No. 23-

IN THE

Supreme Court of the United States

HOLTEC INTERNATIONAL,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA, FASKEN LAND AND MINERALS, LIMITED, AND PERMIAN BASIN LAND AND ROYALTY OWNERS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After more than six years of extensive licensing proceedings, the United States Nuclear Regulatory Commission (NRC) issued petitioner a license to store spent nuclear fuel at a proposed facility in New Mexico. Several opposing parties in the NRC proceeding sought judicial review of petitioner's license in the normal course: before the D.C. Circuit pursuant to the Administrative Order Reviews Act (commonly known as the Hobbs Act), 28 U.S.C. § 2342. Years later, one of those parties initiated a second attack on petitioner's license in the Fifth Circuit, relying on the Fifth Circuit's unique *ultra vires* exception to the Hobbs Act to challenge the NRC's issuance of petitioner's license as beyond the agency's authority. The Fifth Circuit heard the case, deepening a split with the Second, Seventh, Tenth, and Eleventh Circuits which have rejected such an exception to the Hobbs Act.

The Fifth Circuit also decided that the NRC does not have authority under the Atomic Energy Act, 42 U.S.C. § 2011 et seq., and Nuclear Waste Policy Act, 42 U.S.C. § 10131(a) et seq., to issue licenses for spent fuel storage and vacated petitioner's NRC license. In issuing this decision, the Fifth Circuit created yet another split from decades-long precedent in the D.C. Circuit and the Tenth Circuit, where petitioner's facility would be located.

The questions presented are:

1. Whether there is an exception to the party-aggrieved requirement of the Hobbs Act for an *ultra vires* challenge to an agency action.

2. Whether the NRC has the statutory authority to issue licenses for spent nuclear fuel storage facilities.

PARTIES TO THE PROCEEDING

Petitioner, intervenor-appellee below, is Holtec International.

The United States Nuclear Regulatory Commission and United States of America were also appellees below.

Respondents, appellants below, are Fasken Land and Minerals, Limited, and Permian Basin Land and Royalty Owners.

CORPORATE DISCLOSURE STATEMENT

Holtec International has no parent corporation; no shareholder owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The license that is at issue in this case has been the subject of the following proceedings:

- *Fasken v. NRC*, No. 23-60377 (5th Cir. Mar. 27, 2024).
- *Beyond Nuclear, Inc. v. NRC*, No. 20-1187, 20-1225, 21-1104, 21-1147 (D.C. Cir.) (oral argument held Mar. 5, 2024).
- *State ex rel. Balderas v. NRC*, No. CIV 21-0284 (D.N.M.) (preliminary order issued Mar. 10, 2022).

The same type of NRC-issued license for a similar proposed project by another party has also been the subject of proceedings in the Fifth, Tenth, and D.C. Circuits:

- *Texas v. NRC*, No. 21-60743 (5th Cir. Aug. 25, 2023) (reh'g en banc denied Mar 14, 2024) (petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 12, 2024) (No. 23-1300)).
- *Don't Waste Mich. v. NRC*, 21-1048, 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231 (D.C. Cir. Jan. 25, 2023)
- *State ex rel. Balderas* v. *NRC*, No. 21-9593 (10th Cir. Feb. 10, 2023).

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This is the second of two related cases from the Fifth Circuit creating two different circuit splits and undermining the federal government's ability to regulate nuclear materials throughout the United States.

In the first case, *Texas v. NRC*, App., *infra*, 4a-35a, *reh'g en banc denied* App., *infra*, 36a-57a, the Fifth Circuit relied on a "judge-made, *ultra vires* exception" to the Hobbs Act to hear a case that failed to meet statutory requirements, creating a split with four other circuit courts. *Texas*, App., *infra*, 54a (Higginson, J., dissenting). The Fifth Circuit's exception to the Hobbs Act in turn allowed that court to find that the NRC does not have authority to issue licenses for spent nuclear fuel storage, thus creating a second split with the Tenth and D.C. Circuits. *Texas*, App., *infra*, 21a. Shortly after issuing the *Texas* decision, the Fifth Circuit applied the same theory to this case, App., *infra*, 1a, and vacated petitioner's license for a spent nuclear fuel storage facility in New Mexico.

Even though it created a circuit split, the Fifth Circuit recognized the *ultra vires* exception to the party-aggrieved requirement of the Hobbs Act, erroneously claiming it was necessary to open the courthouse door to *ultra vires* claims. But the door to the courthouse was already open, and a litigant can be a party aggrieved in compliance with the Hobbs Act while also challenging an *ultra vires* agency action. Here Fasken could have done both in the D.C. Circuit, where Sierra Club and Beyond Nuclear have already raised Hobbs Act claims challenging as

ultra vires NRC's authority to issue petitioner's license.

The Fifth Circuit, nevertheless, has discarded both the door to the courthouse and the structure holding the door in place, inviting litigants to ignore the requirements of the Hobbs Act. Under *Texas* and this case, a litigant can skip the agency's proceedings, wait until after the eleventh hour to challenge a license after it has been issued, and attack the same license in multiple circuit courts. This deprives the agency and the licensee of the opportunity to address the litigant's concerns or to right the alleged wrongs, and serves only to reinstate the judicial inefficiencies that the Hobbs Act was intended to avoid: delay and duplication of effort. In the end, the Fifth Circuit has opened the door for third parties to impose on the agencies subject to the Hobbs Act and the circuit courts duplicative, tardy, and unnecessary litigation.

