted an improper

attempt to regulate activities that are preempted by the Atomic Energy Act of 1954, as amended, namely uranium milling and tailings management, that are either within the sole province of the NRC or can only be regulated pursuant to Agreement State authority.

In two separate opinions each signed by three members of the Supreme Court, six Justices concluded the Virginia ban was not preempted by the Atomic Energy Act.

Each of the three panelists participated in the argument or briefing before the Court. The panelists will discuss the impact of the Court's recent decision and what it means to potential conflicts between state sovereignty in the regulation of public safety and the NRC's exclusive authority to protect the public from radiological hazards. All areas of Atomic Energy Act preemption, including high-level waste, interim storage, permanent disposal, and reactors, could be affected.

Our panelists will discuss the reasoning and implications of the three perspectives in the Court's opinion. We will hear an analysis of Justice Gorsuch's lead opinion for a three-Justice plurality -- Gorsuch, Kavanaugh, and Thomas -- that takes a

fairly standard textualist approach to the controversy, noting that, invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law.

Simply put, the lead opinion holds that since mining regulation is not within the NRC's authority, the State of Virginia's purpose in enacting its ban was not relevant to the preemption analysis.

Justice Ginsburg, in a separate three-Justice concurrence -- Ginsburg, Sotomayor, and Kagan -- states that without gainsaying that it sometimes may be appropriate to inquire into the purpose for which a state law was enacted, this case requires no such inquiry. Only AEA-regulated activities trigger a legislative purpose analysis.

Chief Justice Roberts, joined by Justices Breyer and Alito, authored a dissenting opinion. The dissent seems to adopt the arguments made by the Solicitor General. The dissent argues that the courts cannot simply take the label that a State affixes to its regulations at face value, but must determine the

true legislative purpose.

I'm going to leave it to our three distinguished panelists to give you a fuller analysis and their impressions of how future courts may apply this important preemption decision of the Supreme Court.

First, we'll hear from Andrew Averbach. Andrew was on the brief for the United States as amicus curiae supporting the petitioners, Virginia Uranium. Andrew Averbach has been the NRC Solicitor since 2012. He came to the NRC from the Commercial Branch of the Civil Division, U.S. Department of Justice. Before joining the Department of Justice, he was in private practice for several years after clerking for United States District Judge Joseph DiClerico.

Then we'll hear from Jay Silberg. Jay Silberg is a partner at Pillsbury Winthrop Shaw Pittman, LLP, and was counsel of record and on brief of amici curiae for the former nuclear regulators in support of the petitioners, Virginia Uranium. Mr. Silberg is a highly regarded nuclear practitioner who advises on all aspects of nuclear law, including licensing, tribal and appellate litigation, merger and

acquisition and contracting, policy development, and compliance. He represents electric utilities and utility groups, government entities, nuclear energy and consulting firms, and other industry players.

Finally, we'll hear from Cale Jaffe, Associate Professor and Director of the Environmental Law and Community Engagement Clinic, University of Virginia School of Law. Professor Jaffe was counsel of record and on the brief of amicus curiae in support of the respondents, John Warren, et al., for members of the Southern Virginia Delegation for the Virginia General Assembly, the local Chambers of Commerce, Civic, Trade, and Economic Development Associations, and Municipalities in the area near the Coles Hill uranium deposit in Pittsylvania County and surrounding communities.

Prior to joining the faculty at the University of Virginia, Professor Jaffe was an attorney with the Southern Environmental Law Center. Professor Jaffe graduated from Yale University with a B.A. in American Studies. He earned his J.D. and M.A. in legal history from the University of Virginia.

Please feel free to submit your questions, any questions you might have for any of our three

panelists as we go along. We'll keep them in hand and at the end of the presentations, we'll ask your questions of our panelists.

So without further ado, I'll turn this over to our first speaker, presenter, Solicitor Andrew Averbach. Thank you.

MR. AVERBACH: Thank you, Judge Froehlich. And it's nice to be here today. As I'll discuss, I had a role in helping to formulate the position of the United States and the NRC as expressed to the Supreme Court in the Virginia Uranium case.

However, I should note as a sort of a garden variety disclaimer, that the views I'll express today are solely my own.

The case presents with an interesting issue and one that I've been watching and working on for really more than ten years, including in my work as Judge Froehlich mentioned, in a prior life at the Department of Justice where I litigated preemption issues or what I'll call at least preemption-adjacent issues against Jay Silberg, who you'll hear from today.

So it'll be interesting to get both his perspective as well as Professor Jaffe's perspective

on the case. And there were some principles that come forward in the case that I think one might typically would be associated with liberals or conservatives or the liberal/conservative block.

And by that I mean things like states' rights or textualism or things like that. But there's actually quite a good amount of strange bedfellows here in some of the opinions and some kind of topsy-turvy alliances.

So it makes for one of the more interesting cases to come out from the Supreme Court in a while. And it's truly a question the federal courts and administrative law geeks can love.

And its implications have, I think, in large part really have yet to be determined. So for that reason I'm looking forward to hearing my colleagues takes.

Just a brief background of the case, a little bit further than what Judge Froehlich could provide it.

The case started in 2015 as a challenge to a Virginia statute. And without getting too far into the weeds, the statute effectively banned conventional, so-called conventional uranium mining in

Virginia, which, and this is sort of the critical point of the case, is something that the NRC does not regulate.

And I'll distinguish conventional uranium mining from so-called in situ recovery, which is a different form of mining, I guess you can call it. But that's something that the NRC does regulate.

And I'll note that that in situ technology wasn't available for the landowner in Virginia Uranium. So Virginia Uranium, the company who owned this piece of property in Virginia, which actually had more uranium in it, the largest, it's actually the largest uranium deposit in the United States, was effectively foreclosed from mining on its property.

So not surprisingly, Virginia Uranium wasn't happy about the situation and raised a preemption challenge in federal court asserting that Virginia's ban was motivated by concerns in particular, radiological concerns attributable not so much to uranium mining, but instead to uranium milling and its management of mill tailings, which are activities that the NRC does regulate.

And Virginia Uranium asserted, among other things, that Virginia was using its control over

uranium mining to regulate and to effectively ban milling and tailings management activities within the state of Virginia due to the state's perceived concern about the radiological hazards of milling uranium and managing tailings.

And so that's sort of the general thrust of Virginia Uranium's case. With that I'll provide a little summary about some general preemption principles at least as they existed prior to the decision.

The notion of preemption dates back to the early days of the Atomic Energy Act when atomic technology was employed by the federal government for defense purposes and was later extended to foster the use of nuclear energy to produce electricity.

And the federal monopoly over atomic energy was loosened to some extent in 1959 when Congress created the Agreement State Program, which as most of you probably know permitted states to regulate certain activities that had otherwise been reserved to the federal government.

