12-707-cv(L)

12-791-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ENTERGY NUCLEAR VERMONT YANKEE, LLC,
ENTERGY NUCLEAR OPERATIONS, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

PETER SHUMLIN, in his official capacity as Governor of the State of Vermont, WILLIAM SORRELL, in his official capacity as the Attorney General of the State of Vermont, JAMES VOLZ, in his official capacity as a member of the Vermont Public Service Board, JOHN BURKE, in his official capacity as a member of the Vermont Public Service Board, DAVID COEN, in his official capacity as a member of the Vermont Public Service Board,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the District of Vermont (Brattleboro)

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INTRODUCTION

In their reply and response to Entergy's cross-appeal arguing that Act 74's Section 6522(c)(2)[1] is preempted, Defendants set forth an approach to AEA preemption that would render it entirely toothless. Under Defendants' view, a State may regulate a nuclear power plant for the preempted purpose of radiological safety so long as it offers the thinnest legislative cover in the form of a preamble or floor statement asserting a non-safety purpose, no matter how contradicted that non-safety purpose may be by evidence of a safety purpose in other textual provisions or legislative history, and no matter how objectively implausible that non-safety purpose may be. And under Defendants' approach, plucked from the inapposite context of rational-basis equal protection and substantive due process review (Reply 11-13), a court's inquiry into plausibility of a proffered non-safety purpose is no inquiry at all, for the court must simply accept any hypothetical non-safety purpose the State might offer. *Compare Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir. 2006) (imposing "stricter requirement" that the statute must be "genuinely responsive" to a non-preempted purpose).

This Court should reject Defendants' effort to rewrite the law of AEA preemption, and thus should reverse on Entergy's cross-appeal as to Section

[1] Defendants invoked this section after judgment below as requiring legislative approval for storage of SNF derived from post-March 2012 operation. SPA106.

6522(c)(2) for the same reasons it should affirm the district court's correct ruling (at issue on Defendants' appeal) that Section 6522(c)(4) and Act 160 are preempted.[2] *PG&E* and related precedents foreclose state regulation of a nuclear power plant where radiological safety is even one of the State's purposes. And what matters is the State's actual purpose, not, as in rational-basis review, some conceivable purpose the statute was not in fact enacted to serve.

Accordingly, this Court should rule on Entergy's cross-appeal that Section 6522(c)(2) is preempted for any or all of four independent reasons:

First, as to text, the Vermont legislature's safety concerns are evident from the inclusion of requirements in a MOU that the Federal Circuit held "likely preempted" because "directly motivated by safety concerns." *Vt. Yankee Nuclear Power Corp. v. United States*, 683 F.3d 1330, 1349 (2012) ("*VYNPC*"). Defendants incorrectly assert (Reply 49) that the legislature was unaware of the MOU: Act 74, specifically 10 V.S.A. § 6522(b)(4), expressly requires that Entergy comply with the MOU. Act 160's text similarly reveals the legislature's safety concerns, for it orders an "analysis of long-term … public health issues," 30 V.S.A. § 254(b)(2)(B), states that this analysis "shall [be] provide[d]" to legislative

[2] The district court would have so ruled as to Section 6522(c)(2) had Defendants raised that provision before judgment. SPA109. The preemption analysis in this cross-appeal reply applies fully to the preemption issue on Defendants' appeal. *Accord* Reply 55 (Sections 6522(c)(2) and (4) "should be treated the same way"). Act 160 is relevant to Section 6522(c)(2)'s validity because Act 160 implemented the Act 74 legislative-approval role. Entergy Br. 18.

committees, *id.* § 254(a)(3), and provides that this public-health objective "shall [be] consider[ed]" by the Board in acting on a petition for post-March 2012 operation, *id.* § 254(c).

Second, Defendants hypothesize that the legislature acted from the non-safety purpose of facilitating Vermont retail utilities' purchase of power from non-nuclear sources, but such a purpose is not plausibly advanced by shutting down Vermont Yankee. Because Vermont Yankee is a merchant wholesale generator and not a retail utility, Vermont retail utilities are free to enter into PPAs with generators other than Vermont Yankee whether or not it continues operating. Defendants' speculation that removing Vermont Yankee from the interstate grid will inspire non-nuclear generators to provide power to Vermont consumers lacks any basis in the record: Defendants' own expert admitted that he did not know whether this rationale motivated any legislator, and Vermont contradicted this hypothesis by seeking a below-market PPA from Entergy in return for allowing the plant to continue operating *and* by purchasing nuclear power from New Hampshire's Seabrook plant. The district court correctly found that shutting down Vermont Yankee cannot plausibly advance Vermont's purported non-safety purposes.

Third, the district court's comprehensive review of the legislative history confirms that safety concerns drove Act 74's enactment. Defendants' attempt to

discredit the legislative history is inconsistent with *Pacific Gas & Electric Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 194 (1983) ("*PG&E*"), which consulted a committee report, and with lower-court cases that relied on even one or two key legislative-history statements to discern purpose. Here, legislators repeatedly expressed that "safety is the prime concern," A1670, and that Vermonters cannot "trust the NRC," A1667, and invoked non-safety rationales as code words for safety, *e.g.*, A1653 ("talking about aesthetics … would be totally acceptable"). Where purpose is the touchstone of analysis, as it is in several constitutional and federal preemption contexts, legislative history is highly relevant.

