

No. 20-1187
(Consolidated with Nos. 21-1225, 21-1104, and 21-1147)

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BEYOND NUCLEAR, INC., et al.,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the
UNITED STATES OF AMERICA,

Respondents,

HOLTEC INTERNATIONAL,

Intervenor.

Petition for Review of Final Administrative Action of the
United States Nuclear Regulatory Commission

**BRIEF FOR AMICUS CURIAE NUCLEAR ENERGY INSTITUTE, INC. IN
SUPPORT OF RESPONDENTS**

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November 16, 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies the following:

A. Parties and Amici

Except for amicus curiae Nuclear Energy Institute, Inc. (NEI), all parties, intervenors, and amici appearing in this Court are listed in the Brief for Federal Respondents.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Federal Respondents.

C. Related Cases

A list of related cases appears in the Brief for Federal Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and D.C. Circuit Rule 26.1, NEI submits the following corporate disclosure statement. NEI is a nonprofit organization incorporated in the District of Columbia. NEI is a “trade association” as that term is defined in Federal Rule of Appellate Procedure 26.1(b). NEI has no parent company and no publicly held company has any ownership interest in NEI. NEI represents the policy interests of its members in the nuclear power industry, including nuclear power plant licensees, reactor designers and advanced technology companies, architect and engineering firms, fuel suppliers and service companies, consulting services and manufacturing companies, companies involved in nuclear

medicine and nuclear industrial applications, radionuclide and radiopharmaceutical companies, universities and research laboratories, law firms, labor unions, and international electric utilities.

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TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
A. Parties and Amici.....	i
B. Rulings Under Review	i
C. Related Cases	i
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES.....	iv
GLOSSARY OF ABBREVIATIONS	vii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	1
ARGUMENT	4
I. Nuclear Energy And Private, Away-From-Reactor Storage Facilities Help Fulfill The Nation’s Energy And Economic Needs	4
II. Petitioners’ Challenges To Private, Away-From-Reactor Storage Facilities Generally And To Holtec’s Facility Specifically Miss The Mark.....	8
A. Petitioners’ Sweeping Argument That Private, Away-From- Reactor Storage Facilities Are Categorically Unlawful in Light of the Fifth Circuit’s Decision in <i>Texas v. NRC</i> Is Fundamentally Misguided.....	9
B. Petitioners’ Narrower Argument That Holtec’s Away-From- Reactor Storage Facility Is Unlawful Is Equally Unavailing.....	14
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Agnew v. Gov’t of the District of Columbia</i> , 920 F.3d 49 (D.C. Cir. 2019).....	12
<i>Bullcreek v. NRC</i> , 359 F.3d 536 (D.C. Cir. 2004).....	10, 13
<i>Don’t Waste Mich. v. NRC</i> , 2023 WL 395030 (D.C. Cir. Jan. 25, 2023)	8, 10, 12, 14
<i>Duke Power Co. v. Carolina Env’t Study Grp., Inc.</i> , 438 U.S. 59 (1978).....	4
<i>In re Holtec Int’l (Hi-Store Consol. Interim Storage Facility)</i> , 91 N.R.C. 167 (Apr. 23, 2020)	15, 16
<i>Nat’l Ass’n of Regul. Util. Comm’rs v. DOE</i> , 680 F.3d 819 (D.C. Cir. 2012).....	13
<i>New Mexico ex rel. Balderas v. NRC</i> , 59 F.4th 1112 (10th Cir. 2023)	10, 12
<i>Skull Valley Band of Goshute Indians v. Nielson</i> , 376 F.3d 1223 (10th Cir. 2004)	10
<i>Texas v. NRC</i> , 78 F.4th 827 (5th Cir. 2023).....	2, 11, 13
<i>United States v. Jicarilla Apache Nation</i> , 564 U.S. 162 (2011).....	11, 12
<i>West Virginia v. EPA</i> , 142 S.Ct. 2587 (2022).....	13

Statutes

42 U.S.C. §2011	4
42 U.S.C. §2073	11, 12
42 U.S.C. §2093	11, 12

42 U.S.C. §2111	11, 12
42 U.S.C. §10101	14
42 U.S.C. §10222	6
Pub. L. No. 79-585, 60 Stat. 755	4
Pub. L. No. 83-703, 68 Stat. 919	4

