12-707-CV(L)

12-791-CV(XAP)

United States Court of Appeals for the Second Circuit

ENTERGY NUCLEAR VERMONT YANKEE, LLC,
and ENTERGY NUCLEAR OPERATIONS, INC.,
Plaintiffs–Appellees–Cross-Appellants,

v.

PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM H. SORRELL, in his official capacity as ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD,
Defendants–Appellants–Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT, Case No. 1:11-cv-99

BRIEF ON BEHALF OF
NATIONAL CONFERENCE OF STATE LEGISLATURES
APPEARING AS AMICUS CURIAE
IN SUPPORT OF DEFENDANTS–APPELLANTS–CROSS-APPELLEES

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I. INTRODUCTION

The critical issue in this appeal – whether the State of Vermont, in enacting Act 160 in 2006 and Act 74 in 2005, lawfully exercised its sovereign authority to regulate the non-radiological aspects of nuclear power generation – implicates principles of federalism and legislative power. The Brief of Appellants has extensively addressed the federalism principles, as embodied in the preemption doctrine and its circumscribed impact on traditional state authority over public utilities. The National Conference of State Legislatures ("NCSL"), appearing *amicus curiae*,[*] agrees with Appellants that the Atomic Energy Act does not preempt the Vermont statutes at issue in this case. NCSL is filing this brief primarily to elaborate on its concerns that fundamental legislative branch responsibilities and prerogatives have been trenched upon by the way in which the district court reached the contrary conclusion.

Specifically, NCSL believes that the district court's inappropriate use of partial legislative record materials to inquire into legislative motive both threatens the independence of legislative decisionmaking and distorts the integrity of the legislative process. Left uncorrected, this type of misguided judicial inquiry will inevitably chill state legislatures' willingness to debate policy issues robustly and to solicit a variety

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[*] No counsel for a party in this proceeding authored this brief in whole or in part. No counsel or party in this proceeding, and no person other than Amicus Curiae NCSL, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief. Counsel for all parties to this proceeding have consented to the filing of this brief.

of viewpoints about proposed legislation openly. Accordingly, all state legislatures – and indeed all courts – should be concerned by the decision below.

NCSL further believes that the district court also erred in its Commerce Clause analysis. NCSL, itself a strong advocate for state cooperation and protector of state interests, well appreciates the crucial role of the dormant Commerce Clause in maintaining good interstate relations. But the Clause is not implicated by mere bargaining between one state, on behalf of its residents, and a major industrial facility located within the state.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The National Conference of State Legislatures ("NCSL") is a bipartisan organization founded in 1975 to serve the legislators and staffs of the nation's fifty states, its commonwealths, and territories. One of NCSL's primary purposes is to improve the quality and effectiveness of state legislatures. It also seeks to promote a sound understanding of the legislative process. NCSL is a frequent advocate for state interests before the federal government. When appropriate, it also appears in court *amicus curiae* to defend legislative prerogatives. NCSL's interest in this proceeding is in protecting the institutional independence of the legislative branch and promoting a robust separation of powers by protecting the Vermont legislature's freedom to conduct wide-ranging inquiry into matters of potential legislative activity as it sees fit, and to speak with a unified voice in enacting state laws.

III. STATEMENT OF THE CASE

On April 18, 2011, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "ENVY"), the owner and operator of the Vermont Yankee Nuclear Power Station in Vernon, Vermont, filed this suit in the United States District Court for the District of Vermont against the Governor of Vermont and other state officials. The complaint's principal allegation was that a 2006 Vermont statute, 2006 Vt. Acts & Resolves No. 160 ("Act 160"), was preempted by the federal Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, through which Congress has "occupied the field" with respect to matters of radiological safety. Act 160 requires a Vermont nuclear power station to obtain a Certificate of Public Good ("CPG") in order to operate. The complaint also alleged that a 2005 Vermont statute, 2005 Vt. Acts & Resolves No. 74 ("Act 74"), which imposed additional requirements concerning the storage of spent nuclear fuel, was similarly preempted by the Atomic Energy Act. The complaint further alleged that Vermont's efforts to obtain favorable electrical power rates from ENVY as a condition of issuing a CPG violated the Constitution's Commerce Clause.