Fourth, even if Section 6522(c)(2) were valid on its face and as implemented in Act 160, it is invalid as applied in Act 189 and S.289. Defendants' responses are unpersuasive. For example, they misleadingly assert that "the district court correctly found that, because Act 189 'is no longer in effect,' Entergy's 'challenge to Act 189 is moot.'" Reply 32 (quoting SPA82). The district court actually stated: "*Since this Court has held Act 160 is preempted*, and because the Act 189 assessment is no longer in effect, the Court holds the challenge to Act 189 is moot …." SPA82 (emphasis added). If this Court were to reverse the district court's holding that Acts 74 and 160 are facially preempted, it would be necessary to decide whether Act 189 (the objectives of which Act 160 requires be taken into

account in acting on a petition for post-March 2012 operation, *see* 30 V.S.A. § 254(c)) constitutes a preempted application of Acts 74 and 160.

On the remaining issue in Entergy's cross-appeal—whether the FPA preempts the requirement of a below-market PPA as a condition of granting a CPG for post-March 2012 operation—this Court should hold that Entergy is entitled to declaratory and injunctive relief. The record shows that Vermont officials, including Defendant Shumlin, mandated such a preempted condition. Defendants' ripeness argument should be rejected because delaying review will harm Entergy by injecting uncertainty into state administrative proceedings.

ARGUMENT

I. THE AEA PREEMPTS SECTION 6522(C)(2)

A. Textual Provisions Demonstrate That Section 6522(c)(2) Is Grounded In Safety Concerns

Textual provisions in Acts 74 and 160 trigger AEA preemption without further inquiry. *See* Entergy Br. 33-34.[3] Act 74 requires that Entergy comply with an MOU that the Federal Circuit found "directly motivated by safety concerns" and thus "likely preempted under *Pacific Gas*," *VYNPC*, 683 F.3d at 1349. And

[3] Defendants ignore *Boeing Co. v. Robinson*, No. CV 10-4839, 2011 WL 1748312, at *9 (C.D. Cal. Apr. 26, 2011), and *Me. Yankee Atomic Power Co. v. Me. Pub. Utils. Comm'n*, 581 A.2d 799, 805-06 (Me. 1990), and their discussion of *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2006), focuses on a different section (Reply 9 n.4 (citing 376 F.3d at 1228-29)), than that Entergy cited (Br. 33 (citing 376 F.3d at 1246)).

Act 160 expressly mentions "public health," 30 V.S.A. § 254(b)(2)(B), as the objective of a study that must be provided to legislative committees, *id.* § 254(a)(3), and as a factor the Board must consider in acting on a petition for post-March 2012 operation, *id.* § 254(c).[4]

1. Defendants protest that the MOU is not part of Act 74's text and thus "its terms cannot be attributed to 180 state legislators, none of whom signed it." Reply 49. Defendants are wrong. Act 74 expressly refers to the MOU, making Entergy's compliance with it a prerequisite to construction of new SNF storage. 10 V.S.A. § 6522(b)(4); *VYNPC*, 683 F.3d at 1343 (Act 74 "approved the construction of a dry storage facility contingent on [Entergy's] … complying with the terms of a spent fuel storage [MOU] ….").[5]

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[4] Defendants incorrectly add "solely" to *PG&E*'s test. *See* Reply 1 ("only a moratorium *solely* 'grounded in safety concerns' is preempted") (quoting *PG&E*, 461 U.S. at 213) (emphasis added). *PG&E* upheld the challenged statute only after emphasizing that safety was not even *a* purpose. 461 U.S. at 213 ("the waste disposal problem was 'largely economic or the result of poor planning, *not* safety related'") (quoting committee report; emphasis in original). Entergy cited (Br. 38), but Defendants ignore, lower-court cases that similarly hold that a statute is preempted under the AEA if safety is one among several purposes. In any event, as the district court alternatively found, safety concerns were the but-for cause of the enactments here and thus would trigger AEA preemption even if the presence of *a* safety purpose were insufficient. SPA68, 78, 81.

[5] Even aside from Act 74's incorporation by reference of the MOU, additional evidence connected the MOU's safety purpose with the rest of Act 74. *E.g.*, A1665 (Senate Finance Committee Chair: "in the [MOU] we have dealt with some health and safety issues, which we would be preempted from doing by legislation"); A1664 (attributing same motive to "House Natural Resources").

2. Defendants argue (Reply 49) that Entergy may not invoke the MOU because Entergy agreed that its provisions were not preempted. As an initial matter, Entergy is not invoking the MOU to escape compliance with its terms, but to demonstrate the legislature's safety purpose for enacting Section 6522(c)(2)'s requirement that Entergy obtain legislative approval before storing SNF derived from post-March 2012 operation. In any event, a regulated entity cannot waive federal preemption. *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 883 (9th Cir. 2006) ("Preemption is a power of the federal government, not an individual right of a third party that the party can 'waive.'").

