No. 21-60743

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND MINERALS, LIMITED; PERMIAN BASIN LAND AND ROYALTY OWNERS,

Petitioners,

v.

NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of Action by the Nuclear Regulatory Commission

REPLY BRIEF FOR STATE PETITIONERS

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INTRODUCTION

The Nuclear Regulatory Commission takes the remarkable position that the Nuclear Waste Policy Act of 1982 has nothing to say about what facilities will store all of the nation's most hazardous nuclear waste for the next 40 to 80 years. The Commission insists that is not a problem because in its view the Atomic Energy Act of 1954 authorizes the Commission to license the nuclear waste facility challenged here. But Congress deliberately avoided addressing long-term nuclear waste storage when it passed the Atomic Energy Act; at that time, and for decades thereafter, industry and government thought this nuclear waste would be "reprocessed" and that a solution for "waste" was not yet necessary. That is why nothing in the Atomic Energy Act authorized nuclear waste facilities.

The Commission claims that the D.C. Circuit's opinion in *Bullcreek v. NRC* supports the counterintuitive argument that the Atomic Energy Act, not the Nuclear Waste Policy Act, governs how the Commission may regulate nuclear waste. But the challenger in *Bullcreek* "conceded" that the Atomic Energy Act gave the Commission this authority, 359 F.3d 536, 542 (D.C. Cir. 2004), so the court had no opportunity to reach the question Texas presents here. A closer inspection—one *Bullcreek* had no reason to undertake, in light of the concession—reflects that the challenger's concession was erroneous. On the eve of the Nuclear Waste Policy Act's passage, the Commission's Chairman admitted to Congress that the Atomic Energy Act did not give the Commission authority to license a waste management facility. *Infra* at 10-11 (Chairman requesting the statute "be amended to establish waste management

facilities . . . . [because that] would allow the Commission to develop a suitable licensing procedure"). In other words, the Commission's own Chairman then agreed with what Texas is stating now.

But even if the Atomic Energy Act authorized licenses for waste management facilities, the ISP facility here was still licensed for an improper purpose. The Commission claims that it can license any facility that is safe. That is wrong: The Atomic Energy Act provides clear limitations on the reasons for which the Commission may issue any license. *E.g.*, 42 U.S.C. § 2073(a). And the Commission's stated land restoration purpose is not one of those reasons.

The Commission also violated the National Environmental Protection Act (NEPA) by failing to consider the risks of a terrorist attack on the facility. The Commission argues that the Court should adopt the Commission's favored side of a circuit split. But that side is wrong.

The ISP license was issued without statutory authority, based on arbitrary and capricious reasoning, and without engagement in the risk assessment analysis that Congress has mandated in NEPA. The license should be vacated.

ARGUMENT

I. The Commission Lacks the Statutory Authority to License ISP's "Consolidated Interim Storage Facility."

A. The Nuclear Waste Policy Act does not authorize the ISP license.

The parties share common ground on one point: the Nuclear Waste Policy Act does not authorize ISP's license. *See* Commission Br.43 (recognizing the Act does

not authorize this facility, but contending the text "says nothing about the agency's authority under *other*" laws); ISP Br.29.[1]

For good reason. Texas detailed in its opening brief that multiple provisions of the Nuclear Waste Policy Act would make no sense if the Atomic Energy Act granted the Commission the authority it asserts here. Texas Br. 18-22. The Nuclear Waste Policy Act "created a *comprehensive* scheme for the interim storage and permanent disposal of" spent nuclear fuel. *Ind. Mich. Power v. Dep't of Energy*, 88 F.3d 1272, 1273 (D.C. Cir. 1996) (emphasis added). For example, the Act expressly contemplated a situation in which commercial reactor storage might be full but no permanent disposal repository would yet be on-line. In such a situation, the reactor owners are statutorily directed to pursue "expansion of storage facilities *at the site* of [their] power reactor." 42 U.S.C. § 10155(b)(1)(B)(i) (emphasis added). If that is impossible, then limited federal storage space might be used. *E.g.*, *id.* § 10151(a), (b). In no event, however, was private, off-site storage space contemplated. Section 10155(h) in particular makes that clear, because it provides that nothing in the Nuclear Waste Policy Act was intended to "encourage, authorize, or require the private or Federal

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[1] Because the Commission appears intent to store all of the nation's commercial nuclear waste in ISP's facility, and a parallel, private, one in New Mexico, *see* Final Environmental Impact Statement ("FEIS") at 5-7 (that facility will accommodate over 100,000 metric tons), the upshot of the Commission's regulatory decision here is that the Nuclear Waste Policy Act will likely govern *no* commercial nuclear waste for at least the next several decades. *See, e.g.*, Government Accountability Office, *Commercial Spent Nuclear Fuel: Congressional Action Needed to Break Impasse and Develop a Permanent Disposal Solution* (Sept. 23, 2021) (nation has approximately 86,000 metric tons of spent nuclear fuel).

use . . . of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government."