The complaint sought declaratory and injunctive relief that would allow the Vermont Yankee Power Station to continue operating after March 21, 2012, when its existing CPG expired. On April 22, 2011, ENVY moved for a preliminary injunction. After conducting two days of hearings and reviewing extensive documentary filings,

the district court denied this motion on July 18, 2011, on the basis that ENVY had not shown that without a preliminary injunction it would suffer irreparable injury. Trial then was held over three days in September 2011. In addition to witnesses at trial, the record before the district court included hours of audio tapes and other records of portions of the Vermont legislative proceedings related to the enactment of Acts 160 and 74. Although the Vermont Legislature does not keep complete records of its proceedings or produce official committee reports (as described in the Brief of Appellants at 13-14, 45-46), materials available to the district court included statements from a few individual members of the Vermont Legislature, as well as advice and opinion from various witnesses who had testified before several legislative committees.

Meanwhile, the Vermont statutes at issue identify their non-radiological safety purposes in their text. Specifically, Act 160 explains in section 1 that its purpose is to ensure that the licensing of nuclear energy generating plants in Vermont occurs on the basis of a full consideration of "the state's need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives." SA128. Similarly, Act 74 both spells out in section 6521 the Vermont Legislature's judgment that "[t]he state's future power supply should be diverse, reliable, economically sound, and environmentally sustainable," SA136, and specifies in section 6522 that the criteria for obtaining a

CPG for a spent nuclear fuel storage facility include establishing that "adequate financial assurance exists for the management of spent fuel," SA138.

On January 19, 2012, the district court issued its final Decision and Order, permanently enjoining Vermont from requiring ENVY to obtain new CPGs, under Acts 160 and 74, in order to operate Vermont Yankee after March 21, 2012. *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 1:11-CV-99, 2012 WL 162400 (D. Vt. 2012), SA1-102. Relying entirely on statements of selected committee witnesses and a handful of state legislators, the court concluded that radiological safety was the primary motive for the state statutes and that the statutes therefore were preempted by the Atomic Energy Act. SA74-78, 81. The court also held that Vermont's effort to secure for its utilities what the court labeled "below-market" rates violated the Commerce Clause. SA93. Defendants have appealed from this Decision and Order.

IV. SUMMARY OF ARGUMENT

Precisely because a judicial inquiry into the motive or purpose that animates a legislative act is fraught with interpretive and other difficulties, the Supreme Court *in the specific context of preemption analysis* has rejected looking beyond the face of a state statute claimed to be preempted to determine purpose. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-17 (1983) ("*PG&E*"). The district court's improper foray through Vermont's partial legislative record, in contravention of this teaching, misconstrues the source of legislative

authority and usurps the legislative role. Legislative record excerpts are neither an appropriate means of controlling legislative authority nor a reliable indicator of legislative motivation. Rather, the relevant motivation is always best expressed in the statutory language itself, the only language to which both houses of the Vermont Legislature and the Governor have committed themselves.

The language of the Vermont statutes at issue here unambiguously demonstrates valid, non-radiological safety purposes, such as promoting a "choice of power sources among various alternatives," Act 160, SA128, and a "diverse, reliable, economically sound, and environmentally sustainable" future power supply, Act 74, SA136. Yet the district court rejected these stated purposes on the basis of nonauthoritative and unreliable excerpts of the public record. This erroneous methodology intrudes upon the independence of the legislative branch and threatens to disrupt its proper functioning. The district court's error is only compounded by the fact that the legitimacy and seriousness of the purposes textually declared in Acts 160 and 74 are confirmed by a long history of Vermont enactments on related subjects, a type of authoritative and reliable legislative history that the district court entirely ignored.

In addition, the dormant Commerce Clause does not preclude Vermont from seeking to obtain favorable electricity rates for its residents. Indeed, regulating *intra*state utility rates is a traditional state function. The dormant Commerce Clause could preclude Vermont from regulating the prices paid by other states for electricity

produced in Vermont, but Vermont has taken no action to control the rates that ENVY charges customers outside Vermont.

