Nos. 23-1300, 23-1312

In the Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

INTERIM STORAGE PARTNERS, LLC, PETITIONER

v.

STATE OF TEXAS, ET AL.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER INTERIM STORAGE PARTNERS, LLC

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QUESTIONS PRESENTED

1. Whether the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which authorizes a "party aggrieved" by an agency's "final order" to petition for review in a court of appeals, 28 U.S.C. 2344, allows nonparties to obtain review of claims asserting that an agency order exceeds the agency's statutory authority.

2. Whether the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, and the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.*, permit the Nuclear Regulatory Commission to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioners in No. 23-1300, the United States Nuclear Regulatory Commission and the United States of America, were the respondents in the court of appeals. Petitioner in No. 23-1312, Interim Storage Partners, LLC, was an intervenor in support of respondents in the court of appeals.

Respondents were the petitioners in the court of appeals. They are the State of Texas; Greg Abbott, Governor of the State of Texas; the Texas Commission on Environmental Quality; Fasken Land and Minerals, Limited; and Permian Basin Land and Royalty Owners.

2. The disclosure statement included in the petition for a writ of certiorari in No. 23-1312 filed on June 12, 2024 remains accurate.

RELATED PROCEEDINGS

The same license that is challenged in this case was also challenged in the United States Court of Appeals for the D.C. Circuit, *Don't Waste Michigan* v. *United States Nuclear Regulatory Commission*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023) (per curiam).

The same license that is challenged in this case was also challenged in the United States Court of Appeals for the Tenth Circuit, *State ex rel. Balderas* v. *United States Nuclear Regulatory Commission*, 59 F.4th 1112 (10th Cir. 2023).

The same type of NRC-issued license for a similar proposed project by another party was the subject of a subsequent decision by the Fifth Circuit, which vacated the license upon the authority of the decision in this case. *Fasken Land & Minerals, Ltd.* v. *NRC*, No. 23-60377 (5th Cir., Mar. 27, 2024). Petitions for certiorari were filed in this Court, Nos. 23-1341 and 23-1352. Respondents Nuclear Regulatory Commission and the United States have requested that those petitions be held pending resolution of this case, and then disposed of as appropriate.

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OPINIONS AND ORDERS BELOW

The panel opinion (ISP Pet. App. 1a-31a), is reported at 78 F.4th 827 (5th Cir. 2023). The order of the court of appeals denying rehearing en banc (ISP Pet. App. 32a-53a) is reported at 95 F.4th 935 (5th Cir. 2024).

STATEMENT OF JURISDICTION

The court of appeals asserted jurisdiction pursuant to an "*ultra vires* exception" to the Hobbs Act, 28 U.S.C. 2344, which is disputed in these cases. The court of appeals filed its order denying rehearing *en banc* on March 14, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. 2011 *et seq.*), the Hobbs Act (codified at 28 U.S.C. 2342, 2344), and the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. 10101 *et seq.*) are set forth at ISP Pet. App. 109a-200a.

INTRODUCTION

At the dawn of the atomic age, the use, ownership, and control of nuclear materials and technology in this country was strictly a government monopoly. That changed, however, with the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. 2011 *et seq.*) ("AEA"). The AEA reflects "Congress' determination 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 under a program of federal regulation and licensing." *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983).

Congress pursued those goals through a newly created agency, the Atomic Energy Commission, which was tasked with developing the rules, regulations, and standards that would govern the still-new, world-altering technology of atomic fission. The degree of responsibility assigned to the agency in the AEA was "virtually unique." *Siegel* v. *Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968). A brand-new industry was born—one that eventually grew to become a major component of the nation's energy and economy, now supplying about one fifth of all electricity consumed in the United States. It is carbon-free and dependable baseload power. Today, new technologies present exciting opportunities to address critical national needs for the future. *E.g.*, *Advanced Nuclear - Pathways to Commercial Liftoff*, U.S. DEP'T OF ENERGY, https://liftoff.energy.gov/advanced-nuclear-2/ (last visited Nov. 11, 2024).

The development of the nuclear energy industry in this country, however, has not been linear. There have been advances and setbacks, as well as periodic political, and economic, challenges. And, there has been the issue of how to deal with spent nuclear fuel. The Nuclear Waste Policy Act of 1982 ("NWPA") charged the Department of Energy with accepting and permanently disposing of spent nuclear fuel, starting in 1998. But, as everyone now knows, that did not occur, and the Yucca Mountain project remains stalled. Utilities are therefore forced to deal with spent nuclear

fuel storage issues on a larger scale than anyone would have liked or anticipated.

This case grew out of that challenge. Petitioner Interim Storage Partners, LLC seeks to construct an installation for the temporary storage of spent nuclear fuel, adjacent to an existing facility in west Texas licensed for disposal of low-level radioactive waste. The project has the potential to alleviate pressures on the domestic nuclear power industry, and to save hundreds of millions of dollars through efficiencies and economies of scale. One cannot, however, simply embark upon such a project alone. Permission—a "license"—is required from the Nuclear Regulatory Commission ("NRC" or "Commission"), which succeeded the Atomic Energy Commission as the regulator of nuclear safety. Obtaining that license is a monumental undertaking. There are reams of required environmental and safety analyses (including a 500-page draft and 700-page final environmental impact statement in this case), public engagement, multiple scoping meetings, requests for supplemental information, robust opportunities for review and opposition, and potential adjudication of contentions and issues, all pursuant to rules, regulations, and legal principles that have become substantially settled since the industry grew from nothing half a century ago to what it is today.

And all of that happened here—ISP spent years, and millions of dollars, to secure its NRC license. Multiple environmental groups and other entities opposed the project. Agency administrative boards were convened and addressed the arguments raised, and the Commission heard and resolved multiple appeals. The D.C. Circuit then heard the legal challenges,

eventually affirming the NRC issuance of the license to ISP. The State of New Mexico, having eschewed the agency procedures for opposing the project, nevertheless filed a petition for review in the Tenth Circuit, which the Tenth Circuit dismissed.

Then, in response to petitions for review filed by the State of Texas and Fasken, the Fifth Circuit went off the rails. Unlike the Tenth Circuit (and every other circuit court to address such issues), the court determined to hear the case even though the requirements of the governing judicial review provision, the Hobbs Act, were not met by the petitioners (because they intentionally declined to avail themselves of the well-known agency processes). To do so, the Fifth Circuit resurrected its seemingly dormant judge-made "*ultra vires* exception," whereby a mere allegation that an agency exceeded its legal authority automatically entitles a litigant to judicial review, even if that litigant is not authorized to sue by the review statute. And, on the merits, the Fifth Circuit held that the NRC had no authority under the AEA to do what it had been doing for many decades (*i.e.*, license temporary away-from-reactor storage of spent nuclear fuel), and that the NWPA did not permit the issuance of the license. In so holding, the Fifth Circuit misapplied basic principles of statutory interpretation, ignored regulations expressly contemplating such projects that have been on the books since 1980, and broke with every other circuit that has addressed the issue.

The repercussions of the Fifth Circuit's errors are destabilizing, and potentially devastating, to a critical industry at a critical time. Respectfully, this Court should reverse.

STATEMENT

I. Legal framework.

1. Less than ten years after Hiroshima, Congress passed the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. 2011 *et seq*.) ("AEA"), to further peaceful uses of atomic energy. The purposes of the AEA included "development, use, and control of atomic energy * * * so as to make the maximum contribution to the general welfare," 42 U.S.C. 2011(a), and to "improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise." 42 U.S.C. 2011(b). Congress found that the development, utilization, and control of atomic energy was "vital to the common defense and security." 42 U.S.C. 2012(a). A central purpose of the AEA was to maximize peaceful development and utilization of atomic energy. 42 U.S.C. 2013(d). See, *e.g.*, *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (AEA enacted to "encourage[] the private sector" to develop "atomic energy for peaceful purposes under a program of federal regulation and licensing").

The AEA created a new agency, the Atomic Energy Commission. Among its chief tasks was to oversee the possession and use of nuclear materials. Congress found that "the processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest," and that the "processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and

security and to protect the health and safety of the public." 42 U.S.C. 2012(c), (d). To that end, Congress broadly tasked the AEA 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).