The Commission does not dispute any of this. It just says (at 43-44) that Section 10155(h) provides only that nothing in *that* Act authorizes private away-from-reactor storage, and should not be read to "repeal" the Atomic Energy Act's grant of authority. But the Commission's "repeal" argument is meritless because the Atomic Energy Act did not confer the authority the Commission claims, *see infra* at 4-13. *Cf. United States v. Estate of Romani*, 523 U.S. 517, 530 (1998) (implied repeal rule inapplicable because "basic question of interpretation" regarding earlier statute "remain[ed] unresolved").

B. The Atomic Energy Act does not authorize the ISP license.

The Commission insists that the Atomic Energy Act authorizes the ISP license. But that interpretation is unsupportable under every canon of statutory interpretation. First, the Atomic Energy Act does not mention nuclear waste management facilities. Second, the statutory language that the Commission seizes upon is irrelevant because it concerns only possession of nuclear material, not construction of a facility. Third, the Commission's assertion of authority is deeply incongruous with our country's long history of nuclear energy regulation. Finally, the Commission's construction of the Atomic Energy Act violates the major questions doctrine and is not entitled to *Chevron* or any other deference.

1. The Atomic Energy Act authorizes facilities licenses for nuclear utilization and production, not waste.

As the State explained in its opening brief, no language in the Atomic Energy Act grants the Commission the power to license private, stand-alone storage facilities for spent nuclear fuel. State Br.15-18. With immaterial exceptions not relevant here, private persons seeking to handle nuclear materials must obtain "a license issued by the Commission pursuant to" specific sections of the Atomic Energy Act. 42 U.S.C. § 2131. The Act specifically refers to only two types of "facilities" licenses that the Commission may grant: "utilization" or "production" facilities. *Id.* § 2132. These are carefully defined terms that do not contemplate a stand-alone facility, away from a nuclear reactor, that will simply store spent nuclear fuel. *See* 42 U.S.C. § 2014(v), (cc). Indeed, even *Bullcreek* acknowledged that there is no express statutory grant of authority for the Commission to do what it did here. 359 F.3d at 538 ("[T]he [Atomic Energy Act] does not specifically refer to the storage or disposal of spent nuclear fuel.").

The Commission does not contend that ISP's facility is a "production or utilization facility." Nor does it contend that the Act authorizes a third kind of facilities license. That should have foreclosed issuance of ISP's license. Instead, the Commission chides the State (at 40) for its "fixation on the type of facility ISP intends to operate." But the State's "fixation" on the specific facility that the Commission licensed is based on the plain text of the statute, which specifically enumerates types of facilities. *See Tex. Educ. v. Dep't of Educ.*, 908 F.3d 127, 132 (5th Cir. 2018) (courts "presume[] that the legislature says in a statute what it means and means in a statute

what it says there"). The ISP facility is not traceable to any of the Atomic Energy Act's statutory text—that should be "the end of the matter." *Chamber of Comm. v. Dep't of Lab.*, 885 F.3d 360, 369 (5th Cir. 2018).

2. The provisions the Commission relies upon do not support the Commission's assertion of authority.

The Commission references three Atomic Energy Act provisions as ostensible textual support for its position. Commission Br.38 (citing 42 U.S.C. §§ 2073, 2092, and 2111). But those provisions principally govern nuclear material *possession*, not nuclear facility construction, and are therefore unhelpful here.

The Commission's three cited provisions are part of discrete Atomic Energy Act subchapters governing, respectively, "Special Nuclear Material" (Subchapter V, including Section 2073), "Source Material" (Subchapter VI, including Section 2092) and "Byproduct Materials" (Subchapter VII, including Section 2111). The Atomic Energy Act does not mention spent nuclear fuel—the material that the ISP facility will house. The Commission contends (at 39) that each of these three materials is a "constituent[] of spent nuclear fuel." Thus, under the Commission's own premise, the Commission can prevail only if the Atomic Energy Act gives the Commission authority to license a facility like ISP's for *each* of these materials.

