No. 23-1300

# In the Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., PETITIONERS

*v.*

STATE OF TEXAS, ET AL.

*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

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

Petitioners were the respondents in the court of appeals. They are the United States Nuclear Regulatory Commission and the United States of America.

Respondents include 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. Respondents also include Interim Storage Partners, LLC, an intervenor-respondent in the court of appeals.

## RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

*State of Texas* v. *Nuclear Regulatory Commission*, No. 21-60743 (Mar. 14, 2024)

United States Court of Appeals (10th Cir.):

*Balderas* v. *United States Nuclear Regulatory Commission*, No. 21-9593 (Feb. 10, 2023)

United States Court of Appeals (D.C. Cir.):

*Don't Waste Michigan* v. *U.S. Nuclear Regulatory Commission*, Nos. 21-1048, 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231 (Jan. 25, 2023)

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## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Nuclear Regulatory Commission and the United States of America, respectfully petitions 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 opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 78 F.4th 827. The order of the court of appeals denying rehearing en banc (App., *infra*, 31a-52a) is reported at 95 F.4th 935.

### JURISDICTION

The judgment of the court of appeals was entered on August 25, 2023. Petitions for rehearing were denied on March 14, 2024 (App., *infra*, 31a-52a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix. App., *infra*, 60a-86a.

## STATEMENT

### A. Legal Background

1. a. Congress enacted the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, to "encourage[] the private sector" to develop "atomic energy for peaceful purposes under a program of federal regulation and licensing." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983); see 42 U.S.C. 2013(a), (b), and (d). As amended, the Act generally prohibits certain activities absent a license issued by the Nuclear Regulatory Commission (Commission), while authorizing the Commission to license such activities as long as they comply with the Commission's health, safety, common defense, and security standards. The Act authorizes the Commission to issue licenses to possess three types of nuclear material: (1) "source material," such as natural uranium, 42 U.S.C. 2092; see 42 U.S.C. 2093(a); (2) "special nuclear material," such as enriched uranium and plutonium, that can be used to sustain nuclear fission, 42 U.S.C. 2073(a); and (3) "byproduct material," which includes other radioactive material produced by nuclear fission, 42 U.S.C. 2111(a). See 42 U.S.C. 2014(e), (z), and (aa) (defining those terms). Licenses under those three provisions are known as "materials licenses."[1]

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[1] Congress has separately authorized the Commission to issue "facilities licenses," which are necessary for private entities to own or operate facilities, including nuclear-power reactors, that produce or utilize nuclear material. See 42 U.S.C. 2133, 2134.

Once fuel in a nuclear reactor is no longer useful, it must be removed from the reactor and cooled in a spent-fuel pool for as long as five years, after which it can either remain in the pool or be placed into "dry" storage. Such spent nuclear fuel consists of source material, special nuclear material, and byproduct material. App., *infra*, 21a; see 10 C.F.R. 72.3. To possess any amount of spent nuclear fuel, an individual or entity must obtain from the Commission a materials license to possess each of its components. The Commission can issue a single license authorizing the possession of all three components. See 42 U.S.C. 2201(h).

The Commission is authorized to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of" those three components "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). In the 1970s, the Commission recognized that the nuclear-power industry would need more space to temporarily store spent fuel. 45 Fed. Reg. 74,693, 74,693 (Nov. 12, 1980). In 1980, following notice-and-comment rulemaking, see *ibid.*, the Commission issued regulations that establish licensing requirements for interim storage of spent fuel, including "dry" storage as an alternative to pool storage, both at and away from the site of the nuclear-reactor facility where the fuel was generated. See 10 C.F.R. Pt. 72; see also *Pacific Gas & Elec. Co.*, 461 U.S. at 217 (noting those regulations).

b. Two years later, Congress enacted the Nuclear Waste Policy Act of 1982 (Policy Act), 42 U.S.C. 10101 *et seq*. The Policy Act created a program for the federal government to establish a deep geologic repository to

permanently dispose of spent fuel from commercial nuclear reactors. See 42 U.S.C. 10131-10145. The Policy Act also directed the Department of Energy to provide limited interim storage of spent fuel if certain conditions were met. See 42 U.S.C. 10151-10157. The Policy Act further provided that, "[n]otwithstanding any other provision of law, nothing in" the Act "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 January 7, 1983." 42 U.S.C. 10155(h). The Policy Act did not modify the Atomic Energy Act provisions that authorized the Commission to license temporary possession of spent nuclear fuel, nor did it disturb the Commission's 1980 regulations.

c. In the four decades since Congress enacted the Policy Act, the Commission has issued materials licenses for spent-fuel storage installations both at, and away from, reactor sites. See, *e.g.*, *In re General Elec. Co.*, 15 N.R.C. 530 (1982) (offsite); 71 Fed. Reg. 10,068 (Feb. 28, 2006) (offsite); 56 Fed. Reg. 57,539 (Nov. 12, 1991) (storage at decommissioning reactor); see also Nuclear Regulatory Commission, *U.S. Independent Spent Fuel Storage Installations (ISFSI)* (Apr. 22, 2021) (map of spent fuel storage installations), https://www.nrc.gov/docs/ML2111/ML21116A041.pdf. Temporary storage of spent fuel remains necessary to facilitate ongoing operation of nuclear reactors and the decommissioning of retired reactors. See, *e.g.*, *Energy Nw.* v. *United States*, 641 F.3d 1300, 1303-1304 (Fed. Cir. 2011) (storage facility that allowed continued generation of power); *Dairyland Power Coop.* v. *United States*, 645

F.3d 1363, 1367-1368 (Fed. Cir. 2011) (storage facility necessary to complete decommissioning).

2. When adjudicating a request for a license to store 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). Under the Commission's regulations, leave to intervene will be granted if a person "provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact" and satisfies other requirements. 10 C.F.R. 2.309(f)(1)(vi); see 10 C.F.R. 2.309(a), (d), and (f). The regulations contemplate intervention by States. 10 C.F.R. 2.309(h).

3. The Hobbs Act, 28 U.S.C. 2341 *et seq.*, vests the courts of appeals with exclusive jurisdiction to review (among other things) any "final order" of the Commission "entered in any proceeding" "granting, suspending, revoking, or amending" a "license." 42 U.S.C. 2239(a)(1)(A) and (b)(1); see 28 U.S.C. 2342(4). The Hobbs Act also gives the courts of appeals exclusive jurisdiction to review final orders and rules issued by many other federal agencies, including the Federal Communications Commission, the Department of Agriculture, the Department of Transportation, the Federal Maritime Commission, and the Surface Transportation Board. 28 U.S.C. 2342.

The Hobbs Act specifies that "[j]urisdiction is invoked by filing a petition as provided by section 2344 of this title." 28 U.S.C. 2342. Section 2344, in turn, provides that "[a]ny party aggrieved by the final order" of a Hobbs Act agency "may, within 60 days after its entry,

file a petition to review the order" in the court of appeals for "the judicial circuit in which the petitioner resides or has its principal office, or" the D.C. Circuit. 28 U.S.C. 2343, 2344.

**B. Factual And Procedural Background**

1. a. In 2018, the Commission gave public notice that Interim Storage Partners (ISP) had applied for a license to store spent nuclear fuel in Andrews County, Texas, away from any nuclear reactor. 83 Fed. Reg. 44,070 (Aug. 29, 2018). The notice explained that interested persons could request a hearing and seek leave to intervene as parties to the proceeding. *Id.* at 44,071.

Several groups sought to intervene as parties, including respondents Fasken Land and Minerals, Limited, and Permian Basin Land and Royalty Owners (collectively, Fasken). See 86 Fed. Reg. 51,926, 51,927 (Sept. 17, 2021). The Commission denied the putative intervenors' intervention requests and issued the license in September 2021. *Id.* at 51,926-51,927; see App., *infra*, 53a-59a; *In re Interim Storage Partners LLC*, 93 N.R.C. 244 (2021); *In re Interim Storage Partners LLC*, 92 N.R.C. 463 (2020).

Respondents Texas, Governor Abbott, and the Texas Commission on Environmental Quality (collectively, Texas) did not seek to intervene or otherwise formally participate in the Commission's adjudication of ISP's application. A year and a half after the deadline for seeking intervention, both Governor Abbott and the Texas Commission on Environmental Quality commented on the draft Environmental Impact Statement (EIS) related to ISP's application. App., *infra*, 7a-8a; see 83 Fed. Reg. at 44,071. More than a year after that—and days before the Commission ultimately issued the license—Governor Abbott sent another letter

to the Commission. App., *infra*, 8a-9a. None of Texas's submissions requested leave to intervene in the agency proceeding.

b. Three courts of appeals issued decisions related to ISP's license. First, some of the putative intervenors, including Fasken, petitioned in the D.C. Circuit for review of the Commission's orders denying their requests to intervene. The D.C. Circuit concluded that the Commission had properly denied the intervention requests. *Don't Waste Mich.* v. *U.S. Nuclear Regulatory Commission*, No. 21-1048, 2023 WL 395030, at *2-*3 (Jan. 25, 2023) (per curiam). The court also declined to consider a putative intervenor's request that the court review the license itself, concluding that because the Commission had properly denied leave to intervene, that putative intervenor "d[id] not qualify as a 'party aggrieved'" under the Hobbs Act. *Id.* at *3 (citation omitted).

Second, New Mexico petitioned for review in the Tenth Circuit. Like Texas, New Mexico did not seek to intervene in the Commission's adjudication and instead commented on the draft EIS. *State ex rel. Balderas* v. *United States Nuclear Regulatory Commission*, 59 F.4th 1112, 1116 (10th Cir. 2023). The Tenth Circuit dismissed New Mexico's petition. *Id.* at 1116-1124. The court held that, because New Mexico had "bypassed the chance to participate as a party in the licensing proceeding," it "doesn't qualify as an aggrieved party under the Hobbs Act." *Id.* at 1118. And the court declined to recognize an ultra vires exception to the Hobbs Act's party-aggrieved limitation on review. *Id.* at 1123-1124.

Third, respondents petitioned for review of the license in the Fifth Circuit.