Other Authorities

Br. for Amicus Curiae Nuclear Energy Institute, Inc. in Support of Rehearing En Banc, <i>Texas v. NRC</i> , No. 21-60743 (5th Cir. filed Oct. 31, 2023)	1
Br. for Amicus Curiae Nuclear Energy Institute, Inc. in Support of Respondents and Affirmance, <i>Don't Waste Mich. v. NRC</i> , Nos. 21-1048, 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231 (consolidated) (D.C. Cir. filed June 13, 2022).....	1, 7
IAEA, <i>Redevelopment of Nuclear Facilities After Decommissioning</i> (2006), https://rb.gy/8gp05	8
Lance N. Larson, <i>Nuclear Waste Storage Sites in the United States</i> , Cong. Res. Serv. (updated May 3, 2019), https://rb.gy/7sq01	7
NEI, <i>Jobs</i> , https://rb.gy/z3ryo (last visited Nov. 15, 2023).....	5
NRC, <i>Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel</i> (Aug. 1979), https://rb.gy/u6k5v	8
NRC, <i>U.S. Independent Spent Fuel Storage Installations (ISFSI)</i> (June 2023), https://rb.gy/sxpao	8
Nuclear Waste Policy Amendments Act of 2019, H.R. 2699, 116th Cong. §§101-08 (2019).....	15
U.S. Dep't of Energy, <i>5 Common Myths About Transporting Spent Nuclear Fuel</i> (May 26, 2020), https://rb.gy/474jh5	8
U.S. Dep't of Energy, <i>5 Fast Facts About Spent Nuclear Fuel</i> (Oct. 3, 2022), https://rb.gy/le3ag	6

U.S. Dep't of Energy, Office of Nuclear Energy, <i>Advantages and Challenges of Nuclear Energy</i> (Mar. 29, 2021), https://rb.gy/wuu9t	5
U.S. Energy Info. Admin., <i>Frequently Asked Questions (FAQ), How Many Nuclear Power Plants Are in the United States, and Where Are They Located?</i> , https://rb.gy/68bg0 (last updated Aug. 3, 2023).....	5
U.S. Energy Info. Admin., <i>Frequently Asked Questions (FAQ), What Is U.S. Electricity Generation by Energy Source?</i> , https://rb.gy/6xjg7 (last updated Oct. 20, 2023).....	5

GLOSSARY OF ABBREVIATIONSAbbreviationDefinition

AEA

Atomic Energy Act

DOE

Department of Energy

NEI

Nuclear Energy Institute

NRC

Nuclear Regulatory Commission

NWPA

Nuclear Waste Policy Act

INTEREST OF AMICUS CURIAE

The Nuclear Energy Institute (NEI) is the trade association for the commercial nuclear energy industry. NEI has hundreds of members involved in all aspects of the industry, including companies licensed to operate commercial nuclear power plants and store commercial spent nuclear fuel in the United States. One of NEI's core functions is to represent its members' interests in litigation that raises issues of critical concern to the industry. *See, e.g.*, Br. for Amicus Curiae Nuclear Energy Institute, Inc. in Support of Rehearing En Banc, *Texas v. NRC*, No. 21-60743 (5th Cir. filed Oct. 31, 2023); Br. for Amicus Curiae Nuclear Energy Institute, Inc. in Support of Respondents and Affirmance, *Don't Waste Mich. v. NRC*, Nos. 21-1048, 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231 (consolidated) (D.C. Cir. filed June 13, 2022). This is such a case. Nuclear energy and private, away-from-reactor facilities that store spent nuclear fuel help fulfill the Nation's energy and economic needs, and petitioners are questioning the legality not only of the particular facility at issue here, but the legality of all such facilities.¹

INTRODUCTION

The commercial nuclear energy industry in the United States got its start 70 years ago, and the benefits that it has provided in the decades since are undeniable.

¹ All parties have consented to the filing of this brief. Amicus curiae states that no party or counsel for a party other than amicus, its members, or its counsel

The industry is responsible for producing nearly one-fifth of the Nation's total electricity and nearly one-half of its carbon-free electricity; the industry generates tens of thousands of high-paying jobs; and the industry adds billions of dollars to the Nation's gross domestic product each year. The industry has long understood that private, away-from-reactor facilities that store spent nuclear fuel—the solid waste product of nuclear energy production—would allow operations to run even more efficiently. Instead of having dozens of different nuclear reactor sites expending duplicative resources to store radioactive waste, away-from-reactor storage facilities would allow the industry to consolidate those efforts at centralized locations. Given the advantages of away-from-reactor storage facilities, the NRC has licensed them for almost half a century.