Spent nuclear fuel fits squarely within this express delegation of authority. It is composed of "special nuclear material," such as enriched uranium and plutonium, "source material," such as natural uranium, and "byproduct material," which includes other radioactive material produced by nuclear fission. ISP Pet. App. 22a; see 42 U.S.C. 2014(e)(3)(a) and (aa) (defining terms). In addition to 42 U.S.C. 2201(b), which charged the Commission with developing rules and regulations for the possession and use of such materials, separate provisions addressed "domestic distribution" of each of the constituent elements of spent nuclear fuel and authorized the Commission to issue licenses to private parties to possess such materials for various purposes. 42 U.S.C. 2073, 2092, 2093, 2111.

The different enumerated purposes for licensing of special nuclear material and source material included certain research and development activities, medical therapy, and use in production (*e.g.*, certain isotope production) and utilization (*e.g.*, nuclear power plant) facilities. And, separately and importantly, 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))[1] and "for any other use approved by the Commission as an aid to science or industry." 42 U.S.C. 2093(a)(4). The identified purposes for licensing of byproduct materials included research and medical uses, as well as "industrial uses" and "such other useful applications as may be developed." 42 U.S.C. 2111(a).

2. Congress amended the AEA in 1974 to create the Nuclear Regulatory Commission ("NRC" or "Commission"), an independent regulatory commission which assumed the broad authority under the AEA to regulate the civilian possession and use of radioactive materials. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233. That amendment also created a separate agency, which ultimately became the Department of Energy ("DOE"), which assumed developmental functions from the Atomic Energy Commission.

3. In 1978, pursuant to the above-noted provisions of the AEA, the NRC issued a proposed rule for notice and comment. The rule, which provided for the possession of spent nuclear fuel "at installations built specifically for this [storage] that are not coupled to either a nuclear power plant or a fuel reprocessing plant."

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[1] 42 U.S.C. 2073(a)(4) was added in 1958, Pub. L. No. 85-681, 72 Stat. 632 (Aug. 19, 1958). That addition was a "correction of a drafting deficiency" and "not a material change," to confirm that the AEC had authority to issue licenses for "industrial use of special nuclear material" that were "not strictly research and development." *Hearings before the Subcommittee on Legislation of the Joint Committee on Atomic Energy*, at 12, 85th Cong., 2d Sess. (July 10, 17, and 18, 1958) (statement of Mr. Hollingworth, Assistant General Manager for Administration, Atomic Energy Commission).

Storage of Spent Nuclear Fuel in an Independent Spent Fuel Storage Installation (ISFSI): Proposed Rule, 43 Fed. Reg. 46,309 (Oct. 6, 1978). After extensive public comments (none of which challenged the NRC's authority to promulgate such a rule), the NRC promulgated a final rule to that effect in 1980. Licensing Requirements for the Storage of Spent Fuel in an Independent Fuel Spent Storage Installation, 45 Fed. Reg. 74,693 (Nov. 12, 1980). These regulations have therefore been on the books at 10 C.F.R. Part 72 for more than forty years.

4. In the many decades since, the NRC has been open, public, and transparent about its exercise of the authority to license interim away-from-reactor storage of spent nuclear fuel. *E.g.*, General Electric Co.; Renewal of Materials License for the Storage of Spent Fuel, 47 Fed. Reg. 20,231 (May 11, 1982) (renewal of materials license SNM-2500 for away-from-reactor spent fuel storage facility in Morris, Illinois); Public Service Co. of Colorado; Issuance of Materials License SNM-2504, Ft. St. Vrain Independent Spent Fuel Storage; Installation at the Ft. St. Vrain Nuclear Generating Station, 56 Fed. Reg. 57,539 (Nov. 12, 1991) (materials license issued under 10 C.F.R. Part 72 at site of decommissioning reactor); Private Fuel Storage, Limited Liability Company; Notice of Issuance of Materials License SNM-2513 for the Private Fuel Storage Facility, 71 Fed. Reg. 10,068 (Feb. 28, 2006) (materials license for away-from-reactor spent fuel storage facility in Tooele County, Utah). See also *Bullcreek* v. *NRC*, 359 F.3d 536, 543 (D.C. Cir. 2004) (noting the existence of three "private away-from-reactor storage facilities" at the time of the passage of the Nuclear Waste Policy Act in 1982; 45 Fed. Reg. at 74,698).

5. Two years after the NRC promulgated Part 72 of Title 10 of the Code of Federal Regulations, Congress passed the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. 10101 *et seq.*) ("NWPA"). Congress was fully aware of the NRC's Part 72 away-from-reactor spent nuclear fuel storage regulations, and aware also that the NRC had asserted authority under the AEA to license such possession of spent nuclear fuel. *E.g.*, S. REP. NO. 97-282, at 44 (1981). Although the AEA is mentioned several times in the text of the NWPA (*e.g.*, 42 U.S.C. 10141(b), 10155(a)(1)(A)(i)), there is no reference to, much less a revocation of, the NRC's Part 72 authority under the AEA to license away-from-reactor storage of spent nuclear fuel.

The NWPA created a comprehensive scheme for the ownership and permanent disposal of spent nuclear fuel by DOE, not private parties. It created acceptance and disposal duties regarding spent nuclear fuel on the part of DOE, not the NRC. See *Don't Waste Mich.* v. *NRC*, No. 21-1048, 2023 WL 395030, at *1 (D.C. Cir. Jan. 25, 2023) ("Storage and disposal, however, are different concepts."). Congress designated Yucca Mountain, Nevada as the permanent disposal repository site, Pub. L. No. 107-200, 116 Stat. 735 (2002), but DOE efforts to license the project with the NRC, and then construct and operate Yucca Mountain, have effectively ceased, and the project remains dormant. See *In re Aiken County*, 725 F.3d 255 257-259 (D.C. Cir. 2013). Accordingly, DOE is in breach of its acceptance and disposal obligations under the NWPA. *E.g.*, *Ind. Mich. Power Co.* v. *United States*, 422 F.3d 1369, 1372 (Fed. Cir. 2005) ("partial breach"). Private parties are therefore being forced to store

spent nuclear fuel in larger quantities, and for longer durations, than Congress, or anyone else, desired or expected. *E.g.*, *Texas* v. *United States*, 891 F.3d 553, 555 (5th Cir. 2018).

6. The AEA allows any person whose interest may be affected by the issuance of a license to request a hearing before the NRC. 42 U.S.C. 2239(a)(1)(A). Jurisdiction for courts to review challenges to such licenses is granted by the Hobbs Act, 28 U.S.C. 2344, which is exclusive and which limits judicial review to a "party aggrieved" by the agency proceeding—that is, a person who has become a "party" to the agency proceeding. If a person is denied "party" status by the agency, then that determination itself is appealable pursuant to 42 U.S.C. 2239(b)(1). Thus, to be able to pursue judicial review under the statute, a person must either be a "party" to the agency proceeding, or at least have attempted to become a "party" to those proceedings. This jurisdictional provision of the Hobbs Act applies not just to the NRC, but also to the Federal Communications Commission, Department of Agriculture, Department of Transportation, Federal Maritime Commission, and Surface Transportation Board. 28 U.S.C. 2342(1)-(7).

II. Facts and proceedings below.

1. In April 2016, one of ISP's joint venture members submitted an application (subsequently assumed and pursued by ISP) to the NRC for a license to temporarily store spent nuclear fuel from civilian nuclear power facilities at a consolidated interim storage facility. The facility was to be constructed adjacent to, but separate from, an existing low-level radiological waste disposal facility in Andrews County, Texas.

Initially, ISP had strong support from the State of Texas, as well as from local communities in west Texas. Then-Governor Rick Perry called for a Texas solution to the issue of temporary storage of spent nuclear fuel, rather than ceding the efforts to potential projects in other states. J.A. 1. The Texas Radiation Advisory Board issued a position stating that it was in the state's best interest to support a facility in the state, and Andrews County passed a unanimous resolution in support. J.A. 6.

2. In August 2018, the NRC published notice of its consideration of the license application in the Federal Register pursuant to its regulations, along with instructions regarding how interested parties and entities could petition for a hearing and intervene in the NRC proceedings.