3. Defendants assert (Reply 50) that Section 6522(c)(2)'s requirement of legislative approval cannot be based on a safety purpose because Entergy itself proposed this requirement. Defendants are again mistaken. Entergy's initial proposal sought simply to clarify that the existing Vermont statutory exemption for construction of SNF storage at Vermont Yankee was site-specific rather than owner-specific. Entergy Br. 15; A234. And that proposal was under duress, as the Vermont Attorney General opinion took Entergy by surprise in holding that the existing exemption for construction of such a facility was owner-specific, and Entergy was soon to run out of storage space in its existing facility. *VYNPC*, 683 F.3d at 1343.

4. Defendants err in dismissing Act 160's "public health" provision as calling for a merely academic "*study*" (Reply 9) of public-health issues associated with Vermont Yankee. In fact, Act 160 defines "public health" as an "*objectiv[e]*" that the Board "*shall consider*" "[i]n acting on a petition subject to this section [for post-March 2012 operation]." 30 V.S.A. § 254(b)-(c) (emphasis added). The public-health study was also intended to guide the legislature's decision whether to authorize the Board to act, insofar as the "stud[y] … *shall [be] provide[d]* … to the committees on natural resources and energy, the house committee on commerce, and the senate committee on finance." *Id.* § 254(a)(3) (emphasis added).

Defendants' attempt (Reply 9-10) to redefine "public health" as *non-radiological* public health is unpersuasive. Defendants ignore that Act 160 is a nuclear plant-specific statute (Entergy Br. 34); that courts have found similar uses of "public health" in such statutes to trigger preemption even though the provisions did not say "radiological public health" (*id.* at 33-34); and that the legislative history unmistakably shows that "public health" was meant to encompass radiological public health (*id.* at 34-35). Nor does *NRC-delegated* public-health authority that some states possess at the fringes of the field (Reply 10 & n.5) support Defendants' interpretation.

Finally, Defendants misquote *PG&E* in asserting that "nothing in Act 160 'regulate[s]' the safety aspects involved in 'the construction or operation of a nuclear powerplant.'" Reply 10 (quoting *PG&E*, 461 U.S. at 212). *PG&E* held that the AEA preempts *both* (1) statutes that "seek to regulate the construction or operation of a nuclear powerplant, … even if enacted out of non-safety concerns," 461 U.S. at 212; *and* (2) statutes "grounded in safety concerns," *id.* at 213. The district court found the latter type of preemption here. SPA62-64, 72-78, 79-82.

B. Defendants' Asserted Non-Safety Rationales Are Not Plausibly Served By Shutting Down Vermont Yankee

PG&E requires a court to determine whether any asserted non-safety purpose is "plausibly served" by the statute. SPA68. If not, the statute is preempted for that reason alone. *E.g.*, *Auto. Club of N.Y., Inc. v. Dykstra*, 520 F.3d 210, 215 (2d Cir. 2008). In *PG&E*, which involved a retail utility, a moratorium on nuclear-plant construction *did* plausibly serve a non-safety economic purpose because retail utilities like PG&E would pass along to in-state ratepayers the costs of SNF storage (and the higher electricity costs that would follow if SNF storage capacity were exhausted and the plant required to shut down). 461 U.S. at 213-14. Here, by contrast, given Vermont Yankee's status as a merchant generator, the district court correctly found that Vermont's "need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives," Act 160, § 1(a); *see also* 10 V.S.A.

§ 6521(1)-(5) (similar)—the asserted non-safety purposes in Acts 74 and 160—are "invalid" as explanations for shutting down Vermont Yankee. SPA77. Vermont's retail utilities are under no obligation to enter into a PPA with Vermont Yankee as opposed to other generators, and so Vermont can pursue its purported non-safety purposes whether or not Vermont Yankee continues operating. Entergy Br. 53-57.

1. Defendants erroneously equate the AEA framework's plausibility test with "'rational-basis review'" (Reply 12) from inapposite constitutional contexts where legislation is presumed valid. Specifically, Defendants' cases (Reply 11-13), which they quote without describing, involved equal protection or substantive due process claims involving economic classifications, *Nordlinger v. Hahn*, 505 U.S. 1 (1992), or prison, *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998), or the military, *General Media Commc'ns, Inc. v. Cohen*, 131 F.3d 273 (2d Cir. 1997), contexts where "judicial deference … is at its apogee," *id.* at 275 (internal quotation marks omitted).

By contrast, in contexts where, as with the AEA, the Supreme Court has already found a federal statute to field-preempt state law,[6] rational-basis deference

[6] Any presumption against preemption that might have applied to the AEA *before PG&E* was decided no longer applies *after PG&E*, which found the presumption overcome and announced a test of field preemption. In the wake of *PG&E*, the presumption against preemption falls away and courts instead apply the field-preemption test that has been announced. In the context of a *nuclear-plant-specific* statute, that test is whether the statute is "grounded in safety concerns." *PG&E*, 461 U.S. at 213. *English v. General Electric Co.*, 496 U.S. 72 (1990), and

does *not* apply and courts carefully scrutinize the *actual* purpose of state legislation to determine whether the law invades the federal field or rather serves a *genuine* or *persuasive* non-preempted purpose. *E.g.*, *Boeing Co. v. Robinson*, No. CV 10-4839, 2011 WL 1748312, at *10 (C.D. Cal. Apr. 26, 2011) (AEA) ("[California's] argument that SB 990 is merely a land-use statute is unpersuasive."); *Loyal Tire*, 445 F.3d at 145 (Interstate Commerce Act) (statute must be "'genuinely responsive,'" not merely "reasonably related," to non-preempted purpose) (quoting *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 442 (2002));[7] *Associated Builders & Contrs. Fla. E. Coast Chapter v. Miami-Dade Cnty.*, 594 F.3d 1321, 1324 (11th Cir. 2010) (OSHA) (rejecting as "not persuasive" County's assertion that local ordinance served non-preempted purpose).[8]