Petitioners would have this Court declare *all* private, away-from-reactor storage facilities unlawful because the Fifth Circuit recently issued an outlier decision holding that the NRC lacks authority to license such facilities under either the Atomic Energy Act (AEA) or the Nuclear Waste Policy Act (NWPA). *See Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023), *pet. for rehearing en banc filed* (Oct. 24, 2023). That position has nothing to recommend it. First and foremost, this Court already held 20 years ago that away-from-reactor storage facilities are perfectly consistent

authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

with the AEA, and the Court just reaffirmed that holding earlier this year in a case involving some of these very same petitioners and a similar license. That insuperable problem aside, the Fifth Circuit's cursory analysis of the AEA does not withstand scrutiny, as that statute plainly authorizes the NRC to issue licenses for the possession of every constituent component of spent nuclear fuel. And the Fifth Circuit's invocation of the NWPA is even more misguided, as that statute has nothing to do with the temporary storage of spent nuclear fuel by private entities, but rather addresses storage and disposal by the federal government. Simply put, the Fifth Circuit's reasoning is exceptionally unpersuasive even assuming (contrary to law) that a panel of this Court could proceed as if it were writing on a clean slate.

Perhaps recognizing that a three-judge panel cannot overrule the Court's precedent, petitioners also press the narrower argument that the particular private, away-from-reactor storage facility at issue here is unlawful because the NRC approved a license application that purportedly authorizes Holtec International (Holtec) to store spent nuclear fuel owned by the Department of Energy (DOE), in contravention of the NWPA. But the NRC did no such thing. To the contrary, the NRC made clear beyond cavil that it approved the license application on the understanding that Holtec would store privately owned spent nuclear fuel—an arrangement that all parties here agree is lawful—while allowing Holtec to store DOE-owned spent fuel only if Congress eventually enacts legislation authorizing

such activity. Contrary to petitioners' suggestions, that display of respect by the executive branch for Congress' policy choices does not offend the separation of powers or otherwise raise any legal concerns. Accordingly, the Court should deny the petitions and affirm the legality of Holtec's away-from-reactor storage facility, while reaffirming the legality of such facilities in general.

ARGUMENT

I. Nuclear Energy And Private, Away-From-Reactor Storage Facilities Help Fulfill The Nation's Energy And Economic Needs.

When Congress first enacted the AEA in 1946—the Nation's first nuclear-related statute—it “contemplated that the development of nuclear power would be a Government monopoly.” *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 63 (1978); *see* Pub. L. No. 79-585, 60 Stat. 755. In the AEA of 1954, *see* Pub. L. No. 83-703, 68 Stat. 919, Congress reversed course and recognized that “the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes.” *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 63 (1978); *see also* 42 U.S.C. §2011(b) (declaration of policy that the AEA is designed to “strengthen free competition in private enterprise”).

The private sector heard that clarion call and delivered. Today, there are 93 commercial nuclear power reactors in 28 states, which provide nearly 20% of the Nation's electricity. *See* U.S. Energy Info. Admin., *Frequently Asked Questions*

(FAQ), *How Many Nuclear Power Plants Are in the United States, and Where Are They Located?*, <https://rb.gy/68bg0> (last updated Aug. 3, 2023); U.S. Energy Info. Admin., *Frequently Asked Questions (FAQ), What Is U.S. Electricity Generation by Energy Source?*, <https://rb.gy/6xjg7> (last updated Oct. 20, 2023). And nuclear energy offers numerous benefits that confirm its indispensable role in a diversified energy supply. Nuclear energy is the most efficient source of carbon-free electricity in the country and is responsible for half of its emissions-free electricity, annually providing nearly 800 billion megawatt-hours of 24/7 electricity—“the equivalent of removing 100 million cars off of the road.” U.S. Dep’t of Energy, Office of Nuclear Energy, *Advantages and Challenges of Nuclear Energy* (Mar. 29, 2021), <https://rb.gy/wuu9t>. On top of that, nuclear power plants are key contributors to the Nation’s economy. The nuclear energy sector adds \$60 billion in economic value annually and directly employs approximately 100,000 people in high-quality, long-term jobs with salaries 50% higher on average than those of other electricity-generation sources. *See* NEI, *Jobs*, <https://rb.gy/z3ry0> (last visited Nov. 15, 2023). And nuclear facilities are responsible for an additional 375,000 secondary jobs. *See id.*