A number of parties made various filings with the NRC between September and November 2018, challenging the issuance of the license on multiple grounds. Challenges included assertions that the proposed license violated the NWPA because it was based upon an assumption that DOE would illegally take title to spent nuclear fuel, and that the license could not legally be granted because of failures of the NRC to comply with the National Environmental Policy Act in various ways. Fasken was one of the parties who tried to challenge the license at the agency level, seeking to assert an out-of-time contention regarding treatment of emergency response costs in the environmental impact statement, and to reopen the evidentiary record based upon alleged deficiencies in the environmental report regarding transportation routes. An NRC administrative hearings board ultimately dismissed or

denied all of the challenges, and those determinations were upheld by the full Commission upon appeal. *In re Interim Storage Partners LLC*, CLI-20-13, 92 N.R.C. 457 (Dec. 4, 2020); *In re Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463 (Dec. 17, 2020); *In re Interim Storage Partners LLC*, CLI-20-15, 92 N.R.C. 491 (Dec. 17, 2020); *In re Interim Storage Partners LLC*, CLI-21-09, 93 N.R.C. 244 (June 22, 2021).

Meanwhile, Texas, now governed by a new administration, had reversed its position and opposed the project. However, Texas elected not to participate in the NRC adjudicatory proceedings pursuant to the NRC's rules, as states and interested parties frequently do. *E.g.*, 10 C.F.R. 2.309(h). Instead, Texas submitted comment letters to the NRC regarding a draft Environmental Impact Statement. J.A. 115-122. And, on the eve of the issuance of the license, Texas objected upon the basis of a just-passed Texas law prohibiting the storage of spent nuclear fuel in the state. J.A. 215-216.

3. Various of the groups that had properly sought to participate in the NRC adjudicatory process, including Fasken, filed petitions in the D.C. Circuit under the Hobbs Act. The D.C. Circuit ultimately dismissed or denied all of those petitions on the merits. *Don't Waste Mich.*, 2023 WL 395030, at *2-3. As to the violation-of-NWPA claims, the court observed that the license contemplated storage of privately owned spent nuclear fuel, and the AEA and implementing regulations "permit[] the NRC 'to license and regulate the storage and disposal of [spent nuclear] fuel.'" *Don't Waste Mich.*, 2023 WL 395030, at *1 (quoting *Bullcreek*, 359 F.3d at 538). The court dismissed separate

late-filed appeals purporting to challenge the issuance of the license itself (as distinguished from the NRC adjudicatory orders), on the grounds that the petitioners' failures to assert such claims before the NRC meant that they could not establish that they were "parties aggrieved" under the Hobbs Act. *Don't Waste Mich.*, 2023 WL 395030, at *3 (citing *Ohio Nuclear-Free Network* v. *NRC*, 53 F.4th 236, 239 (D.C. Cir. 2022)). Finally, as to Fasken's claims that the NRC had erred by refusing to admit Fasken's late-filed contention and declining to reopen the record, the court held that "[n]either claim has merit." *Ibid.*

4. The State of New Mexico, like Texas, also did not participate in the NRC adjudicatory process, but filed a challenge to the license in the Tenth Circuit. That court dismissed the petition for review due to New Mexico's failure to participate as required at the agency level. *State ex rel. Balderas* v. *NRC*, 59 F.4th 1112, 1124 (10th Cir. 2023).

5. Texas, along with Fasken, filed petitions in the Fifth Circuit, challenging the NRC's issuance of the license on multiple grounds. ISP intervened. The NRC moved to dismiss the appeals for lack of jurisdiction under the Hobbs Act. The court carried that motion with the case.

The Fifth Circuit rejected the NRC's standing and jurisdictional challenges to the Texas and Fasken petitions. The court, in *dicta*, expressed disagreement with the D.C. Circuit and "at least one other circuit" regarding interpretation of the Hobbs Act's aggrieved-party requirement. ISP Pet. App. 10a-21a; see *Ohio Nuclear-Free Network*, 53 F.4th at 239; *Balderas*, 59 F.4th at 1117. But then, as the panel's actual basis for

hearing the case, the Fifth Circuit applied a purported "*ultra vires* exception" to statutory standing requirements under the Hobbs Act. ISP Pet. App. 19a. The Fifth Circuit acknowledged that the "*ultra vires*" position upon which it rested jurisdiction had not been adopted by any other circuit and had been expressly rejected by the Second, Seventh, Tenth, and Eleventh Circuits. ISP Pet. App. 19a n.3.

The Fifth Circuit therefore determined to reach the merits of the subset of arguments by Texas and Fasken that the court deemed to be claims of "*ultra vires*" agency action. ISP Pet. App. 19a. In doing so, it held that the AEA does not authorize the Commission to license a private, away-from reactor storage facility for spent nuclear fuel, dismissing contrary rulings by the D.C. Circuit (in *Bullcreek*, 359 F.3d at 538), and the Tenth Circuit (in *Skull Valley Band of Goshute Indians* v. *Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004)), as "unpersuasive" and "unhelpful" based upon a lack of "textual analysis" of the AEA in those decisions. ISP Pet. App. 21a-26a. The Fifth Circuit further held that the NWPA "doesn't permit" the activity authorized by the ISP license. ISP Pet. App. 21a-30a. Finally, the Fifth Circuit observed that treatment of nuclear waste "has been hotly contested for over a half century." ISP Pet. App. 30a. That debate supposedly implicated the "major questions" doctrine described in *West Virginia* v. *EPA*, 597 U.S. 697 (2022), which the Fifth Circuit held to further support its result.

6. The government and ISP each moved for rehearing *en banc*. By a 9-7 vote of eligible judges, the full court denied review. ISP Pet. App. 33a. A concurrence of six judges expanded on the panel's *dicta*

regarding the Hobbs Act, and further elaborated on the *ultra vires* doctrine on which the panel rested jurisdiction. A dissent of four judges explained that the court's "exercise of jurisdiction has grave consequences for regulated entities' settled expectations and careful investments in costly, time-consuming agency proceedings, inviting spoilers to sidestep the avenues for participation that Congress carefully crafted to prevent this uncertainty." ISP Pet. App. 46a (Higginson, J., dissenting).

SUMMARY OF ARGUMENT

The Fifth Circuit made multiple consequential errors in this case. This Court should correct those errors and reverse the judgment of the Fifth Circuit.

First, the Fifth Circuit should not have entertained the petitions by Texas and Fasken. To do so, it resurrected an atextual "*ultra vires* exception" to the Hobbs Act's judicial review provisions. Under that doctrine, a mere allegation that an agency exceeded its statutory authority automatically allows a circuit court to hear the challenge, regardless of the standing requirements imposed by the statute. That doctrine—which before this case seemed destined for the dustbin of history—was originally based on dubious *dicta* from a 1982 Fifth Circuit decision. *Am. Trucking Ass'ns, Inc.* v. *ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982). Since then, every single time that the doctrine has been considered by another circuit, it has been rejected, creating splits between the Fifth Circuit and the Second, Seventh, Tenth, and Eleventh Circuits. *State ex rel. Balderas* v. *NRC*, 59 F.4th 1112, 1123-1124 (10th Cir. 2023); *Nat'l Ass'n of State Util. Consumer Advocs.* v. *FCC*, 457 F.3d 1238, 1249 (11th Cir. 2006), modified

on other grounds on denial of reh'g, 468 F.3d 1272 (11th Cir. 2006) (per curiam); *Erie-Niagara Rail Steering Comm.* v. *Surface Trans. Bd.*, 167 F.3d 111, 112-113 (2d Cir. 1999) (per curiam); *In re: Chi., Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-335 (7th Cir. 1986). As those other circuits have cogently explained, not only is the doctrine unsupported, it is arbitrary and unworkable. A clever litigant can frame many allegations of wrongful agency action as the agency "exceeding its authority," which would effectively render Congress's judicial review limitations meaningless. That is judicial aggrandizement of the highest order, and the Court should reject it.