V. ARGUMENT

A. The District Court Usurped the Legislative Role By Making a Speculative Determination, Contrary to the Plain Language of Acts 160 and 74, that Radiological Safety Was the Primary Motive of the Vermont Legislature.

In concluding that the federal Atomic Energy Act preempts the Vermont statutes at issue here, the district court determined that the Vermont Legislature's primary motive for enacting Acts 160 and 74 was radiological safety, despite contrary expressions of purpose in the text of both statutes. Unfortunately, the district court's speculative search for legislative motives beyond those found on the face of the statutes reflects a misunderstanding of the judiciary's role in preemption cases, and intrudes upon well-established legislative branch prerogatives.

Of course, in many legal controversies the judicial role includes identifying the purpose of a legislative enactment. In a prototypical case of statutory interpretation (a type of case not present here, because the correct interpretation of the statute's language is not at issue), this inquiry may be helpful in ascertaining the meaning of a textually ambiguous provision. In a very different type of case, of which the challenge to Acts 160 and 74 is an example, identifying the purpose instead may be relevant to determining the constitutionality of government action. For instance, courts occasionally must decide if race, rather than partisan politics, was the primary motive

for a legislative redistricting plan, *see Bush v. Vera*, 517 U.S. 952, 958-59 (1996); or whether an enactment challenged on First Amendment grounds has a proper secular purpose, *see Mueller v. Allen*, 463 U.S. 388, 394 (1983); or whether the language of a state statute indicates a federally preempted purpose, *see PG&E*, 461 U.S. at 212-17. Yet even in this second type of case, in which what is at stake is not how to construe a statute but whether the statute has a permissible purpose, the Supreme Court's well-known instruction in *American Trucking* should be axiomatic:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.

United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

Moreover, the Supreme Court in *American Trucking* warned that when courts look beyond text to determine purpose, "there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body." *Id.* at 544. Related dangers are that courts will mistake the unrepresentative views of individual legislators as the views of the entire body, or in other ways unintentionally distort the legislature's handiwork. *See*, *e.g.*, *United States v. Anderson*, 895 F.2d 641, 647 (9th Cir. 1990) (Kozinksi, J., dissenting) (arguing that legislative history "frequently reflects the views of only a minority of the legislature; it is often planted, to assuage a certain constituency, or worse, to influence court decisions").

These are not new principles. In 1810 the Supreme Court wrote:

> It may well be doubted, how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption? or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority? or on what number of the members? Would the act be null, whatever might be the wish of the nation? or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810). In 1977, the Court again restated this principle: "This Court has recognized, ever since *Fletcher v. Peck*, that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (citation omitted).

For these same reasons, the Supreme Court *in the specific context of the fifty states' residual authority to regulate the non-radiological safety aspects of nuclear power generation* refused to "become embroiled in attempting to ascertain California's true motive," given a clear statutory statement of an acceptable purpose. *PG&E,* 461 U.S. at 216. In part, the Court explained, this was because "what

motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Id.* Moreover, only the statutory text has been authoritatively agreed upon by both houses and the governor. *Cf. Massachusetts v. U.S. Dep't of Health & Human Servs.*, 10-2204, ___ F.3d ___, 2012 WL 1948017, at *11 (1st Cir. May 31, 2012) ("the motives of a small group cannot taint a statute supported by large majorities in both Houses and signed by [the President]").

Nevertheless, courts frequently do look beyond text to identify purpose, despite the hazards. As the Supreme Court in *American Trucking* continued:

> A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion.

310 U.S. at 544. Yet it is essential to recognize the context of this statement: The Court was interpreting the meaning of statutory language, not determining the legitimacy of an animating purpose. In that context, the Court went on to articulate the predominant view that when interpreting statutory meaning, a range of legislative history materials may assist the court, despite the risk: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use." *Id.* at 543-44; *but see*, *e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997) (espousing minority view that courts should never rely on legislative history).

