No. 04-575

In the Supreme Court of the United States

DIANNE R. NIELSON, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, ET AL., PETITIONERS

v.

PRIVATE FUEL STORAGE, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a challenge to Utah's scheme for the regulation of a privately developed spent nuclear fuel storage facility was ripe for judicial review.

2. Whether Utah's scheme is preempted by the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulation:

Statutes and regulation—Continued: Page

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Following a publicly-announced proposal by respondents, a private consortium of electric utilities and an Indian tribe, to develop a storage facility for spent nuclear fuel on Indian land in the State of Utah, the State enacted a series of comprehensive and interrelated statutes to ban or limit the storage and transportation of spent nuclear fuel. The Tenth Circuit held that respondents' challenge to those statutes was ripe for review and that most of the statutory provisions were preempted by the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.* Those

rulings are correct and do not warrant further review by this Court.

1. In the AEA, Congress vested the Nuclear Regulatory Commission (NRC) with "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials. Upon these subjects, no role was left for the states." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (citations omitted); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 249-250 (1984). The AEA also preempts state laws that have a purpose to address "protection against radiation hazards," 42 U.S.C. 2021(k), or that have a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English* v. *General Elec. Co.*, 496 U.S. 72, 85 (1990).

Spent nuclear fuel (SNF), which is highly radioactive, must periodically be removed from commercial nuclear reactors. *Pacific Gas*, 461 U.S. at 195-196. "While the AEA does not specifically refer to the storage or disposal of spent nuclear fuel, it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of such fuel." *Bullcreek* v. *NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004). Pursuant to the AEA, the NRC has promulgated regulations providing a comprehensive procedure for the licensing of *temporary* SNF storage installations in order to ensure safe storage of the material. 10 C.F.R. Pt. 72. Congress addressed the *permanent* disposal of SNF (as well as high level radioactive waste) in the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.*, which provides for the study and eventual development of a permanent geologic repository. *Nuclear Energy Inst., Inc.* v. *EPA*, 373 F.3d 1251, 1258-1262 (D.C. Cir. 2004).

"As of 2003, nuclear reactors in the United States had generated approximately 49,000 metric tons of spent nuclear fuel. Most of this waste is currently stored at reactor sites across the

country. * * * By the year 2035, the United States will have produced 105,000 metric tons of nuclear waste—approximately twice the current inventory." *Nuclear Energy Inst.* v. *EPA*, 373 F.3d at 1258 (citations omitted). Facilities for the storage and disposal of SNF are therefore essential to sustain the viability of nuclear power as an energy source. *Pacific Gas*, 461 U.S. at 195-196 & n.2.

Since 1997, respondent Private Fuel Storage (PFS) has sought a license from the NRC to build and operate a temporary SNF storage facility on Utah land belonging to respondent the Skull Valley Band of Goshute Indians that is located southeast of Salt Lake City. Pet. App. 4a, 56a. The proposed facility would provide storage capacity for utilities that seek offsite storage of the SNF, until such time as the permanent geologic repository is operational. Expressing specific concern about the safety of PFS's efforts, Utah passed a series of statutes between 1998 and 2001 that the courts below found were designed to block the proposed facility. *Id.* at 5a, 37a, 47a, 49a-50a, 52a, 56a-57a, 63a. They are summarized briefly below.

a. *Utah's Licensing Regulations.* Part 3 of Utah's Radiation Control Act requires a SNF storage facility that has been licensed by the NRC also to obtain a state license for construction and operation. Utah Code Ann. § 19-3-304. The licensing scheme requires extensive analysis of health and safety issues related to the storage of SNF. *Id.* §§ 19-3-301(2)-(4), 19-3-304 to 19-3-307. The applicant also must provide Utah's Department of Environmental Quality (DEQ) with extensive information related to health and safety aspects of the proposed installation. *Id.* § 19-3-305. The license may not be issued unless DEQ finds the information in the application sufficient to support a variety of specific findings related to the health and safety effects of the facility. *Id.* § 19-3-306. The applicant must satisfy DEQ, for example, that "the wastes will not cause or contribute to an increase in mortality, an increase in illness, or pose a pres-

ent or potential hazard to human health or the environment." *Id.* § 19-3-306(3). The applicant must also provide information on topics such as groundwater, security plans, quality assurance programs, radiation safety programs, and emergency plans. *Id.* § 19-3-305. All of those areas are regulated by the NRC under 10 C.F.R Part 72 in order to protect human health and safety and the environment.