2. The Fifth Circuit held that it could review respondents' challenges to the Commission's issuance of

the ISP license and that the Commission lacked authority to grant licenses for the temporary offsite storage of spent nuclear fuel.

a. The Fifth Circuit held that it could consider respondents' claims. App., *infra*, 14a-20a. The court discussed whether respondents were "part[ies] aggrieved" under the Hobbs Act, 28 U.S.C. 2344, but ultimately "d[id not] * * * resolve" that issue because the Fifth Circuit had previously recognized an ultra vires exception to that requirement. App., *infra*, 18a. The court explained that the Fifth Circuit had identified a "'rare instance[]' where a 'person may appeal an agency action even if not a party to the original agency proceeding'": "where 'the agency action is attacked as exceeding its power.'" *Id.* at 19a (quoting *American Trucking Ass'ns* v. *ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam), cert. denied, 460 U.S. 1022 (1983), and 469 U.S. 930 (1984)) (brackets omitted). The court held that, under that exception, it could review respondents' claim that the "Commission lacks the statutory authority to license" offsite storage facilities. *Id.* at 20a. In reaching that conclusion, the court acknowledged that four other courts of appeals "have refused to adopt" an ultra vires exception to the Hobbs Act's party-aggrieved requirement. *Id.* at 19a n.3.

b. On the merits, the Fifth Circuit held that the Commission "has no statutory authority to issue the license." App., *infra*, 21a; see *id.* at 21a-30a. The court concluded that the three Atomic Energy Act provisions that the Commission has long invoked in issuing materials licenses, see pp. 2-3, *supra*, "d[id] not support" licenses like ISP's. App., *infra*, 24a; see *id.* at 21a-25a. In the court's view, those provisions "authorize[] the

Commission to issue such licenses only for certain enumerated purposes—none of which encompass storage or disposal of" spent nuclear fuel. *Id.* at 22a. The court rejected as "unpersuasive" decisions from two other courts of appeals holding that the Atomic Energy Act authorized the Commission to issue licenses for offsite storage of spent fuel. *Id.* at 24a; see *id.* at 24a-25a.

The Fifth Circuit further held that the Commission's issuance of offsite storage licenses "cannot be reconciled with" the Policy Act. App., *infra*, 25a; see *id.* at 25a-29a. The court noted that the Act requires the government to pursue a permanent repository to dispose of spent nuclear fuel and authorizes limited interim storage of spent fuel under certain conditions. *Id.* at 26a-28a. In the court's view, given the "Congressional policy expressed in" the Policy Act and the "historical context surrounding" it, the Act "plainly contemplates that, until there's a permanent repository, spent nuclear fuel is to be stored onsite at-the-reactor or in a federal facility." *Id.* at 21a, 29a. The court found the statutory scheme "unambiguous," *id.* at 29a, and held that the Commission's interpretation would not be entitled to deference in any event because "[w]hat to do with the nation's ever-growing accumulation of nuclear waste is a major question that * * * has been hotly politically contested for over half a century," *id.* at 29a-30a.

3. The Fifth Circuit denied the government's petition for rehearing en banc by a 9-7 vote. App., *infra*, 31a-32a.

Judge Jones, joined by five other judges, concurred in the denial of rehearing en banc. App., *infra*, 33a-44a. Opining on the question the panel had declined to reach, she first concluded that respondents had sufficiently

"'participated' in the proceeding" to be parties aggrieved under the Hobbs Act. *Id.* at 37a. She recognized, however, that this conclusion was at odds with decisions from the D.C. and Tenth Circuits. *Id.* at 38a & n.2. She also reiterated the panel's conclusion that the ultra vires exception would apply if respondents were not parties to the Commission proceeding. *Id.* at 40a-44a.

Judge Higginson, joined by three other judges, dissented from the denial of rehearing en banc. App., *infra*, 45a-52a. He criticized the panel for "threatening to create" a circuit split with "new, troubling dicta" that suggested that respondents were "'part[ies] aggrieved'"; "ignor[ing]" the party-aggrieved "limitation" in the Hobbs Act; and "deepening" the ultra vires "circuit split that arose from [the Fifth Circuit's] atextual dicta in a footnote over forty years ago." *Id.* at 45a (citation omitted). He emphasized that the panel's invocation of the ultra vires exception "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 created to prevent this uncertainty." *Ibid.*

**REASONS FOR GRANTING THE PETITION**

The Fifth Circuit has long been an outlier in embracing a judge-made ultra vires exception to the Hobbs Act's requirement that only a "party aggrieved" may file a petition for review. That exception contradicts the Hobbs Act's plain text and upends procedural norms that permit only a party to an adjudication to obtain further review.

The Fifth Circuit's merits holding also conflicts with decisions of other courts of appeals. As the D.C. and

Tenth Circuits have correctly concluded, the Atomic Energy Act authorizes the Commission to license temporary offsite storage of spent nuclear fuel, and the Policy Act does not repeal or restrict that authority. In reaching a contrary conclusion, the Fifth Circuit disturbed the Commission's authority to safely regulate nuclear materials by issuing such licenses—an authority that the Commission has exercised for more than 40 years. The Court should grant the petition for a writ of certiorari and vacate or reverse.

**A. The Fifth Circuit's Decision Is Wrong**

The Fifth Circuit erred in holding that a judge-made ultra vires exception permitted it to review claims raised by persons who were not parties to the agency adjudication. And the court erred again when it held that the Commission lacked statutory authority to license offsite storage of spent nuclear fuel.

***1. The Hobbs Act is not subject to an ultra vires exception***

a. In the Hobbs Act, Congress granted the courts of appeals exclusive jurisdiction to review certain final orders of specified agencies, including the Commission. 28 U.S.C. 2342. Congress directed that this "[j]urisdiction is invoked by filing a petition as provided by" Section 2344. *Ibid.* Section 2344 in turn provides that "[a]ny party aggrieved by the final order may, within 60 days," "file a petition to review the order," 28 U.S.C. 2344, in a court of appeals in which venue lies, see 28 U.S.C. 2343. If an agency denies a person's request to become a "party," that denial of party status is itself a final order that can be reviewed in the courts of appeals. See 42 U.S.C. 2239(a)(1)(A) and (b)(1).

By allowing only a "*party* aggrieved" to file a petition for review, Congress required the person seeking review to be a recognized party to the underlying agency proceeding. 28 U.S.C. 2344 (emphasis added). The term "party" "has a precise meaning in legal parlance" and generally means "he or they by or against whom a suit is brought." *Black's Law Dictionary* 1278 (4th ed. 1951) (capitalization and emphasis omitted). "[A]ll others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties." *Ibid.*; see *ibid.* (defining "[p]arty aggrieved" as "one whose right has been directly and injuriously affected by action of court") (emphasis omitted); *The Random House Dictionary of the English Language* 1052-1053 (1967) (defining "party" as "one of the litigants in a legal proceeding; a plaintiff or defendant in a suit") (emphasis omitted).

Other federal statutory provisions, in contrast, use broader language to identify the set of individuals or entities who may obtain judicial review. Under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.*, for example, "[a] person" who is "adversely affected or aggrieved" by agency action may obtain judicial review. 5 U.S.C. 702. "To give meaning to that apparently intentional variation" between the Hobbs Act and the APA—which was enacted four years earlier—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* v. *ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983) (Scalia, J.). The courts of appeals (including the Fifth Circuit) have accordingly concluded that, because the Hobbs Act uses "the term 'party aggrieved'" "'in a definitive sense,'" it "'limits the right of appeal to those who actually participated in

the agency proceeding.'" *Baros* v. *Texas Mexican Ry. Co.*, 400 F.3d 228, 238 (5th Cir. 2005) (citation omitted); see, *e.g.*, *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 799 F.2d 317, 335 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987).

Section 2348 reinforces that understanding. Section 2348 states that "any part[ies] in interest in the proceeding before the agency whose interests will be affected * * * may appear as parties [to the judicial-review proceedings] of their own motion and as of right." 28 U.S.C. 2348. By contrast, other entities "whose interests are affected by the order of the agency[] may intervene in any proceeding to review the order." *Ibid.* That distinction "would be defeated if [a] nonparty" to an agency proceeding "could file its own petition for review as a matter of right." *Alabama Power Co.* v. *FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002), cert. denied, 540 U.S. 937 (2003).

Although the Hobbs Act covers many agencies, the Atomic Energy Act provides additional evidence that only a "party" to the agency proceeding may seek judicial review of Commission orders. The Hobbs Act authorizes review of "all final orders" of the Commission that are "made reviewable by section 2239 of title 42," a provision of the Atomic Energy Act. 28 U.S.C. 2342(4). Section 2239 makes reviewable final orders entered in licensing proceedings, see 42 U.S.C. 2239(b)(1), and states that 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 Atomic Energy Act itself thus distinguishes a "person" from a "party."

None of the respondents in this case was admitted as a party to the Commission's licensing proceeding. Texas never sought to intervene, even though the Commission's regulations expressly contemplate intervention by States. See 10 C.F.R. 2.309(h). Fasken sought to intervene; the Commission denied that request; and when Fasken and other putative intervenors challenged that order in the D.C. Circuit, that court upheld the Commission's denial. *Don't Waste Mich.* v. *U.S. Nuclear Regulatory Commission*, No. 21-1048, 2023 WL 395030, at *2-*3 (Jan. 25, 2023) (per curiam). Because respondents were not "part[ies] aggrieved" in the agency adjudication, the Hobbs Act did not authorize the Fifth Circuit to review their challenges to ISP's license. 28 U.S.C. 2344; cf. *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 762 (2002) ("[I]f a party fails to appear before the [agency], it may not then argue the merits of its position in an appeal" under the Hobbs Act.).

b. i. Instead of enforcing the statutory limits on court of appeals review, the Fifth Circuit addressed the merits of respondents' claims based on a judge-made ultra vires exception. By allowing review of petitions filed by persons that were not parties to an agency's proceeding, the court disregarded the Hobbs Act's plain text. See pp. 11-13, *supra*. Litigants cannot evade the Hobbs Act's limits on court of appeals review by asking a district court to enjoin allegedly ultra vires agency action. *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 468-469 (1984). The ultra vires exception endorsed by the Fifth Circuit is even more clearly inconsistent with the Hobbs Act's review scheme because it allows nonparties to agency adjudications to invoke a review provision that is expressly limited to "part[ies]." 28 U.S.C. 2344.

The Fifth Circuit's ultra vires exception suffers from additional flaws. First, under an expansive conception of what constitutes ultra vires agency action, the "party" requirement would impose no practical limit on the availability of judicial review. "'[E]xceeding the power' of the agency may be a synonym for 'wrong,' so that the statute then precludes review only when there is no reason for review anyway." *Chicago*, 799 F.2d at 335.

Second, to prevent the ultra vires exception from swallowing the rule that only "part[ies]" to agency proceedings may seek judicial review under the Hobbs Act, courts would be required to draw highly malleable distinctions between action in excess of an agency's authority and an agency's unlawful exercise of the authority it actually possesses. See App., *infra*, 51a-52a (Higginson, J., dissenting). Respondents' claims, for example, could be framed either as an assertion that the Commission exercised a power it purportedly does not have (*i.e.*, the power to license offsite storage of spent fuel) or as an assertion that it has unlawfully exercised a power that it does have (*i.e.*, the power to license private entities to take possession of spent fuel in some circumstances, including for storage at the site of a reactor). A court of appeals' ability to review a claim should not depend on such distinctions. See *City of Arlington* v. *FCC*, 569 U.S. 290, 300 (2013) (explaining that nothing of substance should turn on whether a particular challenge was "framed as going to the scope of the [agency's] delegated authority or [its] application of its delegated authority") (emphases omitted).