The Fifth Circuit also—despite the NRC's decades-long history of licensing spent nuclear fuel storage facilities and the views of two other circuit courts—found that the NRC "has no statutory authority" under the Atomic Energy Act or the Nuclear Waste Policy Act to issue a license for a spent nuclear fuel storage facility. *Texas*, App., *infra*, 47a. In so doing, the Fifth Circuit decided that the NRC lacks "a broad grant of authority to issue licenses for any type of possession of special nuclear material or source material" or long-lived byproduct material and, thus, could not issue licenses for the storage of spent nuclear fuel. *Texas*, App., *infra*, 27a. This is plainly contrary to the language of the Atomic Energy Act, and the D.C. Circuit and Tenth Circuit

analysis must prevail over the Fifth Circuit's analysis in *Texas*. This Court should also overturn the Fifth Circuit's decisions because they cast a long shadow over numerous NRC materials licenses across the United States, including those for existing spent fuel storage facilities, uranium enrichment facilities, and nuclear fuel fabrication facilities.

For these reasons, Petitioner Holtec International respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals opinion (App., *infra*, 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix. App., *infra*, 337a-344a.

STATEMENT

A. Legal Framework

1. The Hobbs Act

The Hobbs Act, 28 U.S.C. 2341 *et seq*., governs judicial review of the orders of several federal agencies, including the NRC. See 42 U.S.C. §§ 2239(a)-(b); 28 U.S.C. § 2342. Under the Hobbs Act, "part[ies] aggrieved by the final order" may petition

for review in the federal courts of appeals. 28 U.S.C. § 2344 ("Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies."). In NRC adjudicatory proceedings, a "party" is a "person whose interest may be affected by the proceeding," and who is admitted to such proceeding. 42 U.S.C. § 2239(a)(1)(A). In addition, if a person pursues party status but is rejected by the agency, that person can nevertheless appeal the NRC's decision rejecting its party status. 42 U.S.C. § 2239(b)(1).

The Hobbs Act's text provides no exceptions to the "party aggrieved" requirement. 28 U.S.C. § 2344. Nonetheless, in 1982 the Fifth Circuit announced an exception, in dicta, to the Hobbs Act party-aggrieved requirement for challenges to an agency action that is alleged to be beyond the agency's authority. *Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982); *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). Four other circuit courts have explicitly refused to follow the Fifth Circuit and have found no exception to the party-aggrieved requirement for alleged *ultra vires* agency actions. See, e.g., *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112-113 (2d Cir. 1999) (declining to follow the Fifth Circuit decisions *American Trucking* and *Wales Transportation* as dicta); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,* 799 F.2d 317, 335-336 (7th Cir. 1986) (declining to follow the Fifth Circuit decision in *American Trucking*); *State ex rel Balderas v. NRC*, 59 F. 4th 1112, 1123-24 (10th Cir. 2023) (declining to follow the Fifth Circuit); *Nat'l Ass'n of State Util. Consumer Advocs. v. FCC*, 457 F.3d 1238, 1249

(2006) (11th Cir. 2006) (declining to follow the Fifth Circuit). The Fifth Circuit has recognized that its *ultra vires* exception has been "squarely rejected by some of our sister circuits," further calling its validity into question. *Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005); see also *Merch. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 n.16 (5th Cir. 1993). Nonetheless, the Fifth Circuit used this exception in *Texas* and this case to avoid the Hobbs Act's party-aggrieved requirement.

2. The Nuclear Legal Framework

a. In 1954, Congress created in the Atomic Energy Act, 42 U.S.C. 2011 *et seq.*, a comprehensive regime for federal regulation over the then-nascent civilian nuclear industry.[1] The Atomic Energy Act was drafted with flexibility in mind, rather than with an intent to proscribe each specific permissible action of the NRC. Indeed,

> [i]n the Presidential Message recommending the legislation which culminated in the Atomic Energy Act of 1954, it was said that flexibility was a peculiar *desideratum* and that, absent an accumulation of experience with the new civilian industry hopefully to be brought into being, "it would be unwise to try to anticipate by law all of the many problems that are certain to arise."

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[1] In the Atomic Energy Act, the "Atomic Energy Commission was given broad regulatory authority over the development of nuclear energy." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 526 (1978). This authority was later transferred to the NRC by the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq*.

Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968) (citing H.R. Rep. No. 83-328, at 7 (2d. Sess. 1954)) (emphasis supplied). Instead, Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel*, 400 F.2d at 783.

While the Atomic Energy Act avoided detailed instructions for the NRC, its intended goals are clearly set forth. Congress intended for the Atomic Energy Act "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes," 42 U.S.C. § 2013(d), and it intended to establish "*Government control* of the possession, use, and production of [both] atomic energy and special nuclear material" in order to "make the maximum contribution to the common defense and security and the national welfare."[2] 42 U.S.C. § 2013(c) (emphasis added). Thus, the Atomic Energy Act vested the Federal Government with exclusive regulatory control over the possession, use, and production of *both* atomic energy and special nuclear material. As a result, the Atomic Energy Act

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[2] Special nuclear material is defined as "(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." 42 U.S.C. § 2014(aa).