And as part of the 1959 amendment to the AEA, Congress enacted a somewhat cryptic provision, which has formed the basis for a lot of the preemption

case law that followed.

And that provision, which is set forth at 42 U.S.C. 2021(k), said that nothing in the section of the AEA, that's Section 274 of the AEA that created the Agreement State Program, shall be construed to affect the authority of any state or local agency to regulate activities for purposes, important word, purposes other than protection against radiation hazards.

And that language indicates that purpose is relevant to determining what states can and cannot do and that notion served to really undergird the understanding of preemption that existed from 1980s until, as I said, the decision in Virginia Uranium.

And essentially, the balance that was struck was that states could regulate NRC licensees with respect to non-nuclear issues, if one thinks for example of minimum wage laws or anti-discrimination laws, but to the extent that the states were concerned with radiation hazards, they had to step aside in favor of the federal government.

And this came to be understood as a variety of so-called field preemption, meaning that aside from the Agreement State Program, Congress had

preempted the field of state regulation where the state regulation was motivated by concerns about radiation hazards.

So, in this particular case, Virginia Uranium made arguments based on the reading of the AEA, the Atomic Energy Act contained in the Supreme Court's decision in Pacific Gas as well as the Tenth Circuit's decision in Skull Valley.

And those decisions generally stood for the notion that when the states act, when a state acts pursuant to its authority in spheres over which it has jurisdiction, whether it's roads or regulations of police and fire services or of rate-making, its actions can still be preempted under the AEA as it's so-called bill reason that it was acting. Was that it was a concern about radiological dangers arising from NRC-regulated activity.

So in PG&E, the Supreme Court found no preemption when, after going through an examination of the legislative history behind a California statute, it determined that there was a plausible economic reason for California's ban on a construction of new nuclear power plants when a reason that didn't have to do with nuclear safety.

Similarly, in Skull Valley, the Tenth Circuit overturned laws, a series of laws that had been enacted by the state of Utah pursuant to the statutory authority over roads, services, and corporate structure. None of which, of course, are regulated by the NRC, even though all of those statutory enactments have the effect of preventing the operation of NRC-licensed spent fuel storage facility.

And there was much in the way of legislative history in the Skull Valley case and statements from the Governor and the like, indicating that the predominant reason and really the only reason that the state had enacted those restrictions was to prevent the proposed private fuel storage facility from operating.

And I'll turn back to the Skull Valley decision at the end of my presentation, but I think it's fair to say that many people, if not most people, were comfortable with the result of the case as it was pretty clear that one way or another, Utah was overstepping its bounds and interfering with something that the federal government had the sole authority to license.

And the Supreme Court denied cert after

the government essentially made those arguments when it participated in an amicus in the case.

So turning back to Virginia Uranium, as Judge Froehlich mentioned, the District Court and the Court of Appeals both rejected the preemption challenge and dismissed the case ruling that, because Virginia was regulating something, in this case conventional mining that the NRC did not regulate, then therefore there was no need to look further into the state's motivation.

This was true, as I said, if the Court held even if one assumed that the real reason for the mining ban was a concern for downstream activities such as milling or tailings management that the NRC did in fact regulate.

Virginia Uranium sought cert and the Court sought the views of the Solicitor General and we, as the NRC, have been watching the case and worked with the Solicitor General's Office to prepare a response.

And the thrust of the United States' argument, and this was largely consistent with what Virginia Uranium itself argued was that assuming that the allegations about Virginia's motives were true, the mining ban would in fact be preempted.

And I'll pause to note that we indulged Virginia Uranium's allegation about the true motive for the mining ban. And rather than evaluating the evidence offered in support of it or trying to get into this sort of thorny question about how to measure what the intent of a legislative body is, we simply assumed, consistent with the posture of the case, which was decided on a 12(b)(6) motion, that Virginia Uranium's allegations about the, well, the Virginia legislature's motives were true.

In the view of the United States, it didn't matter that the mining was something that the NRC didn't regulate, rather the United States analogized the mining to the roads in Skull Valley calling it a choke point or, you know, a point that the states could focus on to get at the activities that the NRC does regulate, namely milling and tailings management.

So the good news, when the decision came out, was that, you know, from the perspective of the United States, was that Justices from across the ideological spectrum agreed with us.

This went from Alito on the right all the way to Breyer on the left, with Chief Justice Roberts

in the middle. The bad news from the perspective of the United States was that there were only three justices who agreed with us or with Virginia Uranium.

In other words, six justices agreed with us. And as Judge Froehlich mentioned, there were two sets of three who each prepared an opinion supporting or affirming the decision of both the District Court and the Fourth Circuit.

The first one was written by Justice Gorsuch and I pause to note that that opinion was labeled as the judgment of the Court.

And I want to sort of take, I want to just make sure that people understand that that decision, just because it was labeled as the judgment of the Court, doesn't have a specific authority or relevance beyond the other three-judge opinion written by Justice Ginsburg.

It's just simply that Justice Thomas, who was the senior member of the Court who joined the majority, or who voted in that particular way, assigned opinion-writing responsibilities to Justice Gorsuch.

So you have two opinions, one of which is labeled the judgment of the Court, the other one is

labeled as concurrence. But really there are three equal, I'm sorry, two equal decisions.

And focusing on the text of Section 2021, both the so-called lead opinion and the concurrence concluded that the motives inquiry, that we heard about in Pacific Gas and that was extended in Skull Valley, is only appropriate when the activity being regulated is itself regulated by the NRC.

Stated differently, it means that states can regulate non-NRC-regulated activities for any purpose. So that's what the two majority opinions concluded.

And now, it's a question of, well, what do you do when you don't have an opinion that garners a majority of the Court, and what exactly is the holding of the case? And the short answer is it's a little bit of a mess, but under established Supreme Court case law, one gets the holding by identifying the narrowest proposition of law that a majority of Justices agreed to that are essential to the Court's resolution of the case.

And here that idea would be that, well, a statute is not preempted under a field preemption theory when it regulates conduct that the NRC itself

does not regulate.

So that's it, right? We're done and the case is easy here. If the states regulating something that the NRC doesn't regulate, there's no preemption, right? Well, I don't think that's quite right. And I think this is really the nub of the issues we'll be talking about today.

Because I think if it were right, we'd have seen six justices rather than three who signed on to a single majority opinion. And I think there's a good bit of daylight between the Gorsuch and Ginsburg opinions.

And it's the existence of that daylight that suggest to me that preemption arguments can still be made when states use their authority to restrict the activities of NRC licensees.

Now, to be clear I don't want to suggest the Court agreed with the position of the United States and the NRC, and clearly Virginia Uranium lost the case.