The Atomic Energy Act does not do so. Sections 2073 and 2093[2] are parallel provisions authorizing licenses for the "possession" of special nuclear material and

[2] The Commission cited Section 2092 but appears to have intended to cite Section 2093. Section 2092 does not seem relevant to the Commission's arguments; it

source material, respectively. But a license to "possess" these materials is not a license to construct a facility that will house that material: one can "possess" material without constructing a facility for it. To drive that point home, these sections explicitly enumerate the *reasons* why the Commission may license possession, such as for research and development. One of those reasons is indeed to construct a facility. But the text limits such facilities to those established under "section 2133," the section establishing utilization and production facilities. 42 U.S.C. §§ 2073(a)(3), 2093(a)(3). So the statutory provisions the Commission relies on direct the reader right back to the problem the Commission wants to escape: the fact that the Atomic Energy Act does not authorize licensing of the facility the Commission licensed here.[3]

Section 2111 similarly governs possession of byproduct material. Through an amendment to the original Act, it does at least mention a "disposal" (but not storage) facility. 42 U.S.C. § 2111(b)(1). But it authorizes disposal only of *certain types* of significantly less hazardous "byproduct material" that are not constituent parts of

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merely indicates that as a general matter, no person may handle source material without a license from the Commission. *See* 42 U.S.C. § 2092.

[3] The Commission declines to place any weight on subsections 2073(a)(4) or 2093(a)(4) to support its authority to license the ISP facility, and they cannot save the Commission regardless. Those provisions authorizing possession "for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter," 42 U.S.C. § 2073(a)(4); *id.* § 2093(a)(4) (materially similar), cannot override the specific clauses cross-referencing the only two permissible facilities. Courts do not read "catchall provision[s]" to override and render superfluous "specifically enumerated" provisions. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011).

spent nuclear fuel. *Compare id.* (cross-referencing 42 U.S.C. § 2014(e)(3), (4), which deal with radium-226 and other similar sources of "naturally occurring radioactive material"), *with* 10 C.F.R. § 72.3 (defining spent nuclear fuel as "fuel that has been withdrawn from a nuclear reactor following irradiation, has undergone at least one year's decay since being used as a source of energy in a power reactor, and has not been chemically separated into its constituent elements by reprocessing"). Section 2111 shows that Congress knew it needed to amend the Atomic Energy Act to give the Commission authority to license facilities for nuclear waste, but in this provision it granted authority only to dispose of certain types of waste not at issue here. That should be dispositive. *See Gulf Fishermens Ass'n v. NMFS*, 968 F.3d 454, 466 (5th Cir. 2020).

3. Historical context shows that Congress did not grant the Commission this power.

The Commission's position is also irreconcilable with the history of nuclear waste regulation. It was "clear[] from the very beginnings of commercial nuclear power [in the 1950s] the Congress was aware of the absence of a permanent waste disposal facility, but decided to proceed with power plant licensing." *NRDC v. NRC*, 582 F.2d 166, 170 (2d Cir. 1978). Congress did not regard indefinite private "storage as a feasible and acceptable method of disposal," and in the Atomic Energy Act "took *no steps* to develop or provide this method of disposal of spent [nuclear] fuel." *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 244 (4th Cir. 1987) (emphasis added). Instead, "Government and industry accepted reprocessing as the

only practical method of disposing spent fuel" in this era. *Id.* at 246. And it was expected that "residue of high level waste . . . would be greatly diminished in volume in the" reprocessing process. *NRDC v. NRC*, 685 F.2d 459, 502 (D.C. Cir. 1982) (Edwards, J., concurring). For that reason, lengthy storage and disposal were not "thought of as [an] immediate safety issue[]." *NRDC*, 582 F.2d at 171. "Rather, waste disposal issues were considered to be ones calling for long term research and study, and *eventual* solution" in a future law. *Id.* at 171 (emphasis added).

Thus, by the time the Nuclear Waste Policy Act was passed in 1982 there had "never been any long-term storage available as an alternative to reprocessing" for spent fuel; the government "ha[d] never provided such storage facilities and no private venturer ha[d] ever constructed or even considered the construction of such a facility." *Westinghouse*, 826 F.2d at 265. Indeed, courts excused private parties from fulfilling contractual obligations to take a nuclear reactor's spent nuclear fuel on the grounds that it would be impossible to fulfill that agreement. *Id.* at 278. "No one dispute[d] that solutions to the commercial waste dilemma [we]re not currently available." *State of Minn. v. NRC*, 602 F.2d 412, 416 (D.C. Cir. 1979). And no one thought that *private* storage was a potential answer. Indeed, Congress thought spent nuclear fuel handling was far too "hazard[ous]" to "be left to private industry." *Westinghouse*, 826 F.2d at 244. Further, the temptation to permit "interim storage" was actively opposed because it "would reduce the pressure for developing a [real solution], thereby turning interim storage facilities into de facto permanent waste repositories." Congressional Office of Technology Assessment, *Managing the Nation's Commercial High-Level Radioactive Waste* at 7 (Mar. 1985).