Source material is defined as "(1) uranium, thorium, or any other material which is determined by the Commission . . . to be source material." 42 U.S.C. § 2014(z).

sets forth an overall framework for Federal Government regulation of the possession, use, and production of atomic energy through utilization facility licenses, 42 U.S.C. §§ 2133(d)-(e); certain methods of producing special nuclear material through production facility licenses, 42 U.S.C. § 2133(b); and the possession and other uses or production of special nuclear material (including uranium enrichment and fuel fabrication) through special nuclear materials licenses. 42 U.S.C. § 2073.

In developing the Atomic Energy Act, Congress also directed the NRC to

> establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.

42 U.S.C. § 2201(b); see also 42 U.S.C. § 2093 (providing authority to issues licenses for source material); 42 U.S.C. § 2111 (providing authority to issues licenses for byproduct material). As a result, the "comprehensive regulatory scheme created by the [Atomic Energy Act] embraces the production, possession, and use of three types of radioactive materials—source material, special nuclear material, and byproduct material," *Train v. Colo. Pub. Int. Rsch. Grp., Inc.*, 426 U.S. 1, 6-7 (1976) (footnotes omitted).

b. For fifty years, the NRC has used its Atomic Energy Act authority to issue special nuclear materials licenses for spent nuclear fuel[3] storage facilities, both at and away from reactors. As one example starting in the 1970s, the Commission issued General Electric Company a special nuclear materials license to store spent nuclear fuel at a non-reactor location in Morris, Illinois. *See* General Electric Co., Issuance of Facility License for Possession Only, 39 Fed. Reg. 32,345, 32,456 (Sept. 6, 1974) (regarding continuation of special nuclear materials license to receive and possess spent nuclear fuel at GE Morris).

c. Congress later developed and enacted the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq*. The GE Morris license and the NRC's issuance of licenses for spent fuel storage were specifically discussed during Congress's development of the Nuclear Waste Policy Act. 128 Cong. Rec. 32,945, 32,946 (1982). Yet Congress did not, in the Nuclear Waste Policy Act itself or in the intervening decades, amend the Atomic Energy Act or otherwise mandate or even suggest that the Commission stop licensing these spent nuclear fuel storage facilities or vacate the existing licenses.

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[3] Spent nuclear fuel is "fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing." 42 U.S.C. § 10101(23). See also 42 U.S.C. § 2014(dd) ("The terms 'high-level radioactive waste' and 'spent nuclear fuel' have the meanings given such terms in section 10101 of this title."). Spent nuclear fuel is comprised of special nuclear material, source material, and byproduct material.

B. Factual and Procedural Background

1. The Holtec NRC Proceeding

The NRC's adjudicatory proceeding for the Holtec license began on July 16, 2018, when the NRC published a notice in the Federal Register providing the public an opportunity to participate by (1) requesting a formal evidentiary hearing to challenge Holtec's application and (2) petitioning for leave to intervene in the proceeding. See 83 Fed. Reg. 39,919 (July 16, 2018).

Fasken responded to this notice on September 14, 2018, filing a motion to dismiss Holtec's license application based on the NRC's asserted lack of authority to issue the license. The Secretary of the Commission considered this motion to be a hearing request and a proposed contention. Thus, Fasken's first contention in the underlying agency proceeding alleged that the Holtec application should be rejected because it purportedly contemplated storage contracts with the U.S. Department of Energy and such contracts would be illegal under the Nuclear Waste Policy Act. *In re Holtec International*, 91 N.R.C. 167, 173-174 (2020). Other organizations, Beyond Nuclear and Sierra Club, requested a hearing, petitioned to intervene, and filed similar claims. *Id.* at 173. An NRC Atomic Safety and Licensing Board appointed by the Commission rejected Fasken's contention, and Fasken appealed that decision to the Commission. *Id.* at 175-176. On April 23, 2020, the Commission affirmed the Board decision rejecting Fasken's contention and Beyond Nuclear and Sierra Club's similar claims. *Id.* at 176.

Fasken later proposed additional contentions, and the Board and Commission issued subsequent orders denying or dismissing all of Fasken's challenges. See *In re Holtec International*, 93 N.R.C. 215, 217 (2021). Shortly after its claims were resolved at the NRC, Fasken filed a Hobbs Act challenge in the D.C. Circuit. See Petition for Review, *Fasken Land & Minerals, Ltd. v. NRC*, No. 21-1147 (D.C. Cir. July 25, 2021), ECF No. 1904236. The NRC issued a license for the Holtec spent fuel storage facility on May 9, 2023. 88 Fed. Reg. 30,801 (May 12, 2023).