But the question is whether it lost big or whether it lost small or somewhere in between, and I would suggest that we're either in this sort of somewhere in between land or at least that the

decision really isn't all that conclusive.

So, post-Virginia Uranium, when can preemption claims be made? I think the answer to that question is that there are three primary lessons to be drawn from that case.

The first lesson is that, well, there are still cases where motive is going to be relevant. And so two points about that. First, the obvious point, when a state is directly regulating something that the NRC regulates, well then motive continues to be relevant.

When the state is doing something like regulating or eliminating the number of casks that can be loaded on to an ISFSI pad, it's certainly inferable that it has done so on the basis of a perceived radiological hazard.

And I think it's saying that -- and I think it's fair to say that in those circumstances that the field preemption claim will still exist. It might not require a great deal of inquiry into legislative history, but a finding of field preemption will still be available under those circumstances.

But there's more to it than that and more to it than just an obvious claim. It seems to be a

zone of cases where those joining Justice Ginsburg's opinion together with the three dissenters, would still be willing to apply the Pacific Gas test and inquire into legislative motive.

Whereas, Justice Gorsuch appears not to go into that inquiry at all. In fact, I think if Justice Gorsuch had his way it's pretty clear that he would throw out Pacific Gas altogether.

But Justice Ginsburg, like the dissenters, seemed to think that it was okay for the PG&E court to address the issue of motivation. And she wrote in her opinion, and I'm quoting here, it is unsurprising that the PG&E court asked why the California law had been enacted.

The state's law addressed construction of a nuclear power plant, she wrote, an activity closely regulated by the federal government for purposes of -- nuclear safety purposes.

That's sort of an interesting sentence there. Because it's not really quite right to say that the law at issue in PG&E, quote, addressed construction.

In fact, what was at issue in PG&E, there wasn't the nuts and bolts of how a plant can be

constructed, but instead the case addressed whether ratepayer funds could be used for such construction.

And the decision in PG&E expressly stated, expressly stated that we emphasize that the statute does not seek to regulate the construction or operation of a nuclear power plant. And the Court went on to say that if it did, it would have been clearly preempted.

So what did Justice Ginsburg mean when she said that it was okay to look at motive because the law at issue in PG&E addressed construction? Well, a couple possible theories as to why she might have been comfortable with looking at motive in that kind of case.

First, legislative decisions that are close to the core function of the NRC need to be scrutinized for their motives. Indeed there are portions of the Gorsuch opinion that talk about how what happened in PG&E -- quite close to what the NRC's core mission is all about.

And I note, in this regard, that the Court certainly bought into the idea that even if it's not really supported by the statutory text, that regulating nuclear reactors is sort of at the apex of

-- the central focus of the NRC's authority. And everything else is somewhat ancillary to that.

The second point I'd make is that legislative decisions that single out nuclear facilities or nuclear licensees, and in particular nuclear power plants for special treatment, still need to be scrutinized for their motives.

Indeed Justice Ginsburg distinguished PG&E on the ground that, in her view, the ban in Virginia Uranium did not, using her words, target a state-regulated activity.

And exactly what this means isn't clear. But, you know, what if the state had said that you couldn't drive more than five miles an hour within a thousand feet of a nuclear power plant?

Certainly, that kind of statute would bring operations at the power plant to a standstill. Would it still be appropriate to look into motive in these circumstances? I think those who joined Justice Ginsburg's opinion might think so.

And it explains why they didn't join the Gorsuch opinion. At a minimum, it explains why their decisions in cases such as Entergy Nuclear Vermont Yankee, which addressed provisions of state law that

placed limitations on things that reactor licensees can do, are likely to be subjected to a field preemption analysis in the future and specifically, to draw questions about what the motivation behind a particular piece of legislation might have been.

Okay. So the first takeaway is that motive isn't necessarily dead; long live motive. A second lesson from the case is that the case didn't implicate the so-called effects test that is set forth in the English v. General Electric case, which was decided seven or eight years after PG&E.

And I think that it's still even the case that even after the decision in Virginia Uranium, preemption cases can still be brought under an effect's theory.

And just as a little bit of background, the English case involved the question of whether or not a state's tort law, in particular an intentional infliction of emotional distress claim, brought by a nuclear facility employee who was terminated for whistleblowing, was preempted.

And the Supreme Court ultimately declined to find preemption, finding that application of state tort law principles wouldn't have enough of an impact

on people who make decisions about how to build or operate nuclear facilities to sustain a preemption claim.

But the Court still left open the possibility, which I think was subsequently untouched in the Virginia Uranium case, of state legislation that would more than tangentially affect decision-making at a nuclear plant being preempted.

And I venture to say that some of the recent legislative efforts to tax the storage of spent nuclear fuel, to the extent that those taxes become sufficiently large, might fall into this category.

And for those who don't know, what I'm thinking on specifically is legislation enacted by the state of New York, which recently there's been legislation from state of New York, which decided that the value of the storage -- the value of the spent fuel storage facility should be included in the value of property for purposes of calculating level of taxes, as if the spent fuel storage facility was like a tennis court or a swimming pool or something that added value to the property.

And, you know, the question comes up, well, what if this additional value in the tax base

increases the licensee's tax bill by tens of millions of dollars?

Or what if, as a condition of storing spent fuel pursuant to an NRC license, licensees were forced to contribute money to states to invest in renewable energy, for example?

Certainly arguments can be made that the effect of these requirements -- or that these requirements might cause decision makers at a power plant to go about their business differently, to make decision differently about how to store spent fuel. Maybe where to ship it or something like that?

I don't see anything in Virginia Uranium that would preclude a finding of preemption based on this theory and that theory supported by the English case in the Supreme Court. So that's point two.

The third point I'd like to make, and it kind of underscores how many of these preemption documents are somewhat interrelated, is that, unlike Justice Gorsuch, Justice Ginsburg did not buy into the idea that a preemption petitioner could not win under the conflict preemption theory.

And she did not agree with Justice Gorsuch's apparent belief that interference with the

federal prerogative to build nuclear facilities set forth in the Atomic Energy Act could never support a finding of preemption.

She simply found that to the extent that the interference in this case wasn't great enough here to sustain an obstacle preemption theory. And that leaves open the possibilities that there are other ways of hindering efforts to exercise federally prevented license from (audio interference) being preempted.

So while simply alleging that well, a particular restriction generally interferes with Congress' express desire that nuclear facilities be permitted to operate, you know, without any restriction, I don't think that will ever sustain a preemption claim.

But I think that there are still theories under which a financially significant obstacle placed by a state to the operation of a nuclear power plant still could gain support under a conflict preemptive theory.

So I know my time is running up. I'll just sort of wrap up by saying that perhaps a helpful way to look at all this is to ask the question of

whether post-Virginia Uranium, the decision in Skull Valley was correct.