Second, the Court should reject any argument that respondents might make that they are "parties aggrieved" under the Hobbs Act. The Fifth Circuit's *dicta* on this point cannot be reconciled with the actual statutory language. In the Hobbs Act, Congress limited judicial review to a "*party* aggrieved." 28 U.S.C. 2344 (emphasis added). Not a "*person* aggrieved." That word-choice is intentional and meaningful—to be a "party," under well-understood definitions of the term, one must actually participate in the agency proceeding pursuant to its rules (or, at the very least, seek to so participate). *E.g.*, *Simmons* v. *ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983) (Scalia, J.). Merely firing off objections does not make one a "party" to the agency proceedings under the Hobbs Act, when agency rules require more. Every other circuit that has considered the issue has so held. *E.g.*, *Ohio Nuclear-Free Network* v. *NRC*, 53 F.4th 236, 239 (D.C. Cir. 2022); see also, *e.g.*, *Gage* v. *U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1217-1218 (D.C. Cir. 1973); *Balderas*, 59 F.4th at 1116-1119.

Third, on the merits, the Fifth Circuit misinterpreted the AEA. The court erroneously concluded that the statute never in fact authorized the NRC to approve licenses for away-from-reactor temporary storage of spent nuclear fuel. It did so even though the statute charges the NRC with regulating "possession and use" of each of the constituent elements of spent nuclear fuel in furtherance of development of atomic power, without locational restrictions. 42 U.S.C. 2201(b); 2011(a); 2012(c), (d). And, even though the statute empowered the NRC to license possession and use of the constituent elements of spent nuclear fuel for uses determined by the agency to be "appropriate" for carrying out the purposes of the AEA, as an "aid to science or industry," and for "industrial uses," all of which comfortably encompass the temporary storage of civilian spent nuclear fuel, and none of which impose geographic or locational restrictions. 42 U.S.C. 2073(a)(4), 2093(a)(4), 2111(a). And, even though NRC regulations providing for away-from-reactor storage of spent nuclear fuel—published after extensive notice and comment rulemaking and in use for decades—have been on the books since 1980. 10 C.F.R. Part 72. And, even though every other circuit that has looked at the issue has rejected the Fifth Circuit's reading. See *Beyond Nuclear, Inc.* v. *NRC*, 113 F.4th 956, 965 (D.C. Cir. 2024); *Bullcreek*, 359 F.3d at 538; *Skull Valley*, 376 F.3d at 1232.

To get there, the Fifth Circuit invoked a sort of *ejusdem generis*-type approach to infer that temporary storage of spent nuclear fuel may only be for "research and development" purposes. ISP Pet. App. 22a. The Fifth Circuit, however, inexplicably failed to consider the statutory provisions that did not fit its desired

result. Moreover, the relevant statutory language and structures—which involved no "list" nor any "common" link or attribute—are in any event not susceptible to the type of interpretive restriction imposed by the Fifth Circuit. *E.g.*, *Harrington* v. *Purdue Pharma, L.P.*, 144 S. Ct. 2071, 2082 (2024); *Ali* v. *Fed. Bureau of Prisons,* 552 U.S. 214, 225 (2008). At bottom, the Fifth Circuit and respondents fundamentally err in at least two ways: (a) by impermissibly reading important portions of the statute as meaningless, see *Corley* v. *United States*, 556 U.S. 303, 314 (2009); and (b) by impermissibly imposing a material condition, namely an "at-reactor" locational limitation on the temporary storage of spent nuclear fuel, that cannot be found in the statute. *E.g.*, *Borden* v. *United States*, 593 U.S. 420, 436 (2021); *Romag Fasteners, Inc.* v. *Fossil, Inc.*, 590 U.S. 212, 215 (2020).

Fourth, nothing in the statute supports the Fifth Circuit's alternative holding that the NWPA "doesn't permit" the license at issue here. ISP Pet. App. 30a. Nor can the result by the Fifth Circuit be justified by some purported "policy," "context," or "scheme" of the NWPA. ISP Pet. App. 21a, 29a, 30a. On the contrary, the "context" of the NWPA is Congress's awareness of the NRC's preexisting authority under the AEA to do exactly what it did in this case, which the NWPA did nothing to repeal or question. See S. REP. NO. 97-282, at 44 (1981); *Bullcreek*, 359 F.3d at 542. The NWPA is self-evidently concerned with permanent *disposal* of spent nuclear fuel by *the DOE*, not temporary *storage* of spent nuclear fuel by *private parties*. *E.g.*, *Don't Waste Mich.*, 2023 WL 395030, at *1 ("Storage and disposal, however, are different concepts."). Every other circuit that has looked at the NWPA's application to

this issue has concluded exactly the opposite of what the Fifth Circuit held here. *Skull Valley*, 376 F.3d at 1232-1233; *Balderas*, 59 F.4th at 1115, 1121; *Beyond Nuclear*, 113 F.4th at 965. Once again, those circuits were correct, and the Fifth Circuit here was not.

ARGUMENT

I. The Fifth Circuit Erred by Applying a Judge-Made "*Ultra Vires* Exception" to Statutory Hobbs Act Requirements.

The Fifth Circuit erred by hearing this case at all pursuant to its atextual, judge-made "*ultra vires*" exception to Hobbs Act requirements. In the Hobbs Act, Congress granted courts of appeals exclusive jurisdiction to review certain final orders of identified agencies, providing (in 28 U.S.C. 2342) that such "[j]urisdiction is invoked by filing a petition" pursuant to 28 U.S.C. 2344. The latter provision provides that "[a]ny party aggrieved" may file suit in a court of appeals within sixty days of the final agency order to be challenged. The Fifth Circuit did not base its exercise of jurisdiction on any finding that Texas and Fasken were "part[ies] aggrieved" under the Hobbs Act. There is no textual support in the Hobbs Act, or any other statute, for the *ultra vires* exception resurrected and applied by the Fifth Circuit to hear this case. That non-statutory exercise of jurisdiction was erroneous and should be reversed. *E.g.*, *Bowles* v. *Russell*, 551 U.S. 205, 214 (2007) (courts have "no authority to create equitable exceptions to jurisdictional requirements.").

First, the doctrine contravenes the long-settled rule that courts of appeals have no authority to exercise jurisdiction that Congress withheld from them.

See, *e.g.*, *Sheldon* v. *Sill*, 49 U.S. 441, 449 (1850). Federal courts are courts of limited jurisdiction, and they cannot expand the powers that a statute confers on them by judicial decree. See, *e.g.*, *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The Fifth Circuit's contrary rule has never been sufficiently justified—even by the Fifth Circuit itself. The genesis of the *ultra vires* doctrine was a footnote, in *dicta*, in a 1982 Fifth Circuit decision involving the Interstate Commerce Commission. *Am. Trucking Ass'ns, Inc.* v. *ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982). That footnote contained no rationale or substantive analysis, and exclusively cited ICC cases before 1975, *i.e.*, before the ICC was even brought within the ambit of the Hobbs Act. *See* Act of Jan. 2, 1975, Pub. L. No. 93-584, §§ 3, 4, 88 Stat. 1917 (1975). Indeed, the actual holding of *American Trucking* was that intervention before the agency was, in fact, required as a prerequisite to judicial review under 28 U.S.C. 2344. *Am. Trucking*, 673 F.2d at 85 (citing *S. C. Loveland Co.* v. *United States*, 534 F.2d 958, 961 (D.C. Cir. 1976); *Gage* v. *U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1217-1221 (D.C. Cir. 1973)). Two years later in a challenge to a rulemaking proceeding, the Fifth Circuit noted the *dicta* from the *American Trucking* footnote to entertain claims brought by non-parties to an ICC order, again without analysis, discussion, nor citation to any post-1975 ICC Hobbs Act (or other) cases. *Wales Transp., Inc.* v. *ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984).

The Fifth Circuit itself has recognized the outlier status of its *ultra vires* doctrine. *E.g.*, ISP Pet. App. 19a n.3, 42a n.5; see *Merchs. Fast Motor Lines, Inc.* v.

ICC, 5 F.3d 911, 922 n.16 (5th Cir. 1993) (noting that "at least one other circuit" declined to recognize the Fifth Circuit's doctrine). Yet rather than simply take the opportunity upon *en banc* review in this case to align itself with the correct majority view, the Fifth Circuit doubled down and resurrected the long-dormant principle.