2. The Holtec D.C. Circuit Proceeding

The Commission decisions in the Holtec proceeding have been under review in the D.C. Circuit since 2020, when Don't Waste Michigan and Beyond Nuclear first filed petitions for review under the Hobbs Act, which were later consolidated with subsequent petitions from Sierra Club and Fasken. See Clerk's Orders Consolidating Cases, *Beyond Nuclear v. NRC*, No. 20-1187 (D.C. Cir. June 20, 2020), ECF No. 1848608 (consolidating *Don't Waste Mich. v. NRC* (No. 20-1225)), ECF No. 1895402 (consolidating *Sierra Club v. NRC* (No. 21-1104)), and ECF No. 1904266 (consolidating *Fasken Land & Minerals, Ltd. v. NRC* (No. 21-1147)).

Fasken initially sought review of the NRC's disposition of its statutory authority contention by including the Commission's decision on the issue in its petition for review in the D.C. Circuit. Petition for Review, *Fasken Land & Minerals, Ltd.*, No. 21-1147 (D.C. Cir. June 25, 2021), ECF No. 1904236. Later, however, Fasken chose to pursue only some of its underlying claims in the D.C. Circuit, focusing on its seismic and geological concerns and ignoring its

challenge to NRC's licensing authority. Final Brief of Fasken at 14-16, *Beyond Nuclear*, No. 20-1187 (D.C. Cir. Jan. 23, 2024), ECF No. 2036986. Other parties, Beyond Nuclear and Sierra Club, pursued claims in the D.C. Circuit challenging the NRC's authority to issue the Holtec license. See Final Brief of Beyond Nuclear at 31-36, *Beyond Nuclear*, No. 20-1187, (D.C. Cir. Jan. 22, 2024), ECF No. 2036820; Final Brief of Environmental Petitioners at 19-22, *Beyond Nuclear*, No. 20-1187 (D.C. Cir. Jan. 23, 2024), ECF No. 2036920. The decision in the D.C. Circuit case is pending.

3. The Holtec Fifth Circuit Proceeding

Two months after the NRC issued Holtec's license, Fasken filed its petition in the Fifth Circuit challenging the NRC's authority to issue the Holtec license. Fasken reiterated its underlying claims on NRC's authority to issue the license but did not justify pursuing its claims years after the NRC had first rejected those claims in its petition to intervene. Instead, Fasken filed its claims under the cloak of a challenge to the NRC's purportedly *ultra vires* issuance of the Holtec license, relying on the Fifth Circuit's *ultra vires* exception argued in *Texas*. App., *infra*, 18a.

The Federal Government moved to transfer Fasken's Fifth Circuit challenge to the D.C. Circuit given the ongoing D.C. Circuit proceeding. See App, *infra*, 3a. However, in briefing the parties all recognized that a decision in *Texas*, a case regarding substantially the same issues for a different facility, would bind a Fifth Circuit panel on the NRC's authority to issue the Holtec license and the

existence of an *ultra vires* exception to Hobbs Act requirements. App., *infra*, 2a.

At this point, a Fifth Circuit panel had rendered a decision in the *Texas* case and vacated the NRC license of a similar spent fuel storage facility owned by Interim Storage Partners, LLC, in Andrews County, Texas. That panel concluded that: (1) it could hear the case under its *ultra vires* exception to the party aggrieved requirements in the Hobbs Act; (2) the NRC lacked the authority to license a spent fuel storage facility under the Atomic Energy Act; (3) the facility license "contradict[ed] Congressional policy expressed in the Nuclear Waste Policy Act," and (4) the NRC's issuance of a license for a spent fuel storage facility was contrary to the major questions doctrine. *Texas*, App., *infra*, 34a-35a, 56a-57a. The Fifth Circuit panel granted the petitions for review in Texas and vacated the Interim Storage Partners license. *Texas*, App., *infra*, 5a.

The Federal Government and Intervenor Interim Storage Partners timely sought rehearing *en banc* of the panel decision. Nine judges voted against rehearing the case, while seven judges voted in favor of rehearing *en banc*. In a March 14, 2024, concurrence, six judges set forth their reasons for denying rehearing, while four judges issued a dissent against the rehearing denial. *Texas*, App., *infra*, 37a.

After a final decision was rendered in the *Texas* case, the Fifth Circuit found that because *Texas* involved a "materially identical license in a materially identical procedural posture," absent the "[c]ourt granting rehearing en banc in *Texas* . . . the panel's consideration of this case will be controlled by [*Texas*]." App., *infra*, 2a. Consequently, because the

Fifth Circuit found that its holding in *Texas* dictated the outcome here, on March 27, 2024, the court granted Fasken's petition for review and vacated Holtec's spent fuel storage facility license. The court also denied the Federal Government's motion to transfer the case to the D.C. Circuit as moot. App., *infra*, 2a-3a.

On June 12, 2024, the Federal Government and Intervenor Interim Storage Partners filed Petitions for Certiorari before this Court seeking a review of the *Texas* decision. Federal Government Petition for Writ of Certiorari, *Texas*, ___ U.S.___ (No. 23-1300); Interim Storage Partners Petition for Writ of Certiorari, *Texas*, ___ U.S.___ (No. 23-1300). The *Texas* case and this case raise substantially the same issues regarding the Hobbs Act and the NRC's authority to issue licenses for spent fuel storage.