However, this familiar principle of statutory construction is wholly misplaced in the preemption context, when what is at issue is not statutory meaning but the constitutional legitimacy of a statute that includes a plainly stated, constitutional animating purpose. Indeed, as this Court observed just last month: "We will not search for an impermissible motive where a permissible motive is apparent, because '[f]ederal preemption doctrine evaluates what legislation does, not why legislators voted for it or what political coalition led to its enactment.'" *Bldg. Indus. Elec. Contractors Ass'n v. City of New York*, 11-3590, ___ F.3d ___, 2012 WL 1563919 at *6 (2d Cir. May 4, 2012) (quoting *N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005)). In short, preemption questions must be settled based on actual *effect*, as informed by *stated* purpose.

This reasonable approach demonstrates the flaw in the district court's reliance on *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Greater N.Y. Metro. Food Council v. Guiliani*, 195 F.3d 100 (2d Cir. 1999); and *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). The district court invoked these cases – ignoring the teaching of *PG&E,* 461 U.S. at 216 – to justify its examination of portions of the Vermont legislative record. *See* SA65-69. The court wrote that it could not "be 'so naive,'" *id.* at 74 (*quoting McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 863 (2005)), as to accept the Vermont Legislature's stated purposes at face value, but instead needed to independently determine the real motive.

Yet the reason that each of these three cases cited by the district court "refused to rely solely on the legislature's professed purpose," *Gade*, 505 U.S. at 105, was not to identify some contrary "true" motive, as the district court implied. Rather, it was to determine "the practical impact of the law." *Id.* at 106; *see id.* at 105 (explaining that preemption analysis may require consideration of both professed purpose and actual effect); *Vango Media*, 34 F.3d at 73 (same); *Greater N.Y. Metro. Food Council*, 195 F.3d at 108 (rejecting blind acceptance of articulated purpose in order to consider both purpose and actual effect). In none of these preemption cases, however, did the judicial analysis include identifying *or even looking for* an ulterior motive not expressed on the face of the state statute.

In sum, in the preemption context, a statutorily expressed statement of valid purpose should be insufficient only when the statute in question nevertheless has a pre-empted effect. In such cases, including *Gade* and its Second Circuit progeny, "the key question" is *not* whether the stated purpose is pretextual rather than supported by the legislative record, but whether the effect of the state law "sufficiently interferes with federal regulation that it should be deemed pre-empted." *Gade*, 505 U.S. at 107.

An effect of thwarting federal law is not present in this case. Even if the Vermont statutes at issue ultimately deny ENVY the authority to operate the Vermont Yankee Power Station, that would not be a pre-empted result. The decision in *PG&E* has long confirmed that the Atomic Energy Act does not preclude states from refusing

to license the operation of nuclear power plants. *See* 461 U.S. at 216. Indeed, as the Court explained, it was not even "particularly controversial" that the Atomic Energy Act itself

> preserved the dual regulation of nuclear-powered electricity generation: the federal government maintains complete control of the safety and "nuclear" aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.

Id. at 211-12. Vermont is simply seeking to retain its sovereign right to determine, for any number of reasons other than radiological safety, such matters as the types of generating facilities to license, what long-term mix of generating capacity to promote, and the way in which its land is used. Section 1 of Act 160 makes this clear in requiring consideration of "the state's need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives," SA128, while Act 74 similarly shows the legislature's desire for "diverse, reliable, economically sound, and environmentally sustainable" sources of electrical power, SA136. Accordingly, neither the legislated purposes of Acts 160 and 74, nor their actual effects, give rise to a preemption claim.

B. The District Court's Usurpation of the Legislative Role Intrudes Upon the Independence of the Legislative Branch and Threatens Substantial Distortions of the Legislative Process.

Having rejected the Supreme Court's instruction in *PG&E* to defer to a state legislature's recitation of a valid statutory purpose, 461 U.S. at 216, the district court

embarked on a process of improper speculation. Relying on remarks about radiological safety made by a minority of individual legislators and a few committee witnesses, the court concluded that a legislative "motivation to regulate radiological safety . . . emerges substantially net positive." SA75. This subjective and impressionistic evaluation of a partial legislative record threatens to distort the legislative process, for several reasons.