Third, the Fifth Circuit's approach is untethered to the norms that govern litigation in court. A Commission licensing proceeding is an adjudication involving the agency and a party seeking a license. By intervening in

the Commission proceeding, other persons may become parties to the licensing adjudication and thereby obtain the right to seek review of an adverse agency order. Nonparties to an agency adjudication, however, can no more obtain Hobbs Act review than a nonparty to a district-court case could appeal to a court of appeals. See *Chicago*, 799 F.2d at 335 ("If a non-party tried to appeal from a judgment of a district court, [the court of appeals] would dismiss the appeal no matter how much in 'excess of power' the decision might be. * * * So it is with review of administrative action.") (citation omitted).

ii. The Fifth Circuit has never articulated a principled rationale for its ultra vires exception. The court did not do so here, but merely cited two prior decisions in which the Fifth Circuit had "recognize[d] an *ultra vires* exception to the party-aggrieved status requirement." App., *infra*, 18a; see *id.* at 18a-20a. Neither of those decisions provides any justification for overriding the Hobbs Act's plain text.

In *American Trucking Associations* v. *ICC*, 673 F.2d 82 (1982) (per curiam), cert. denied, 460 U.S. 1022 (1983), and 469 U.S. 930 (1984), the Fifth Circuit first recognized the exception in dicta in a footnote that offered no rationale. The court merely stated that "[a]n appeal is allowed if the agency action is 'attacked as exceeding the power of the'" Interstate Commerce Commission (ICC). *Id.* at 85 n.4 (citation omitted). Two years later, in *Wales Transportation, Inc.* v. *ICC*, 728 F.2d 774 (5th Cir. 1984), the court summarily noted that the exception existed before relying on it to review claims brought by nonparties. *Id.* at 776 n.1. Both decisions cited ICC cases decided *before* Congress brought judicial review

of ICC orders within the Hobbs Act's ambit. See *American Trucking*, 673 F.2d at 85 n.4; *Wales Transp.*, 728 F.2d at 776 n.1; App., *infra*, 49a-50a (Higginson, J., dissenting); see also Act of Jan. 2, 1975, Pub. L. No. 93-584, §§ 3-5, 88 Stat. 1917. Even if the "other procedures" that previously governed judicial review of ICC orders allowed "non-parties" to sue, "there is no compelling support for the proposition that, despite the plain statutory language to the contrary" in the Hobbs Act, "such petitions remain valid today." *Erie-Niagara Rail Steering Comm'n* v. *Surface Transp. Bd.*, 167 F.3d 111, 112 (2d Cir. 1999) (per curiam).

In her opinion concurring in the denial of rehearing en banc in this case, Judge Jones suggested that this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), supports the Fifth Circuit's ultra vires exception. App., *infra*, 42a & n.6. But this Court has found *Kyne* inapplicable when (1) the relevant statute provides a "meaningful and adequate opportunity for judicial review" for those who have "statutory rights," and (2) there is "clarity" regarding "the congressional preclusion of review." *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991). Here, those with "statutory rights"—parties to Commission proceedings—have a right to review under the Hobbs Act, including of claims that agency action exceeds statutory authority. *Id.* at 43; see *Huawei Techs. USA, Inc.* v. *FCC*, 2 F.4th 421, 435-447 (5th Cir. 2021) (Hobbs Act decision addressing a claim that the challenged action exceeded the agency's statutory authority). Texas could have obtained such statutory rights by intervening in the agency adjudication, but it never attempted to do so. When Fasken asserted a statutory right to intervene and the agency denied its intervention motion, the D.C.

Circuit reviewed that assertion and concluded that Fasken and the other putative intervenors lacked a right to intervene. *Don't Waste Mich.*, 2023 WL 395030, at *2-*3.

c. The Fifth Circuit panel also speculated that respondents might qualify as "parties" under the Hobbs Act because they had "participated in the agency proceeding" by "comment[ing]" on the Commission's draft EIS, and because Fasken had "attempted to intervene" in the adjudication. App., *infra*, 15a; see *id.* at 15a-18a. But neither of those steps could confer party status. In accordance with its usual meaning, the Hobbs Act term "party" refers to someone who has been admitted to the agency proceeding. See pp. 11-13, *supra*. For Commission adjudications like this one, treating all forms of participation (including the mere submission of comments or letters, or unsuccessful *attempts* to intervene) as conferring party status to challenge the licensing decision would conflict with the text of the Hobbs Act and with legal norms that govern adjudications generally—which distinguish between parties (including intervenors) and amici. Cf. *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 933 (2009) ("[I]ntervention is the requisite method for a nonparty to become a party to a lawsuit.").

The Atomic Energy Act delineates the "process by which the Commission could make a 'person' a 'party' in the licensing proceeding context." App., *infra*, 48a (Higginson, J., dissenting) (quoting 42 U.S.C. 2239(a)(1)(A)); see p. 5, *supra*. When the Commission declines to "admit" a "person as a party to such proceeding," 42 U.S.C. 2239(a)(1)(A), that person may obtain judicial review of the order denying intervention, and the Commission may be required to reopen its proceeding and allow the

person full party participation if the reviewing court holds that intervention was improperly denied. Other courts of appeals have accordingly rejected arguments that comments on a draft EIS or similar actions are sufficient to confer party status under the Hobbs Act. See *State ex rel. Balderas* v. *United States Nuclear Regulatory Commission*, 59 F.4th 1112, 1117-1119 (10th Cir. 2023); *Ohio Nuclear-Free Network* v. *U.S. Nuclear Regulatory Commission*, 53 F.4th 236, 238-240 (D.C. Cir. 2022).[2]

***2. The Commission has statutory authority to license temporary offsite storage of spent nuclear fuel***

The Fifth Circuit held that the Atomic Energy Act does not authorize the Commission to license temporary offsite storage of spent nuclear fuel, and that the Policy Act separately bars such licenses. App., *infra*, 21a-30a. In reaching those conclusions, the court misinterpreted both statutes, misapplied the major-questions doctrine, and upended more than 40 years of agency practice.

a. i. The Atomic Energy Act's plain text authorizes the Commission to issue materials licenses to private

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[2] The Hobbs Act also applies to some agency rulemakings. App., *infra*, 37a (Jones, J., concurring). Submitting a comment to an agency may be enough to make a person a "party" to an informal rulemaking. See *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 the prerequisites to party status in rulemakings are not at issue here. Consistent with the APA, with which the Commission must comply when taking action, see 42 U.S.C. 2231, the Commission considers nuclear materials licenses by adjudication, see 5 U.S.C. 551(4)-(9). And the Commission has established procedures for licensing adjudications that allow persons to request and obtain party status and present their concerns in evidentiary hearings. See p. 5, *supra*.

entities to temporarily store spent fuel away from nuclear reactors. The Act gives the Commission "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983). And "a primary purpose of" the Act "was, and continues to be, the promotion of nuclear power." *Id.* at 221. The Act's stated "purpose[s]" include "providing for" "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 U.S.C. 2013(d); see 42 U.S.C. 2011. Congress charged the Commission with ensuring that those activities would be conducted in a safe and secure manner. See 42 U.S.C. 2201(b).

The Atomic Energy Act authorizes the Commission to issue materials licenses when the agency determines that possessing the materials will advance the Act's purposes. The Act creates a "comprehensive regulatory scheme" that covers "the production, possession, and use of" "source material, special nuclear material, and byproduct material." *Train* v. *Colorado Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 5-6 (1976). Because spent nuclear fuel contains each of those substances, a private party that wishes to possess spent fuel must obtain a materials license covering all three. See pp. 2-3, *supra*.

The three Atomic Energy Act provisions that authorize the storage of source material, special nuclear material, and byproduct material plainly allow the Commission to grant licenses for offsite storage of spent nu-

clear fuel. The Commission is authorized to issue licenses to possess source material for a number of enumerated uses and "for any other use approved by the Commission as an aid to science or industry." 42 U.S.C. 2093(a)(4). The Commission likewise can license possession of special nuclear material "for such other uses as [it] determines to be appropriate to carry out the purposes" of the Act. 42 U.S.C. 2073(a)(4). And the Commission can issue licenses to those "seeking to use byproduct material for" "industrial uses" "or such other useful applications as may be developed." 42 U.S.C. 2111(a). The Act's plain language therefore clearly empowers the agency to license possession of the three components of spent nuclear fuel for purposes connected to generating nuclear power—which include interim storage of spent fuel.

Those provisions impose no geographic restrictions. Rather, they expressly contemplate Commission licenses under which the materials will move between locations or change hands. The Commission "is authorized" "to issue licenses to *transfer or receive in interstate commerce*" special nuclear material. 42 U.S.C. 2073(a) (emphasis added). Similar language appears in connection with the other materials-licensing provisions. See 42 U.S.C. 2092 ("Unless authorized by a general or specific license[,]" "no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to" "any source material."); 42 U.S.C. 2111(a) ("No person may transfer or receive in interstate commerce" "any byproduct material, except to the extent authorized by this section."). Congress thus affirmatively contemplated broad geographic movement of those materials.

The Commission's longstanding regulatory practice reinforces that understanding. In 1980, the Commission invoked the statutory provisions just discussed—Sections 2073, 2093, 2111, and 2201(b)—in promulgating regulations that established a formal process for licensing temporary storage of spent fuel, both at and away from nuclear reactors. 45 Fed. Reg. at 74,699; see 10 C.F.R. Pt. 72. The Commission emphasized that it was establishing regulatory requirements only for "temporary storage," which it defined as "'interim storage of spent fuel for a limited time only, pending its ultimate disposal.'" 45 Fed. Reg. at 74,694. And in response to comments, the Commission noted that, because it saw no "compelling reasons generally favoring either at-reactor or away-from-reactor siting of" spent-fuel storage, the regulations "permit[ted] either." *Id.* at 74,696; see *id.* at 74,698. Since issuing those regulations, the Commission has repeatedly licensed offsite storage facilities for spent nuclear fuel. See p. 4, *supra*.

ii. The Fifth Circuit's contrary reading of the Atomic Energy Act, App., *infra*, 21a-25a, is inconsistent with the Act's text and context.

The Fifth Circuit found that Sections 2073(a)(4) and 2093(a)(4) were limited by the "more specific purposes listed" in Sections 2073(a)(1) and (2) and 2093(a)(1) and (2), which refer to "certain types of research and development." App., *infra*, 22a. But limiting the (a)(4) subsections to the specific "types of research and development" listed in preceding subsections, *ibid.*, would deprive the (a)(4) provisions of any independent practical effect. Courts should have "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Freytag* v.

*Commissioner*, 501 U.S. 868, 877 (1991) (citation omitted); see *ibid.* (finding that "[t]he scope of [one] subsection" must be read to be "greater than" that of the remaining subsections).

The Fifth Circuit also misread Section 2111(a). Rather than give meaning to Section 2111(a)'s plain text—which authorizes the Commission to license *possession* of byproduct materials for industrial purposes and other useful applications—the Fifth Circuit focused on Sections 2111(b) and (c), which address *disposal* of low-level radioactive waste. App., *infra*, 23a-24a; see 42 U.S.C. 2111. The court appears to have concluded that subsection (a) cannot be read to allow storage of spent nuclear fuel because subsections (b) and (c) address low-level radioactive waste, which "emit[s] radiation for significantly less time than spent nuclear fuel." App., *infra*, 23a. But the limits on disposal in subsections (b) and (c) are irrelevant to the Commission's subsection (a) authority to license the possession and use of byproduct material more broadly.