And, as I mentioned earlier, I think the popular view out there is that Skull Valley was properly decided and sort of I can't necessarily define preemption, but I know it when I see it kind of way.

And I would submit to you that the plaintiff in Skull Valley could still sustain a preemption claim even today, after the decision in Virginia Uranium.

Three quick points about that. First, that case involved the targeting of nuclear facilities. Indeed, by affirming the Fourth Circuit's decision, the Court effectively endorsed the Court of Appeals attempt to distinguish Skull Valley, addressed it on this very ground about targeting.

The Fourth Circuit characterized the statutes in Skull Valley as a surgical targeting of the storage and transportation of spent fuel, and I would submit that a series of laws that are directed at nuclear facilities, such as what was at issue in Skull Valley or in Entergy Nuclear, would still be preemptive under a field preemption theory.

The second point, there's much in the Skull Valley decision that rests on the English conception of preemption, which, as I said, was untouched by the decision in Virginia Uranium.

This includes provisions concerning the construction of roads and things like that where the Court specifically said you know what, there's too much of an effect here on the decisions that the licensees have to make about how to operate their plants. So I think that's a second reason why the decision in Skull Valley would stand.

And finally, the same is true for conflict preemption principals as well. In Skull Valley, the Court specifically found that some of the statutes at issue conflicted with the objectives of federal law, including provisions concerning unfunded liabilities of the facility and the abolition of limited liability for directors of the facility.

This would suggest to me that regardless of whatever nuggets one could isolate in the Skull Valley case, from either the governor or the state or the legislature as debate about how the legislation came up, it would still be possible to win on a conflict preemption theory if the facts of Skull

Valley came up again.

So that's my spiel. I'd be happy to answer your questions afterward, and I look forward to hearing the comments of my fellow panelists. Thank you.

JUDGE FROEHLICH: Thank you very much, Andrew. We'll hear next from Jay Silberg.

MR. SILBERG: Thank you, Judge Froehlich. Let me take a step back and go back to first principles.

In the late 1960s the state of Minnesota sought to impose limits on radioactive releases from Northern States Power Company's Monticello Nuclear Plant, limits that were stricter than the ones being imposed by the NRC's predecessor, the Atomic Energy Commission.

Starting with the constitutional principle that federal statutes were the supreme law of the land, and that state laws to the contrary notwithstanding, the Eighth Circuit's majority agreed with the District Court and ruled under the Atomic Energy Act that the federal government had the sole authority to regulate radiation hazards associated with radiological materials and production utilization

facilities, the last of those including nuclear power plants.

In the context of the state regulations thereunder challenged, the Court ruled that federal law preempted the field with respect to the construction and operation of nuclear reactors.

In a little remembered dissent, Judge Osterhout disagreed, finding that there was no express preemption in the Atomic Energy Act or in its legislative history and noted that Congress could have included an express preemption, had it chosen to do so, but it didn't.

The Supreme Court affirmed, perhaps unfortunately without an opinion. Since that decision, the Supreme Court has waded into the nuclear preemption waters a number of times, but has unfortunately left them murkier every time they do so.

Virginia Uranium, the Supreme Court's most recent foray, has done little to clarify the state of nuclear preemption. The Court took on the Virginia Uranium case to resolve the division of authority that it saw between the Fourth Circuit Virginia Uranium decision and the Tenth Circuit's Skull Valley ruling.

The Supreme Court affirmed the Fourth

Circuit judgment, but as a court, did little else. The Court's three splintered opinions did nothing to resolve the disagreements between the Fourth and Tenth Circuit, at least in my view, or, for that matter, with the Second Circuit's recent decision in Entergy Nuclear Vermont Yankee.

I'm sure that Professor Jaffe and as you just heard Solicitor Averbach will have little difficulty in parsing the Court's tri-part decision, but on a more practical level, I don't expect that Virginia Uranium is going to make providing the advice we give to clients any easier.

It's easy to read parts of the Virginia Uranium as a setback, giving us, at the end of the day, less clarity and not more. Judge Gorsuch's opinion speaks in less than glowing terms of the Court's Pacific Gas decision usually considered the seminal decision on federal nuclear preemption.

In the opinion, he describes Pacific Gas as a quote, doubtful extension of a questionable judicial gloss. In another place, a significant intrusion into states sovereignty and a significant judicial intrusion into Congress's authority to delimit the preemptive effects of its laws.

And that doesn't sound like a glowing endorsement to me. Similarly, referring to the basis of federal preemption and some brooding federal interest or appealing to a judicial preference, seems to tip Justice Gorsuch's hand as to how he really feels about federal preemption.

And his opinion's requirement that the litigant must point specifically to constitutional text or a federal statute that does the displacing or conflicts to state law harkens back to Judge Osterhout's decision in the Eighth Circuit, Judge Osterhout's dissent in the Eighth Circuit's decision in 1979 in Northern States.

As for Justice Gorsuch's discussion of the risks of examining the purpose underlying state laws that are attacked that they grant, stifling deliberation in state legislatures, exhort to secrecy and subterfuge, looking for hidden legislative wishes.

One need only look at what the legislatures were trying to accomplish in those cases like Skull Valley and Entergy Nuclear Vermont Yankee and how the states tried to disguise what they were really up to.

Urging that the words safety and public

health not be spoken in legislative debates or arguing that a two-billion-dollar cash bond established by the state of Utah and criminalizing nuclear rated contract somehow were not intended to interfere with constructing or operating the nuclear facility at large. And were not based on, ultimately, nuclear hazards associated with that facility.

Allowing legislative purpose to remain unexamined makes it easy for any clever state legislature to be able to dodge the claim of nuclear preemption by clever disguise.

And while Justice Gorsuch's opinion warns of the dangers of inquiring into the legislative purposes, section 274(k) of the Atomic Energy Act and drawing the line between federal and state responsibilities, draws the line for permissible state activities based on purposes other than protection against radiation hazards.

The purposes test should be at the heart of the input. And we can turn to Justice Ginsburg's concurrence. The concurrence apparently seeks to stake out an intermediate position or perhaps finding herself between Justice Gorsuch's rock and the Chief Justice's hard place.

It wasn't clear to me how it was decided that Justice Ginsburg would concur the judgement rather than Justice Gorsuch concurring the judgments. Perhaps it's Justice Thomas' senior status that tilted the ballots.

Justice Ginsburg, in any event, seemed willing to concede that there is federal preemption of at least some state statutes enacted to guard against nuclear hazards.

Contrast this to her characterization of a dissent as preempting all state laws motivated by radiation hazards concern. So even if a state law were to guard against nuclear hazards, in her language, Justice Ginsburg's concurrence suggests that such a finding isn't enough in and of itself to trigger preemption.

To me, a step back. The concurrence would also concede that it may sometimes be appropriate to inquire into purpose, but only sometimes.