One alarming result of the district court's analysis is to give individual legislators a remarkable (and extra-constitutional) power over the legislature as a whole and its authority. The court's approach is to use the words of a few to ascribe to the Vermont Legislature, as a matter of law, an intent that the legislature as a body did not desire or adopt, and one that is contradicted by the statements of purpose that the legislature did formally adopt. This is a power that a determined minority could strategically abuse to thwart the will of the majority.

More mundanely, it is simply the case that in the normal course of the legislative process, any number of individual legislators may be inclined to support or oppose a particular measure for a variety of unknowable reasons. Those views cannot fairly be attributed to the legislature as a body. Indeed, to do so would deprive the body of its constitutional control over its own work, leaving it impotent against the assertions of individual members, who have no lawful authority to bind the legislature except as part of a voting majority in the course of the regular lawmaking process.

Similarly, witnesses may opine in favor of or in opposition to proposed legislation for any number of reasons, genuinely held or pretextual. Ironically, some of the witnesses cited by the district court discussed issues of nuclear safety because legislators had invited their testimony to help circumscribe the extent of state legislative authority. *See*, *e.g.*, JA1352-55 (expert witness describing permissible legislative role as excluding matters of radiological safety); JA 1372-73 (legislators distinguishing between electric and nuclear policy and receiving counsel concerning limits of state authority). Of course, legislators should be encouraged to call witnesses who can provide guidance on the limits of the legislature's constitutional authority. Yet the decision below understandably will chill legislators' willingness to do so.

Likewise, legislators should generally be encouraged to solicit a range of views, critical and supportive, on proposed legislation, regardless of rationale. Obviously, the mere receipt of these views does not make them the views of the legislature or a legislative majority. Yet the district court's decision below will cause legislators to think twice about even soliciting controversial views that may influence a judicial determination of legislative purpose, and otherwise to screen out information and testimony so as to limit the potential for judicial mischief.

In other words, had the Vermont legislature anticipated the district court's approach, it might have enacted precisely the same statutes, but excluded from the committee proceedings any witnesses who would discuss radiological safety, while

cautioning its members to avoid any mention of the topic. Although that kind of artificially limited legislative process ought not to be promoted, it would have passed muster in the district court. Of course, when the effect of a state statute is permissible, and the stated purpose for the statute likewise is permissible, it is not sensible for the result of judicial review to depend on whether the legislature has created a selective legislative record (or even any record at all). But the decision below will encourage just this kind of distortion.

Indeed, the decision below may encourage legislative secrecy generally. Recent trends have been toward openness and transparency in legislative processes, providing citizens with a wealth of valuable information, for instance about their individual legislators, about the pressures they face, and about the range of input and ideas they considered. But the district court's reliance on isolated statements in the public record to nullify the expressed will of the majority, and thus thwart the legislature's ability to exercise its rightful authority, will discourage legislatures from making such records available, and perhaps even from holding hearings in public.

In addition to relying on isolated witness and legislator statements to nullify the Vermont Legislature's avowed legislative purposes, the district court compounded its error by refusing to pay greater attention to the broader legislative landscape that framed Acts 160 and 74. Specifically, these Acts are just two of at least a dozen enactments over the past decade through which the Vermont Legislature has addressed

issues of energy efficiency, diversity, reliability, and promotion of renewable energy options – all permissible purposes not preempted by the Atomic Energy Act – as the defendants pointed out to the district court below, *see*, *e.g*, Defendants' Pretrial Statement of Disputed Facts (filed Sept. 4, 2011) (Docket Entry 143-1) at ¶¶ 22-26; Defendants' Sur-Reply to Plaintiffs' Reply to Defendants' Opposition to Preliminary Injunction (filed June 17, 2011) (Docket Entry 68) at 9 n.7. For instance, in 2008 the Vermont Legislature established a goal of producing twenty-five percent of the state's energy from renewable sources by 2025. *See* 2008 Vt. Acts & Resolves No. 92; *see also* Brief of Appellants at 7 n.2 (listing ten Vermont enactments since 2002, other than Acts 160 and 74, with these purposes). These enactments provide much more reliable – and, because they are *enactments,* authoritative – evidence for evaluating the stated purposes of Acts 160 and 74 than does a subjective consideration of the unrepresentative and nonbinding statements of witnesses or legislators culled from a partial legislative record. This history of enactments confirms Vermont's current and long-standing interest in the non-radiological safety aspects of Vermont Yankee.