The Fifth Circuit therefore identified no sound basis for its cramped reading of the Atomic Energy Act. The Act's plain language ties possession of materials to uses that advance the Act's statutory purposes—including the central purpose of facilitating the generation of nuclear power. That would be impossible without storage of spent nuclear fuel, and nothing in the Act limits storage (or possession more generally) of nuclear materials to a specific location.

b. i. The Policy Act neither repealed nor limited the Commission's preexisting Atomic Energy Act authority to license private offsite storage of spent nuclear fuel. The Policy Act focuses primarily on federal programs

for storage and disposal. It established federal responsibility and a comprehensive framework for the siting, construction, and operation of a deep geologic repository for the permanent disposal of spent fuel and high-level radioactive waste. See 42 U.S.C. 10131-10145. It also authorized the Department of Energy, before January 1990, to provide limited interim storage of spent fuel if certain conditions were satisfied. See 42 U.S.C. 10151-10157. Because those conditions were not met, no such capacity was provided. And the Act authorized the federal government to build monitored retrievable storage, the construction and capacity of which were linked to progress on a repository. See 42 U.S.C. 10161-10169.

The Act also noted Congress's policy goal that, because of the limited capacity of the federal interim-storage programs, spent fuel should be stored in existing storage already available at reactor sites whenever practical. For example, Congress made a "find[ing] that" nuclear-power reactor owners and operators have "the *primary* responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, *to the extent practical*, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner *where practical*." 42 U.S.C. 10151(a)(1) (emphases added); see 42 U.S.C. 10152 (directing the government to encourage onsite storage if "consistent with" certain factors). That congressional finding does not prevent the Commission from licensing offsite storage facilities. To the contrary, while those provisions encourage the use of onsite facilities, their language assumes that such facilities will not always be practical.

"Congress legislates against the backdrop of existing law," *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (citation omitted), and is "'presum[ed]'" not to "repeal[]" a statute "by implication," *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 510 (2018) (citation omitted). Nothing in the Policy Act's text cuts back on the Atomic Energy Act provisions that authorize the Commission to license offsite storage of spent fuel. Although "Congress was aware" that the Commission had interpreted the Atomic Energy Act to authorize the licensing of offsite and onsite storage of spent fuel, the Policy Act "left untouched" that preexisting authority. *Bullcreek* v. *Nuclear Regulatory Commission*, 359 F.3d 536, 542 (D.C. Cir. 2004). Such "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted).

Section 10155(h) of the Policy Act is consistent with that understanding. That section provides that, "[n]otwithstanding any other provision of law, nothing in" the Policy Act "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 January 7, 1983." 42 U.S.C. 10155(h). In disclaiming any implication that the Policy Act "encourage[d]" or "require[d]" offsite storage, *ibid.*, Congress did not prohibit or restrict such storage, but simply left in place the Commission's pre-existing licensing authority under the Atomic Energy Act.

ii. The Fifth Circuit identified no Policy Act provision that bars the Commission from licensing offsite storage of spent fuel. App., *infra*, 25a-29a. Instead, the court relied on what it perceived to be the "Congressional policy expressed in" and the "historical context surrounding" the Policy Act. *Id.* at 21a. Based on its vague notions of the Act's purposes, the court concluded that the Act creates a "comprehensive statutory scheme for addressing spent nuclear fuel accumulation" and "contemplates that, until there's a permanent repository, spent nuclear fuel is to be stored onsite at-the-reactor or in a federal facility." *Id.* at 29a.

The Fifth Circuit's approach to statutory interpretation is fundamentally flawed. "As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma* v. *Castro-Huerta*, 597 U.S. 629, 642 (2022). To be sure, congressional policy judgments reflected in the text of an enacted law may help to clarify particular ambiguous provisions of that law. But absent any specific Policy Act provision that could reasonably be construed to prohibit offsite storage of spent nuclear fuel—and the court identified none—the court's sense of general congressional policy provided no sound basis for reading such a prohibition into the Act.

c. The Fifth Circuit also misapplied the major-questions doctrine. That doctrine applies only when an agency claims an "[e]xtraordinary grant[] of regulatory authority" based on "'modest words,' 'vague terms,' or 'subtle devices,'" and the "'history and the breadth'" of that asserted power provide "'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia* v. *EPA*, 597 U.S. 697, 721, 723 (2022) (brackets and citations omitted). The storage of

spent nuclear fuel lies at the heart of the Commission's expertise and congressionally assigned role, and the Commission has unquestioned power to issue licenses for temporary storage of spent fuel *at the site of a nuclear reactor*. In issuing licenses for interim *offsite* storage as well, the Commission has not claimed an "[e]xtraordinary grant[] of regulatory authority." *Id.* at 723. That is particularly so because the Commission has issued such licenses for more than 40 years, and two courts of appeals upheld its exercise of that authority 20 years ago. See p. 30, *infra*.

The Fifth Circuit stated that "[w]hat to do with the nation's ever-growing accumulation of nuclear waste is a major question that * * * has been hotly politically contested for over a half century." App., *infra*, 29a-30a. But the Commission has not claimed authority to fashion appropriate arrangements for *permanent* "[d]isposal," *id.* at 29a, of the Nation's nuclear waste. Rather, this case presents only the question whether, in authorizing *temporary* storage of spent fuel pending the creation of a permanent repository, the Commission may license offsite as well as onsite storage. That issue has none of the hallmarks of a "major question." And even assuming that temporary storage of nuclear fuel has important economic and political consequences, this Court has never held that the major-questions doctrine is implicated whenever a case is of some importance.

### B. The Decision Below Implicates Two Acknowledged Circuit Conflicts And Warrants Further Review

The Fifth Circuit's decision reinforces a circuit split on the availability of an ultra vires exception to the Hobbs Act, and it creates a new circuit split on the Commission's authority to license temporary offsite storage of spent nuclear fuel. Both questions are recurring, and

the Fifth Circuit's resolution of those issues is likely to have wide-ranging effects. Indeed, since the panel's decision in this case, another Fifth Circuit panel has invoked the ultra vires exception to review and declare invalid a Commission license for another temporary offsite spent fuel facility. See *Fasken Land & Minerals, Ltd.* v. *Nuclear Regulatory Commission*, No. 23-60377 (Mar. 27, 2024). And because the en banc court denied the government's request to correct its errors, the court's outlier views will remain binding in the Fifth Circuit unless this Court intervenes.

1. a. Four courts of appeals have squarely rejected—and no other court of appeals has embraced—the view that a nonparty to an agency adjudication may seek Hobbs Act review of an allegedly ultra vires agency order. App., *infra*, 19a n.3. Indeed, in dismissing a petition for review filed by New Mexico, the Tenth Circuit recently considered the *same* Commission action (the issuance of ISP's license) and addressed the *same* reviewability question, but reached a conclusion contrary to the Fifth Circuit's. *Balderas*, 59 F.4th at 1123-1124. The Tenth Circuit emphasized that "New Mexico could have obtained judicial review" by "participating in the [licensing] proceeding[]"; found that submitting comments on the draft EIS was insufficient to make New Mexico a "party"; and declined to recognize an ultra vires exception to the Hobbs Act's rule that only "parties" to the agency proceeding may obtain judicial review. *Ibid.*; see *id.* at 1117-1119.

The Second Circuit has likewise rejected the ultra vires exception, criticizing the Fifth Circuit's decisions as "[un]persuasive" and concluding that no exception is permitted under the "plain meaning" of the Hobbs Act's "text." *Erie-Niagara Rail Steering Comm'n*, 167 F.3d

at 112. The Seventh Circuit has made clear "that non-parties may not seek judicial review in the courts of appeals under the Hobbs Act," finding the Fifth Circuit's ultra vires exception "dubious for several reasons." *Chicago*, 799 F.2d at 335; see pp. 15-16, *supra* (discussing some of the Seventh Circuit's rationales for rejecting the exception). And the Eleventh Circuit has declined to adopt the Fifth Circuit's exception, concluding that persons who "were never parties to" the relevant agency proceeding could not petition for review. *National Ass'n of State Util. Consumer Advocates* v. *FCC*, 457 F.3d 1238, 1249-1250 (11th Cir. 2006) (citation omitted), modified in part not relevant, 468 F.3d 1272 (11th Cir. 2006), cert. denied, 552 U.S. 1165 (2008).

In the face of consistent criticism from other courts of appeals, the Fifth Circuit breathed new life into its ultra vires exception by applying it for the first time since 1984. See *Wales Transp.*, 728 F.2d at 776 n.1. It then doubled down on that obvious mistake by denying en banc review in this case. Rules governing a court's authority to adjudicate a case should be clear and consistent, but the decision below throws the Hobbs Act's review scheme into disarray.

b. The Fifth Circuit's reinvigoration of the ultra vires exception also will have significant consequences. The court's decision inflicts serious harms on Hobbs Act agencies and those who appear before them. Among other problems, the ultra vires exception deprives agencies of the ability to respond to arguments in the first instance as part of agency adjudications. It thereby encourages litigants to skip the administrative proceeding and then ambush the agency by calling its authority into question once that proceeding is over. By allowing such

belated challenges, the exception "has grave consequences for regulated entities' settled expectations and careful investments in costly, time-consuming agency proceedings." App., *infra*, 45a (Higginson, J., dissenting). And because the Hobbs Act covers numerous agencies, the court's decision threatens "a wide range of industries—including agriculture, transportation, development, and communications," *ibid.*, as well as nuclear energy.

2. a. The Fifth Circuit's holding that the Commission lacks statutory authority to license temporary offsite storage of spent nuclear fuel conflicts with decisions of the D.C. and Tenth Circuits. See App., *infra*, 24a-25a (noting those decisions but declining to follow them). In *Bullcreek*, the D.C. Circuit concluded that the Atomic Energy Act "authorized" the Commission to license offsite storage of spent fuel, and that the Policy Act did not "repeal or supersede" that authority. 359 F.3d at 542. The Tenth Circuit likewise agreed that the Atomic Energy Act "authorizes the [Commission] to license privately-owned, away-from-reactor storage facilities," and that the Policy Act did not restrict the agency's exercise of that power. *Skull Valley Band of Goshute Indians* v. *Nielson*, 376 F.3d 1223, 1232 (2004), cert. denied, 546 U.S. 1060 (2005).

b. In 2023, 18.6% of electricity generated in the United States came from nuclear power, a low cost, reliable, clean source of energy. U.S. Energy Info. Admin., U.S. Dep't of Energy, *Frequently Asked Questions (FAQs): What is U.S. electricity generation by energy source?*, https://perma.cc/7XEC-DY3N (Feb. 29, 2024). The court below eliminated a private, market-based solution for safely and temporarily storing spent nuclear

fuel until a permanent repository is available for disposal. Prohibiting offsite storage also limits the options for nuclear-reactor owners and operators that wish to decommission existing plants.