REASONS FOR GRANTING THE PETITION

The *Texas* decision and the decision in this case created two different circuit splits, one on judicial review under the Hobbs Act, and the second on the scope of the NRC's statutory authority to issue nuclear materials licenses. Both of these circuit splits are worthy of this Court's consideration. First, in creating an *ultra vires* exception to the party-aggrieved requirements of the Hobbs Act, the Fifth Circuit created a split with four other circuit courts, undermined the goals of the Hobbs Act, and destabilized the process for judicial review for the federal agencies and agency orders subject to that Act. Second, in an inexplicable reading of the Atomic Energy Act, the Fifth Circuit split with the D.C. Circuit and the Tenth Circuit by limiting the NRC's ability to issue nuclear materials licenses in a

manner directly contrary to the NRC's plain text statutory authority. This decision not only resulted in the vacatur of the two licenses at issue in *Texas* and this case but also potentially undermines the federal government's ability to regulate a broader swath of the nuclear industry, leaving other nuclear materials licenses subject to substantial uncertainty. This Court's intervention is necessary to prevent further damage to the process of judicial review for agencies subject to the Hobbs Act and to the NRC's authority to issue nuclear materials licenses.

I. The Fifth Circuit Erred By Ignoring The Plain Text Of The Hobbs Act And The Faithful Interpretations Of Four Other Circuits.

A. There Is No *Ultra Vires* Exception To The Hobbs Act.

There is no dispute that the plain language of the Hobbs Act allows only "part[ies] aggrieved by the final order" of an agency subject to the Act to petition for review in the federal courts. 28 U.S.C. § 2344. There is also no dispute that the text of the Hobbs Act provides no exceptions to this party-aggrieved status requirement. See 28 U.S.C. § 2344. Yet, the Fifth Circuit in *Texas* (and applied in this case) adds an extra textual gloss to the statute, suspending this requirement for any attack on an agency action claimed to be *ultra vires*. *Texas*, App., *infra*, 45a (allowing any person to appeal "where 'the agency action is attacked as exceeding its power'") (internal brackets omitted).

Four other Circuits have already considered, and rejected, this extra-textual "exception." These

Courts have observed that the Hobbs Act *limits* Circuit court review to petitions filed by aggrieved parties. As bluntly stated by the Seventh Circuit, the Hobbs Act "limits review to petitions filed by parties, and that is that." *In re Chicago,* 799 F.2d at 335.

The alleged existence of an *ultra vires* agency action is not enough to overcome Congress' decision to limit the reach of the Circuit courts. As the Seventh and Tenth Circuits have correctly observed, the courts "may not decide a case just because that would be a good idea; power must be granted, not assumed." *Id.*; see also *Balderas*, 59 F.4th at 1123. And, as the Second, Seventh, Tenth, and Eleventh Circuits have all recognized, an *ultra vires* "exception" to the Hobbs Act is particularly dangerous. "'[E]xceeding the power' of an agency may be a synonym for 'wrong,' " such that the so-called "'exception' could be invoked in every case," *eliminating* the statutory limits on the courts. *Erie-Niagara Rail*, 167 F.3d at 112 (citing *In re Chicago,* 799 F.2d at 335); see also *Balderas*, 59 F.4th at 1123-24, *National Ass'n of State Util. Consumer Advocs.*, 457 F.3d at 1249.

The Fifth Circuit's *en banc* concurrence in *Texas* claims that it is a "misconception[ ]" "that the *ultra vires* exception means no more than that an agency 'got it wrong' per [Administrative Procedure Act] standards." *Texas*, App., *infra*, 48a (Jones, J., concurring). The concurrence claims that the *ultra vires* exception is narrower because "the term literally refers to being 'outside' the agency's power, *i.e.*, in defiance of the limits placed by Congress in the agency's governing statute or the Constitution."

Texas, App., *infra*, 48a-49a. The concurrence then concludes, without any explanation whatsoever, that "if ever there were a case in which an agency acted *ultra vires,* it should be this case." *Texas*, App., *infra*, 49a.

On the contrary, as described below, it has been the long-established precedent of two other Circuit courts that the NRC is acting within the bounds of its statutory authority when issuing licenses for spent fuel storage. Given the D.C. Circuit and Tenth Circuit precedent to the contrary, and the NRC's decades-long licensing practice, it is not clear how the NRC's issuance of a license in this case is the epitome of an *ultra vires* agency action.

The dissent to the *en banc* rehearing denial has by far the better argument. "Parsing which merits arguments here fall under our court's *ultra vires* exception shows its unworkability—and the risk for judicial aggrandizement when courts can pick and choose when to abide by Congress's limits." *Texas*, App., *infra*, 24a (Higginson, J., dissenting). As the dissent cogently observes, the panel heard the case only after "speculat[ing] about what a petitioner's challenges are *really* about to decide whether Congress's clear jurisdictional limitation on their power to hear cases *really* applies," since the panel decision decided that the *ultra vires* exception allowed it to hear some claims (that the NRC violated the Atomic Energy Act and the Nuclear Waste Policy Act) but not other claims (that the NRC violated the Administrative Procedure Act or National Environmental Policy Act). *Texas*, App., *infra*, 56a (emphasis supplied). Considering that "[a]n agency exceeds its power whenever it violates

the law," there is no rational explanation for how the panel parsed these claims to define an *ultra vires* action. *Texas*, App., *infra*, 57a. With no rational bounds to the definition of an *ultra vires* action, the exception "reads out the difference . . . that Congress created between broader judicial review under the Administrative Procedure Act and narrower judicial review under the Hobbs Act." *Texas*, App., *infra*, 57a.