Thus, for 70 years, the private sector has proven that it plays a vital role in fulfilling the Nation’s energy and economic needs. But the industry’s ability to utilize private, away-from-reactor storage facilities would make it even more

efficient and productive. Unlike fossil-fuel-fired power plants, which emit carbon dioxide and other air pollutants to the atmosphere, nuclear generation's primary byproduct is contained in the solid fuel that it uses to produce electricity. After generating electricity for approximately five years, spent nuclear fuel assemblies are removed from the reactor and safely stored initially in a concrete and steel fuel pool. When the spent fuel is sufficiently cool—after a few years of underwater storage—it is transferred and stored in dry casks, which are large steel-reinforced concrete containers. Over the past three decades alone, the industry has safely loaded and placed 3,600 of these containers into storage, largely at the sites of the reactors themselves.² And the industry has had to undertake these temporary storage tasks because DOE has failed to fulfill its legal obligations under the NWPA to start accepting spent fuel from commercial nuclear reactors for permanent disposal by January 31, 1998. *See, e.g.*, 42 U.S.C. §10222(a)(5)(B).

Although the nuclear industry has demonstrated that storing spent nuclear fuel at dozens of different reactor sites in dozens of different states is safe, it is well-recognized that this approach is highly inefficient. That is because each reactor site is responsible for staffing and other costs associated with meeting security,

² All the spent fuel produced by the U.S. nuclear energy industry “since the 1950s ... could fit on a single football field at a depth of less than 10 yards.” U.S. Dep’t of Energy, *5 Fast Facts About Spent Nuclear Fuel* (Oct. 3, 2022), <https://rb.gy/le3ag>.

monitoring, maintenance, and other requirements for spent nuclear fuel storage. And that is especially true at the dozens of reactor sites that are decommissioned and have “no ongoing reactor operations.” Lance N. Larson, *Nuclear Waste Storage Sites in the United States* 1-2, Cong. Res. Serv. (updated May 3, 2019), <https://rb.gy/7sq01>. Thus, in the absence of away-from-reactor storage facilities, the private sector is required to expend vast resources for the sole purpose of storing relatively small amounts of spent nuclear fuel at each nuclear reactor site—resources that industry could use for other productive ends—particularly at sites no longer producing nuclear energy. *See, e.g., Don’t Waste Mich., supra*, C.I.355 at 8-8 (NRC noting that annual operation and maintenance costs for storing spent fuel at decommissioned reactor sites are ten times greater than those at sites with an operating reactor).

Consolidating security, monitoring, inspection, and other operational efforts at private, away-from-reactor storage facilities—which can store spent fuel from multiple different reactors—thus creates enormous efficiencies and reduces overall fuel management costs, especially for spent fuel currently stored at decommissioned reactor sites. Indeed, the NRC has found that away-from-reactor storage facilities can save *hundreds of millions of dollars* as compared to storing spent nuclear fuel at existing locations, *see id.* at 8-11, all without generating any increased safety risks as the fuel is transported (contrary to petitioners’ suggestions otherwise), *see* U.S. Dep’t of Energy, *5 Common Myths About Transporting Spent Nuclear Fuel* (May

26, 2020), <https://rb.gy/474jh5> (“More than 2,500 SNF shipments have been transported around the country without any radiological incidents over the past 55 years.”); *contra* Sierra Club Br.44-45 (suggesting that it is “certainly possible” that a “serious radiological rail accident” will occur “en route to or from Holtec”); Fort Worth Amicus Br.1-9 (similar). And those remarkable figures do not even account for the economic opportunities associated with redeveloping the land that decommissioned reactor sites occupy. *See, e.g.*, IAEA, *Redevelopment of Nuclear Facilities After Decommissioning* 57-66 (2006), <https://rb.gy/8gp05>.