Below, the six-judge opinion supporting the denial of *en banc* review identified no statutory basis for the court's exercise of jurisdiction, but belatedly defended the panel's decision by invoking *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958), on which neither the panel nor the parties had relied. ISP Pet. App. 43a. As the dissenting opinion correctly noted, however, this Court subsequently clarified that *Kyne* has no applicability where, as here, there is a meaningful and adequate opportunity for judicial review under the relevant statute. ISP Pet. App. 51a n.2 (citing *Bd. of Governors of Fed. Rsrv. Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991)). Indeed, even the opinion supporting denial of *en banc* review "agree[d]" that this Court clarified *Kyne* in *MCorp*. ISP Pet. App. 43a n.6. In short, there is no statutory authority or judicial precedent to support what the Fifth Circuit did here.

Second, the uniform contrary precedent rejecting the doctrine is compelling. After *American Trucking* and *Wales Transportation*, litigants in other circuits periodically tried to sidestep Hobbs Act requirements through the *ultra vires* grounds recited by the Fifth Circuit. Those efforts were consistently, and persuasively, rejected. *State ex rel. Balderas* v. *NRC*, 59 F.4th 1112, 1123-1124 (10th Cir. 2023); *Nat'l Ass'n of State Util. Consumer Advocs.* v. *FCC*, 457 F.3d 1238, 1249

(11th Cir. 2006), modified on other grounds on denial of reh'g, 468 F.3d 1272 (11th Cir. 2006) (per curiam); *Erie-Niagara Rail Steering Comm.* v. *Surface Trans. Bd.*, 167 F.3d 111, 112-113 (2d Cir. 1999) (per curiam); *In re: Chi., Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-335 (7th Cir. 1986). Unlike the Fifth Circuit in *American Trucking* and *Wales Transportation*, those courts thoroughly analyzed—and explained—the bases of their rulings, concluding (for example) that the Fifth Circuit failed to acknowledge "the intervening change in governing procedure" regarding review of ICC orders, and also failed to show why such a position should "remain valid today." *Erie-Niagara Rail Steering Comm.*, 167 F.3d at 112.

Third, there is no basis in logic, common sense, or policy for the *ultra vires* exception, as the circumstances of this very case confirm. The Fifth Circuit's view was that Texas had made three merits arguments, and Fasken had made four—with both sets of petitioners including Administrative Procedure Act and other claims. Of those, and pursuant to its "*ultra vires*" ruling, the Fifth Circuit had to pick which of the arguments qualified as an assertion that the agency exceeded its authority. The court selected Texas's statutory authority claim (but not its Administrative Procedure Act claim) and one of Fasken's two Administrative Procedure Act claims (*i.e.*, one invoking the Nuclear Waste Policy Act). ISP App. 20a-21a. The arbitrary and unworkable nature of that type of *ad hoc* approach is plain: any clever litigant can frame an argument of agency error as the agency exceeding its lawful authority. That characterization, as Judge Easterbrook has aptly observed for the Seventh Circuit, is merely "a synonym for 'wrong.'" *Chi.,*

Milwaukee, St. Paul & Pac. R.R., 799 F.2d at 335. Moreover, the Fifth Circuit articulated no rationale that would limit its *ultra vires* doctrine to just the Hobbs Act—if left to stand, the doctrine could truly represent a sea change in courts' ability to disregard carefully crafted and long-settled congressionally mandated review schemes. The "risk for judicial aggrandizement when courts can pick and choose when to abide by Congress' limits" is obvious. ISP Pet. App. 52a (Higginson, J., dissenting).

II. The Fifth Circuit's *Dicta* Regarding Hobbs Act "Party Aggrieved" Requirements Was Erroneous.

In opposing certiorari, respondents primarily relied on arguments that the respondents were in fact "parties aggrieved" under the Hobbs Act (and the Fifth Circuit's *dicta* to that effect), rather than trying to defend the *ultra vires* exception pursuant to which the Fifth Circuit actually heard the case. (Texas Br. in Opp. 8-16; Fasken Br. in Opp. 24-32.)

Continuation of that strategy here would be unavailing—the Hobbs Act *dicta* by the Fifth Circuit is wrong, unsupported by the statute, and at odds with every other relevant circuit precedent. Respondents can offer no good reason to upend decades of well-settled law regarding the applicable judicial review scheme, and this Court should not endorse the Fifth Circuit's aberrant views regarding the Hobbs Act.

Under the AEA, when an applicant seeks a materials license to possess spent nuclear fuel, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party

to such proceeding." 42 U.S.C. 2239(a)(1)(A). The NRC has promulgated regulations governing such hearings, *e.g.*, 10 C.F.R. 2.309(a), (d), and (f), including provisions specifically contemplating participation by States. 10 C.F.R. 2.309(h). The Hobbs Act vests courts of appeals with exclusive jurisdiction to review a "final order" of the Commission "entered in any proceeding" "granting, suspending, revoking, or amending" a "license." 28 U.S.C. 2342(4); 42 U.S.C. 2239(a)(1)(A) and (b)(1). Jurisdiction for courts to review challenges to such licenses is limited to appeals by a "party aggrieved" by the agency proceeding—that is, a person who has become a "party" to the agency proceeding. 28 U.S.C. 2344. (If a person is denied "party" status by the agency, then that determination itself is appealable pursuant to 42 U.S.C. 2239(b)(1).)

Start with the language of the statute: the right to judicial review was limited by Congress to a "*party* aggrieved." 28 U.S.C. 2344. Not a "*person*" aggrieved, as in other review statutes like the Administrative Procedure Act, 5 U.S.C. 702. That distinction is meaningful, as then-Judge Scalia explained for the court in *Simmons* v. *ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983)—"[t]o give meaning to that apparently intentional variation," the term "party" in the Hobbs Act must be understood as "referring to a party before the agency, not a party to the judicial proceeding." *Simmons*, 716 F.2d at 43. That understanding comports with settled, well-understood meanings of the term in the law. *E.g.*, *Party*, BLACK'S LAW DICTIONARY 1278 (4th ed. Rev. 1968) ("'Party' is a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, * * * and all

others who may be affected by the suit are * * * persons interested, but not parties.").

And, without exception (until now), in numerous decisions over the years courts have repeatedly confirmed the proposition that those who fail to "properly intervene[] in the underlying NRC proceeding * * * are not 'parti[ies] aggrieved,'" and therefore may not seek judicial review under the Hobbs Act. *Ohio Nuclear-Free Network*, 53 F.4th at 239; see also, *e.g.*, *Nat'l Parks Conservation Ass'n* v. *FERC*, 6 F.4th 1044, 1049-1050 (9th Cir. 2021); *NRDC* v. *NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016); *Gage*, 479 F.2d at 1217-1218; *Balderas*, 59 F.4th at 1116-1119. That consistent line of judicial interpretation carries great weight. Cf. *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2278 (2024) (Gorsuch, J., concurring) ("Madison observed that judicial rulings '*repeatedly confirmed*' may supply better evidence of the law's meaning than isolated or aberrant ones." (emphasis in original) (citing Letter from James Madison to Charles J. Ingersol (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 184 (1867))).

Other statutory indicia reinforce the principle. Section 2348 provides that "part[ies] in interest in the proceeding before the agency" may appear in judicial review proceedings of their own motion and as of right, but other entities "whose interests are affected by the order of the agency, may intervene." 28 U.S.C. 2348. That statutory distinction between judicial review as-of-right on the one hand, and permissive intervention on the other, "would be defeated" if a nonparty to the agency proceeding "could file its own petition for

review as a matter of right." *Ala. Power Co.* v. *FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002).

For a formal agency hearing implicated by a request for a spent nuclear fuel materials license such as in this case, merely dashing off emails, letters, or even a set of lengthy comments to the agency does not make one a "party." Just as filing an *amicus* brief in a court does not confer party status or entitle the *amici* to pursue an appeal in its own right, pursuit of an action in court is limited to "parties." *E.g.*, FED. R. APP. P. 3-4. As Judge Easterbrook observed in another Hobbs Act case, "[i]f a non-party tried to appeal from a judgment of a district court," a court would summarily "dismiss the appeal." *Chi., Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d at 334-335.