It is clear that the Fifth Circuit's *ultra vires* exception is extra-textual and ripe for abuse, and the four Circuits that have refused to adopt it are correct. This Court should take this case and reject the *ultra vires* exception to prevent endless extra-statutory challenges to the agencies that are subject to Hobbs Act review.

B. The *Ultra Vires* Exception Is An End Run Around The Requirements Of The Hobbs Act.

The Fifth Circuit's *en banc* concurrence argues that its *ultra vires* exception is consistent with the practice of this Court ensuring that "Article III courts are not totally closed to plaintiffs" who claim that an agency acts beyond its delegated powers. *Texas*, App., *infra*, 47a (Jones, J., concurring) (citing *Leedom v. Kyne,* 358 U.S. 184 (1958)). In the alternative, the concurrence also argues that the *ultra vires* exception is not necessary because the parties in that case, Fasken and Texas, would otherwise qualify as parties aggrieved under the Hobbs Act. *Texas*, App., *infra*, 44a. These conflicting rationales demonstrate the concurrence's irrationality. There is no need for an *ultra vires* exception to ensure judicial review *when the parties*

could have sought judicial review in compliance with the Hobbs Act.

Indeed, Fasken has not used the *ultra vires* exception as a means to ensure the availability of judicial review in this case, because Fasken already had the right to judicial review. Fasken participated in the Holtec licensing proceeding, disputing various aspects of the proceeding. Fasken is a party aggrieved as to those claims, and it used that status years ago to initiate a separate, ongoing challenge in the D.C. Circuit. Fasken could have, but chose not to, pursue its challenge to the NRC's authority to issue the Holtec license in the pending D.C. Circuit proceeding. In fact, Beyond Nuclear and Sierra Club are pursuing those claims.

Fasken did not need the *ultra vires* exception to obtain judicial review. Instead, it used the exception to avoid the statutory constraints of judicial review under the Hobbs Act. Congress intended the Hobbs Act to ensure the "elimination of multiple suits challenging the same Commission order [and] limitation of the time for filing review to 60 days after entry of the order." *Simmons v. ICC*, 716 F. 2d 40, 44 (D.C. Cir. 1983) (citing H.R. Rep. No. 1569, at 4-6, 93d Cong., 2d Sess. (1974), S. Rep. No. 500, at 3-4, 93d Cong., 1st Sess. (1973));see also *Carpenter v. DOT*, 13 F.3d 313, 316 (9th Cir. 1994) ("By creating a strict time frame for review and bypassing district courts, Congress hoped [the Hobbs Act would] increase the speed, efficiency and consistency of judicial review."). By using the *ultra vires* exception, Fasken seeks to avoid these limitations. It filed multiple suits in separate judicial circuits against the same NRC license, and (in this proceeding) filed

its challenge after the 60-day Hobbs Act deadline from the NRC decisions rejecting Fasken's contentions. In short, Fasken has used the Fifth Circuit's *ultra vires* exception as an excuse to flout the requirements of the Hobbs Act, not as a means to ensure judicial review.

Unless remedied by this Court, the Fifth Circuit's weaponization of this end run around the requirements of the Hobbs Act means that every agency that is subject to the Act can expect duplicative, tardy, and unnecessary litigation arising from similar challenges in the future.

II. The Fifth Circuit's Decision To Limit The NRC's Statutory Authority Is Plainly Inaccurate And Contrary To Settled Precedent.

A. The Fifth Circuit's Decision Creates A Circuit Split.

The D.C. Circuit and the Tenth Circuit have long held that the NRC has the statutory authority to issue licenses for the storage of spent nuclear fuel because: (1) the Atomic Energy Act unambiguously grants the NRC such authority, and (2) the Nuclear Waste Policy Act did not revoke that authority. See *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004), *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004). Thus, the NRC has for decades had the unassailable, court-approved authority to license spent nuclear fuel storage facilities, until last year when the Fifth Circuit decided otherwise in *Texas*, App., *infra*, 4a-35a, and this case, App., *infra*, 1a-3a.

In *Bullcreek*, the D.C. Circuit held that the Atomic Energy Act "authorized the NRC to regulate the possession, use, and transfer of the constituent materials of spent nuclear fuel, including special nuclear material, source material, and byproduct material." 359 F.3d at 538. Thus, the D.C. Circuit concluded that "it has long been recognized that the [Atomic Energy Act] confers on the NRC authority to license and regulate the storage and disposal of such fuel," citing this Court's decision in *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 207 (1983), among other cases. *Bullcreek*, 359 F.3d at 538. The D.C. Circuit further observed that "Congress was aware of the NRC's regulations for licensing private away-from-reactor storage facilities." *Id.* at 542. Yet, Congress left the NRC's authority under the Atomic Energy Act fully intact, despite crafting the Nuclear Waste Policy Act, an otherwise comprehensive piece of legislation on nuclear waste policy. *Id*.