Precisely because of these obvious benefits, the private sector has invested capital in (and the NRC has granted licenses for) private, away-from-reactor storage facilities since the 1970s. *See, e.g.*, NRC, *Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel* 8-2 (Aug. 1979), <https://rb.gy/u6k5v>; *see also* NRC, *U.S. Independent Spent Fuel Storage Installations (ISFSI)* (June 2023), <https://rb.gy/sxpao>. And as this case and others confirm, *see, e.g.*, *Don’t Waste Mich. v. NRC*, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023), there is a strong interest in developing these facilities.

II. Petitioners’ Challenges To Private, Away-From-Reactor Storage Facilities Generally And To Holtec’s Facility Specifically Miss The Mark.

According to petitioners here, however, not only is the license for Holtec’s private, away-from-reactor storage facility unlawful; the NRC has engaged in *ultra*

vires action each and every time that it has granted a license for such a facility over the last half-century. Nothing supports these extraordinary claims.

A. Petitioners’ Sweeping Argument That Private, Away-From-Reactor Storage Facilities Are Categorically Unlawful in Light of the Fifth Circuit’s Decision in *Texas v. NRC* Is Fundamentally Misguided.

Petitioners first swing for the fences, insisting that the Fifth Circuit’s recent decision in *Texas v. NRC* confirms that the NRC has no authority *at all* to license private, away-from-reactor storage facilities. *See* Sierra Club Br.7-10; *see also* Beyond Nuclear Br.7 n.7 (suggesting in a footnote that, in light of *Texas*, the NRC’s authority to license private, away-from-reactor storage facilities is “less clear”).³ That argument suffers from a host of problems, not the least of which is that the Fifth Circuit does not sit above this Court in the judicial hierarchy.⁴ That is critical because this Court already held two decades ago that the NRC may “licens[e] ... away-from-reactor spent nuclear fuel storage facilities for private nuclear generators” “[p]ursuant to its AEA authority.” *Bullcreek v. NRC*, 359 F.3d

³ Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners state in a footnote that the Fifth Circuit’s *Texas* decision “renders a decision on [their] Petition moot.” Fasken Br.3 n.2. To the extent that they are suggesting that *Texas* controls the outcome here, that is obviously wrong, as *Texas* addressed a license for an away-from-reactor storage facility issued to a different party (Interim Storage Partners, LLC, not Holtec) in a different state (Texas, not New Mexico).

⁴ Petitioners also did not even raise this argument before the NRC. *See* NRC Br.51-52.

536, 538 (D.C. Cir. 2004) (emphasis added); *see also id.* at 539 (“The NRC’s authority ... to license private generators to store spent nuclear fuel[] originated with the AEA[.]”).

Confronted with that insurmountable obstacle, petitioners invoke the Fifth Circuit’s theory that the *Bullcreek* Court merely “assumed” that the AEA conferred such authority on the NRC but did not squarely hold as much. *See* Sierra Club Br.8-9; *cf.* Beyond Nuclear Br.7 n.7; New Mexico Amicus Br.8. But that claim is impossible to square both with *Bullcreek*’s plain language and this Court’s reaffirmation just this year of *Bullcreek*’s holding (in a case involving some of the very same petitioners here, no less): “Under the Atomic Energy Act,” the NRC is “permit[ted]” to “license and regulate the storage ... of spent nuclear fuel.” *Don’t Waste Mich.*, 2023 WL 395030, at *1 (brackets omitted) (quoting *Bullcreek*, 359 F.3d at 538). And the only other circuit (aside from the Fifth Circuit) to squarely address the issue here had no trouble identifying the holding in *Bullcreek* and expressly adopting it as its own. *See, e.g., New Mexico ex rel. Balderas v. NRC*, 59 F.4th 1112, 1122 (10th Cir. 2023) (quoting *Bullcreek* for the proposition that “the Atomic Energy Act ... authorizes licensing and regulation of ‘private use of private away-from-reactor spent fuel storage facilities’” (emphases omitted)); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004) (explaining that *Bullcreek* “concluded that ... the Atomic Energy Act of

1954 ... authorizes the NRC to license privately-owned, away-from-reactor storage facilities”).