Part 3 also imposes substantial application and licensing fees. The applicant must pay a non-refundable "initial fee" of $5 million and thereafter "shall * * * pay an additional fee to cover the costs to the state associated with review of the application, including costs to the state and the state's contractors for permitting, technical, administrative, legal, safety, and emergency response reviews, planning, training, infrastructure, and other impact analyses, studies, and services required to evaluate a proposed facility." Utah Code Ann. § 19-3-308(1)(a) and (b). The applicant must also post a bond of "*at least*" $2 billion, or "a greater amount as determined * * * to be necessary to adequately respond to," among other things, "any reasonably foreseeable releases." *Id.* § 19-3-306(10) (emphasis added).

b. *Unfunded liability payment.* Part 3 further requires the operator of an SNF storage facility to pay to the State an amount equal to 75% of the "unfunded potential liability" of the project. Utah Code Ann. § 19-3-319(3)(a). That amount will be determined by DEQ based upon the health and economic costs expected to result from "a reasonably foreseeable accidental release" of SNF. *Id.* § 19-3-301(5)(a). Under those provisions, the DEQ may require payment of an additional amount above the level of insurance that the NRC decides to require in the project license. Pet. App. 44a-45a.

c. *Revocation of limited liability.* Part 3 also revokes statutory and common-law limited liability for officers, directors, and equity-interest owners of companies operating SNF storage facilities in Utah. Utah Code Ann. § 19-3-318.

d. *County planning requirements and the prohibition on providing municipal services*. Utah's legislation also includes county planning requirements. Pet. App. 36a, 75a. Among other things, county governments must either ban the storage and transportation of SNF, or adopt a comprehensive land use plan containing detailed information regarding the effects of any proposed SNF site upon public health and welfare. Utah Code Ann. § 17-27-301. The plan also must include "specific measures to mitigate the effects of high-level nuclear waste and greater than Class C radioactive waste and guarantee the health and safety of the citizens of the state." *Id.* § 17-27-301(3)(a)(iii). In addition, a county "may not provide, contract to provide, or agree in any manner to provide municipal-type services * * * to any area under consideration for a storage facility or transfer facility for placement of high-level nuclear waste, or greater than Class C radioactive waste." *Id.* § 17-34-1(3).

e. *Transportation provisions*. Utah also enacted provisions related to roads and railroad crossings that may be needed for access to an SNF storage facility in Utah. Utah Code Ann. §§ 54-4-15, 72-3-301, 72-4-125(4), 78-34-6(5); Pet. App. 8a-9a. One of the provisions divests the county of control over the only road providing access to PFS's proposed SNF storage facility, by designating the road a state highway. Utah Code Ann. § 72-4-125(4); Pet. App. 8a. Another provision requires that, before a disputed petition for a railroad crossing filed by an entity engaged in SNF storage may be resolved, the Governor and the state legislature must concur in the decision—a requirement that is imposed only on entities engaged in SNF storage. Utah Code Ann. § 54-4-15(4)(b); Pet. App. 8a.[1]

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[1] Utah also passed certain provisions that require drug and alcohol testing of employees of companies engaged in SNF storage and authorize litigation to determine water rights in areas under consideration for SNF storage. The district court rejected respondents' Commerce Clause challenge to those provisions, Pet. App. 77a-80a, and that ruling was not appealed. *Id.* at 5a.

2. Respondents challenged Utah's statutes in the United States District Court for the District of Utah, arguing, *inter alia*, that they were preempted by the AEA. In July 2002, the district court issued an order holding that respondents had standing to sue, that their claims were ripe for review, and that the relevant statutes were preempted by the AEA. Pet. App. 54a-77a.