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (both cited at Def. Reply 15), are not to the contrary, as they involved *generally-applicable* statutes governed by a different test, *i.e.*, whether the statute has "some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels," *English*, 496 U.S. at 85. So too in *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997), an ERISA case, the Court specifically noted that the state had not enacted a pension-specific statute, *see id.* at 814-15 ("This is not a case in which New York has forbidden a method of calculating pension benefits that federal law permits ….").

[7] *Loyal Tire* announced this standard in the context of a preemption statute that, like the AEA (*see* Def. Reply 3), contains a savings clause. 445 F.3d at 142.

[8] *PG&E* itself refutes Defendants' rational-basis-review conception of AEA preemption. *PG&E* placed central reliance on what the actual California legislature had in mind when enacting the moratorium, 461 U.S. at 213-14, whereas under rational-basis review, the "legislature need not 'actually articulate at any time the purpose or rationale supporting its classification,'" *Heller v. Doe*, 509

2. On the merits, Defendants do not refute Entergy's explanation (Br. 11, 56) that Vermont retail utilities need not enter into a PPA with Vermont Yankee. They thus cannot deny that Vermont is free to pursue its supposed "need for power" and "energy diversity" goals by requiring Vermont retail utilities to enter into PPAs with non-nuclear generation sources and/or by subsidizing the development of such sources—even if Vermont Yankee continues operating and providing out-of-Vermont purchasers the opportunity to buy Vermont Yankee's power.[9] Defendants suggest, quoting their expert witness, that such measures are inadequate without also shutting Vermont Yankee down because its "'sheer size' … and the downward pressure that it exerts on prices … has 'a dampening effect on the development of alternatives.'" Reply 13 (quoting A194). But that expert conceded he did not know whether legislators had this in mind when enacting Acts

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U.S. 312, 320 (1993) (quoting *Nordlinger*, 505 U.S. at 15), and thus a merely conceivable purpose may suffice.

[9] *Southern California Edison Co. & San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269, 62,080 (1995) (*see* Def. Reply 6), recognizes that states "may order utilities to purchase renewable generation." And there is nothing unprecedented about a state's utilities declining to enter into any PPAs with a nuclear merchant generator located in the state, such that the generator contracts only with out-of-state purchasers. A165 (discussing Massachusetts).

Connecticut Dep't of Public Utility Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009) (*see* Def. Reply 6), is inapposite because it did not involve the AEA or any assessment of the plausibility of a state's purportedly non-safety reason for declining to license a nuclear plant. Entergy Br. 55 n.32. Moreover, Entergy's position does not depend upon the *FPA* preempting Vermont's authority, but on the merchant-generator status of Vermont Yankee undermining the plausibility of Vermont's non-safety purposes and thus triggering *AEA* preemption.

74 or 160. A195; *see Loyal Tire*, 445 F.3d at 148 (rejecting proffered purpose because, *inter alia*, it was "*post-hoc*"). Even aside from the *post-hoc* nature of this speculative "incentives" rationale, it is belied by evidence that (a) Vermont was willing to allow Vermont Yankee to continue operating if its power were sold to Vermont utilities at a below-market price, *e.g.*, A1677; and (b) Vermont authorized its retail utilities to enter into a PPA with a nuclear plant in New Hampshire (Entergy Br. 56). The district court, after hearing all of this evidence, found Defendants' rationale implausible, SPA77, and that finding deserves deference on appeal.[10]

3. Defendants' additional purported non-safety rationale—that Vermont Yankee must be shut down or else Vermont will bear SNF-storage costs (Reply 14)—fails for similar reasons. At the threshold, Defendants did not invoke it below and thus may not do so now. *E.g.*, *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005). In any event, this Court should reject Defendants' unsupported speculation that SNF-storage expense "may well be borne by state taxpayers if companies like Entergy become insolvent or abandon their obligations." Reply 14. Defendants again ignore that Vermont Yankee is a merchant generator and thus

[10] *E.g.*, *United States v. Thompson*, 528 F.3d 110, 116 (2d Cir. 2008) (affirming as not clearly erroneous district court's finding that prosecutor's purported race-neutral explanation for use of peremptory challenge was a pretext); *May v. Cooperman*, 780 F.2d 240, 252 (3d Cir. 1985) (affirming as not clearly erroneous district court's finding that legislature's purported non-religious purpose for requiring a moment in silence at public schools was a pretext).

that Vermont Yankee's SNF-storage costs are not passed on to Vermont consumers. Entergy Br. 4, 11-13.[11] Rather, those costs are paid from Vermont Yankee's ordinary budget while it is operating, and from its decommissioning fund (which NRC regulates[12]) thereafter. *E.g.*, 10 C.F.R. §§ 50.75; 50.82(a)(8). And most of those costs will be reimbursed by the United States in the form of damages payments for breach of its contract to remove SNF from the plant; to date, Entergy has recovered more than $39 million. *VYNPC*, 683 F.3d at 1337-38 & n.2, 1346, 1351.