* * *

In conclusion, NCSL believes that it is fundamentally important that legislatures be free to solicit input from a diverse set of interests, who may or may not support proposed legislation for a variety of reasons. These reasons may be proper or improper, more or less persuasive. But it is up to the legislature to sort through them

and determine what is good public policy. For centuries, the legislative privilege (as contained in the Speech or Debate Clause of the U.S. Constitution, art. I, § 6, cl. 1; in analogous provisions in almost every state constitution, including Vermont's, *see* VT. CONST. chap. I, art. XIV; and in various common law decisions, *see*, *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 373-76 (1951) (holding that state legislators have absolute immunity against civil liability in federal court for performance of legislative duties)) has protected the ability of legislatures to conduct open, wide-ranging debates without fear that judicial inquiry into the legitimacy (rather than the meaning) of the legislative product would devolve into a consideration of the reasoning or motives of individual legislators. Here, not only are the Vermont statutes legitimate on their face, but a review of a broader, authoritative legislative history reinforces the fact that throughout the past decade Vermont has been repeatedly motivated by the same permissible purposes as those recited on the face of Acts 160 and 74. In these circumstances, the district court's speculative effort to substitute its own view of the "primary" motive of the Vermont Legislature for that which appears on the face of Vermont's statutes is inappropriate. Accordingly, the district court erred as a matter of law in concluding that the Atomic Energy Act preempts the Vermont statutes at issue in this case.

C. The Commerce Clause Does Not Preclude Vermont's Efforts to Bargain with ENVY for Favorable Terms.

The district court separately concluded that Vermont's effort to negotiate favorable utility rates with ENVY before issuing it a Certificate of Public Good

violated the dormant Commerce Clause. If sustained, this conclusion would dramatically expand the potential reach of the Commerce Clause to preclude a variety of state regulations having no direct impact on interstate commerce.

The National Conference of State Legislatures well recognizes and embraces the principle that, in order to protect the free flow of commerce and preserve good relations between states, the dormant Commerce Clause precludes state laws "whose object is local economic protectionism." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 390 (1994). But protectionism is not at stake in this case. Instead, what is at stake is the equally important principle that, consistent with the Commerce Clause, "a State may seek lower prices for its consumers." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 580 (1986).

It is true that a state pursuing favorable economic terms for its own residents must not "insist that producers or consumers in other States surrender whatever competitive advantages they may possess," *id.*, or otherwise discriminate against economic actors in other states. But in this case, Vermont has done nothing to control or influence the rates that ENVY might choose to provide to electrical consumers in other states, or otherwise to infringe upon whatever competitive advantages other states may have. Nor, contrary to the district court's view, SA87-88, 93, is Vermont seeking to gain "a preferred right of access, over out-of-state consumers," to resources within the state. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338

(1982); *see Brown-Forman Distillers*, 476 U.S. at 580. Rather, Vermont is only seeking good terms for its own residents. It has imposed no burden on the ability of economic actors in other states to bargain with ENVY, and no limitation on ENVY's ability to enter into whatever rate agreements it wishes with other consumers.

In short, by seeking favorable rates for its own electrical utilities, Vermont has merely sought to ensure that its residents would benefit from the state's agreement to allow a major industrial facility to locate in the state. This legitimate purpose – the core of the long-established and approved Certificate of Public Good processes in use throughout the country – is threatened by the erroneous decision below.

VI. CONCLUSION

For the foregoing reasons, the National Conference of State Legislatures respectfully asks this Court to reverse and vacate the January 21, 2012 Decision and Order of the United States District Court for the District of Vermont that granted declaratory and injunctive relief in favor of ENVY.

RESPECTFULLY SUBMITTED this 11th day of June, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the applicable type-volume limitation for an *amicus curiae* brief. The length of this brief, as measured by the Word Count function of the WordPerfect software used to prepare it, is 5042 words, exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ *Steven F. Huefner*
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