The Fifth Circuit's novel limits on the Commission's licensing authority will have serious repercussions for the Commission and the nuclear-power industry. The court's decision upends the Commission's 44-year-old regulatory framework for licensing storage of spent fuel. And it disrupts the nuclear-power industry by categorically prohibiting the Commission from approving offsite storage of spent fuel, despite the agency's longstanding issuance of such licenses. This Court's review is warranted to prevent those serious and legally unjustified consequences.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2024

# APPENDIX

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 21-60743

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

*v.*

NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA, RESPONDENTS

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Filed: Aug. 25, 2023

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Appeal from the Nuclear Regulatory Commission
Agency No. 72-1050

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Before JONES, HO, and WILSON, Circuit Judges.

JAMES C. HO, Circuit Judge:

Nuclear power generation produces thousands of metric tons of nuclear waste each year. And such waste has been accumulating at nuclear power plants throughout the United States for decades. Congress has mandated that such waste be permanently stored in a geologic repository. But the development, licensing, and construction of that repository has stalled.

To address this problem, the Nuclear Regulatory Commission has asserted that it has authority under the

Atomic Energy Act to license temporary, away-from-reactor storage facilities for spent nuclear fuel. Based on that claim of authority, the Commission has issued a license for Interim Storage Partners, LLC, a private company, to operate a temporary storage facility on the Permian Basin, in Andrews County, Texas. Fasken Land and Minerals, Ltd., a for-profit organization working in oil and gas extraction, and Permian Basin Land and Royalty Owners ("PBLRO"), an association seeking to protect the interests of the Permian Basin, have petitioned for review of the license.[1] So has the State of Texas, which argues, *inter alia*, that the Atomic Energy Act doesn't confer authority on the Commission to license such a facility.

Texas is correct. The Atomic Energy Act does not confer on the Commission the broad authority it claims to issue licenses for private parties to store spent nuclear fuel away-from-the-reactor. And the Nuclear Waste Policy Act establishes a comprehensive statutory scheme for dealing with nuclear waste generated from commercial nuclear power generation, thereby foreclosing the Commission's claim of authority. Accordingly, we grant the petition for review and vacate the license.

## I.

This case is the latest development in a decades-long debate over nuclear power and waste regulation. Accordingly, we provide a brief overview of relevant historical and technical background before delving into the specifics of the licensing proceedings challenged here.

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[1] For the remainder of this opinion, we use the term "Fasken" to refer to Fasken Land and Minerals, Ltd. and PBLRO collectively, unless addressing an issue where it's necessary to distinguish them.

**A.**

The United States began producing nuclear waste in the 1940s, first as a byproduct of nuclear weapons development and then as a byproduct of the commercial nuclear power industry. BLUE RIBBON COMMISSION ON AMERICA'S NUCLEAR FUTURE, REPORT TO THE SECRETARY OF ENERGY 19 (Jan. 2012) https://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf [hereinafter BRC REPORT]. The first nuclear reactor was demonstrated in 1942, and Congress authorized civilian application of atomic power through the Atomic Energy Act of 1946. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

The Act granted regulatory authority over nuclear energy to the Atomic Energy Commission. *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 n.1 (D.C. Cir. 1984). But the Energy Reorganization Act of 1974 disbanded that agency and redistributed its authority, as relevant here, to the Nuclear Regulatory Commission. *Id.* After Congress passed the Atomic Energy Act, commercial production of nuclear energy boomed.

Commercial nuclear energy is produced through a series of industrial processes, which include the mining and processing of nuclear fuel, the use of the fuel in a reactor, and the storage and ultimate disposal or reprocessing of that fuel. BRC REPORT at 9. Once nuclear fuel has been used in a reactor for about four to six years, it can no longer produce energy and is considered used or spent. *Id.* at 10. That spent fuel is removed from the reactor. *Id.*

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). It's "intensely radioactive" and "must be carefully stored." *Pac. Gas & Elec. Co.*, 461 U.S. at 195, 103 S. Ct. 1713. The spent fuel is first placed in wet pool storage for cooling, where it remains for at least five years, but may remain for decades. BRC REPORT at 11. Once the spent nuclear fuel has cooled sufficiently in wet storage, it's generally transferred to dry cask storage. *Id.*

At first, there was little concern regarding storage for spent fuel. *See* BRC REPORT at 19-20; *Idaho v. DOE*, 945 F.2d 295, 298-99 (9th Cir. 1991). There was a widespread belief within the commercial nuclear energy industry that spent fuel would be reprocessed. *Idaho*, 945 F.2d 295, 298-99 (9th Cir. 1991). But the private reprocessing industry collapsed in the 1970s, *id.*, and growing concerns led President Ford to issue a directive deferring commercial reprocessing and recycling, which President Carter later extended. BRC REPORT at 20. Although President Reagan reversed that policy, "for a variety of reasons, including costs, commercial reprocessing has never resumed." *Id.*

After years of accumulating spent nuclear fuel in nuclear power plants throughout the country, *see* 42 U.S.C. § 10131(a)(3), Congress enacted the Nuclear Waste Policy Act in 1982. That Act sought to "devise a permanent solution to the problems of civilian radioactive waste disposal." *Id.* It tasked the Department of Energy with establishing "a repository deep underground within a rock formation where the waste would be placed, permanently stored, and isolated from human

contact." *Nat'l Ass' of Regul. Util. Comm'rs v. DOE*, 680 F.3d 819, 821 (D.C. Cir. 2012). Yucca Mountain in Nevada was chosen as the only suitable site for the repository. *See* 42 U.S.C. § 10172. The decision drew widespread opposition in Nevada. BRC REPORT at 22.

Decades of delay ensued. Despite a Congressional mandate that the Department of Energy start accepting waste from the States by January 31, 1998, *see* 42 U.S.C. § 10222(a)(5)(B), "by the mid-1990s, the Department of Energy made clear that it could not meet the 1998 deadline, and it came and went without the federal government accepting any waste." *Texas v. U.S.*, 891 F.3d 553, 555-56 (5th Cir. 2018).

In 2008, the Department of Energy finally submitted its license application for the Yucca Mountain repository to the Commission. *In re Aiken Cnty.*, 725 F.3d 742, 258 (D.C. Cir. 2013). But the Commission "shut down its review and consideration" of the application. *Id.* By its own admission, the Commission had no intention of reviewing the application, *id.*, even though the Nuclear Waste Policy Act mandates a decision be made within three years of submission. *See* 42 U.S.C. § 10134(d).

In light of the delays and controversy, the Obama Administration decided to halt the work on the Yucca Mountain repository. BRC REPORT at vi. The Obama Administration instead formed the Blue Ribbon Commission on America's Nuclear Future, which concluded that a consent-based approach to siting nuclear waste storage facilities would be preferred to the Yucca Mountain policy. *See id.* at vii-x.

Spent nuclear fuel continues to accumulate at reactor sites across the country. Some estimates suggest the U.S. inventory of spent nuclear fuel may exceed 200,000 metric tons by 2050. BRC REPORT at 14. The commercial nuclear power industry as a whole is estimated to generate between 2,000 and 2,400 metric tons of spent nuclear fuel each year. *Id.* And there are thousands of metric tons of spent fuel in various sites where commercial reactors no longer operate. *Id.*

**B.**

After the Blue Ribbon Commission embraced a consent-based approach for siting nuclear waste storage facilities, the governments of Texas and New Mexico expressed support for establishing facilities within the states. Then-Governors Rick Perry of Texas and Susana Martinez of New Mexico wrote letters supporting the establishment of facilities within their respective states. And Andrews County—a rural community located near the Texas-New Mexico border—passed a resolution in support of siting a spent nuclear fuel facility there.

Based in part on these expressions of support, Waste Control Specialists, LLC applied to the Commission for a license to operate a consolidated interim storage facility for high-level spent nuclear fuel in Andrews County. Andrews County is located within the Permian Basin, one of the country's largest oil basins and a top global oil producer.

The Commission began its environmental review of the proposed facility in accordance with the National Environmental Policy Act. *See* 42 U.S.C. § 4321 *et seq.* But the application anticipated that the Department of

Energy would take title to the spent nuclear fuel. Some stakeholders challenged the legality of that provision as prohibited by the Nuclear Waste Policy Act. Waste Control Specialists then asked the Commission to suspend its review.

Approximately a year later, Interim Storage Partners, LLC—a partnership between the original applicant, Waste Control Specialists, and another company—asked the Commission to resume its review of the now-revised license application. In its summary report on the scoping period, the Commission noted that it had received comments expressing concerns that the facility would become a *de facto* permanent disposal facility and that the license would be illegal under existing regulations. The Commission responded that such comments were outside the scope of the environmental impact statement.

In December 2019, the Atomic Safety and Licensing Board—the independent adjudicatory division of the Commission—terminated an adjudicatory proceeding regarding the license application. Before the proceeding was terminated, Fasken timely filed five contentions alleging that the Commission violated the National Environmental Policy Act and its own regulations. The Board denied each one. The following month, Fasken filed a motion to reopen the record along with a motion to amend a previously filed contention. The Board denied the motions.

The Commission published a draft environmental impact statement in May 2020. The Commission received approximately 2,527 unique comments on the draft environmental impact statement, and many opposed the facility. One comment was a letter from Texas Gover-

nor Greg Abbott urging the Commission to deny the license application because of the lack of a permanent repository and the importance of the Permian Basin to the nation's energy security and economy. The Texas Commission on Environmental Quality submitted a comment that the licensing lacks public consent and doesn't properly account for the possibility that Texas would become the permanent solution of spent nuclear fuel disposal if the permanent repository isn't developed by the expiration of the facility's 40-year license term.

Fasken also submitted various comments. Its comments noted the uniqueness of the Permian Basin, the danger of transporting spent nuclear fuel to the facility, the lack of community consent, and the possibility that the facility could become a *de facto* permanent facility. Based on the draft environmental impact statement, Fasken also filed a second motion to reopen the adjudicatory proceeding. The Board once again denied the request.

The Commission issued the final environmental impact statement in July 2021. It recommended the license be issued, and noted that concerns regarding Yucca Mountain and the need for a permanent repository fell outside its scope. In an appendix, the Commission responded to timely comments, including those from Petitioners. The Commission responded to concerns that the facility would become a *de facto* permanent repository by noting the application was only for a temporary facility.

The following September, the Texas Legislature passed H.B. 7. The statute makes it illegal to "dispose of or store high level radioactive waste" in Texas. Governor Abbott sent a letter to the Commission with a copy

of H.B. 7. He reiterated that "the State of Texas has serious concerns with the design of the proposed ISP facility and with locating it in an area that is essential to the country's energy security." The next day, Fasken submitted an environmental analysis critiquing various aspects of the final environmental impact statement.

A few days later, the Commission issued the license.

Texas and Fasken have now petitioned this court for review of the license. Texas asks that the license be set aside. And Fasken asks that we suspend all further activities on the facility and remand to the Commission for a hard look analysis. While this case was pending before this court, Fasken and others who sought but were denied intervention in the agency adjudication had a petition for review pending before the D.C. Circuit appealing the denials of their intervention. *See Don't Waste Michigan v. NRC*, 2023 WL 395030 (Jan. 25, 2023). The petition was denied in January 2023. *Id.* at *1. Interim Storage Partners, LLC intervened in this case to represent its interests.