3. The court of appeals affirmed. Pet. App. 1a-53a. The court held that respondents' preemption claims were ripe for review because the question of preemption is predominately legal and therefore fit for judicial resolution. *Id.* at 23a-24a. The court also reasoned that postponing review would impose a substantial hardship on the parties. *Id.* at 24a. On the merits, the court affirmed the district court's holding that the challenged statutes regulated in the area of nuclear safety and therefore were preempted. *Id.* at 25a-53a.

DISCUSSION

The court of appeals applied well-established legal principles governing ripeness and preemption to the unique circumstances of this case and concluded that Utah's statutory scheme is preempted. That decision is correct, and does not conflict with any decisions of this Court or any court of appeals. Further review is not warranted.

A. The Ripeness Question Does Not Merit Review

Petitioners argue (Pet. 14-19) that respondents' challenge to its regulatory scheme is premature because the proposed project has not received two necessary federal approvals for the project and because the State has yet to apply its laws to the proposed facility. Although additional steps remain before the project may go forward, the challenge nonetheless is ripe, and in any event, the ripeness issue does not warrant this Court's review.[2]

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[2] On September 9, 2005, the NRC concluded the licensing proceeding and authorized its staff to issue PFS a license. *Private Fuel Storage, L.L.C.*, No.

In determining whether a particular claim is ripe, courts traditionally examine both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Pacific Gas*, 461 U.S. at 201 (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967)). Applying those principles, the Court in *Pacific Gas*, 461 U.S. at 201-202, held ripe for judicial review a preemption challenge brought by utilities to a state moratorium on construction of nuclear power plants until the State certified the availability of permanent waste disposal. The Court explained that "[t]he question of preemption is predominantly legal, and although it would be useful to have the benefit of [the State's] interpretation of [the relevant statute], resolution of the pre-emption issue need not await that development." *Id.* at 201. The Court also explained that "postponement of decision would likely work substantial hardship on the utilities" because the utilities would have to expend millions of dollars in proceeding with constructing a facility without knowing whether the State ultimately would block its operation. *Ibid.* Having found the challenge ripe, the Court concluded that the state moratorium was not preempted. *Id.* at 203-223.[3]

72-22-ISFSI (CLI-05-19). That decision will likely be the subject of judicial review proceedings. Moreover, the Department of Interior advises that although the Bureau of Indian Affairs conditionally approved the lease between PFS and the tribe in May 1997, several outstanding contingencies, such as the preparation of an environmental impact statement, remain before the lease can receive final approval. As explained in the text, however, the court of appeals correctly found respondent's challenge ripe because final federal approval is not needed to render the legal issues fit for judicial resolution and delay would impose a substantial hardship on respondents.

[3] Petitioners erroneously rely on *Texas* v. *United States*, 523 U.S. 296 (1998), for the proposition that a case is never ripe if there are any outstanding contingent events. Pet. 16-17. Indeed, the Court in *Pacific Gas* found the preemption challenge to the waste disposal regulations ripe for review notwithstanding that the State had yet to deny certification and the NRC had yet to issue a license to the utilities. See 81-1945 Resp. Br. at 22-24. Moreover,

By contrast, the Court in *Pacific Gas* found *not* ripe the utilities' challenge to a state law requiring utilities, on a case-by-case basis, to demonstrate adequate on-site interim storage capacity. The Court explained that, in any given case, the State may determine that a plant's storage capacity is adequate, and that resolution of the utilities' challenge to the case-by-case provision would not remove any uncertainty concerning the construction of power plants because, in light of the Court's holding on the merits that the moratorium was not preempted, the utilities would experience uncertainty regardless of whether the validity of the case-by-case law was addressed immediately. 461 U.S. at 203.