Respondents, the Fifth Circuit's *dicta*, and the opinion in support of denial of *en banc* review have pointed to cases where the mere submission of comments in *an agency rulemaking* may be enough to confer "party" status for purposes of such proceedings governed by the Hobbs Act. ISP App. 17a-19a, 37a-38a; Texas Br. in Opp. 9-10, 15. Here, however, that analogy misses the mark. Rulemakings (which are not at issue here) and adjudicatory agency proceedings (which are) are fundamentally different. Who can fairly be said to be a "party" to a notice and comment rulemaking, if not a person who submits comments in accordance with agency rules? That conclusion simply applies the words of the statute to the particular agency procedure at issue, and courts have consistently and sensibly recognized that the nature of the agency proceeding can dictate what is required to confer "party" status. *E.g.*, *Water Transp. Ass'n* v. *ICC*,

819 F.2d 1189, 1192 (D.C. Cir. 1987) (the "degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted."). But even in rulemakings, an interested person must comply with procedures regarding proper submission of comments—slipping a handwritten note under the door of the agency headquarters after the deadline for comments has passed would not suffice. *E.g.*, *Ala. Power Co.* v. *ICC*, 852 F.2d 1361, 1368 (D.C. Cir. 1988) (denying "party" status in a rulemaking proceeding where petitioner's submission fell "short of that required in the type of ICC proceeding at issue here."). The specifics of what is required to become a "party" may vary depending on the particular agency action at issue, but that does not mean that a person who intentionally eschews available agency procedures for becoming a party can nevertheless then claim "party" status and appeal the agency determination to a circuit court. See, *e.g.*, *Balderas*, 59 F.4th at 1118 ("The appropriateness and availability of these procedures differ when agencies enact rules and adjudicate disputes.").

Contrary to the concurring opinion below, ISP Pet. App. 35a, this case does not implicate any lack of available judicial review or threaten the judiciary's role under *Marbury* v. *Madison*, 5 U.S. 137 (1803). Neither respondent was denied a day in court, nor was the NRC in "control [of] the courthouse door." ISP Pet. App. 34a. Just the opposite—Fasken actually had its day in court in the D.C. Circuit on the issues properly raised at the agency level, but it did not prevail. *Don't Waste Mich.*, 2023 WL 395030, at *3. With regard to Texas, the NRC regulations explicitly provide for potential participation by States, 10 C.F.R. 2.309(h), and

States routinely challenge NRC licensing actions at both the agency level and in courts pursuant to the Hobbs Act. *E.g.*, *N.J. Dep't of Env't Prot.* v. *NRC*, 561 F.3d 132, 135 (3d Cir. 2009) (New Jersey); *Palisades Nuclear Plant & Big Rock Point*, CLI-22-08, 2022 WL 18355239, at *10 n.76 (N.R.C. July 15, 2022) (Michigan); *In re Entergy Nuclear Vt. Yankee*, CLI-16-12, 2016 WL 3476306, at *2 n.28 (N.R.C. June 23, 2016) (Vermont). Here, Texas was for the license, and then against it, but for whatever reason did not take the steps that were fully available to it for participation at the agency level, which would have opened the "courthouse door." The Fifth Circuit's departure from long-settled law in this case was not necessary to ensure availability of meaningful judicial review.

Finally with respect to the Hobbs Act and justiciability, the severe negative repercussions of the Fifth Circuit's ruling in this case should be considered. If any person can sue in court at any time to block or vacate an NRC-issued license without even trying to participate before the agency, why continue to have extensive safety-based adjudicatory hearings at the agency level at all? For decades, the NRC has relied upon such adjudicatory proceedings to protect the health and safety of the public. ISP spent many years and millions of dollars to secure its license in this case. That was all rendered for naught, however, with the belated stroke of a pen by the Fifth Circuit. If that is the new normal, rational business entities are unlikely to take on that type of risk, expense, and uncertainty for future nuclear projects. The impacts for a crucial, capital-intensive industry, at a critical time of new technologies and opportunities, would be potentially catastrophic. As the dissent to denial of *en banc* review

correctly recognized, the "grave consequences" of the Fifth Circuit's decision here for an industry that is a substantial source of the nation's power, and most of its actual and potential non-carbon-based generation of electricity, can hardly be overstated. ISP Pet. App. 46a.

III. The Atomic Energy Act Permits the NRC to License Private Parties to Temporarily Possess Spent Nuclear Fuel Away from the Nuclear Reactor That Generated the Spent Nuclear Fuel.

A. Licenses for Temporary Away-From-Reactor Possession of Spent Nuclear Fuel Fall Within the NRC's Expressly Delegated Authority.

The authority of the NRC to license private parties to temporarily store spent nuclear fuel away from the reactor that generated the fuel is comfortably established by the terms of the AEA itself, and confirmed by the relevant history, context, and consistent judicial rulings to that effect.

Spent nuclear fuel is composed of special nuclear material, source material, and byproduct material. ISP Pet. App. 22a; see, *e.g., Bullcreek*, 359 F.3d at 538. From that undisputed factual premise, the legal conclusion readily follows. Again, start with the words of the statute: Section 161(b) of the AEA, 42 U.S.C. 2201(b), tasks the NRC with the responsibility to "establish by rule, regulation, or order" the "standards and instructions to govern the possession and use" of all of the constituent elements of spent nuclear fuel that the NRC deems "necessary or desirable to promote the common defense and security or to protect

health or to minimize danger to life or property." Congress confirmed that "common defense and security" includes "development, utilization, and control of atomic energy for military and all other purposes," and also confirmed that the "processing and utilization" of the constituent elements of spent nuclear fuel "must be regulated" by the NRC "in the national interest," to "protect the health and safety of the public." 42 U.S.C. 2011(a); 2012(c), (d). With the development of a domestic nuclear power industry and the consequent potential need to store spent nuclear fuel away from operating reactors, it plainly fell within the NRC's mandate—indeed, it was the agency's duty—to regulate such possession and use to safeguard the public health and safety.

Additional statutory provisions regarding the possession and use of each of the three constituent elements of spent nuclear fuel point to the same conclusion. For special nuclear material, the NRC is authorized to issue licenses for possession for research and development regarding atomic energy (42 U.S.C. 2073(a)(1)), for research and development regarding medical uses (42 U.S.C. 2073(a)(2)), for use in utilization facilities (*i.e.*, power plants) or production facilities (*i.e.*, certain isotope production plants) (42 U.S.C. 2073(a)(3)), and—significantly and separately—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) (emphasis supplied).

Similarly, for source material, the NRC is authorized to issue licenses for possession for research and development regarding atomic energy (42 U.S.C. 2093(a)(1)), for research and development regarding

medical uses (42 U.S.C. 2093(a)(2)), for use in utilization facilities (*i.e.*, power plants) or production facilities (*i.e.*, certain isotope production plants) (42 U.S.C. 2093(a)(3)), and—significantly and separately—for "*for any other use approved by the Commission as an aid to science or industry*." 42 U.S.C. 2093(a)(4) (emphasis supplied).

For byproduct material, the Commission was authorized to issue licenses for use in research and development, medical therapy, and agricultural uses, but also "*industrial uses*," and "*such other useful applications as may be developed*." 42 U.S.C. 2111(a) (emphasis supplied).

Nowhere in this statutory scheme does Congress place artificial limits on the NRC's ability to license possession or use of these materials. On the contrary, Congress made clear that the "purposes of this chapter" and the "industry" and "industrial uses" that the NRC was charged with considering for regulation of special nuclear, source, and byproduct material broadly encompassed the "development, use, and control of atomic energy." 42 U.S.C. 2011(a). Congress further decreed that the agency should endeavor to "strengthen free competition in private enterprise" in pursuing its regulatory mission. 42 U.S.C. 2011(b). The project to be licensed by the NRC in this case—a private, away-from-reactor installation to facilitate the use of atomic energy by temporarily storing the resulting used nuclear fuel—falls within the bull's eye of the industrial purposes that the AEA was enacted to address and that the NRC was charged to regulate.