The suggestion seems to be that an inquiry into purpose is allowed when the activity is one that is quote, closely related to the federal government for nuclear safety purposes closely regulated by the federal government for nuclear safety purposes.

Referring to the PG&E examination of the purpose underlying California's moratorium on construction of new nuclear plants. But that such an inquiry into purpose is not allowed where the state is using a ban on activities not regulated by the federal government to prohibit, on nuclear safety grounds, activities that are closely regulated by the federal government as in the case of Virginia Uranium.

The concurrence essentially sidesteps the question of how to deal with pretext legislation. Arguably, the case in Virginia Uranium, as well as other states.

When a state is charged with having banned conventional uranium mining subject to unchallenged state authority as a pretext to prohibit NRC regulated uranium milling and tailing storage.

Since the mining is not an activity closely regulated by the federal government, indeed it's not regulated at all, and the concurrence construction would bar a purposes inquiry as to whether the states real intent was to indirectly prohibit, on radiation safety grounds, an activity that was closely regulated by the federal government.

Although the concurrence points to Section

274(k) of the Atomic Energy Act as setting the boundaries for preemption inquiry, the boundary which the concurrent says it has no license to expand, nowhere in that provision is the state given a free pass to do indirectly what it cannot do directly.

Talk a little bit about the two justices' dissent. It doesn't give much credence to the attempts in both of the other opinions to strike from our Atomic Energy Act precedence particularly Pacific Gas.

By characterizing the Act as prohibiting state laws that have a purpose and effect of regulating preempt appeals, the dissent jumps over the pretext problem as long as the purpose and effects test is met.

The response to the concerns that a purposes inquiry would invite the search or quote, hidden legislative wishes, stifling deliberation in state legislatures and led to a search for quote, unenacted purposes and objectives, the Chief Justice argues that ignoring the purposes underlying the state law invites evasion, would make a mockery of the federal preemption provisions.

Certainly, puts a premium on clever state

legislatures. And where do we go from here? The unusual, perhaps unique three-to-three-to-three split raises the question of what happens next?

We're already dealing with a new Court. What will Honorable Justice Barrett do, which of the three sides would she join if she had the opportunity?

One might assume that it would not be to join Justice Kagan and Sotomayor, but who knows. Meanwhile, what will District Courts and the Courts of Appeals do if faced with a nuclear preemption case?

What do we advise our clients if faced with an arguably preemptable state regulation or statute or order?

While pretense, pretext and assumption, well, while pretext preemption cases would be the most interesting state legislatures got to be very creative, run of the mill preemption doctors have never, actions have never gone away.

Since Northern States Power, states and state agencies will sometimes take the direct path and simply seek to impose their own radiation or nuclear safety standards on nuclear activities.

We have such a case in our firm today. Some of these attempts get challenged, usually with

predictable results. In other cases, the clients may apply their small p, political judgement, and defer a preemption challenge.

They reason that there are many other issues between them and the state agencies and they need to pick their battles carefully and judiciously.

Going along with a state's requirements may be preferable to litigating the in-state agency that has so many other opportunities to inflict pain.

And I don't see any principle reason why simple preemption challenges and straight-forward state radiation and nuclear safety requirements should be affected by Virginia Uranium.

These cases don't require the inquiry into legislative purpose, that so troubled the Gorsuch opinion.

And although the Gorsuch opinion certainly carries with it more than a hint of dislike for Atomic Energy Act based preemption, I don't see the basis for a different outcome on a straight-forward nuclear preemption case.

For a pretext preemption case, the challenges will depend on how clever the state legislatures or state regulators are in putting

forward their requirements.

Many cannot resist the temptation to clearly say that their concern lies with the nuclear risk allowed by NRC regulations and licensing.

Others may be more or less clever in dressing up their underlying concern with nuclear risk in the clothes of an economic or other justification.

Predicting the outcome of a pretext preemption challenge may well vary between judge and court, and will probably be somewhere between an educated guess and an educated guess.

But for the trial in the appellate courts, they will find much in Virginia Uranium to buttress their views regardless of what their views may be.

With this level of uncertainty and the high stakes that may often be involved, clients may find it difficult not to challenge a state or state agency. Other than when considering the small p, political considerations that I just mentioned.

In conclusion, the state of Virginia and Virginia Uranium together with many amici, no doubt hope that the Supreme Court would bring clarity to federal preemption applied to things nuclear.

But such was not to be the case. The

Supreme Court marshalled six votes to affirm the Fourth Circuit judgment, but little else found agreement for more than three votes.

The door remains open for challenges with little new guidance and no resolution. So stay tuned. Thanks very much and appreciate any questions.

JUDGE FROEHLICH: Thank you, Mr. Silberg.

We had some questions, I have them streaming in, but I think we'll hold them till the end. I'd like to take now to hear from Professor Jaffe and then we'll go to questions. Thank you.

Professor Jaffe.

MR. JAFFE: All right. Thank you very much. And I will endeavor to sort of stay on, keep us on time so we can get to many of those questions as possible.

So I actually think, I disagree a little bit with both of my panelists on some pieces. I did think we have some clear language on where to go from the Supreme Court here.

Justice Ginsburg in her concurring opinion began by saying quote, I agree with much contained in Justices Ginsburg, sorry, Justice Gorsuch's opinion and then she cited in the slip opinion in pages 4

through 10.

So we can safely conclude that the first, essentially, ten pages of Justice Gorsuch's opinion had six votes back then and would still have five votes today with the unanswered question of where Justice Barrett would fall.

And where Justice Gorsuch went differently in then after page 10, from the slip opinion, was really where he launched into sort of a broader full-throated criticism of some of the broader doctrines of preemption. Really went after obstacle preemption and conflict preemption.

So anyways, I would say, if you're trying to sort of find the part to focus on, you know, print out the slip opinion and read pages 1 through 10 of Justice Gorsuch, you'll have a very clear idea and what is in that line, I'll give you sort of a key thing.

He talks about Pacific Gas and he says, and this is where I think he's got six votes here. And says, it is one thing to do what Pacific Gas did and inquire exactingly into state legislative purposes when state law prohibits a regulated activity like the construction of a nuclear power plant, and this comes

close to trenching on core federal power preserved for the federal government by the AEA.

But it is another thing to do what Virginia Uranium wishes us to do and impose the same exacting scrutiny on state laws prohibiting an activity like mining that are far removed from the NRC's historic powers.

So in that sort of clear line between when you're working on issues that are directly, we are directly trodding on the AEA, on the NRC's turf, we are going to run into trouble if you are a state legislature.

If you can stay off of the NRC's turf, even though you're going to have an indirect impact on it, we are likely okay. So let me, that's where I think we get ultimately.