## II.

We begin with jurisdiction. The Commission challenges this court's jurisdiction to hear the petitions for review for lack of both constitutional standing and statutory standing. We consider each argument in turn and find neither succeeds.

### A.

As a preliminary matter, the Commission suggests that Petitioners forfeited constitutional standing by failing to argue it in their opening briefs. We disagree.

Neither Petitioner argued constitutional standing beyond their general jurisdictional statements. Generally, a petitioner is required "to present specific facts supporting standing through citations to the administrative record or affidavits or other evidence attached to its opening brief, *unless standing is self-evident*." *Sierra Club v. EPA*, 793 F.3d 656, 662 (6th Cir. 2015) (emphasis added, quotation omitted). A petitioner may reasonably believe standing to be self-evident when "nothing in the record alerted [the] petitioners to the possibility that their standing would be challenged." *Am. Libr. Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005). That's the case here.

From the earliest stages of this proceeding, the Commission has challenged jurisdiction on statutory standing grounds only. It twice moved to dismiss, but neither motion challenged constitutional standing. Accordingly, Petitioners could reasonably assume it was self-evident. *Cf. Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 542 n.4 (5th Cir. 2019) ("overlook[ing] Petitioners' decision to include only a cursory discussion of standing because . . . they had a good-faith (though mistaken) belief that standing would be both undisputed and easy to resolve"). And—once constitutional standing was challenged—both Petitioners provided well-developed legal arguments with citations to the record and evidence to show their standing. Petitioners haven't forfeited constitutional standing.

The "irreducible constitutional minimum" of standing requires that Petitioners "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo,*

*Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). The causation elements of the constitutional standing analysis are easily met: Petitioners' alleged injuries directly result from the issuance of the license (traceability), and an order from this court could vacate the license (redressability). So only injury in fact is at issue.

The Commission argues that the licensing and eventual operation of the storage facility doesn't injure either Texas or Fasken. We disagree. Because "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," we may proceed even if only one of the Petitioners has standing. *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). But here both Petitioners successfully assert an injury resulting from the license.

Texas meets the injury-in-fact requirement because the license preempts state law. Texas has "a sovereign interest in the power to create and enforce a legal code." *Tex. Off. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (quotation omitted) (holding that Texas has standing to challenge the FCC's assertion of authority over an aspect of telecommunications regulation that the State believed it controlled). And we have held that the preemption of an existing state law can constitute an injury. *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015). "A state has standing based on a conflict between federal and state law if the state statute at issue regulates behavior or provides for the administration of a state program, but not if it simply purports to immunize state citizens from federal law." *Id.* (cleaned up). Here the issuance of the license and re-

sulting operation of the facility directly conflicts with H.B. 7.

The Texas Legislature has enacted legislation that prevents the storage of high-level radioactive waste, including spent nuclear fuel, within the State except at currently or formerly operating nuclear power reactors. The legislation also amends Texas statutes to add that "a person, including the compact waste disposal facility license holder, may not dispose of or store high level radioactive waste in this state." TEX. HEALTH & SAFETY CODE § 401.072. Although a non-binding, declaratory state statute would not be enough to confer standing, here there's an enforceability conflict between the license and operation of the facility, which authorizes storage of high-level radioactive waste in Texas, and H.B. 7, which proscribes such storage. *Cf. Virginia v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011) (a state statute that is merely a "non-binding declaration [and] does not create any genuine conflict . . . creates no sovereign interest capable of producing injury-in-fact"). That's enough for Texas to assert an injury.

Fasken also has standing based on its proximity to radioactive materials. To establish injury in an environmental case, there's a "geographic-nexus requirement." *Biological Diversity*, 937 F.3d at 538. "The Supreme Court has ruled that geographic remoteness forecloses a finding of injury when no further facts have been brought forward showing that the impact in those distant places will in some fashion be reflected where the plaintiffs are." *Id.* (cleaned up). *See also id.* at 540 ("when a person visits an area for aesthetic purposes, pollution interfering with his aesthetic enjoyment may cause an injury in fact," if "the aesthetic experience

was actually offensive to the plaintiff"). Fasken has provided evidence of its members' geographic proximity to the facility. Some of Fasken's members own land within four miles of the facility, draw water from wells beneath the facility, drive within a mile of the facility, use rail lines the facility would use, and travel on highways within a few hundred feet of the rail lines that transport spent nuclear fuel to the facility. In the context of radioactive materials, such proximity is sufficient to establish injury. *See Duke Power Co. v. Caroline Env't Study Grp., Inc.*, 438 U.S. 59, 74, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) ("[T]he emission of non-natural radiation into appellees' environment would also seem a direct and present injury."). *See also Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (finding a petitioner living 18 miles from Yucca Mountain had standing); *Kelley v. Selin*, 42 F.3d 1501, 1509 (6th Cir. 1995) (finding petitioners who "own[ ] land in close proximity to . . . the proposed site for spent fuel storage" had "alleged sufficient injury to establish standing").

PBLRO also has associational standing. "Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted, nor the relief requested requires participation of individual members." *Biological Diversity*, 937 F.3d at 536 (quoting *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006)). Each of those elements is met. First, some of its members have an injury because they live, work, or regularly drive close the facility. And as we've already noted, *see supra*, the causa-

tion elements are met. Next, "the germaneness requirement is undemanding and requires mere pertinence between the litigation at issue and the organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (quotations omitted). This factor is easily met because PBLRO was created specifically to oppose the facility. Last, there's no reason to believe that PBLRO is unable to represent its members' interests without their individual participation. *See id.* at 551-53 (noting this prong usually isn't met when the relief sought is damages for individual members or the claim requires fact-intensive-individual inquiry).

**B.**

Petitioners seeking to challenge a final order from the Commission also need standing under the Administrative Orders Review Act, generally known as the Hobbs Act. *See Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997) ("[T]he Hobbs Act requires (1) 'party' status (i.e., that petitioners participated in the proceeding before the agency), and (2) aggrievement (i.e., that they meet the requirements of constitutional and prudential standing).") (citation omitted).

The Hobbs Act vests "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of . . . final orders of the" Commission on the federal courts of appeals. 28 U.S.C. § 2342. (The Act actually refers to the Atomic Energy Commission. But the Energy Reorganization Act of 1974 abolished that agency and transferred its licensing and related regulatory functions to the Nuclear Regulatory Commission. *See* 42 U.S.C. § 5841(a), (f).)

Under the Act, "[a]ny party aggrieved by the final order may . . . file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344. Courts "have consistently held that the phrase 'party aggrieved' requires that petitioners have been parties to the underlying agency proceedings, not simply parties to the present suit." *ACA Int'l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018). *See also Am. Trucking Ass'ns v. ICC*, 673 F.2d 82, 84 (5th Cir. 1982) (per curiam) ("The word 'party' is used in a definite sense in the [Hobbs Act], and limits the right to appeal to those who actually participated in the agency proceeding."). The Commission argues that neither Texas nor Fasken has standing under the Hobbs Act because neither is a "party aggrieved."

"To be an aggrieved party, one must have participated in the agency proceeding under review." *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). Here, both Petitioners participated in the agency proceeding—Texas commented on its opposition of the issuance of the license and Fasken attempted to intervene and filed contentions. But according to the Commission, neither form of participation is sufficient to confer party status under the Hobbs Act.

The Commission argues that Texas doesn't have party status because "participating in the appropriate and available administrative procedures is the statutorily prescribed prerequisite to invocation of the Court's jurisdiction," and submitting comments doesn't accord

with the degree of formality of the proceedings in this license adjudication.[2]

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[2] In the alternative, the Commission argues that "even if this Court were to determine that dismissal of [Texas's] Petition for Review is not required as a matter of jurisdiction, the same result is nonetheless required as a matter of non-jurisdictional, mandatory exhaustion." Not so. The Commission relies on *Fleming v. USDA*, which held that "even non-jurisdictional exhaustion requirements . . . forbid judges from excusing non-exhaustion" and that "if the government raises [such an] exhaustion requirement, the court must enforce it." 987 F.3d 1093, 1099 (D.C. Cir. 2021). But neither the Hobbs Act nor the Atomic Energy Act impose a mandatory exhaustion requirement. The Commission's argument implicitly equates the exhaustion requirements in the Horse Protection Act and the Prison Litigation Reform Act—both of which are discussed in *Fleming*—to the Hobbs Act and Atomic Energy Act. These statutes aren't comparable. Both the Horse Protection Act and the Prison Litigation Reform Act have explicit exhaustion requirements. *See* 7 U.S.C. § 6912(e) ("[A] person shall exhaust all administrative appeal procedures established by the Secretary [of Agriculture] or required by law before the person may bring an action in a court of competent jurisdiction."); 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such an administrative remedies as are available are exhausted."). But neither the Hobbs Act nor the Atomic Energy Act do. *See* 28 U.S.C. § 2344 (no exhaustion requirement); 42 U.S.C. § 2239(b) (same).

It's also worth noting that caselaw suggests that so long as the petitioner is a "party aggrieved" and the basis for the challenge was brought before the agency by *some* party—*even if* not the by the petitioner—that's enough for the case to move forward. *See Reytblatt*, 105 F.3d at 720-21; *Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 1992). It'd make little sense to interpret the Hobbs Act as imposing an exhaustion requirement while allowing a petitioner to bring a claim it did not itself bring before the agency.

The Commission takes a different approach with Fasken. It argues that, as a party denied intervention, Fasken may only challenge the order denying it intervention. From the Commission's perspective, if a putative intervenor has failed to obtain party status, it can't later seek review of the final judgment on the merits.

The plain text of the Hobbs Act merely requires that a petitioner seeking review of an agency action be a "party aggrieved." 28 U.S.C. § 2344. The text makes no distinction between different kinds of agency proceedings. *See Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973). Nor does it suggest that a petitioner who went through the procedures to intervene in an adjudication can't be a party aggrieved. In fact, it's clear that the function of the "party aggrieved" status requirement is to ensure that the agency had the opportunity to consider the issue that petitioners are concerned with. *See, e.g., id.* at 1219 ("The 'party' status requirement operates to preclude direct appellate court review without a record which at least resulted from the factfinder's focus on the alternative regulatory provisions which petitioners propose.") (emphases omitted).

In sum, the plain text of the Hobbs Act requires only that a petitioner have participated—in some way—in the agency proceedings, which Texas did through comments and Fasken did by seeking intervention and filing contentions. But caselaw suggests that's not enough.

Precedent from other circuits suggests that neither Texas nor Fasken are parties aggrieved for Hobbs Act purposes. The D.C. Circuit has read the Hobbs Act to contemplate participation in "the appropriate and available administrative procedures." *Id.* at 1217. And it

has interpreted this to mean that the "degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." *Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987). *But see ACA Int'l*, 885 F.3d at 711-712 (noting that in at least some limited circumstances commenting may be enough in certain non-rulemaking proceedings). The D.C. Circuit and at least one other circuit apply this heightened participation requirement. *See Ohio Nuclear-Free Network v. NRC*, 53 F.4th 236, 239 (D.C. Cir. 2022); *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1368 (D.C. Cir. 1988). *See also State ex rel. Balderas v. NRC*, 59 F.4th 1112, 1117 (10th Cir. 2023). The D.C. Circuit has also said that, when an agency requires intervention, those who sought but were denied intervention lack standing to seek judicial review. *Water Transp. Ass'n*, 819 F.2d at 1192. *See also NRDC v. NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016) ("To challenge the Commission's grant of a license renewal . . . a party must have successfully intervened in the proceeding by submitting adequate contentions under [the Commission's regulations].").