C. Legislative History Confirms That Section 6522(c)(2) Is Grounded In Safety Concerns

Unlike in *PG&E*, where legislative history showed the California legislature's concerns were "'largely economic or the result of poor planning, *not* safety related,'" *id.* at 213 (quoting committee report), the legislative history here

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[11] Defendants assert that Vermont Yankee's merchant-generator status is irrelevant because "[s]tates regulate all sorts of entities that produce goods and services for the interstate market pursuant to their general police power." Reply 6. But that truism is "[s]ubject to constitutional limitations." *Pullman Co. v. Kansas ex rel. Coleman*, 216 U.S. 56, 65 (1910) (White, J., concurring); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 273 (1932) (similar). One such limitation is preemption under the Supremacy Clause, *see Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (examining whether state statute was preempted by federal law)—which in the AEA context forecloses state regulation of a merchant generator grounded in safety concerns.

[12] *E.g.*, Letter from NRC Staff to Vermont DPS (Oct. 2, 2012), *available at* http://pbadupws.nrc.gov/docs/ML1225/ML122540962.pdf (rejecting request to require Entergy to submit annual reports).

revealed that safety was the Vermont legislature's predominant purpose in enacting Act 74. As the district court correctly found, "the legislature's desire and intent to regulate the radiological safety of dry cask storage is crystal clear." SPA79-80 (citing 19 examples of legislators' safety concerns and noting that additional examples "are too numerous to recount again here"); SPA74-77 (similar, Act 160).

1. Unable to contest that *PG&E* relied on legislative history, Defendants argue (Reply 20-21) that the *PG&E* committee report differs in kind from the draft bills and legislators' statements here. To the contrary, "[l]egislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the [legislature]." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001); *see also, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (similar).

Although courts in *statutory-interpretation* cases like *Circuit City* consider legislative history of whatever stripe[13] a "problematic" tool for interpreting text, *e.g.*, *Circuit City*, 532 U.S. at 119; Reply 29 & n.15, courts in AEA and other *preemption/constitutional* cases regularly use legislative history to ascertain the

[13] Although courts sometimes prefer committee reports to other legislative-history materials, there is no rigid rule that *only* committee reports may be consulted. *See Zuber v. Allen*, 396 U.S. 168, 186 (1969) (relying on committee report but suggesting that "extensive and thoughtful [floor] debate" might have overridden it); *Disabled in Action v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) ("We focus on the most authoritative and reliable materials of legislative history, including: the conference committee report, committee reports, sponsor/floor manager statement and floor and hearing colloquy.").

statute's true purpose, *e.g.*, *PG&E*, 461 U.S. at 213-14 (relying on committee report and rejecting other proffered materials not because they were less reliable than that report, but because they pertained to "other state laws that are not before the Court"); *Skull Valley*, 376 F.3d at 1252-53; *Long Island Lighting Co. v. Cnty. of Suffolk*, 628 F.Supp. 654, 665-66 (E.D.N.Y. 1986); *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 & n.1 (2d Cir. 1999); *Loyal Tire*, 445 F.3d at 145-46; *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 861, 867-74 (2005); *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 344, 355 (2d Cir. 2002); Entergy Br. 49-51 & nn.26-27.[14]

2. Defendants do not address *Skull Valley*, *Long Island Lighting*, *McCreary*,[15] or *Consolidated Edison*. Defendants' responses to *Greater N.Y. Metro.* (Reply 25) and *Loyal Tire* (Reply 25 n.13) are unpersuasive. As Entergy explained (Br. 50-51), *Greater N.Y. Metro.*, which involved a preemption test

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[14] Given *PG&E*'s own reliance on legislative history, its citation of *United States v. O'Brien*, 391 U.S. 367 (1968), cannot be construed (Reply 21, 26-27) to repudiate the use of legislative history. Rather, as Entergy explained (Br. 47), the import of *PG&E*'s citation of *O'Brien* is that comments by an isolated legislator should not control. The district court here relied on much more. SPA74-82.

[15] Defendants do argue that constitutional-law precedents because they involve a "search for 'racially invidious intent' or religious discrimination." Reply 25 (quoting *HMK Corp. v. Walsey*, 828 F.2d 1071, 1076 (4th Cir. 1987)). But *HMK*'s *dictum* referred only to "racially invidious intent" and did not address other areas of constitutional law (such as the Establishment Clause) or the federal preemption contexts discussed in text, where courts carefully determine the statute's true purpose.

requiring a showing of both preempted purpose *and* effect, applies *a fortiori* to an AEA preemption test that requires only preempted purpose. Importantly, it was in the context of purpose analysis, not effects analysis, that this Court examined legislative history. 195 F.3d at 108 & n.1.[16]

As evident from the numerous decisions in different contexts that examine legislative history, *Loyal Tire* cannot be limited to the federal statute at issue there. Defendants' suggestion (Reply 25 n.13) that state statutes are more leniently judged than municipal ordinances is baseless: *Loyal Tire*'s test was announced in a Supreme Court decision that *equated* states and municipalities. *Ours Garage*, 536 U.S. at 437; *see also Skull Valley*, 376 F.3d at 1244 & n.4 (in holding state statute preempted by AEA, relying on *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1110-12 (3d Cir. 1985), which involved a municipal ordinance).