Shortly after *Bullcreek* was decided, the Tenth Circuit found the D.C. Circuit's analysis persuasive and declined to revisit the issue in *Skull Valley*. See 376 F.3d at 1232. Nearly twenty years later, the Tenth Circuit reiterated that the NRC "bears the authority to license the private use of facilities to store spent nuclear fuel," *Balderas*, 59 F.4th at1115-16, while the D.C. Circuit, again, explained that "the NRC may promulgate regulations governing the possession and use of nuclear material" and "[t]his authority permits the NRC 'to license and regulate the storage and disposal of spent nuclear fuel.'" *Don't Waste Mich. v. NRC*, No. 21-1048, 2023 WL 395030, at *1 (D.C. Cir. Jan. 25, 2023) (per curiam) (quoting *Bullcreek*, 359 F.3d at 538).

This interpretation of the NRC's statutory authority is correct and should be upheld, and the Fifth Circuit decision to the contrary should be rejected.

B. The Fifth Circuit's Application Of The Atomic Energy Act Is Egregiously Wrong.

The Fifth Circuit parts with the D.C. and Tenth Circuits by misreading the Atomic Energy Act to reach several demonstrably erroneous conclusions. First, the Fifth Circuit incorrectly found that the NRC has only limited authority under the Atomic Energy Act to issue licenses over special nuclear material and cannot license the storage of spent nuclear fuel. See *Texas*, App., *infra*, 27a, 34a. Second, the Fifth Circuit wrongly found that the NRC cannot issue licenses for the byproduct material in spent nuclear fuel. See *Texas*, App., *infra*, 27a-28a. Thus, the Fifth Circuit concluded that the NRC has no authority to issue licenses to store spent nuclear fuel either through its authority over nuclear material. See *Texas*, App., *infra*, 28a.

The plain text of the Atomic Energy Act demonstrates the many errors in the *Texas* analysis.

a. First, the Atomic Energy Act clearly provides the NRC with the authority to issue special nuclear materials licenses for four purposes: (1) "for the conduct of research and development activities," (2) for use in a research reactor licensed under 42 U.S.C. § 2134, (3) for use under a production or utilization facility licensed under 42 U.S.C. § 2133, and (4) "*for such other uses as the Commission determines to be appropriate to carry out the purposes of* [*the Atomic Energy Act*]." 42 U.S.C. §§ 2073(a)(1)-(4) (emphasis

added). This broad grant of authority is plain on its face, but in *Texas*, the Fifth Circuit eliminated the fourth category, *i.e.*, NRC's authority to issue licenses for "other uses as the Commission determines to be appropriate" under 42 U.S.C. § 2073(a)(4).

The Fifth Circuit interpreted this broad authority to issue licenses for "other uses" to mean that the Atomic Energy Act "authorizes the Commission to issue [nuclear materials] licenses only for certain enumerated purposes," including "various types of research and development," and for "utilization or production facilities for industrial or commercial purposes." *Texas*, App., *infra*, 26a-27a (internal quotations omitted). The Fifth Circuit pulls language from an entirely separate part of the Atomic Energy Act—regarding source material—to limit the NRC's authority to issue special nuclear materials licenses for "such other uses that the Commission . . . 'determines to be appropriate to carry out the purposes of th[e] chapter'" to *only those* that the Commission "'approves . . . as an aid to science and industry.'" *Texas*, App., *infra*, 26a (citing 42 U.S.C. § 2093(a)(4)). According to the Fifth Circuit, this extra-textual gloss is necessary because "[p]rinciples of statutory interpretation require these grants [in the special nuclear material provision] be read in light of the other, more specific purposes listed [in the source material provision]—namely *for certain types of research and development*." *Texas*, App., *infra*, 26a (emphasis added).

Thus, under the Fifth Circuit's convoluted interpretation of the Atomic Energy Act, the NRC may only issue special nuclear materials licenses for

research and development purposes and utilization or production facilities. See *Texas*, App., *infra*, 26a. That interpretation must be wrong because it renders the NRC's authority to issue licenses for "other uses" as mere statutory surplusage. It is also plainly wrong because it directly contradicts the statutory history of the Atomic Energy Ac, as Congress deliberately "authorize[d] the Commission to issue licenses for the possession of special nuclear material within the United States *for uses which do not fall expressly within the present provisions of subsection 53a* [(42 U.S.C. § 2073(a)(1)-(3))]." Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954, H.R. Rep. No. 85-2272, at 1 (1958) (emphasis added); see 42 U.S.C. Section 2073(a)(4). In this respect, the Fifth Circuit's analysis contradicts both the plain text of the Atomic Energy Act and its statutory history and must be overturned.

b. Second, the Fifth Circuit further deviates from the text of the Atomic Energy Act by deciding that the Act does not "confer[] a broad grant of authority to issue licenses for any type of possession of special nuclear material or source material." *Texas*, App., infra, 27a.