The D.C. Circuit embraces readings of the Hobbs Act that impose an extra-textual gloss by requiring a degree of participation not contemplated in the plain text of the statute. We think the fairest reading of the Hobbs Act doesn't impose such additional requirements. But we ultimately don't need to resolve that tension, because the Fifth Circuit recognizes an exception to the Hobbs Act party-aggrieved status requirement that's dispositive of this issue here.

This circuit recognizes an *ultra vires* exception to the party-aggrieved status requirement. In *American*

*Trucking Associations, Inc. v. ICC*, this court noted "two rare instances" where a "person may appeal an agency action even if not a party to the original agency proceeding"—(1) where "the agency action is attacked as exceeding [its] power" and (2) where the person "challenges the constitutionality of the statute conferring authority on the agency." 673 F.2d at 85 n.4 (quotation omitted).[3]

This exception only allows us to reach those portions of the Petitioners' challenges that argue the Commission acted beyond its statutory authority. *See Wales Transp.*, 728 F.2d at 776 n.1 (allowing petitioner to pro-

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[3] The Commission's various arguments that this exception isn't applicable are unavailing. It's true that we've recognized the exception is "exceedingly narrow." *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993). And it's also true that other circuits have refused to adopt it. *See Balderas*, 59 F.4th at 1123-24; *Nat'l Ass'n of State Util. Consumer Advocs. v. FCC*, 457 F.3d 1238, 1250 (11th Cir. 2006); *Erie-Niagara Rail Steering Comm. v. STB*, 167 F.3d 111, 112-13 (2d Cir. 1999); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986). But the exception remains good law in this circuit. Neither the Commission nor the court have identified any case overturning the exception. And to the extent that the Commission claims the exception was mere dicta in *American Trucking*, that argument fails because we've since applied the exception in *Wales Transportation, Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). Under our circuit's rule of orderliness, we are bound to follow *American Trucking* and *Wales Transportation* because they haven't been overturned by the en banc court. The Commission is also wrong in suggesting the exception is limited to challenges of ICC orders. While it's true that both *American Trucking* and *Wales Transportation* involved challenges to ICC orders, neither case limits the exception's application to the ICC. *See Am. Trucking*, 673 F.2d at 85 n.4 (referring to agency proceedings, not ICC proceedings); *Wales Transp.*, 728 F.2d at 776 n.1 (same).

ceed despite not having participated in the agency proceeding on only those claims that challenged the agency's authority under the statute). Accordingly, we must consider which, if any, of the Petitioners' challenges fall within that category.

Texas makes three merits arguments: (1) the Commission lacks the statutory authority to license the facility; (2) the license issuance violated the Administrative Procedure Act; and (3) the Commission violated the National Environmental Policy Act by failing to assess the risks of a potential terrorist attack. The first argument falls within the exception. It attacks the Commission for licensing a facility without the authority to do so under the Atomic Energy Act, and in conflict with the Nuclear Waste Policy Act.

Fasken makes four merits arguments: (1) the Commission violated the National Environmental Policy Act and Administrative Procedure Act by allowing a licensing condition that violates the Nuclear Waste Policy Act; (2) the Commission's assumptions about when the permanent repository will be operational are arbitrary and capricious; (3) the Commission adopted an unreasonably narrow purpose statement; and (4) the Commission violated the National Environmental Policy Act and Administrative Procedure Act by accepting the applicant's unreasonable site selection. The first of these challenges falls within the exception. Fasken's argument centers on the contention that the Commission acted beyond its statutory authority by issuing a license with a condition expressly prohibited by the Nuclear Waste Policy Act.

## III.

The Commission has no statutory authority to issue the license. The Atomic Energy Act doesn't authorize the Commission to license a private, away-from-reactor storage facility for spent nuclear fuel. And issuing such a license contradicts Congressional policy expressed in the Nuclear Waste Policy Act. This understanding aligns with the historical context surrounding the development of these statutes.

### A.

Under the Atomic Energy Act, the Commission retains jurisdiction over nuclear plant licensing and regulation. *See* 42 U.S.C. § 5842. It has authority to regulate the construction and operation of nuclear power plants. *See* 42 U.S.C. §§ 2011-2297h-13. *See also Union of Concerned Scientists*, 735 F.2d at 1438-39 (summarizing the two-step licensing procedure for nuclear power plant operation).

The Act also confers on the Commission the authority to issue licenses for the possession of "special nuclear material," *see* 42 U.S.C. § 2073, "source material," *see id.* § 2093, and "byproduct material," *see id.* § 2111. *See also* 42 U.S.C. §§ 2014(aa), (z), (e) (defining each term, respectively). Special nuclear material, source material, and byproduct material are constituent materials of spent nuclear fuel. *See Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004). The Commission argues that, because it has authority to issue licenses for the possession of these constituent materials, that means it has broad authority to license storage facilities for spent nuclear fuel.

But this ignores the fact that the Act authorizes the Commission to issue such licenses only for certain enumerated purposes—none of which encompass storage or disposal of material as radioactive as spent nuclear fuel.

Sections 2073 and 2093 specify that licenses may be issued for various types of research and development, *see* 42 U.S.C. §§ 2073(a)(1)-(a)(2), 2093(a)(1)-(a)(2). It also permits such other uses that the Commission either "determines to be appropriate to carry out the purposes of th[e] chapter," *id.* § 2073(a)(4), or "approves . . . as an aid to science and industry," *id.* § 2093(a)(4). Principles of statutory interpretation require these grants be read in light of the other, more specific purposes listed—namely for certain types of research and development. *Cf. U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 185, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011) ("When Congress provides specific statutory obligations, we will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated.").

Both these sections also allow the agency to issue licenses "for use under a license issued pursuant to section 2133 of th[e] title." *Id.* 42 U.S.C. §§ 2073(a)(3), 2093(a)(3) (same). Section 2133 details the Commission's authority to issue licenses for "utilization or production facilities for industrial or commercial purposes." *Id.* § 2133(a). Utilization and production have specific definitions under the statute. *See id.* §§ 2014 (cc) (defining utilization facilities); 2014(v) (defining production facilities). And the definitions of utilization and production facilities are about nuclear reactors and fuel fabrication or enrichment facilities—not storage or disposal, as the Commission admits in its briefing. *See id.*

Neither § 2073 nor § 2093 confers a broad grant of authority to issue licenses for any type of possession of special nuclear material or source material.

The same is true for § 2111. That section authorizes the Commission "to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed." *Id.* § 2111(a). It also specifies conditions under which certain types of byproduct material may be disposed. *Id.* § 2111(b). And the types of byproduct material covered by § 2111(b) emit radiation for significantly less time than spent nuclear fuel.

That section cross-references the definition of byproduct materials in § 2014(e)(3)-(4), which refers to radium-226 and other material that "would pose a threat similar to the threat posed by . . . radium-226 to the public health and safety." That's important because some of the isotopes in spent nuclear fuel have much longer half-lives than radium-226. The "intensity of radiation from radioactive materials decreases over time" and the "time required for the intensity to decrease by one-half is referred to as the 'half-life.'" NRC, FREQUENTLY ASKED QUESTIONS (FAQS) REGARDING RADIUM-226 § A.1, https://scp.nrc.gov/narmtoolbox/radium faq102008.pdf. Radium-226 has a half-life of 1600 years. *Id.* Spent nuclear fuel, on the other hand, is composed of a variety of radioactive isotopes of elements produced in the nuclear fission process. NRC, RADIOACTIVE WASTE BACKGROUNDER 1, https://www.nrc.gov/docs/ML0501/ML050110277.pdf. Some of these isotopes—strontium-90 and cesium-137—

have half-lives of about 30 years. But others "take much longer to decay." *Id.* One of these isotopes is plutonium-239, which "has a half-life of 24,000 years"—fifteen times that of radium-226. *Id.* There's no plausible argument that spent nuclear fuel, which contains radioactive isotopes with half-lives much longer than radium-226, is the type radioactive material contemplated in the disposal provision in § 2111(b).

So these provisions do not support the Commission's claim of authority. In response, the Commission and Interim Storage Partners, LLC point to two cases from sister circuits. Both are unpersuasive.

In *Bullcreek v. NRC*, the D.C. Circuit denied petitions for review of the Commission's Rulemaking Order and held that the Nuclear Waste Policy Act did "not repeal or supersede the [Commission]'s authority under the Atomic Energy Act to license private away-from-reactor storage facilities." 359 F.3d at 537-38. The D.C. Circuit essentially assumed that the Atomic Energy Act had granted the Commission authority to license away-from-reactor storage facilities, despite explicitly recognizing that the Act "does not specifically refer to the storage or disposal of spent nuclear fuel." *Id.* at 538. Rather than focus on the text of the statute, it merely noted that "it has long been recognized that the [Atomic Energy Act] confers on the [Commission] authority to license and regulate the storage and disposal of such fuel." *Id.* But none of the cases the D.C. Circuit cited provide a textual analysis of the Atomic Energy Act and whether it allows away-from-reactor spent nuclear fuel storage. Each of those cases dealt with separate questions of preemption and the role of states in this scheme. *See generally Pac. Gas. & Elec.*

*v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983); *Jersey Cent. Power & Light Co. v. Twp. of Lacey*, 772 F.2d 1103 (3d Cir. 1985); *Illinois v. Gen. Elec. Co.*, 683 F.2d 206 (7th Cir. 1982). They are irrelevant to the question before us.

So the D.C. Circuit provided no textual basis for its assumption that the statute authorized the Commission to issue such licenses. *See id.* (discussing the Atomic Energy Act). *Bullcreek* may be correct that the Nuclear Waste Policy Act didn't repeal portions of the Atomic Energy Act since "repeals by implication are not favored," but it doesn't actually address what authority the Commission had under the Atomic Energy Act. *Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

The other case the Commission cites—*Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004)—is just as unhelpful. It merely relies on *Bullcreek* to "not revisit the issues surrounding the [Commission]'s authority to license away-from-reactor [spent nuclear fuel] storage facilities." *Skull Valley*, 376 F.3d at 1232. It too assumes the Commission's authority without analyzing the statute.

**B.**

Moreover, the Commission's argument cannot be reconciled with the Nuclear Waste Policy Act.