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[16] Defendants again argue (Reply 27 & n.14) that *PG&E*'s distinction of *Perez v. Campbell*, 402 U.S. 637, 652 (1971), proves that a state's legislature's avowed purpose in text controls. But, as Entergy explained (Br. 48), the *PG&E* petitioners did not cite *Perez* as justifying an examination of legislative history to discern purpose; rather, they cited it in arguing that the state statute's effects alone (regardless of purpose) triggered preemption. The sentence Defendants quote (Reply 27 n.14) comes under a heading in the *PG&E* petitioners' brief (at 48) that makes this clear. In any event, the *Court's* focus on effects in the *Perez* footnote is confirmed by its discussion of the state law "*frustrat[ing] the operation* of federal law." 461 U.S. at 216 n.28 (emphasis added). Under *PG&E*'s field-preemption test, however, there is no requirement that the challenger show frustration or conflict or effect, but only that the statute was "grounded in safety concerns." *Id.* at 213.

Against this weight of precedent, Defendants (Reply 23-24) invoke *Building Indus. Elec. Contractors Ass'n v. City of N.Y.*, 678 F.3d 184 (2d Cir. 2012) ("*BIECA*"). As Entergy explained (Br. 52-53), *BIECA* involved preemption under the National Labor Relations Act, where purpose is irrelevant. *BIECA* thus should not be viewed as overruling *sub silentio* this Court's decisions in *Loyal Tire* and *Greater N.Y. Metro.* (which involved preemption tests where purpose *is* relevant) or rejecting similar decisions by other courts under the AEA.

3. Finally, Defendants assert that the district court gave "excessive weight to a small sliver of statements in the legislative history, failing to recognize their place in the larger context of recorded and unrecorded legislative history." Reply 28. To the contrary, the court's review could not have been more comprehensive or contextual: The court heard legislative-history excerpts from both parties for several hours during the bench trial, A297-351, and reviewed additional evidence after trial, *e.g.*, SPA26 (citing S.124, As Introduced).[17] Only after this review did the court find that "the legislature's desire and intent to regulate the radiological safety of dry cask storage is crystal clear," SPA79; *see also* SPA74-77 (similar, Act 160), and that legislators' later use of non-safety language often reflected not a genuine desire to act on non-safety concerns, but an attempt to use that language as

[17] The court also recognized that "remarks of witnesses [as opposed to legislators] at committee hearings are accorded little weight …[,]" SPA74 (quotation marks omitted), and that a "legislator's comments regarding later drafts may be more reflective of legislative intent," *id.*

a code word for safety, *e.g.*, SPA81.[18] The district court's focus on numerous illustrative examples of legislators' statements and draft bills was entirely appropriate; this Court and others have similarly relied on statements from a sample of legislators to ascertain purpose.[19] *E.g.*, *Skull Valley*, 376 F.3d at 1252 (relying on statements of a legislator and Utah's Governor to establish that a challenged statute's purpose was radiological safety); *Consol. Edison*, 292 F.3d at 355 (citing statements of individual legislators to support finding of impermissible punitive purpose).[20]

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[18] Defendants again contend (Reply 2, 29) that early statements and early bills were superseded by strike-all amendments. Entergy responded at Br. 16 & 18 n.7.

[19] Defendants assert that "Entergy points to only five [named] legislators … who made statements about safety." Reply 2. That figure is understated because many statements in the audio-recorded legislative history are not attributable to a named legislator. Moreover, Defendants' focus on the number of speakers ignores that the much larger audience did not object to safety discussions as inappropriate, apart from a few warnings about being too explicit or using the "wrong" language.

[20] Defendants' cases (Reply 28) are irrelevant or unpersuasive. *Sonzinsky v. United States*, 300 U.S. 506 (1937), predates the precedents holding that inquiry into legislative purpose is required in certain contexts (including AEA preemption). While *United States v. Johnson*, 14 F.3d 766, 771 (2d Cir. 1994), found that the text of a particular committee report was inconclusive, the legislative history here is the polar opposite. In contrast with *Linquist v. Bowen*, 813 F.2d 884, 889-90 (8th Cir. 1987), *Harrison v. PPG Indus.*, 446 U.S. 578, 592 (1980), and *Waterman v. Farmer*, 183 F.3d 208, 214 (3d Cir. 1999), the legislative history here is not vague, and Entergy (unlike Defendants) does not claim support from the fact that some portions are missing.

D. Even If Section 6522(c)(2) Is Not Preempted On Its Face Or As Implemented In Act 160, It Is Preempted As Applied In Act 189 And S.289

The district court, having found Act 160 and an Act 74 provision preempted on their face, did not reach Entergy's alternative claim that those statutes are preempted as applied in Act 189 and S.289. SPA82.[21] If this Court reverses the district court's facial-preemption holding, it should reach the as-applied challenge.