And I'll just say that again. My takeaway is that if a state law is not literally trodding on the NRC's turf, even if the state law has an indirect on the NRC's roles, the state law will likely not be preempted.

I think that's how the six of the justices, five still today, read Pacific Gas and the other sort of two major Supreme Court cases on nuclear

related preemption. Silkwood v. Kerr-McGee and English v. General Electric.

So you take Pacific Gas, you take Silkwood, you take English, and then you add on Virginia Uranium, I think that is where you get. That's the line that we get.

Now, what do we do about the two circuit court cases that are sort of out there and unclear? One that Entergy Nuclear Vermont Yankee v. Shumlin, and Skull Valley v. Nielson from the Second Circuit in 2013, and the Tenth Circuit in 2004.

My takeaway is that those cases are likely to be somewhat outliers and not to say that they're bad law, but to say that I would be surprised to see those situations arise again. Though you never know whether state legislatures would be so foolish as to venture into that territory.

And why I think those two decisions are outliers, but then you look at what the state legislatures were doing, they were literally inserting themselves into the NRC's role.

The Vermont legislature in Entergy Nuclear Vermont Yankee didn't just sort of exercise its traditional authority. It said that a nuclear energy

generating plant, this is one of the two state laws that was sort of core issue in Entergy Nuclear.

It says, a nuclear energy generating plant may be operated in Vermont only with explicit approval of the Vermont General Assembly. So they're literally inserting themselves into the licensing process that is prohibited to them.

So that's a clear no-no. Skull Valley similarly, the most important, I think, piece of statues were the state law on the road provision that said that the Governor and the General Assembly of Utah had a specific role to license road traffic heading to a spent nuclear fuel facility.

In other words, let me make this claim, I think if you look at Skull Valley, if Utah had said we're just going to prohibit use of any state roads for transport of trucks over a certain size, knowing full well that means you cannot get to spent nuclear fuel facility on the Goshute Indian property, they would've been fine with that. That would survive a Virginia Uranium type analysis.

Where they got into trouble, where the Utah legislature got into trouble, was not in just doing an outright prohibition in an area of its

historic control, state roads, but rather in saying, well, we're going to allow it if we feel okay with it.

They're essentially inserting themselves into the licensing process. That's where both the Utah legislature and Skull Valley, the Vermont legislature and Entergy Nuclear, that's where they got in trouble in trying to sort of have it both ways a little bit. Saying we want to prohibit this, but if we get convinced that it's safe enough, we'll agree to it.

That sort of insertion into the legislative process, into the licensing process is where I think they got in trouble.

Now, one more thing that I wanted to make sure to hit on here is sort of, where do we go looking forward in terms of preemption law not just in the NRC context, but really more broadly.

Because that's the part of Gorsuch's plurality opinion that I think is really most interesting, but it's also the part that he only got three votes for.

This is the part after page 10 of the slip opinion where no one else signed on, or rather Ginsburg did not sign off. And he made it pretty

clear that the whole world of obstacle preemption or conflict preemption is something that he is just not a fan of.

Go back to how he sets up the case. You know, Justice Gorsuch is famous for being a very colloquial writer. Very easily accessible writer in terms of his opinions. But he's also, but don't mistake that for not being a careful writer or very intentional writer.

He's obviously extremely smart and has extremely smart clerks working for him. Each word is chosen with precision. He begins by talking about the case, by talking about a road block that the company hit, that's his choice of word, in trying to get a uranium mine approved.

And he writes, to overcome that obstacle of the state uranium mining ban, Virginia Uranium filed this lawsuit. He clearly intended to use the word obstacle, I think, to foreshadow sort of his concerns about obstacle preemption.

So essentially, he's saying there is an obstacle preemption issue here to be raised, but I'm not going to side with Virginia Uranium on this because I have grave concerns about the field of

obstacle preemption.

And here he goes off on his own a little bit. He says, our field preemption cases, this again distinct a little bit from the conflict preemption cases, he says, our field preemption cases, the stricter view of beyond sort of digging into legislative motive and says, consider just some of the cost to cooperative federalists and individual liberty we would invite by inquiring into state legislative purpose too precipitously.

So he then launches into this real, I can't quite think of the word, politic against obstacle preemption and field preemption when you're looking at legislative purpose.

And I think that's the piece to watch to see whether he ultimately gets more votes for a real strengthening of preemption law, restriction of the federal role, strengthening of the state role.

There are a couple of other opinions too look to sort of see where this preemption world is going to go.

You know, Gorsuch's own opinion back when he was on the Tenth Circuit, when he was then Judge Gorsuch in Cook v. Rockwell International Corporation,

a 2015 case where, then Judge Gorsuch, was looking at a case involving the Price-Anderson Act.

And the Tenth Circuit held that the Act did not preempt the state law nuisance claim that had been brought by property owners against a nuclear reactors manufacturing plant.

Now, in Cook v. Rockwell International the plaintiffs conceded that their harm that they were concerned about did not trigger the Price-Anderson Act avenues of relief for them, but they instead thought well, we're going to go with traditional state law nuisance claim and Judge Gorsuch said, absolutely, those state law nuisance claims remain valid.

In a couple other cases, well, one other case I'll mention and then we'll get to questions. Justice Gorsuch in a dissent recently, the Supreme Court in a CERCLA case, a Superfund case, Atlantic Richfield v. Christian.

This was a case where the Supreme Court was looking at whether landowners in Montana can go over and above what EPA prescribes in developing a CERCLA cleanup strategy.

And the majority in that case, sort of said, look, you guys have a very difficult job here.

CERCLA cleanups are complex, we're going to defer to the expertise of EPA, we'll have them essentially call the shots in whether a Montana state cleanup program would be, conflict with programs for the EPA CERCLA plan.

Justice Gorsuch dissented there and he said, landowners now should be allowed to proceed as landowners historically have seeking remedies or for pollution on their lands in state court under state law.

So the question is, where does that go now? He didn't get a majority for it in Atlantic Richfield, he didn't get a majority for that view in Virginia Uranium, but it's clearly an issue of concern for him.

How will Justice Barrett join in the Court? The fact that that to me is the piece to watch. This sort of this effort from Justice Gorsuch, or this concern from Justice Gorsuch, would be a better word, that preemption should be embolden. And I'll leave at that.

JUDGE FROEHLICH: Thank you, Professor Jaffe. Well, while the three panelists were making their presentation, we got many, many questions and I

guess I'll start with some of the most general and if you'll just chime in on who wants to take it. We'll proceed and try to get as many of them as we possibly can.

So we had a question, I think this was for the entire panel. It asks, does a state law that granted tax credits to a nuclear plant owner that expedites spent fuel transfer of dry casks be clearly preempted?

MR. JAFFE: I'll just start by saying that's a really interesting question because it hits on two issues.