The Commission's interpretation of the Atomic Energy Act flies in the face of all of this established context. Worse yet, the Commission admitted to Congress on the Nuclear Waste Policy Act's eve that it *lacked* the authority it claims here. After the "reprocessing" concept collapsed, the lack of waste management options began to have devastating consequences for industry. *Minnesota*, 602 F.2d at 414. In response, the Commission requested new authority from Congress. United States Nuclear Regulatory Commission, NUREG-0527, *Regulation of Federal Radioactive Waste Activities: Report to Congress on Extending the Nuclear Regulatory Commission's Licensing or Regulatory Authority to Federal Radioactive Waste Storage and Disposal Activities* at G-8 (Sept. 1979), *available at* https://perma.cc/ECF4-JMKU (last visited May 16, 2022). Specifically, the Commission's Chairman testified that the Commission needed new authority to license "waste management facilities as a third category [of facility] in addition to production and utilization facilities." *Id.* at G-10. He explained the Commission needed that authority because "waste facilities are neither production nor utilization facilities as defined by the Atomic Energy Act," and that no other statutory authority provided a compelling basis for the Commission's licensing authority over a private waste facility. *Id.*[4]; *see also* 42 Fed. Reg. 34,391, 34,392 (July 5, 1977) ("[T]he Commission's regulations . . . deal with the handling

[4] The Commission has authority to license *Department of Energy* waste facilities under Section 202 of the 1974 Energy Reorganization Act. *See* 44 Fed. Reg. 70,408, 70,408 (Dec. 6, 1979) (describing this authority). But the Commission Chairman recognized in his congressional testimony that this licensing was distinct from, and inapplicable to, *private* facilities licensing. NUREG-0527, *supra*, at G-10.

of spent fuel and other high-level wastes . . . only to the extent that such activities are related to *on-site* activities carried on by the licensee." (emphasis added)).

4. The Commission's interpretation violates the major questions doctrine and warrants no deference.

The Commission argues (at 47-48) that *Chevron* deference should tip the scales in its favor. To invoke *Chevron*, however, the Commission would have to invoke a genuine ambiguity in the statute, and here, there is none. *Supra* at 4-8; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). In any event, proper administrative law rules tip the scales in *Texas's* favor, not the Commission's. That is because agency action that involves major questions or impacts the relationship between the federal and State governments requires particularly "clear language" from Congress. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam). By Congress's own account, the long-term handling of spent nuclear fuel is a major question that also significantly implicates the States. Texas Br.16; *NRDC*, 685 F.2d at 494 (Edwards J., concurring) (nuclear waste regulation "may prove to be one of the most important [issues] to be decided by the United States courts in this century"). But the Atomic Energy Act contains anything *but* the "clear language" the Commission would need to regulate this major question. As shown *supra*, the Act forecloses the authority the Commission invokes here. At the very best for the Commission, the Atomic Energy Act is silent on this topic. *See Bullcreek*, 359 F.3d at 538. But if "congressional silence [were] a sufficient basis upon which an agency may build a rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change and agencies would enjoy

virtually limitless hegemony." *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1085 (11th Cir. 2013). That outcome would be "plainly out of keeping with [administrative law] and quite likely with the Constitution as well." *Id.*

In connection with the *Chevron* argument, the Commission relies (at 41) on what it calls the agency's "longstanding practice" of licensing away-from-reactor storage facilities. But there is no "adverse possession" rule of administrative law that "insulates [agency] disregard of statutory text." *Rapanos v. United States*, 547 U.S. 715, 752 (2006). And the Commission's reference to other licenses it has issued actually proves that it has *not* historically licensed away-from-reactor private storage facilities. The Commission notes, for example, (at 41) that it approved the renewal of a materials license for an away-from-reactor spent fuel storage facility in Morris, Illinois. But that facility was initially licensed as a *reprocessing* facility. *People of State of Ill. v. NRC*, 591 F.2d 12, 13 n.1 (7th Cir. 1979). It was converted to storage when the reprocessing concept collapsed. Much of the spent fuel that is being housed there was transferred when the facility was supposed to be a reprocessing facility. *See S. Cal. Edison v. United States*, 93 Fed. Cl. 337, 344 (Ct. Fed. Claims 2010) (describing this history). And, at the time the Nuclear Waste Policy Act was passed, this was the "only away-from-site facility in the" entire country that "accept[ed] spent nuclear fuel for storage." *People of State of Ill. v. Gen. Elec.*, 683 F.2d 206, 208 (7th Cir. 1982). It is a *sui generis* example and a relic of unique circumstances.[5]

[5] The existence of this facility also likely explains Congress's prohibition on the Commission "encourag[ing]" parties to use away-from-reactor storage. 42 U.S.C.