Here, the court of appeals properly applied settled principles governing the determination whether a particular controversy is ripe and found that respondents' preemption challenges "were primarily legal ones" and that state law "subjected PFS to immediate harm in the NRC licensing proceeding." Pet. App. 22a. The court pointed out that, in the proceedings before the NRC, Utah "had invoked the statutory provision prohibiting county officials from providing services to SNF storage facilities" as an asserted basis for opposing an NRC license. *Ibid.*[4]

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in *Texas*, the Court held that "we find it too speculative whether the problem Texas presents will ever need solving; we find the legal issue Texas raises not yet fit for our consideration, and the hardship to Texas of biding its time insubstantial." 523 U.S. at 302. As explained *infra*, none of those factors is present in this case.

[4] After the district court's decision, the NRC's Atomic Safety and Licensing Board rejected the State's contention on the ground that Utah's laws "have no effect because they are unconstitutional." *Private Fuel Storage, L.L.C.*, 56 N.R.C. 169, 184 (2002). The NRC denied the State's request for review, concluding that Congress "clearly intended the federal government to occupy the field of regulating the safety of atomic energy," and that "Utah's laws seemingly amount to an attempt to make it impossible for any applicant to obtain an NRC * * * license." *Private Fuel Storage, L.L.C.*, 59 N.R.C. 31, 37 (2004).

Moreover, as with the moratorium in *Pacific Gas*, respondents faced real uncertainty in light of the challenged statutes. As the court of appeals explained, "[t]o delay a decision would impose upon [respondents] the uncertainty of not knowing whether they will be required to incur the substantial expenses and comply with the numerous regulatory requirements imposed by the Utah statutes." Pet. App. 24a. Thus, as the district court found, should the state laws be upheld, it was "more likely than not PFS would not proceed with the construction of the proposed facility." *Id.* at 23a (quoting district court opinion, *id.* at 63a). It was accordingly proper for the courts below to determine whether respondents could pursue an NRC license without interference from allegedly preempted state laws. *Id.* at 22a-24a.

Petitioners also err in contending that, under *National Park Hospitality Ass'n* v. *Department of the Interior (NPHA)*, 538 U.S. 803 (2003), uncertainty about the law can never constitute hardship. Pet. 17-18. In *NPHA*, the challenged regulation expressed the National Park Service's *non-binding* view that disputes arising out of its contracts with concessionaires would not be subject to the Contract Disputes Act of 1978. 538 U.S. at 804-806. The Court explained that the regulation reflected a general statement of agency policy that "'create[s] no legal rights or obligations'" and "leaves a concessioner free to conduct its business as it sees fit." 538 U.S. at 809, 810 (quoting *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998)). The challenged Utah statutes in this case, by contrast, are binding laws that impose immediate obligations on third parties (*e.g.*, local government officials) and impose a highly burdensome and costly scheme such that PFS, even were it to receive federal approval, would not construct or operate the proposed facility. Although aspects of that scheme are contingent on the grant of federal approval for the project, the Utah legislation nonetheless was intended to and did immediately and substantially affect the viability of the PFS project. Pet. App. 17a, 24a. Accordingly, like the morato-

rium in *Pacific Gas* and unlike the case-by-case capacity regulation there, the uncertainty surrounding Utah's scheme directly affects respondents' decisionmaking.

The Tenth Circuit's holding is also entirely consistent with *Ohio Forestry Ass'n*, *supra*, relied upon by petitioner. Pet. 16-18. The Forest Plan at issue in *Ohio Forestry* did "not command anyone to do anything or to refrain from doing anything," and "create[d] no legal rights or obligations." 523 U.S. at 733. Moreover, the plan was implemented through site-specific decisions, and the Court therefore concluded that assessment of the plan's impacts should occur in the context of a site-specific challenge. *Id.* at 734; cf. *Pacific Gas*, 461 U.S. at 203. Here, by contrast, no further factual development was needed for the courts below to determine that the State had legislated in a preempted field of federal law by enacting a series of binding and burdensome laws to protect against what the State perceived to be an unacceptable risk of radiation hazards. Moreover, *Ohio Forestry* did not involve the type or extent of hardship at issue here.