It hits on that sort of the preemption world that we've been talking about in terms of the Atomic Energy Act and the NRC's field, but then there's a second claim.

I'm not sure if the questioner intended to write, which is also really interesting, which is the dormant commerce clause claim, which is whether tax breaks, you know, or tariffs or other sort of financial levers can be used in a way that doesn't violate the dormant commerce clause.

MR. AVERBACH: Yes. I would also sort of point out a couple of things. I mean, I think that

the premise of the question is sort of gets to the point that I was making when I was talking about the English case, which is, you know, the Supreme Court clearly acknowledges the possibility that when there are situations where state law is having an effect on what people with, in terms of how they operate the plant, then I would include how they are going to store their spent fuel, that is conduct and mixing, will they have a preemption issue.

The sort of flip side of it, I don't see anyone challenging a tax break that they get in court. You know, it's much of a less standing to yell and scream about preemption.

Certainly, I don't think a company is going to be terribly offended, you know, provided that they want to go through with this, that they would be having to pay less money if they comply with certain incentives that the state offers.

So I think the preemption issue in theory, practically, I'm not sure where it goes.

MR. SILBERG: Although, I'm sure since the NRC in approving decommissioning plans looks at exactly those questions. Is it safe to take fuel out and move it from the pool to the pad or handle it in

other ways?

It is a question where timing makes a difference. And there could well be a preemption aspect to that. So just because money is involved doesn't necessarily mean that you get a free ride on it. I think it could well be preempted.

JUDGE FROEHLICH: All right. Well, we had another question that is somewhat related stating, there are many states that currently prohibit new nuclear power facilities. Given the discussion we just had, wouldn't such laws be found to be improperly encroach on a federal law?

MR. SILBERG: Well, that's kind of what Pacific Gas said. I think it does and I disagree with Pacific Gas. And I thought that the Court did not do a good job and perhaps the Ninth Circuit as well, and we're really looking hard as to what was the pretext that the state legislature was undergoing when it passed the Warren-Alquist laws.

I think they were worried about nuclear power, about safety issues in the context particularly, about disposal of nuclear waste. It was not just an economic issue.

So I think it would be preempted, but it

does run afoul of how many people would read PG&E.

MR. AVERBACH: And I would add to what Jay said that, you know, it depends on how you look at or how one is supposed to address the question of multiple causal factors leading to a decision.

It may be, and I share Jay's view, that there may have been safety-related concerns within the collective mind of the California legislature.

The question was whether or not California could come up with a plausible reason, in addition to safety or besides safety, and they were able to say, oh, well this had to do with economics.

I think that as a general matter and I think in these cases that lawyers for the various states are pretty good at coming up with a non-safety rationale for doing things.

I should probably say, the best, the notable exception of Vermont, who's legislatures were somewhat famous for having said on the floor of the House or Senate, I don't remember which, oh, we need to find another word for safety.

And that sort of became the cause celebre for the Entergy in that case. Saying look, they're clearly trying to disguise their true motive, but, you

know, in the California case, I suppose it's plausible that California was in substantial part motivated by economics and not by safety and if that's the concern of some hypothetical state, then following Pacific Gas I guess you don't have a preemption problem.

JUDGE FROEHLICH: Thank you.

MR. SILBERG: Well, I was just going to sort of weigh in on that. And I think and again it comes back to how they are inserting themselves into the process.

If, you know, I think the Supreme Court is very mindful of the fact that state public utility commissions, state public service commissions have a historic role to play in passing on costs from utilities or emergent power plants alone from utilities to ratepayers and they're not likely to intrude on that state sort of historic authority.

There was an interesting case in Justice Ginsburg opinion in the Virginia Uranium case where she noted that there was nothing in the Virginia law that prohibits a milling facility, an NRC licensed milling facility, NRC tailing storage, from being in Virginia, just the mining.

So if there, if there happened to be let's

say a mine site in North Carolina, she pointed out, you could bring in that ore by, you know, truck, train, or whatever and get it to a milling facility in Virginia. Virginia law wouldn't prohibit that.

Now, Virginia Uranium pointed out well, that would be cost-prohibitive. No one is ever going to drag uranium ore with very I think grade that they've got there in Coles Hill, all that distance.

But obviously, from a constitutional standpoint, the constitutionality of the statute cannot rise or fall based on what the price per pound of U-308 is.

The constitution of the statute has to be a knowable detail. So I think when you're in that historic zone and you're saying, if they want to build a plant, a nuclear power plant and not pass the cost on the ratepayers, they can do it. But we're not letting them pass the cost to the ratepayers.

The Supreme Court's going to defer to the state public utility commission on that.

MR. AVERBACH: Yes. And another point, and this kind of varies across the country. But the PG&E case was a sort of pre-deregulation decision and for that reason there was a lot of state economic

interest involved.

We saw in Vermont Yankee case is that whole line of reasoning sort of collapsed when you were talking about emerging generator. And this is sort of something to think about in the background.

That some of the justifications as to the state's interests, because of its economic interests don't hold up so much when we're not talking about a public utility as the owner of the plant.

JUDGE FROEHLICH: We just got a question in that asks, just in general, do you think that a successful effect preemption case depends on the showing that the effect reduces or could reduce radiological safety?

MR. SILBERG: It really shouldn't matter. I think it probably will matter whether it's high-levels releases or low-levels releases. The NRC has said this is what you ought to be doing then the state, with a contrary opinion, ought not to be able to impose that contrary opinion.

But, in some cases where the NRC is neutral as to whether in one direction or not, you could impose a different standard, then it might make a difference.

But I think it may be very fact specific.

JUDGE FROEHLICH: Thank you. Another question that came in, is preemption a relevant question when the federal government is in conflict with a tribal entity rather than the state? Are they parallel issues?

And another question from the same questioner, what are the roles of the interveners in cases like Virginia Uranium?

MR. JAFFE: Yes, I think there's, the tribal land issue is a really interesting one. There was a case not that long ago from the Supreme Court involving the validation of tribal sovereignty in a criminal law case.

In Oklahoma that's, I'd recommend the questioner take a look at. I can't remember the cite of the case right off the top of my head. And certainly that's, I think, would be helpful to sort of get a sense where the Courts heading on tribal issues.

On the, I forget the other piece of it was, Judge Froehlich, what was the second half of that question?

JUDGE FROEHLICH: Let me go back. What were the roles of the interveners in cases --

MR. JAFFE: Oh, right.

JUDGE FROEHLICH: Perhaps you could --

MR. JAFFE: I'll say this. I heard a lecture by now retired Justice Kennedy where he talked about the role of the amicus bar at the Supreme Court.

And made it clear that the amicus briefs that he thought were the most valuable and shed the most light were the ones in environment and scientific cases, highly technical cases, where folks would get scientific expertise or environmental expertise that shed some light on how, what the real-world impact of what their ruling might be from the scientific or technical community.