The fact that the Commission promulgated its "Part 72" regulations governing away-from-reactor storage in 1980 also does not help the Commission. "A regulation's age is no antidote to clear inconsistency with a statute." *Brown v. Gardner*, 513 U.S. 115, 122 (1994). And Congress is typically expected to incorporate relevant agency regulations in new enactments if it truly approves them. *E.g.*, 21 U.S.C. § 355 (over a dozen express incorporations of FDA regulations). Congress actually did incorporate some Commission regulations in the Nuclear Waste Policy Act for the Commission's facility licensing regulations, but preserved the Commission's licensing rules for storage *only* "at the site" of the reactor. 42 U.S.C. § 10153.

II. The Commission's Issuance of the License Violates the Administrative Procedure Act.

A. The Commission's stated purpose for the ISP license is arbitrary and capricious.

Texas explained in its opening brief that the Commission advanced a statutorily impermissible purpose to support the ISP license: "[S]o that stored SNF at decommissioned reactor sites may be removed and the land at these sites could be made available for other uses." FEIS at 1-3. The Commission has no jurisdiction over land

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§ 10155(h). The Commission says (at 44) "there would be no need to state that the [Nuclear Waste Policy Act] should not be read to 'encourage' private away-from-reactor storage if, as Texas asserts, the [Atomic Energy Act] did not authorize" such storage. But this facility's existence was well-known when Congress enacted the Nuclear Waste Policy Act. *Westinghouse*, 826 F.2d at 248. The prohibition on "encouraging" private, away from reactor storage, then, can be understood as an instruction that this facility should not be used in place of on-site storage.

use determinations, and it was arbitrary and capricious to justify its action on this extra-statutory ground. Texas Br.29-30.

The Commission agrees (at 61) that it "has no jurisdiction over land use," but says (at 59-60) that its determination that ISP will operate "safely" was nevertheless sufficient for licensing. That reasoning ignores that the Commission does not have authority to license any and all "safe" uses of nuclear material. The Atomic Energy Act authorizes the Commission to issue a materials license[6] only (A) for specific "research and development activities," 42 U.S.C. § 2073(a)(1), (2); (B) in conjunction with a utilization or production facility license, *id.* § 2073(a)(3), or (C) "to carry out the purposes of" the Act, *id.* § 2073(a)(4); *see also id.* § 2093(a) (materially similar). This license is indisputably not for research, development, or a utilization or production facility.

The license also fails to "carry out the purposes of" the Atomic Energy Act. The Commission surmises (at 61-62) that the ISP facility will "encourage[] new power plant applicants to enter the market" and prevent existing plants from "shut[ting] down." The *agency* did not advance that rationale, so it should not be considered. *Phil. Gas Works v. FERC*, 989 F.2d 1246, 1250 (D.C. Cir. 1993) (agency, not agency's "appellate lawyers" "must adopt" the reasoning for the agency order); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). And, without more, the rationale

[6] For the reasons outlined *supra* at 5-6, ISP's license is *not* a materials license, but rather is an extra-statutory facilities license. For purposes of this arbitrary and capricious argument, however, Texas proceeds against the rationale that the Commission propounded.

makes no sense. This industry's historical practice since its inception has been for nuclear reactors to have their *own* storage, *see Westinghouse*, 826 F.2d at 244-48, and to expand it *on-site* when necessary. Indeed, Congress directed the Commission to facilitate at-reactor storage construction and expansion. 42 U.S.C. § 10152.[7] Granted, nuclear reactor operators may find it more cost-effective to store their waste off-site. But that is also not a justification the Commission can rely on. "The Atomic Energy Act does not give the NRC comprehensive planning responsibility," and it does not give the agency authority to advance what is "economically wise" for nuclear reactors. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 218, 223 n.34 (1983).

The Commission also attempts (at 62-63) to defend its land use justification by claiming that under a "NEPA analysis, it is proper for a permitting agency . . . to consider the purpose and need for the facility from the applicant's perspective." That argument fails because "NEPA, as a procedural device, does not work a broadening of the agency's substantive powers." *NRDC v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1983) (same). An applicant's request for an unlawful license does not confer power on the agency to grant one.