B. The Court Of Appeals' Application Of Field Preemption Principles To The Circumstances Of This Case Does Not Merit Review

On the merits of the preemption issue, petitioners argue that the court of appeals' decision violates the standards for facial preemption of state law, because respondents allegedly have not shown that the state laws are invalid in *all* of their applications. Pet. 13. Petitioners thus fault the courts below for not determining whether any of the laws could be validly applied to serve interests other than the regulation of radiological safety. Pet. 19-27. But this is not a case where generally applicable safety laws are preempted as applied to a federally-preempted field, like nuclear safety regulation. Here, the lower courts found that the entirety of the series of interrelated laws at issue here were targeted specifically to regulate the safety aspects of the proposed

waste facility and were designed to halt the construction and operation of the proposed facility based on radiation hazard concerns. In light of those factual determinations, the decision to find the entire statutory scheme preempted on its face is correct. Moreover, the case-specific determination of the lower courts does not merit this Court's review and is correct in any event.

1. "[S]tate law is pre-empted where," *inter alia*, "it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79. When Congress so intends, it is said to have preempted the "field," *ibid.*, and thus a state law addressed specifically to the pre-empted field is invalid on its face, *i.e.*, in all of its applications. "When the federal government completely occupies a given field or an identifiable portion of it, * * * the test of [field] pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Pacific Gas*, 461 U.S. at 212-213 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

Congress has preempted the field of nuclear safety regulation. *Pacific Gas*, 461 U.S. at 212-213; *English*, 496 U.S. at 82. As the Court has explained, "[s]tate safety regulation is not preempted only when it conflicts with federal law[;] [r]ather, the federal government has occupied the entire field of nuclear safety concerns." *Pacific Gas*, 461 U.S. at 212. Thus, the AEA preempts *any* state legislation that falls within "the field of nuclear safety concerns." *Id.* at 212-213; accord *id.* at 208 ("the safety of nuclear technology [is] the exclusive business of the federal government").

For those reasons, petitioners err in relying on *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572, 588-589 (1987), in which the Court held that a state permitting scheme was not facially preempted because it was possible that the scheme could be implemented as an exercise of permissible environmental regulation. That decision did not involve any issue of

field preemption, and thus sheds no light on the question presented in this case. *Id.* at 589 (noting that field preemption was "concededly not the case"). Moreover, the Court emphasized that the allegedly preempting federal regulations specifically contemplated state regulation in the field of environmental protection, which is, of course, a contemplation at odds with any theory of field preemption. *Id.* at 583-589. Here, by contrast, the federal government exclusively regulates the field of nuclear safety and the "licens[ing] [of] the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas*, 461 U.S. at 207.[5]

2. In this case, the court of appeals carefully reviewed Utah's statutory scheme and determined that it was targeted to and regulated exclusively in the preempted field of nuclear safety. The Tenth Circuit specifically found that Utah's statutes were motivated by concerns about nuclear safety and directly addressed the field of radiation hazards. Pet. App. 37a, 47a, 49a-50a, 52a. Although petitioners argue that Utah's purpose in protecting against radiation hazards does not bring the challenged legislation within the preempted field, Pet. 22-23, there is no basis for this Court to reconsider its statement in *English* that "part of the pre-empted field is defined by reference to the purpose of the state law." *English*, 496 U.S. at 84; see 42 U.S.C. 2021(k) ("Nothing in this section shall be construed to affect the