Act 189. As explained *supra*, at 4-5, Defendants incorrectly describe (Reply 32-33) the Act 189 argument as "moot." Defendants also err in construing (Reply 33) Entergy's as-applied challenge as an attempt to use a later statute to interpret the meaning of an earlier statute. An as-applied preemption challenge focuses solely on the "application" conduct that post-dates the underlying statute. *E.g.*, *Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 679-80 (7th Cir. 2011); *Pharma. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 78 (1st Cir. 2001). Finally, on the merits, Defendants offer no response to the repeated discussion of safety in Act 189's legislative history or to the fact that Act 189 cannot plausibly be viewed as based on a non-safety "reliability" purpose because it omits to address the plant's two most important reliability systems. Entergy Br. 58-59.[22]

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[21] Had Defendants timely raised Section 6522(c)(2), the district court would have found it preempted and declined to reach the as-applied challenge to it for the same reason. SPA109.

[22] Defendants suggest (Reply 33 n.20) that Entergy's challenge is barred because Entergy's lobbyist formerly described Act 189 as non-safety legislation. But

S.289. Defendants assert (Reply 33 n.21) that the Senate's vote was not rushed because Entergy had been lobbying for such legislative authorization for years. This misses the point. The vote was rushed in the sense that it occurred shortly after a tritium leak so that anti-Vermont Yankee senators could focus on the plant's perceived unsafe operation. Entergy Br. 59-60.

II. THE FPA PREEMPTS THE DEMAND FOR BELOW-MARKET RATES

Entergy explained (Br. 66-68) that the district court, while correct on AEA preemption, erred in ruling that Entergy's FPA claim was premature because Entergy had not yet capitulated to Vermont's efforts to extract a below-market PPA. Neither Defendants' responses on the merits nor their incorporation of procedural objections raised on the Dormant Commerce Clause ("DCC") claim is persuasive.

A. The FPA Bars Vermont Officials' Demonstrated Conduct

1. Defendants misleadingly contend that it is "undisputed that private utilities, not state officials, negotiated the PPAs" and "that no one from the State told Entergy what it had to charge purchasers." Reply 52. But legislative leaders and other State officials were heavily involved *on the utilities' side* of the negotiations to the point where Governor Shumlin had veto power over the PPA

Entergy did not then have all of the legislative history that it obtained in developing this case, and in any event a preemption challenge is not waivable. *See supra*, at 7.

terms. *E.g.*, A174-75 (utility executive "told [Entergy] that before he would actually execute the PPA …, he needed to meet with the Governor … and as long as the Governor did not have any problems with it, he would go ahead and sign the PPA"); A572-73 (letter from legislative leaders to Entergy regarding lack of PPA); A754 (same).[23]

2. Defendants suggest (Reply 53) without authority that a market-based tariff provides one-way protection to *buyers* of energy, not to sellers. But Defendants do not dispute that market-based tariffs are premised on sellers "enter[ing] into *freely negotiated* contracts with purchasers," *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008) (emphasis added), or that Entergy's tariff provides that all transactions for the sale of "electric energy and capacity … shall be *voluntary*," A838 (emphasis added).

3. Defendants incorrectly suggest (Reply 54) that FERC is the exclusive forum for Entergy's FPA preemption claim. Just as the filed-rate doctrine may be raised as a defense in a ratepayer's court challenge to a particular rate, *e.g.*, *Simon v. KeySpan Corp.*, 694 F.3d 196, 204-06 (2d Cir. 2012) (citing cases), it may be

[23] Defendants' assertion that relief targeting price alone is "unworkab[le]" (Reply 36, 53) is inconsistent with the State's emphasis on a "below-market PPA" leading up to the 2010 vote on S.289, A174-75; A787-88, and with Defendants' concession that, if Entergy prevailed on its FPA or DCC claims, the district court could "enjoi[n] the State from requiring VY to sell power at below-market rates," ECF No. 143, at 18.

raised in a seller's court challenge to state action as preempted by the federal filed rate, *e.g.*, *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003); *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988). Moreover, Defendants fail to explain how FERC could provide the relief that Entergy seeks here; were FERC to invalidate a below-market PPA in a challenge brought by Entergy, such a ruling would not invalidate Vermont's insistence on a below-market PPA as a condition of post-March 2012 operation.

4. Defendants' suggestion (Reply 52-53) that the FPA claim fails due to the absence of a "state law or regulation" conditioning post-March 2012 operation on the existence of a below-market PPA is inconsistent with the filed-rate doctrine, *e.g.*, *Entergy La.*, 539 U.S. at 47 (applying doctrine to utility commission's ratemaking), and with preemption law more generally, *e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 609, 615 n.5 (1986) (applying preemption analysis to city's decision not to renew taxicab franchise).