In short, the best reading of these provisions—indeed, the only plausible reading—is that the NRC is

acting well within the authority delegated to it by Congress in the AEA when the NRC regulates the temporary storage of spent nuclear fuel by a private party. Each of the delegations just discussed is a classic example of Congress empowering the NRC "to regulate subject to the limits imposed by a term or phrase that 'leaves [the agency] with flexibility.'" *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2263 & n.6 (2024) (citation omitted). Nothing in the AEA limits the NRC's authority over such temporary storage to the physical site of an operating, or formerly operating, reactor.

Consistent with its statutory mandate, when the NRC determined to formalize its procedures regarding away-from-reactor storage of spent nuclear fuel in 1978, it did so in the most public, deliberate, and transparent way possible—with extensive notice and comment rulemaking, explicitly citing the above-noted AEA statutory provisions as its authority for doing so. The public record and comments covered almost every conceivable issue, including policy debates regarding "at-reactor versus away-from-reactor siting" of storage installations (45 Fed. Reg. at 74,696 (cleaned up)), but there was no suggestion regarding any lack of NRC authority over the latter under the AEA. Those regulations were promulgated in 1980, and have been on the books at 10 C.F.R. Part 72 and applied as needed, both prior to the passage of the NWPA in 1982 and for the more than four decades since. There are at least a dozen existing sites in the country where there is no operating reactor and where spent nuclear fuel is stored, at least seven of which are privately owned and licensed pursuant to the same statutory and regulatory authority as the proposed project in this case. See

U.S. Independent Spent Fuel Storage Installations (ISFSI), NRC (June 2023), https://www.nrc.gov/docs/ML2316/ML23165A245.pdf (Current U.S. Independent Spent Fuel Storage Installation (ISFSI) Map as of June 12, 2023 (nrc.gov)).

The D.C. and Tenth Circuits have consistently affirmed this reading of the AEA. In the *Bullcreek* proceedings, both at the agency level and before the court of appeals, the vigorously contested issues were all about whether the NRC's existing authority under the AEA to license away-from-reactor storage of spent nuclear fuel had been abrogated by the NWPA. See *In re Priv. Fuel Storage, L.L.C.*, CLI-02-29, 56 N.R.C. 390, 395-396 (Dec. 18, 2002); *Bullcreek*, 359 F.3d at 539-540; see also *Skull Valley*, 376 F.3d at 1232. If there was any legitimate doubt about the existence of the NRC's preexisting authority under the AEA in the first place, such doubts would have been aired in those proceedings, rather than conceded. *Bullcreek*, 359 F.3d at 541.

In *Bullcreek*, the D.C. Circuit did not say it was "assuming without deciding" the AEA's scope, which would have been easy enough to do if that was truly what was going on. That, however, was *not* what was going on—the underlying AEA authority for the NRC was the necessary predicate to the whole case. Moreover, any doubts that might have existed about the depth or pedigree of the *Bullcreek* court's holdings regarding AEA authority were dispelled by the D.C. Circuit's recent decision in *Beyond Nuclear, Inc.* v. *NRC*, 113 F.4th 956 (D.C. Cir. 2024). In *Beyond Nuclear*, which involved a private away-from-reactor spent fuel storage project similar to the one in this case, the D.C.

Circuit reaffirmed its rulings in unmistakable terms: "In *Bullcreek*, we explicitly held that the AEA provided the 'NRC authority to license and regulate the storage and disposal of spent nuclear fuel,' and '[p]ursuant to its AEA authority, the NRC promulgated regulations * * * for licensing onsite and away-from-reactor spent nuclear fuel storage facilities for private nuclear generators.'" *Beyond Nuclear*, 113 F.4th at 965 (quoting *Bullcreek*, 359 F.3d at 538). The court further held that the NRC had "easily rejected" the exact same AEA argument made by the respondents here, upon the authority of *Bullcreek*. *Beyond Nuclear*, 113 F.4th at 965.

The statutory text, the decades-old regulations, and the case law are all consistent: the AEA permits the NRC to license private parties to temporarily store spent nuclear fuel away from the nuclear reactor that generated the fuel.

B. The Fifth Circuit and the Respondents Misread the AEA.

That has been the settled law for decades, until the Fifth Circuit's decision in this case. None of the arguments offered by the Fifth Circuit, or by respondents, warrant a departure.

1. While the Fifth Circuit did not come right out and say it, the court's main interpretative approach was to apply a distorted type of *ejusdem generis* or *noscitur a sociis* reasoning to the AEA's delegations of authority. That is, the Fifth Circuit looked at the "research and development" provisions of 42 U.S.C. 2073(a)(1) and (2) for special nuclear material, and of 42 U.S.C. 2093(a)(1) and (2) for source material, and inferred that possession licenses for those materials

may only be issued by the NRC for "certain types of research and development." ISP Pet. App. 22a.

That conclusion is wrong for many reasons. *First*, even if it were proper to apply an *ejusdem generis*-type canon of interpretation here (and it was not, as explained below), the Fifth Circuit inexplicably failed to consider 42 U.S.C. 2073(a)(3) and 2093(a)(3), which authorize "facilities" licenses for power and isotope production plants and have nothing to do with "research and development." One cannot just ignore portions of the surrounding statute that do not fit the desired result.

Second, application of *ejusdem generis*, as this Court recently held, requires a "long and detailed list of specific directions," with a common "link." *Harrington* v. *Purdue Pharma, L.P.*, 144 S. Ct. 2071, 2082 (2024), neither of which are present here. There is no "long list," but, rather, just four distinct enumerations of possible licensing purposes, with the last one being an express assignment of broad responsibility to the agency. Indeed, and tellingly, in opposing certiorari, Fasken rejected the "research and development" commonality proffered by the Fifth Circuit, in favor of a newly minted "active, productive use" construct, which was never argued below nor embraced by the Fifth Circuit. Fasken Br. in Opp. 14. Such disagreements about the required commonality *among those asserting and trying to defend the result* are proof positive that there is no true "common attribute," and that the *ejusdem generis* canon therefore does not apply. *E.g.*, *Ali* v. *Fed. Bureau of Prisons,* 552 U.S. 214, 225 (2008); *Sw. Airlines Co.* v. *Saxon*, 596 U.S. 450, 462 (2022).

Third, the Fifth Circuit read critically important sections of the statutes, *i.e.*, 42 U.S.C. 2073(a)(4) and 2093(a)(4), as meaningless, *i.e.*, as adding nothing to the "research and development" provisions. Subsections (a)(4) of the statutes are not mere catchall provisions, but, rather, significant terms that expressly ensure that the agency can fully implement the congressionally defined purposes of the AEA. Doctrines such as *noscitur a sociis* may not be applied to give a statutory term "the same function as other words in the definition, thereby denying it independent meaning." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 702 (1995). And, courts should refrain from "interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski* v. *Kappos*, 561 U.S. 593, 596, 607-608 (2010), (citing *Corley* v. *United States*, 556 U.S. 303, 314 (2009)). The Fifth Circuit violated those elemental principles, and its decision should be reversed.

2. The Fifth Circuit's only treatment of Sections 2073(a)(3) and 2093(a)(3) was to set up, and then reject, a strawman. Those sections refer to 42 U.S.C. 2133, which authorize so-called "facilities" licenses for "utilization facilities," which are power plants (42 U.S.C. 2014(cc)), and "production facilities," which are isotope production facilities (42 U.S.C. 2014(v)). Because those are defined terms that the Fifth Circuit viewed as not encompassing "storage or disposal," the Fifth Circuit held that they do not authorize the project at issue. ISP App. 23a. But no one ever argued that they did. The argument, instead, was that other aspects of the agency's delegated powers furnish the necessary authority. And if the Fifth Circuit's reading were correct, a seemingly necessary implication would

be that the AEA does not authorize the NRC to license "storage" of spent nuclear fuel—by anyone, anywhere, ever. In opposing certiorari, Texas ran with that view, Texas Br. in Opp. 22, but then, perhaps recognizing that that simply could not be correct, postulated that "common sense" (as opposed to anything in the statute) must mean that nuclear utilities are allowed to store fuel at the site of an operating reactor. Texas Br. in Opp. 30. The contortions one must make to defend the Fifth Circuit's outcome reveals its error.