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[5] For similar reasons, petitioners err in relying on lower court decisions that declined to find a law preempted in areas of the law other than the field of nuclear safety. Pet. 28-29. None of those decisions involved field preemption. Rather, the area asserted to be preempted contemplated the operation of state law. *Pharmaceutical Research & Mfrs. of Am.* v. *Concannon*, 249 F.3d 66 (1st Cir. 2001), aff'd, 538 U.S. 644 (2003); *Natural Res. Def. Council* v. *Houston*, 146 F.3d 1118 (9th Cir. 1998), cert. denied, 526 U.S. 1111 (1999); *Pentel* v. *City of Mendota Heights*, 13 F.3d 1261 (8th Cir. 1994); *Chemical Specialities Mfrs. Ass'n* v. *Allenby*, 958 F.2d 941 (9th Cir.), cert. denied, 506 U.S. 825 (1992); *Baltimore & Ohio R.R.* v. *Oberly*, 837 F.2d 108 (3d Cir. 1988); *Esso Standard Oil Co.* v. *Department of Consumer Affairs*, 793 F.2d 431 (1st Cir. 1986).

authority of any State or local agency to regulate activities for *purposes* other than protection against radiation hazards.") (emphasis added). Quite to the contrary, the Court subsequently has reaffirmed the rule in *English* that purpose is relevant and has made clear that a State cannot avoid preemption simply by "articulat[ing] a purpose other than (or in addition to)" the prohibited purpose. *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992). Thus, when a State enacts legislation based upon "nuclear safety concerns," the laws are preempted without the need to demonstrate their effect. *Pacific Gas*, 461 U.S. at 212-213.

With respect to Utah's licensing scheme, petitioners fault the court of appeals for focusing "only on certain radiological-safety measures" that pervaded Utah's licensing scheme, when the "informational" and fee requirements could conceivably serve some non-safety interests of the State. Pet. 12, 26; accord Pet. 24. Although petitioners apparently concede that "certain" of the State's licensing provisions are preempted, petitioners do not identify which provisions fall within the category of preempted legislation, and petitioners do not identify any precise *non*-safety interest of the State that would be advanced by any particular provision of the licensing scheme. Accordingly, petitioners fail to provide any basis for overturning the lower courts' finding that Utah's scheme is entirely "grounded in [radiological] safety concerns." Pet. App. 52a (quoting *Pacific Gas*, 461 U.S. at 213). Petitioners' argument, moreover, overlooks the fact that Utah's comprehensive licensing scheme *as a whole* was targeted at the preempted field of nuclear safety and attempts to regulate within the NRC's "exclusive jurisdiction to license the * * * delivery, receipt, acquisition, possession and use of nuclear materials." *Pacific Gas*, 461 U.S. at 206. Thus, unlike the state moratorium upheld in *Pacific Gas*, in which the State was exercising its traditional authority over utilities to advance the economic interests of ratepayers, *id.* at 207-212, Utah's statutes exclusively target

a proposed nuclear waste storage facility, *i.e.*, a facility that generates no power within the State and solely engages in the "delivery, receipt, acquisition, [and] possession * * * of nuclear materials," *id.* at 207. Because Utah's laws erect targeted discriminatory barriers aimed at blocking respondents from engaging in those activities, Utah's statutory scheme "would * * * directly conflict with the NRC's exclusive authority" to license those activities. *Id.* at 212.

The court of appeals correctly concluded that, because Utah's scheme pervasively regulated the field of nuclear safety, the challenged provisions would have "'some direct and substantial effect on the decisions' * * * regarding radiological safety levels of SNF in Utah." *Pacific Gas*, 461 U.S. at 212 (quoting *English*, 496 U.S. at 85). Indeed, even the State's "informational" requirements directly regulate in the area of protection against radiological hazards. Those provisions would require PFS to undertake extensive studies in areas unquestionably within the NRC's authority to regulate, such as the environmental and human health risk and effects of radiation hazards. *E.g.*, Utah Code Ann. § 19-3-305(1), (4), (10), (12), (14); see also *id.* § 17-27-301(3)(a)(i) (incorporating informational provisions into county planning requirements).[6]

Petitioners also argue that, under *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), States may require power plants to ensure adequate funding in the event of a nuclear accident, and that the unfunded liability provisions here were improperly inval-

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[6] Although some of the other informational provisions in Section 19-3-305 may have a non-safety rationale or serve non-safety interests, the State, as discussed, did not pass those provisions in isolation but as part of a comprehensive scheme that was targeted at preventing the facility from operating based primarily on safety concerns. We do not read the court of appeals' decision as preventing Utah from reenacting narrowly tailored statutes that do not seek to address radiological hazards and do not otherwise undermine the NRC's efforts to regulate nuclear facilities.