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[7] This argument does not rise or fall with Texas's statutory argument. *If* the Commission has authority to license an away-from-reactor private storage facility (it does not), such a license might not be arbitrary and capricious if there are safety concerns obstructing the expansion of *at-reactor* storage, or other statutorily-valid considerations. But the Commission did not advance such a rationale here.

And there are other problems with the Commission's justification. Texas explained that the Commission's land use justification, in addition to being invalid, was improperly applied here because the license allows fuel from *active* reactors to be moved to ISP's facility. Texas Br.31-32. The Commission did not respond to this argument. Texas also explained that the Commission elevated its extra-statutory goal over environmental considerations. Texas Br.32-33. The Commission responds (at 65) that "[r]eactor sites will eventually be decommissioned, so there are no environmental consequences avoided . . . in delaying" a resolution on where the waste will go. But the Nuclear Waste Policy Act provides exactly where that waste must eventually go: to a permanent repository. The environmental consequences of constructing the ISP facility and moving waste there are plainly avoided if the waste is stored on-site at reactors until a permanent repository is ready.

B. The Commission's order flouts the statutory directive to minimize transportation of spent nuclear fuel.

Texas's opening brief further demonstrated that the Commission's decision failed to account for the statutory mandate to minimize transportation. Texas Br.33-37; 42 U.S.C. § 10155(a)(3); *see also id.* § 10164(2).

The Commission offers three flawed responses. First, the Commission maintains (at 46) that the transportation minimization obligations "do not address the issuance of a license to a private party to store spent fuel." *See also* ISP Br.35 (similar). But that is wrong: Congress clearly contemplated that *private* contractors may transport spent nuclear fuel, 42 U.S.C. § 10157 ("[t]ransportation" of such fuel may be conducted under Commission licenses by "private industry"), but nevertheless

imposed this obligation, *id.* § 10155(a)(3) (neighboring statutory section imposing transport minimization obligation). Plainly, transportation must be minimized no matter whether government or private transporters are moving the waste. If what the Commission instead is saying is that transportation must only be minimized if the *destination* is a federal facility, then it is in essence saying that Congress legislated an absurdity. There is no sensible reason why Congress would want to limit transportation destined to a federal facility but would be indifferent to transportation to a private facility. *Cf.* 10 C.F.R. § 72.108 (Commission regulation reflecting effects of "transportation" "must be evaluated").

Second, the Commission's attempt (at 69-70) to reorient the transportation question as one strictly about safety also fails. The statutory mandate is to limit transportation full-stop—not merely to limit *unsafe* transportation. 42 U.S.C. §§ 10155(a)(3), 10164(2). There are many non-safety reasons for the Commission to minimize transport. Even mere "discernment of a threat posed by spent fuel" transport—regardless of how *bona fide* the threat is—"has real implications for affected individuals." *See* Nat'l Research Council of the Nat'l Academies, *Going the Distance?: The Safe Transport of Spent Nuclear Fuel and High-Level Radioactive Waste in the United States* 152 (2006) ("NAS Report"). Private citizens know that "transportation programs are run by fallible institutions" and have legitimate fears about radioactive spent nuclear fuel. *Id.* at 154. Congress's transport-minimization mandate respects this intuitive public aversion to spent nuclear fuel. But the Commission's license issuance here ignores it. And the Commission compounded the problem by assuming transporters would adhere perfectly to the agency's remarkably

complex rules for safe transportation. The Commission's *own regulations* recognize that human error is possible, and case law provides that it was arbitrary and capricious not to take that into account. Texas Br.36-37.

Third, the Commission claims (at 46 n.24) that "even if" it was obligated to minimize transport, it was not "irrational" for the Commission to permit the transportation scheme here. It is not apparent how that is true; as Texas explained, waste will literally pass by Yucca Mountain on its way to Texas before presumably returning to Yucca Mountain in years to come. Texas Br.34. But if this transportation scheme is nevertheless rational, it is the agency's obligation to explain how on remand.