3. Another strawman invoked by the Fifth Circuit involved 42 U.S.C. 2011, which relates to byproduct materials. The Fifth Circuit focused on 42 U.S.C. 2111(b), which addresses "*disposal*" of certain types of "byproduct" materials. ISP Pet. App. 23a. The license at issue here, however, has nothing to do with "disposal," but instead involves temporary "possession" of spent nuclear fuel until it is permanently disposed of. The relevant "byproduct" provision is therefore Section 2111(a)—not Section 2111(b), which no one ever invoked to authorize the license at issue. The Fifth Circuit then did its own web-based research about half-lives of certain radioactive isotopes, opining that the half-life of radium-226 is far less than that of plutonium, and, since spent nuclear fuel contains plutonium, Section 2111(b) could not apply or authorize the license. ISP Pet. App. 23-24a. But, again, no one ever argued that it did, and plutonium is not even "byproduct" material. Rather, it is "special nuclear material." 42 U.S.C. 2014(aa). The Fifth Circuit's reliance on Section 2111(b) for its conclusions is therefore doubly misguided.

4. At bottom, the Fifth Circuit and the respondents impermissibly seek to insert a substantive material term that they may now wish was in the AEA, but which is not—namely, a geographic "at-reactor" limitation on possession and storage of spent nuclear fuel. Courts, however, may not rewrite statutes to insert terms that are not there. *E.g.*, *Borden* v. *United States*, 593 U.S. 420, 436 (2021) ("Once again, statutory construction does not work that way: A court does not get to delete inconvenient language and insert convenient language to yield the court's preferred meaning."); *Romag Fasteners, Inc.* v. *Fossil, Inc.*, 590 U.S. 212, 215 (2020) ("Nor does this Court usually read into statutes words that aren't there.").

5. The last important point about the AEA concerns the Fifth Circuit's reliance on *West Virginia* v. *EPA*, 597 U.S. 697 (2022). ISP Pet. App. 30-31a; see also Fasken Br. in Opp. 15-17; Texas Br. in Opp. 32. Whatever the post-*Loper Bright* import of *West Virginia* might be, the "major questions" doctrine has no bearing here. In all the ways that matter, this case presents circumstances that are the complete *opposite* of those that led this Court to give heightened scrutiny to agency action in *West Virginia*. This is not a case where an agency strayed outside its lane—safety-based regulation of nuclear materials, which has always been the agency's core function under the AEA, *e.g.*, 42 U.S.C. 2011(b), 2201(b). The license and applicable regulations here plainly serve just that purpose. Here, there was nothing "unprecedented" nor any way that "things changed" when the NRC exercised its decades-old, completely transparent licensing authority for these materials. *West Virginia*, 597 U.S. at 711. Congress had *not* "considered and rejected" the

exercise of that challenged authority. *Id.* at 731. And it is emphatically *not* true that the NRC has "never regulated" in the way now being challenged. *Id.* at 729-731. The NRC should be allowed to keep doing what it has lawfully been doing under the AEA for nearly half a century, and *West Virginia* is not at all to the contrary.

IV. The Nuclear Waste Policy Act Does Not Prohibit the NRC from Licensing Private Parties to Temporarily Store Spent Nuclear Fuel Away from the Nuclear Reactor That Generated the Spent Nuclear Fuel.

In holding that the NWPA "doesn't permit" private away-from-reactor storage of spent nuclear fuel, the Fifth Circuit abandoned any pretense of relying on statutory text. ISP Pet. App. 30a. Rather, the court invoked characterizations of alleged "Congressional policy," "historical context," and the overall "statutory scheme." ISP Pet. App. 21a, 29a, 30a. It had no other choice: the NWPA contains no text whatsoever that expressly or impliedly prohibits the NRC from licensing a private party to possess spent nuclear fuel at an away-from-reactor site. In all the briefing in these matters to date, neither respondents nor the Fifth Circuit ever identified any such term, because one does not exist.

The Fifth Circuit also misconstrued the structure and text of the portions of the NWPA that it did cite. For example, the Fifth Circuit erroneously invoked a part of the NWPA that describes at-reactor storage at Part B-Interim Storage Program, 42 U.S.C. 10151-10157, as a purported limitation on the NRC (ISP App. 28a-29a), without appreciating that the actual role of

those provisions was merely to delineate "preconditions on private generators for obtaining federal interim storage." *Bullcreek*, 359 F.3d at 542. Similarly, the "monitored retrievable storage" provisions at 42 U.S.C. 10161-10169, by their terms, relate to storage of spent nuclear fuel by DOE, not by private parties. (Neither of those programs ultimately came to pass, but the statutory provisions did nothing to call into question the NRC's pre-existing authority under the AEA.) Section 10155(h), which the Fifth Circuit cited in a footnote (ISP Pet. App. 28a n.4), states that "nothing in this chapter shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on" the date of enactment. That provision, however, merely limits the scope of the NWPA—it "is facially neutral: neither prohibiting nor promoting the use of private [away-from-reactor] storage facilities." *Bullcreek*, 359 F.3d at 542 (cleaned up). Properly construed, "nothing in the text of § 10155(h) suggests that Congress intended to repeal" the NRC's authority to license private away-from-reactor storage under the AEA. *Bullcreek*, 359 F.3d at 542.

The context of the NWPA's enactment confirms the Fifth Circuit's error. The regulations at 10 C.F.R. Part 72 had long been on the books when the NWPA was being debated and enacted, and the NRC's assertion of authority to license private away-from-reactor storage under the AEA was well known to Congress. See S. REP. NO. 97-282, at 44 (1981); *Bullcreek*, 359 F.3d at 542 ("Congress was aware of the NRC's regulations for licensing private away-from-reactor storage

facilities"). Congress, of course, "legislates against the backdrop of existing law," *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 587 U.S. 601, 611 (2019) (citation omitted). And here, that existing law included the AEA delegations discussed above, which the NRC openly construed as permitting the type of licensing being challenged here. It is a "cardinal rule" that a revocation of the NRC's preexisting statutory authority should not be implied from a subsequent law. *Morton* v. *Mancari*, 417 U.S. 535, 549-551 (1974). Had Congress wanted to limit this licensing authority, it would have done so explicitly.

And, once again, the case law of other circuits is consistent, persuasive, and directly contrary to the NWPA holding of the Fifth Circuit here. The NWPA arguments by the petitioners in *Bullcreek* and the respondents in this case (adopted by the Fifth Circuit) are almost verbatim: Compare *Bullcreek*, 359 F.3d at 539 ("Congress had established in the NWPA a 'comprehensive national nuclear waste management system for the storage of [spent nuclear fuel],'" that prohibited the NRC from licensing private away-from-reactor storage of spent nuclear fuel (quoting petition)) with ISP Pet. App. 29a ("comprehensive statutory scheme" of the NWPA precludes the NRC from licensing away-from-reactor storage of spent nuclear fuel). In response, and unlike the Fifth Circuit here, the *Bullcreek* court thoroughly—and accurately—reviewed the "language," "structure," and "legislative history" of the NWPA, and rejected the claims. *Bullcreek*, 359 F.3d at 541-542. Every other circuit court that has addressed the issue has reached the same result. *Skull Valley*, 376 F.3d at 1232-1233; *Balderas*,

59 F.4th at 1115, 1121; *Beyond Nuclear*, 113 F.4th at 965.

In sum: the NWPA created acceptance and disposal obligations on the part of *DOE*, not the *NRC*. The NWPA was all about permanent *disposal* of spent nuclear fuel by DOE, not *temporary possession* of spent nuclear fuel by private parties. *E.g.*, *Don't Waste Mich.*, 2023 WL 395030, at *1 ("Storage and disposal, however, are different concepts."); *Balderas*, 59 F.4th at 1115, 1121 (NWPA "governs the establishment of a federal repository for permanent storage [*i.e.*, disposal], not temporary storage by private parties."). As the other circuits have held, at the end of the day the NWPA has nothing to do with the issues in this case. The Fifth Circuit erred in splitting with those circuits and concluding otherwise.

CONCLUSION

The judgment of the Fifth Circuit should be reversed, and this Court should direct the Fifth Circuit to dismiss or deny the petitions.

Respectfully submitted,

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