This cannot be the case. The NRC has a mandate to provide "*Government control* of the *possession*, use, and production of" "special nuclear material." 42 U.S.C. § 2013(c) (emphasis added). In addition, the plain language of the Atomic Energy Act further provides that the NRC is authorized to "establish by rule, regulation, or order, such standards and instructions to govern the *possession* and use of special nuclear material, source material, and

byproduct material." 42 U.S.C. § 2201(b) (emphasis added). The NRC must be able to issue licenses for the possession of these nuclear materials in order to maintain control over the possession of special nuclear material and to regulate the possession of special nuclear material, source material, and byproduct material. Yet, the Fifth Circuit analysis reads these entire provisions of the Atomic Energy Act. Its decision to limit the NRC's authority is plainly contrary to the Act and must be overturned.

c. Third, the Fifth Circuit found that the NRC does not have authority over the byproduct material in spent nuclear fuel by once again ignoring the text of the Atomic Energy Act. The Fifth Circuit interpreted the definition of byproduct material based on provisions relating to a particular byproduct material, radium-226, and, thus, purported to limit NRC authority to only byproduct materials like radium-226 that "emit radiation for significantly less time than spent nuclear fuel." *Texas*, App, *infra*, 27a. This analysis ignores the plain text of the Atomic Energy Act which, since its enactment, has defined byproduct material as "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material." 42 U.S.C. § 2014(e)(1). The radium-226 language was added decades later to the Atomic Energy Act as an example of *naturally occurring* radioactive material (not reactor-created radioactive material). Pub. L. No. 109-58, 119 Stat. 594, 806, 807 (Aug. 8, 2005).

Again, the Fifth Circuit has ignored the Atomic Energy Act to arbitrarily limit the NRC's authority

over nuclear materials. Given the lack of textual support for this misinterpretation of the NRC's authority over byproduct material, the Fifth Circuit's decision again must be overturned.

C. The Fifth Circuit Further Erred In Finding That The Nuclear Waste Policy Act Is Relevant To The NRC's Authority.

Having found no authority in the Atomic Energy Act, the Fifth Circuit then decided that the Nuclear Waste Policy Act also does not provide the NRC with any independent authority to license the storage of spent nuclear fuel. *Texas*, App., infra, 33a-34a. This conclusion, even if correct, is irrelevant to this case.

The NRC's clear authority to license spent fuel storage is derived from the Atomic Energy Act, not from the Nuclear Waste Policy Act. The Nuclear Waste Policy Act did not need to provide the NRC with independent statutory authority to regulate spent nuclear fuel, because, contrary to the Fifth Circuit's decision, that authority is already found in the Atomic Energy Act. As the D.C. Circuit correctly observed in *Bullcreek*,

> private away-from-reactor storage was already regulated by the NRC under the [Atomic Energy Act] prior to the [Nuclear Waste Policy Act]. It was not an anomaly for the [Nuclear Waste Policy Act] to focus on regulating those "supplements" that the [Nuclear Waste Policy Act] itself added, namely federal storage programs, and to leave the pre-existing regulatory scheme as it found it. In the absence of irreconcilability between the [Atomic Energy Act] and the

> [Nuclear Waste Policy Act], there is no basis to conclude that in enacting the [Nuclear Waste Policy Act] Congress implicitly repealed or superseded the NRC's authority.

359 F.3d at 543. Once granted in the Atomic Energy Act, there was no need for Congress to address the issue again in the Nuclear Waste Policy Act, particularly given Congressional acknowledgement during its enactment of the Nuclear Waste Policy Act that the NRC was already issuing licenses for spent nuclear fuel storage to facilities such as GE Morris. 128 Cong. Rec. 32,945, 32,946 (1982).

Whether the Nuclear Waste Policy Act grants the NRC any additional authority to license spent nuclear fuel storage, beyond that already granted in the Atomic Energy Act, is simply irrelevant to this case.

D. The Fifth Circuit's Reasoning Confounds The Regulation Of Nuclear Materials.

This Court should also grant certiorari and overturn the Fifth Circuit's decisions in *Texas* and this case because of the potentially broader implications on the NRC's issuance of nuclear materials licenses. The Fifth Circuit's interpretation would undercut long-standing NRC-licenses like the license issued to the GE Morris facility which has actively stored spent nuclear fuel for 50 years. See 39 Fed. Reg. at 32,456. It also cannot be reconciled with spent nuclear fuel storage at decommissioned and operating reactor sites, which necessarily requires the possession of special nuclear material, source material, and byproduct material.

The Fifth Circuit's rationale is also inconsistent with the NRC's authority to issue licenses for nuclear fuel cycle activities like uranium enrichment and fuel fabrication. The Fifth Circuit claims that "the definitions of utilization and production facilities" include fuel fabrication or enrichment facilities, limiting the impact of its decision to only spent nuclear fuel storage facilities. *Texas*, App., infra, 27a. But fuel fabrication and uranium enrichment facilities are neither production nor utilization facilities, and, in fact, uranium enrichment is specifically carved out of the production facility definition. 42 U.S.C. § 2014(v). As a result, the Fifth Circuit's interpretation of the Atomic Energy Act subverts not only the licenses in *Texas* and this case but also those for other spent fuel storage facilities, in addition to uranium enrichment and fuel fabrication facilities, both of which are necessary for the continued operation of the nuclear industry.

For this reason, the Fifth Circuit's rationale must be overturned.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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