C. The Commission's cost-benefit analysis does not justify the ISP license.

The Commission's flawed cost-benefit analysis also cannot save the ISP license. Texas Br.37-38. The Commission does not dispute that. The Commission says instead (at 65-66) that the cost-benefit analysis satisfied its *NEPA* obligations. But here the Commission runs into trouble as well because under NEPA, an agency's environmental impact statement is invalid if it relies on "misleading economic assumptions." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996); *Sierra Club v. Sigler*, 695 F.2d 957, 978, 983 (5th Cir. 1983) (vacating agency environmental impact statement based on "skewed" cost benefit analysis). Texas explained how the cost-benefit analysis used misleading economic assumptions in

multiple respects. Texas Br.37-41. And the record underscores that the Commission's responses miss the mark.[8]

III. The Commission Violated NEPA by Failing to Assess the Risks from Potential Terrorist Attacks.

Texas explained in its opening brief that the Commission was obligated under NEPA to address the potential risks of a terrorist attack on the ISP facility. Texas Br.41-47. Texas was candid that this issue is the subject of a circuit split, but explained (at 42-45) that the better view of the split, controlling Supreme Court precedent, and the governing Council on Environmental Quality (CEQ) regulation provide that the NRC should have accounted for this risk. *See* 40 C.F.R. § 1502.21(d) (CEQ regulation providing agency should assess "impacts that have catastrophic consequences, even if their probability of occurrence is low"); *Sigler*, 695 F.2d at 972 ("CEQ's regulations . . . are binding on this court.").

The Commission does not address the CEQ regulation in its response brief. Nor does the Commission dispute that it did not conduct an evaluation of risks of a terrorist attack. Instead, the agency asks this Court to adopt the reasoning in *New Jersey*

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[8] For example, Texas explained that the cost-benefit analysis rigged the deck in ISP's favor by assuming that the ISP facility's costs were fixed and would not increase by one dime as thousands of tons of nuclear waste are added to the facility. By contrast, however, the Commission assumed that the *at-reactor* facilities have variable costs that change according to how much waste is stored there. Texas Br.39-40. There may be a way to square this circle, but the Commission did not try. It just says (at 68) that Texas's complaint about ISP's costs remaining constant "ignores the passive nature of" ISP's activity. But that is no answer because storage *at* reactor is *also* passive.

Department of Environmental Protection v. NRC, 561 F.3d 132 (3d Cir. 2009), and disregard the Ninth Circuit's more applicable opinion. Commission Br.79-82. Texas has already explained the flaws with the Third Circuit's reasoning. Texas Br.43-44. And the Commission's remaining defenses lack merit.

The Commission claims (at 83-84) that it analyzed risks from "accidents" that are similar to risks "as might reasonably be expected as a consequence of a terrorist attack." But the whole nature of a terrorist attack is that it is *not* an "accident," but rather a deliberate act controlled by human beings who can plan, adapt, and detect weaknesses. Natural accidents—like freak weather occurrences—are far different than deliberately setting off a "bomb" at the facility, or "hijack[ing] [an] aircraft" and crashing it into the facility. C.I. No. 1128 (Letter from Texas Governor Greg Abbott ("Abbott Letter")) at 2 (bringing this problem to the Commission's attention). The Commission also says (at 84) that it has previously conducted "generic" assessments of terrorist attacks. But generic assessments are not alone sufficient. The Commission was obligated to take into account site-specific factors at the time of licensing and address how they impact its generic analysis. Texas Br.45. Texas identified site-specific issues. Abbott Letter at 2-3. The Commission failed to consider them.

The Commission insists (at 85-86) that Texas should have brought its site-specific considerations to the agency not through a comment, but instead by participating formally in the agency's adjudicatory proceedings. But Texas's site-specific concerns were present before the agency and the agency acknowledged them. FEIS D-150; *see also infra* at 24.

IV. The State Has Article III Standing and Is a "Party Aggrieved" Under the Hobbs Act.

A. The Commission's standing arguments are meritless.

The Commission's assertion (at 27-30) that the State lacks standing is meritless. Texas's standing is facially obvious for three reasons.

First, the State is harmed in its sovereign capacity as a landowner because it will be forced to host the Nation's nuclear waste against its objections. *Pac. Gas & Elec. Co.*, 461 U.S. at 212 (States retain "traditional authority over . . . land use" under the Atomic Energy Act). Texas has an indisputable "well-founded desire to preserve its sovereign territory," *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (State possessed standing to challenge speculative future loss of coastline), and the ISP license infringes on that sovereignty interest.

Second, the Texas Legislature has passed legislation that would otherwise prevent the ISP facility from being constructed and operated in Texas. Texas Br.12. That legislation also prevents Texas's Commission on Environmental Quality (TCEQ) from issuing a license for spent nuclear fuel storage. C.I. No. 127 at 1. Texas has well-founded interests in "enforce[ing] a legal code," *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999), and the ISP license hampers that interest because if upheld it may preempt Texas's law. *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015) ("preemption of an existing state law constitutes an injury").