Petitioners’ request that this Court follow the Fifth Circuit’s *Texas* decision thus is dead on arrival. But even if a panel of this Court were writing on a blank slate, the Fifth Circuit’s reasoning has little to recommend it. Indeed, the Fifth Circuit conceded that the AEA expressly authorizes the NRC to issue licenses to possess the “constituent materials of spent nuclear fuel”—*i.e.*, special nuclear material, source material, and byproduct material. 78 F.4th at 840 (discussing 42 U.S.C. §§2073, 2093, 2111). And while the Fifth Circuit emphasized certain provisions in the AEA allowing the NRC to grant such licenses for specific purposes, such as “research and development,” it recognized that the NRC also had explicit authority under that statute to issue such licenses for any “other” purpose that the NRC deems appropriate. *Id.* The Fifth Circuit nonetheless declared—citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)—that those separate grants of “other” authority preclude the NRC from issuing licenses for away-from-reactor storage facilities and that the NRC’s authority is constrained by the “research and development” provisions. *Id.* at 840-41.

That reasoning is fatally flawed. The cited passage from *Jicarilla* explained only that, where a statute imposed on the United States “specific” disclosure “obligations” vis-à-vis Indian trusts, a “catchall” provision stating that trust

obligations “‘are not limited to’ those enumerated” could not mean that the United States has “a general common-law duty to disclose all information related to the administration of Indian trusts,” as that would render the enumerated obligations “superfluous.” 564 U.S. at 185. Setting aside that the relevant AEA provisions here, *see* 42 U.S.C. §§2073, 2093, 2111, do not impose any “obligations” on the NRC, reading those provisions to allow the NRC to issue licenses for away-from-reactor storage facilities does not render any other provision in the AEA “superfluous.” In fact, it is the Fifth Circuit’s reading that produces superfluity: If the NRC could issue licenses only for research-and-development purposes, the provisions specifically authorizing the NRC to issue licenses for “other” purposes would do no work. *But see Agnew v. Gov’t of the District of Columbia*, 920 F.3d 49, 57 (D.C. Cir. 2019) (referencing the “directive that a statute not be interpreted in a way that renders any part of it superfluous”).

Nor is there any force to petitioners’ other *Texas*-inspired argument: that the NWPA “does not permit the NRC to license a nuclear waste storage facility.” Sierra Club Br.7. That is because the NWPA “governs the establishment of a *federal* repository for *permanent* storage”—*i.e.*, “disposal”—“not *temporary* storage by *private* parties,” which is the province of the AEA. *Balderas*, 59 F.4th at 1115, 1121 (emphases added); *see also Don’t Waste Mich.*, 2023 WL 395030, at *1 (explaining that “[s]torage and disposal ... are different concepts” and that “Congress addressed

plans to permanently dispose of spent nuclear fuel” in the NWPA); *Nat’l Ass’n of Regul. Util. Comm’rs v. DOE*, 680 F.3d 819, 821 (D.C. Cir. 2012) (“The [NWPA] made the federal government responsible for *permanently disposing* of spent nuclear fuel[.]”).⁵ The NWPA may have had relevance if Congress repealed the NRC’s preexisting authority in the AEA to license private, away-from-reactor storage facilities. But as this Court already concluded in *Bullcreek*, the NWPA “does not repeal or supersede the NRC’s authority under the Atomic Energy Act to license private away-from-reactor storage facilities, so the NWPA’s “failure” to *independently* “‘authorize’ storage at private facilities” is immaterial. 359 F.3d at 537-39. Petitioners’ reliance on the Fifth Circuit’s *Texas* decision thus is wrong from start to finish.⁶

⁵ Indeed, petitioners appear to concede that the NWPA limitations do not apply to private parties, a distinction clear on the face of the statute. *See, e.g., Sierra Club Br.7* (“There is no provision in the Act for private away-from-reactor storage.”); *Beyond Nuclear Br.7*.

⁶ Petitioners do not invoke the Fifth Circuit’s alternative theory that the “major questions doctrine” also forecloses the NRC’s ability to license private, away-from-reactor storage facilities. *See Texas*, 78 F.4th at 844. That is unsurprising. The *raison d’être* of the major questions doctrine is to prevent agencies from invoking an “ancillary provision” in “a long-extant statute” to assert “‘an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority,’” especially into an area beyond its core area of “expertise.” *West Virginia v. EPA*, 142 S.Ct. 2587, 2610, 2612-13 (2022). But the NRC has made clear that the AEA’s plain text authorizes licenses to private entities for away-from-reactor storage facilities for a half-century—a subject matter in the heartland of the NRC’s expertise—and this Court endorsed that view two decades ago.