idated because the State has yet to determine what respondents' potential exposure would be or how respondents would make the required payment of 75% of its potential liability to the State. Pet. 25. *Silkwood* held that common law damages actions based on radiation accidents were not preempted because Congress specifically contemplated the availability of "existing state tort law remedies" in passing the Price-Anderson Act, 42 U.S.C. 2210, and because Congress had not provided any federal remedy for persons injured by a radiation accident. *Silkwood*, 464 U.S. at 251-252. Absent those considerations, the Court suggested, the result would likely have been different. *Id.* at 250-251.

This case involves not generally-applicable, pre-existing common law remedies expressly preserved by federal law, but an extraordinary regulatory bonding requirement that addresses an issue—the financial ability of a storage facility to compensate in the event of damages actions—expressly addressed by the federal scheme. As the court of appeals explained, "[u]nder the federal licensing scheme * * * it is not the states but rather the NRC that is vested with the authority to decide under what conditions to license an SNF storage facility." Pet. App. 45a. Indeed, the NRC in this case has already determined that PFS's $200 million nuclear energy liability policy, which was "the largest one currently available," is sufficient under NRC financial protection requirements. *Id.* at 43a. In addition, the NRC "at this juncture . . . has decided *not* to invoke its discretionary authority" to apply the Price-Anderson Act to SNF storage facilities. *Ibid.*; see 42 U.S.C. 2210(a). The State was not free to impose additional requirements based on its view of the safety risks associated with operation of the facility.

Utah's abolition of traditional limited liability for corporate shareholders suffers similar flaws. Pet. 24-26. The court of appeals explained that state law "removes [the] well established protection" of limited liability and "does so for reasons that the Utah officials concede are related to radiological safety con-

cerns." Pet. App. 47a. Unlike the "existing state tort law remedies" at issue in *Silkwood* (464 U.S. at 252) and in *English*, which applied in a *neutral* manner to all private employers, the State in this case has created a discriminatory rule of liability targeted solely at the nuclear waste industry based on its perceived threat of radiological hazards. Utah Code Ann. § 19-3-318(2)(b) ("An organization engaging in [nuclear waste] activities has significant potential to affect the health, welfare, or best interests of the state and should not have limited liability for its equity interest holders."). Thus, "the abolition of limited liability attempts a sea change in the law of corporations and is targeted at the nuclear industry only. The statutes do not involve a state tort remedy that existed prior to the enactment of federal legislation regarding nuclear power and that Congress intended to preserve." Pet. App. 47a.

The court of appeals also properly invalidated Utah's attempt to ban counties from providing PFS any municipal services, including "fire protection, garbage disposal, water, electricity, and law enforcement." Pet. App. 36a. Those sweeping provisions are designed to "address matters of radiological safety that are addressed by federal law and that are the exclusive province of the federal government." *Id.* at 37a. Although petitioners correctly observe that the AEA does not require counties to provide municipal services to nuclear waste facilities, Pet. 24-25, the State's "pervasive ban on providing municipal services here * * * targets only those engaged in SNF transportation and storage and does so for safety reasons." Pet. App. 38a . The court thus properly concluded that both the "purpose and effect of the state law" was to "use [the State's] authority to regulate law enforcement and other similar matters as a means of regulating radiological hazards." *Id.* at 40a-41a. The same is true of the county siting provisions, which force counties to adopt "specific measures * * * to guarantee the health and safety of the citizens of the

state" against the threats posed by nuclear waste. Utah Code Ann. § 17-27-301(3)(a)(iii).[7]