And obviously --

MR. SILBERG: I have not heard that --

MR. JAFFE: -- about those opportunities in these kinds of cases.

MR. SILBERG: I had not heard that speech, but in fact, in Virginia Uranium we represented, in our amicus brief, I think 20 retired NRC regulators and the purpose of that brief was to make exactly that point.

To show that the issues that were under consideration, the mining/milling processing issues

were being safely overseen by the Nuclear Regulatory Commission as testified to by retired senior NRC officials.

JUDGE FROEHLICH: Thank you. Another question that was addressed to the panel as a whole was we (audio interference). Related to the Vermont Yankee v. Shumlin case, the Vermont Yankee owners, Entergy at the time, agreed to abide by regulation of a Vermont Public Service Board, now the Vermont Public Utility Commission, when they purchased the plant.

Since the PUC has given it to regulator authority by the Vermont legislature, could it be possible to argue that the legislature was speaking on authority that it normally delegates to a Vermont regulator?

MR. AVERBACH: Yes. I'll take it. I'm not quite sure where the question is going and I have to admit it's been a while since I've looked at everything that happened in that case.

But, you know, I do remember one of the quirks of that case was that the legislature is sort of uniquely poised to make a decision that's not explained, that is sort of shrouded in this mystery of, I mean, in some cases, though I'm not sure about

Vermont, there's not even recorded debate.

And so, as a consequence, one of the very unique things about it was that they took decision-making authority away from the Public -- I think it was the PSC, I forget which, and put it in this little black-box legislative determination about whether or not, effectively, Vermont Yankee should be able to operate.

So I do think there's a distinction between those kinds of bodies. And in the case of a decision issued by an administrative agency in Vermont, that at least would have been nominally appealable within the Vermont judicial system for some kind of arbitrary and capricious or contrary to law review.

You don't really have that in the context of the legislative decision. It's just kind of, it is what it is and there's no further judicial or review available be it the independent preemption challenge.

MR. SILBERG: I think the Second Circuit was specifically concerned with the ability of Vermont to isolate whatever actions they were taking from judicial review.

But not only was the action preempted, but

it was also made unreviewable. And I think that had some bearing on how the Court came out as putting licensee in a very untenable position on multiple grounds.

MR. AVERBACH: Yes. And the one thing I'll say and just is that in that case and, you know, particularly in the Utah case as well, that the facts supporting the preemption or finding of preemption were pretty overwhelming.

And we get into some harder calls, we'd probably say the Virginia Uranium case was a little bit of a harder call too and I'll go back to my statement that the United States did not commit one way or another as to whether or not what the true motive of the Virginia legislature was.

But in all other cases, there's some legislature quite foolishly saying, let's find another word for safety and with the Utah legislature kind of going over the top, like Professor Jaffe says in terms of going a little bit too much to make its desires and intentions known.

So that aspect of the case, and you know, I think there's a segment of the population and of the legislatures that is very vocal about opposition to

nuclear power and it's not like they're doing something wrong by representing their constituents and saying, oh, I'd like to keep my constituents safe.

It's not like, they're, you know, doing something abhorrent like encouraging discrimination or anything like that. I don't want to separate the two. But very often their motives and what they're doing is very plain from the record that gets reviewed by the Court.

MR. JAFFE: I mean, though Justice Gorsuch, I think, really articulated very well the concerns with looking into legislative motive.

But then you run into this obvious problem, which is you can have identically worded statute, verbatim, word-for-word in State A versus State B, but if the legislative record in State B has impermissible motive, in terms of legislature statement, that one stricken down, but State A's law, even though it's the exact same words somehow survives the constitutional muster.

That can't be the rule. We have to have something that's more fair and clearer applied. I think the rule coming out of Virginia Uranium and how he makes sense of that with Skull Valley, is you look

at whether the state is really meddling directly on the NRC's turf.

You know, that's the big difference. And it's not so much the effect. I mean, Virginia law clearly had an effect on whether this mine could be operated, but Justice Gorsuch concluded by saying, you know, if the federal government decides that Coles Hills deposits essential or crucial, they can purchase the property or seize it through eminent domain without even amending the AEA.

Or they could amend the AEA to sort of say, you're going to exempt this field. But as long as they're not doing what Vermont did or what Utah did, which is saying, we want a role, we want a veto vote on the licensing, really inserting themselves in the licensing process. I think as long as the state stays out of that they're okay.

MR. AVERBACH: I'm curious if the you have a view as to a lot of what Justice Gorsuch says sort of goes back to Justice Scalia and a lot of, I think, what those views about legislative history have to do with are trying to interpret or isolate the intent of the legislature by going back to legislative history.

And in particular, in order to elucidate

the meaning of the statute. I wonder if you see any difference between using legislative history as a means of finding out the intent of a piece of legislation, vis-à-vis the legislation's meaning, as distinct from the somewhat different task of trying to determine what the legislatures motive to do it when Congress has specifically made motive part of the inquiry?

MR. JAFFE: That's a great question. I think that gets to what Justice Breyer was concerned about, his oral argument questions in Virginia and were on that issue saying, if the statutes not so clear and easy to read, we have to kind of figure it out. How do we figure out what it means? We look at, you know, whatever legislative history there is on it.

So if a statute's ambiguous, yes, the question gets murkier.

MR. AVERBACH: And in the end, the Chief Justice, the very last couple words he said were basically along the lines of well, I recognize this is a thoroughly imperfect process but, you know, it's all we've got.

And maybe he's right. Maybe it's cleaner just to say, you know what, this is so fake and, you

know, potentially misleading. It's not to be entirely we're wanting to endeavor.

MR. JAFFE: Mr. Silberg, I think you're muted. You got to, but I want to hear your closing thought.

MR. SILBERG: Yes. No, I think that you shouldn't be allowed to do indirectly what you couldn't do directly. I think rewarding the state legislatures for being more clever than some by keeping the record clean is asking for cleverness and disingenuousness over, you know, a more pure, if you will, constitutional doctor.

JUDGE FROEHLICH: Mr. Silberg, you have had the last word on this topic. I thank you. In fact I want to thank each of our panelists for their presentations today.

We appreciate their insights, their perspectives on this important environmental and preemption case.

I also want to thank everyone who attended this afternoon session for their attention, their participation, and for the many, many questions that we received.

Finally, I want to thank all those who

work behind the scenes. The IT wizards, our session coordinator, Twana Ellis, Eric, Sam, and all those who made this virtual RIC session possible.

I hope to see everyone next year. Maybe it will even be in person. I hope you all have a good afternoon and I thank you for your attendance.

(Whereupon, the above-entitled matter went off the record at 2:49 p.m.)