B. Petitioners' Narrower Argument That Holtec's Away-From-Reactor Storage Facility Is Unlawful Is Equally Unavailing.

Unable to explain why *Texas* overrules *Bullcreek*, petitioners retreat to the narrower argument that Holtec's particular license for a private, away-from-reactor storage facility is unlawful because the license application approved by the NRC "provides that either DOE or private licensees could own the spent fuel during storage"—and the NWPA "expressly prohibits federal ownership of spent fuel before a repository is operational," which has not yet occurred. *Beyond Nuclear* Br.17; *see* *Sierra Club* Br.7 (adopting same argument); *New Mexico Amicus* Br.2-8 (same); *see also* 42 U.S.C. §10101(18) (defining "repository" as a "system" intended for "permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel"). In other words, petitioners insist that the NRC has authorized "unlawful" conduct (albeit, in the disjunctive). *Beyond Nuclear* Br.19. As petitioners acknowledge, this Court has already rejected similar arguments previously. *See* *Beyond Nuclear* Br.13 (citing *Don't Waste Mich.*, 2023 WL 395030, at *2). The latest incarnation of the argument fares no better.

Indeed, the order under review here is crystal clear that the NRC did *not* condone unlawful conduct. As it explained, "Holtec and DOE acknowledge that it would be illegal under NWPA for DOE to take title to the spent nuclear fuel at this time" and that Holtec's application simply reflects its "hopes that Congress will amend the NWPA in the future," *In re Holtec Int'l (Hi-Store Consol. Interim Storage*

Facility), 91 N.R.C. 167, 176 (Apr. 23, 2020)—as Congress has recently considered doing, *see, e.g.*, Nuclear Waste Policy Amendments Act of 2019, H.R. 2699, 116th Cong. §§101-08 (2019). But because the license addresses DOE storage only in the disjunctive, “Holtec had committed not to ‘contract unlawfully’ with DOE,” and because DOE has also “publicly taken” the “position that it cannot lawfully provide interim storage before a repository is operational,” the license is not legally defective. *Holtec*, 91 N.R.C. at 175-76. After all, it is just a license that would permit Holtec “to enter into lawful customer contracts today” (*i.e.*, with other private entities) “but also permit it to enter into additional customer contracts if and when they become lawful in the future” (*i.e.*, with DOE). *Id.* at 176.

Once it is recognized that the NRC never endorsed unlawful activity, petitioners’ remaining arguments collapse. Petitioners contend that the “presumption of regularity” as applied to DOE cannot “excuse” the NRC’s own purportedly “unlawful conduct,” which supposedly “permits Holtec to enter into contracts with DOE” that are “unlawful.” *Beyond Nuclear Br.19*. But as the NRC stated over and over again, its approval of Holtec’s license application is premised on the understanding that Holtec will enter into “*lawful*” contracts only. *Holtec*, 91 N.R.C. at 175-76 (emphasis added). Petitioners also assert that, although it is “lawful” for Holtec to store privately owned spent nuclear fuel, the Court should “sever” the “unlawful” provision of Holtec’s license that purportedly allows Holtec

to store DOE-owned spent nuclear fuel. Beyond Nuclear Br.19-20. Once again, petitioners simply ignore the NRC’s admonition that it is authorizing Holtec to store DOE-owned fuel *only* “if and when” such storage is lawful. *Holtec*, 91 N.R.C. at 175. Finally, petitioners posit that the NRC’s “consideration and approval of Holtec’s license application violated the constitutional separation of powers doctrine.” Beyond Nuclear Br.20 (capitalization altered). But the notion that the executive branch crosses a constitutional line by *respecting* the legislative branch’s choice not to authorize private storage of DOE-owned spent nuclear fuel (and its ability to make a different choice in the future) strains all credulity.

* * *

The NRC has licensed private, away-from-reactor storage facilities for nearly half-a-century pursuant to express statutory authority in the AEA. The NRC’s license for Holtec’s away-from-reactor storage facility falls comfortably within that longstanding tradition. The Court thus should reject petitioners’ overreaching and destabilizing request to declare all such facilities unlawful, along with its narrower but equally meritless request to declare Holtec’s facility unlawful.

CONCLUSION

For the reasons set forth above, this Court should deny the petitions for review.

Respectfully submitted,

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November 16, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because it contains 3,865 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

November 16, 2023

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that, on November 16, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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