Third, monetary harms always provide a clear basis for standing. *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015). The Governor warned the Commission that

the "safe transportation of spent nuclear fuel would require [the State to spend money on] specialized emergency response equipment and trained personnel, as well as significant infrastructure investments." C.I. No. 1128 at 3. Far from disputing those concerns, the Commission acknowledged their validity. FEIS 4-75 ("States . . . may incur costs for emergency-response training and equipment.").

B. The State and TCEQ are proper parties to petition for review under the Hobbs Act.

The Commission rehashes its motions-stage argument that Texas is not a "party aggrieved" because it has not satisfied a specific "exhaustion requirement": to intervene (not just comment) in the agency's adjudicatory proceedings. Commission Br.31, 36. But Texas is a "party aggrieved" under the Hobbs Act, 28 U.S.C. § 2344, because it is injured and it submitted comments during agency proceedings.

The Commission's fundamental misstep is ignoring that the statute does not impose any "exhaustion requirement"—it just says a challenger must be a "party aggrieved." 28 U.S.C. § 2344. This is not a case "[w]here Congress specifically mandate[d] exhaustion." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). *Cf.* 15 U.S.C. § 717r(a) (FERC's statute providing parties "*shall* [seek] rehearing" with FERC before obtaining judicial review). When Congress does do that, the statute's defined process for "exhaustion[] is required." *McCarthy*, 503 U.S. at 144. "But where" as here, "Congress has not clearly required exhaustion, sound judicial discretion governs." *Id.*

Submitting comments to an agency during its proceedings satisfies judicial exhaustion requirements. It also satisfies the Hobbs' Act's "party aggrieved" prerequisite. *See* Texas Resp. to Mot. to Dismiss at 6 (Nov. 15, 2021). This is all the more apparent here because "Congress intended to provide for . . . review of all final orders in licensing proceedings whether or not a hearing before the [Commission] occurred or could have occurred." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985).

But even if there were an exhaustion issue, Texas's challenge would still be proper for multiple reasons:

First, this Court's precedent provides that Texas's statutory argument is reviewable regardless of exhaustion. *Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam). The Commission's attacks (at 32) on *American Trucking* do not change the fact that it remains the law in this Circuit. *See Wales Transp., Inc. v. ICC*, 728 F.2d 774 (5th Cir. 1984) (applying *American Trucking*).

Second, Texas's statutory argument is also reviewable because it would have been "futile" to raise it before the agency given that the Commission had already "predetermined" the answer. *McCarthy*, 503 U.S. at 147-48 (providing grounds for excusing failure to exhaust); Commission Br.35 (explaining that the Commission's own precedent dictated its answer to Texas's statutory argument).

Third, all of Texas's arguments are reviewable because, as the Commission concedes, at a bare minimum *other* parties raised these arguments before the agency. *See, e.g.*, *Pac. Choice Seafood v. Ross*, 976 F.3d 932, 942 (9th Cir. 2020), *cert. denied* 141 S.

Ct. 2518 (2021) (courts consider issue provided it was "raised with sufficient clarity" even if "by someone other than the petitioning party"); *see* Commission Br.18-19 (Commission admitting "other organizations . . . raised contentions raising a wide spectrum of issues, including the assertions that the NRC lacks authority to issue a license for an away-from-reactor storage facility"); *see also* 35 (similar). That makes sense, because exhaustion is designed to give the agency a first crack at a question, not as a procedural "gotcha" to deprive parties of access to the courts. Texas Resp. to Mot. to Dismiss at 6; *see also* ISP Br.21.

The Commission also argues (at 31) that jurisdiction is somehow improper here because other courts of appeals are also reviewing the same order. But Texas explained that if only one court has jurisdiction, this Court is plainly the right one. *See* Texas Statement Regarding Respondents' Motion to Dismiss or Transfer at 3-5 (Dec. 13, 2021) (Texas Statement). Texas was the first party to properly petition for review of the license itself, which carried statutory consequences under 28 U.S.C. § 2112. As Texas previously explained, *see* Texas Statement at 4-5, the Commission erred by filing the record in more than one court of appeals, in apparent violation of 28 U.S.C. § 2112, instead of only here, as it was statutorily directed. That mistake cannot deny Texas judicial review.

Finally, the Commission's concern (at 36) that parties will forego intervention in Commission adjudications is speculative and ignores that there are other reasons to intervene, such as to participate in hearings and tailor the scope of evidence that will appear in the administrative record. *E.g.*, 10 C.F.R. § 2.711.

Conclusion

The Court should vacate the ISP license.

Respectfully submitted.

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Certificate of Service

On May 16, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,497 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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