Petitioners also argue that the State's transportation provisions merely reallocate control over transportation to the facility away from the county and to the Governor and state Legislature. Petitioners accordingly argue that the State should be permitted to apply the provisions before determining that they conflict with federal law. Pet. 26. That contention lacks merit. Petitioners do not dispute that the purpose of the transportation provisions is "to prevent the transportation and storage of SNF in Utah" based on the State's concerns regarding nuclear safety. Pet. App. 49a (citing district court opinion, *id.* at 74a n.10). The evidence included the statement of the state legislator who sponsored the road provisions, explaining that they established a "moat" around the proposed SNF site. *Id.* at 49a. Moreover, the legislative history of the road and railroad crossing provisions confirms that they were based on health and safety concerns. *Id.* at 49a-50a, 74a n.10. The court of appeals also concluded that "by jeopardizing access to the proposed SNF storage facility, the Road Provisions directly and substantially affect decisions regarding radiological safety levels by those operating nuclear facilities," *id.* at 50a, and were preempted for that reason as well. See *id.* at 74a ("This metaphorical 'moat' more likely than not would prevent the construction of PFS's proposed SNF facility. * * * Governor Leavitt has made clear that he will not allow SNF into Utah if possible.").

3. Petitioners also argue that the court of appeals' decision conflicts with *Kerr-McGee Chemical Corp.* v. *City of West Chi-*

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[7] Petitioners' attempt to defend the ban on municipal services also does not warrant this Court's review because petitioners represent that those provisions will be rendered inapplicable if the NRC approves a license for PFS. Pet. 6. Thus, petitioners have no interest in having the Court grant plenary review of the Tenth Circuit's invalidation of that provision because it will, by petitioners' own admission, never be implemented by the State.

cago, 914 F.2d 820 (7th Cir. 1990), which held a state law not preempted when it was not clear that the state law would frustrate NRC's licensing regime. That decision, however, concerned a local erosion control and sedimentation ordinance that, quite unlike the state laws here, was completely "radiation neutral." *Id.* at 827. Here, by contrast, Utah's legislation targets a specific proposed nuclear waste facility with a comprehensive set of restrictive requirements that are aimed at preventing its construction and operation based upon nuclear safety concerns. Utah's legislation is simply not "radiation neutral." *Ibid*.

Petitioners also claim that the court of appeals' decision conflicts with *Citizens for an Orderly Energy Policy, Inc.* v. *County of Suffolk*, 813 F.2d 570 (2d Cir. 1987), which involved a county resolution declining to participate in radiological emergency response planning. The Second Circuit's decision, however, did not even independently discuss the issue of preemption, but merely affirmed the district court's resolution of the issue for "substantially for the reasons set forth in the district court's opinion." *Id*. at 571. In any event, the decision is readily distinguishable. The district court explained that Congress in passing the AEA "was well aware of the possibility that local governments might refuse" to engage in emergency planning. *Citizens for an Orderly Energy Policy, Inc.* v. *County of Suffolk*, 604 F. Supp. 1084, 1095 (E.D.N.Y. 1985). Here, no such Congressional intent supports the sweeping series of statutes passed by the State to regulate in the area of nuclear safety.

Petitioners' claim that the decision below conflicts with the NRC's views in *Long Island Lighting Co.*, 21 N.R.C. 644 (1985), fails for similar reasons. In that decision, the NRC's Atomic Safety and Licensing Board found that state laws prohibiting *the plant itself* from exercising traditional police powers in the event of a nuclear emergency (*e.g.*, by guiding off-site traffic or by directing the public) were not preempted. The NRC found that the state laws, which were neutral and not directed at the nuclear

industry, "were enacted * * * for purposes totally unrelated to nuclear safety concerns." *Id.* at 904; *ibid.* ("The apparent purposes * * * have no nexus with regulation of radiological health and safety. They are simply laws regulating local matters such as flow of traffic on public roads."). By contrast, Utah's comprehensive and targeted legislation is directly related to the State's concern about radiological safety levels at the proposed SNF storage facility and would have a direct and substantial effect on the federal health and safety regulatory scheme that protects against radiological hazards. The court of appeals thus correctly concluded that Utah's unique statutory scheme, viewed as a whole, is preempted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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