B. The FPA Claim Is Not Procedurally Barred

1. Defendants erroneously contend (Reply 52 (citing Reply 43-47)) that the FPA preemption claim is not ripe, presumably on the ground that no below-market PPA was agreed to and the Board proceeding is ongoing.[24] But, as Entergy

[24] To the extent Defendants challenge the constitutional ripeness of Entergy's FPA claim, that argument fails because there is nothing hypothetical or speculative about Entergy's alleged harm: Vermont officials have already communicated to

explained (Br. 64-65) with respect to the DCC claim, such prudential ripeness arguments were not raised below and are waived.[25]

2. Waiver aside, Defendants' ripeness argument fails because they have offered no basis to postpone consideration of the FPA claim until after the Board's decision. This purely legal issue is "fi[t] … for judicial decision," and withholding consideration would cause Entergy hardship by forcing it to devote resources in the Board proceeding to preempted topics. *Ehrenfeld v. Mahfoud*, 489 F.3d 542, 546 (2d Cir. 2007). Indeed, Defendants' efforts to avoid consideration of the FPA claim now are in significant tension with their recent argument, in seeking to expedite oral argument of the appeal, that resolution of the appeal would alleviate "potential uncertainty in the pending proceedings before the Board," ECF No. 163, at 7. This Court's failure to resolve the FPA claim now will inject needless uncertainty into the Board proceeding.

Defendants' reliance (Reply 43) on *Texas v. United States*, 523 U.S. 296 (1998), is misplaced. There, Texas sought a declaration that the preclearance

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Vermont utilities that a below-market PPA is a prerequisite to post-March 2012 operation, A174-75; A166, the legislature voted not to authorize the Board to proceed with Entergy's CPG application in part due to the absence of a below-market PPA, A174-75; A240-42; A573-75; A754, and Defendant Shumlin apparently vetoed the PPA that Entergy had negotiated with Vermont utilities, A174-75.

[25] Defendants are incorrect (Reply 46-47) that their single use of "ripe" below sufficed. *United States v. Griffiths*, 47 F.3d 74, 77 (2d Cir. 1995) (party failed to "offer *some* argument or development of its theory").

provisions of Section 5 of the Voting Rights Act do not apply to implementation of certain provisions of state law permitting Texas to sanction local school districts for failure to meet state-mandated educational achievement levels. The Supreme Court held that the claim was unripe because invocation of the state law was "contingent on a number of factors," and "Texas ha[d] not pointed to any particular school district in which the application of [the state law] is currently foreseen or even likely." *Id.* at 300. Here, by contrast, state officials, including Defendant Shumlin, have *already* conveyed the necessity of a below-market PPA as a condition of post-March 2012 operation.

Nor, contrary to Defendants' suggestion (Reply 47), should a decision on the FPA claim be postponed because, after Entergy prevailed on its AEA claim, the State convinced the Board to open a new docket for Entergy's CPG petition. This ministerial action does not wipe away the record evidence demonstrating that legislative leaders, Defendant Shumlin, and other Vermont officials sought a below-market PPA as a condition of post-March 2012 operation.[26]

3. Defendants incorrectly suggest (Reply 52; *see also* Reply 41-42 & n.29) that granting relief on the FPA claim would violate the Eleventh Amendment. The prospective injunctive and declaratory relief is narrowly tailored to prevent state

[26] Defendants ask (Reply 38, 52) the Court to disregard evidence from DPS and legislators memorializing the State's insistence on a below-market PPA since they are not defendants. But this evidence is relevant to finding that it was the State's policy that Vermont Yankee would be shut down absent a below-market PPA.

officials who have a demonstrable connection to Entergy's CPG petition from conditioning post-March 2012 operation on the existence of a below-market PPA. *E.g.*, *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005) (under *Ex Parte Young*, defendant must have "some connection" to state action challenged as violating federal law). There is no "real har[m]" (Reply 41) associated with relief designed to ensure that Board members do not rely on preempted considerations in considering Entergy's CPG petition.

4. Defendants incorrectly contend (Reply 41-42 & n.29) that an injunction cannot lie against Defendants Shumlin and Sorrell. Defendant Shumlin, as Governor, is a proper party because of his participation in the PPA negotiations (*see supra*, at 21-22), his power over DPS (Entergy Br. 63-64), and his authority to execute Vermont law (*id.*). Defendant Sorrell, as Attorney General, is a proper party given his responsibility for enforcing any shutdown of Vermont Yankee based on the absence of a below-market PPA. *Id.* at 64. These connections to the challenged state action are more than sufficient. *E.g.*, *In re Dairy Mart*, 411 F.3d at 372; *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1203 n.4 (10th Cir. 2009).[27]

[27] *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996) (*see* Def. Reply 41), is in significant tension with the above authorities and with the Sixth Circuit's decision in *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (1982), which held that a Governor was a proper defendant where "the substantial public interest in enforcing the trade practices legislation involved here places a significant obligation upon the Governor to use his general authority to see that state laws are enforced." *Id.* at 665 n.5.

In any event, Defendants do not discuss Entergy's request for declaratory relief, A1836-37 (¶107); A1838. Unlike in *Ward v. Thomas*, 207 F.3d 114 (2d Cir. 2000), there is no threat that the declaration could be used to obtain money damages from the State, and thus no Eleventh Amendment concern.

CONCLUSION

On Entergy's cross-appeal, this Court should declare invalid and enjoin enforcement of Section 6522(c)(2) and Defendants' demand for a below-market PPA as a condition of granting a CPG for post-March 2012 operation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in FRAP 28.1(e)(2)(C), because it contains 6,999 words, excluding the parts of the brief exempted by the rule.

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