Spent nuclear fuel wasn't a concern in the 1940s and 1950s when the Atomic Energy Act was passed and amended. "Prior to the late 1970's, private utilities operating nuclear reactors were largely unconcerned with the storage of spent nuclear fuel." *Idaho*, 945 F.2d at

298. "It was accepted that spent fuel would be reprocessed." *Id.* "In the mid-70's, however, the private reprocessing industry collapsed for both economic and regulatory reasons." *Id.* "As a consequence, the nuclear industry was confronted with an unanticipated accumulation of spent nuclear fuel, inadequate private facilities for the storage of the spent fuel, and no long term plans for managing nuclear waste." *Id.* *See also* BRC REPORT at 20 (noting these problems and describing passage of the Act as "mark[ing] the beginning of a new chapter in U.S. efforts to deal with the nuclear waste issue"). This led Congress to pass the Nuclear Waste Policy Act in 1982.

The Nuclear Waste Policy Act provides a comprehensive scheme to address the accumulation of nuclear waste. Congress recognized that "Federal efforts during the [prior] 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal ha[d] not been adequate" and that "State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel." 42 U.S.C. § 10131(a)(3), (6). "The Act made the federal government responsible for permanently disposing of spent nuclear fuel and high-level radioactive waste produced by civilian nuclear power generation and defense activities." *Nat'l Ass'n of Regul. Util. Comm'rs v. DOE*, 680 F.3d 819, 821 (D.C. Cir. 2012). *See also* 42 U.S.C. § 10131(a)(4) ("[T]he Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment.").

The Act also tasked the Department of Energy with establishing "a repository deep underground within a rock formation where the waste would be placed, permanently stored, and isolated from human contact." *Nat'l Ass'n of Regul. Util Comm'rs*, 680 F.3d at 821. *See also* 42 U.S.C. §§ 100133-34 (tasking the Energy Secretary with site characterization and public hearing duties related to the Yucca Mountain site selection). Yucca Mountain was chosen as the only suitable site for the repository when the Act was amended in 1987. *See* 42 U.S.C. § 10172 (selection of Yucca Mountain site). But the project stalled, even though the Nuclear Waste Policy Act "is obviously designed to prevent the Department [of Energy] from delaying the construction of Yucca Mountain as the permanent facility while using temporary facilities." *Nat'l Ass'n of Regul. Util. Comm'rs v. DOE*, 736 F.3d 517, 519 (D.C. Cir. 2013) (citing 42 U.S.C. § 10168(d)(1)).

In addition to the establishment of the permanent repository, *see* 42 U.S.C. §§ 10131-10145, the Nuclear Waste Policy Act also established other measures to deal with spent nuclear fuel.[4]

One is temporary storage. *See id.* §§ 10151-10157. The Act places "primary responsibility for providing interim storage of spent nuclear fuel" on "the persons owning and operating civilian nuclear power reactors." *Id.* § 10151(a)(1). It tasks the Commission and the Sec-

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[4] All these measures are subject to the proviso in 42 U.S.C. § 10155(h), which 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.

retary of Energy to "take such actions as . . . necessary to encourage and expedite the effective use of available storage, and the necessary additional storage, *at the site* of each civilian nuclear power reactor." *Id.* § 10152 (emphasis added). *See also id.* § 10153 ("The establishment of such procedures shall not preclude the licensing . . . of any technology for the storage of civilian spent nuclear fuel *at the site* of any civilian nuclear power reactor.") (emphasis added). It further tasks the Secretary of Energy with "provid[ing] . . . capacity for the storage of spent nuclear fuel from civilian nuclear power reactors." *Id.* § 10155(a)(1). Moreover, the Act provides that "the Federal Government has the responsibility to provide . . . not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity" where it is necessary for the "continued, orderly operation of such reactors." *Id.* § 10151(a)(3). Here, the license permits storage of at least 5,000 and as much as 40,000 metric tons of nuclear waste.

The other measure is monitored retrievable storage. *See id.* § 10161-10169. *See also id.* § 10101(34) (defining "monitored retrievable storage facility"). Under the statute, "[t]he Secretary [of Energy] is authorized to site, construct, and operate one monitored retrievable storage facility subject to the conditions described [in the relevant sections of statute]." *Id.* § 10162(b). And one of those conditions is that "[a]ny license issued by the Commission for a monitored retrievable storage facility under [the statute] shall provide that . . . construction of such facility may not begin until the Commission has issued a license for the construction of a repository [i.e., Yucca Mountain]." *Id.* § 10168(d)(1).

Reading these provisions together makes clear that the Nuclear Waste Policy Act creates a comprehensive statutory scheme for addressing spent nuclear fuel accumulation. The scheme prioritizes construction of the permanent repository and limits temporary storage to private at-the-reactor storage or at federal sites. It plainly contemplates that, until there's a permanent repository, spent nuclear fuel is to be stored onsite at-the-reactor or in a federal facility.

In sum, the Atomic Energy Act doesn't authorize the Commission to license a private, away-from-reactor storage facility for spent nuclear fuel. And the Nuclear Waste Policy Act doesn't permit it. Accordingly, we hold that the Commission doesn't have authority to issue the license challenged here.

When read alongside each other, we find these statutes unambiguous. And even if the statutes were ambiguous, the Commission's interpretation wouldn't be entitled to deference.

Last year, the Supreme Court directed that, "[w]here the statute at issue is one that confers authority upon an administrative agency, that inquiry must be shaped, at least in some measure, by the nature of the question presented—whether Congress in fact meant to confer the power the agency has asserted" and whether there are "reason[s] to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, --- U.S. ----, 142 S. Ct. 2587, 2607-08, 213 L. Ed. 2d 896 (2022) (quotations omitted) (adopting the major questions doctrine).

Disposal of nuclear waste is an issue of great "economic and political significance." *Id.* at 2608. What

to do with the nation's ever-growing accumulation of nuclear waste is a major question that—as the history of the Yucca Mountain repository shows—has been hotly politically contested for over a half century. Congress itself has acknowledged that "high-level radioactive waste and spent nuclear fuel have become major subjects of public concern." 42 U.S.C. § 10131(a)(7) (findings section of the Nuclear Waste Policy Act). "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to *clear* delegation from that representative body." *West Virginia*, 142 S. Ct. at 2616 (emphasis added). Here, there's no such clear delegation under the Atomic Energy Act. And the Nuclear Waste Policy Act belies the Commission's arguments to the contrary.

* * *

We grant the petitions for review, vacate the license, and deny the Commission's motions to dismiss.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 21-60743

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

*v.*

NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA, RESPONDENTS

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[Filed: Mar. 14, 2024]

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Appeal from the Nuclear Regulatory Commission
Agency No. 72-1050

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**ON PETITION FOR REHEARING EN BANC**

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Before JONES, HO, and WILSON, *Circuit Judges*.

PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35, 36 and 5th CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, seven judges voted in favor of rehearing en banc (Stewart, Southwick, Graves, Higginson, Willett, Douglas, and Ramirez), and nine voted against rehearing en banc (Richman, Jones, Smith, Elrod, Haynes, Ho, Duncan, Engelhardt, and Wilson).

Judge Oldham is recused and did not participate in the poll.

NO. 21-60743, STATE OF TEXAS V. NUCLEAR REGULATORY COMM'N

EDITH H. JONES, *Circuit Judge*, joined by SMITH, ELROD, HO, ENGELHARDT, and WILSON, *Circuit Judges*, concurring in the denial of rehearing en banc:

The panel previously identified two bases of authority to review the NRC's proposed action to redirect the storage of nuclear energy waste away from Yucca Mountain, in conflict with federal law: these petitioners are parties aggrieved, and the NRC has acted *ultra vires*. The dissent challenges both grounds of jurisdiction. We continue to adhere to our position that the judiciary has not only the authority but the duty to review the NRC's actions, which may threaten significant environmental damage in the Permian Basin, one of the largest fossil fuel deposits in the world.

**1. "Party Aggrieved"**

Who has the ability to secure judicial review of this particular licensing decision? There's no question of Article III standing for the petitioners. Also, there's no question that Fasken (shorthand for petitioning mineral operators and landowners neighboring the proposed storage site) is "aggrieved." Nor that the state of Texas, which submitted comments and later passed a law prohibiting such storage, is "aggrieved." The argument is made that under Section 2344 of the Hobbs Act, "parties aggrieved" who may seek judicial review means only those whom the agency permitted to intervene in the licensing proceeding. But here, Fasken's multiple attempts formally to intervene were repeatedly rebuffed by the agency. *See Texas v. NRC* 78 F.4th 827, 834. If this argument is accepted, in other words,

the NRC controls the courthouse door through its authority to determine who may be "parties" to licensing proceedings. And the state of Texas, which didn't formally attempt to intervene but made its position plainly known to NRC, has no access to judicial review at all.

The question of our jurisdiction is therefore bound up with fundamental principles governing review of agency decisions. Specifically, the courts default in our duty to "say what the law is" (i.e., *Marbury v Madison*, 1 Cranch 137 (1803)) if we enable the agency to be the unilateral "decider" of the statutory term "party aggrieved." *Massachusetts v. NRC,* 878 F.2d 1516, 1520 (1st Cir. 1989). Our duty is reinforced by the oft-stated "strong presumption" that a statute should be read in a way that accords with the "basic[] principle" that agency actions are "subject to judicial review." *Guerrero-Lasparilla v. Barr,* 140 S. Ct. 1062, 1069 (2020); *Bowen v. Mich. Acad. Of Family Physicians,* 476 U.S. 667, 670, 106 S. Ct. 2133, 2135 (1986) (noting "the strong presumption that Congress intends judicial review of administrative action"); *Kirby Corp. v. Pena*, 109 F.3d 258, 261 (5th Cir. 1997) ("There is a 'strong presumption' that Congress intends there to be judicial review of administrative agency action, . . . and the government bears a 'heavy burden' when arguing that Congress meant to prohibit all judicial review") (citations omitted)); *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988) ("If the wording of a preclusion clause is less than absolute, . . . [j]udicial review is favored when an agency is charged with acting beyond its authority."). A holding that courts cannot decide who are aggrieved parties according to the statutory language is not only contrary to these principles but also seems particularly unlikely in a legal world where deference to agency interpretations

of law, e.g., in *Auer* and *Chevron*, is under increasing scrutiny.

The contrary position of judicial abdication rests on a provision of the Atomic Energy Act that allegedly constitutes "the only process" by which the [NRC] could make a "party": "[T]he Commission shall grant a hearing upon the request of *any person who 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) (emphasis added). Given the breadth of NRC's statutory charge to allow "affected persons" to be made "parties," it seems paradoxical to resort to the Hobbs Act to disable Fasken and Texas from judicial review by agency fiat. More specifically, with respect to the NRC's proffered interpretation, there are two responses. First, the D.C. Circuit has interpreted the term "parties aggrieved" more broadly than simply those who were joined as formal parties by the agency to administrative proceedings. Second, to the extent a couple of courts have rigidly used the term "parties" to mean only those formally admitted in agency proceedings, those decisions are either distinguishable or wrong.

With a couple of exceptions noted below, the term "party aggrieved" for judicial review purposes has been interpreted flexibly by the D.C. Circuit itself. Beginning with *Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983), then-judge Scalia laid the groundwork for interpreting that phrase as he held that "party aggrieved" means more than "person aggrieved" for purposes of Administrative Procedure Act judicial review.[1] 5

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[1] Judge Scalia cites this court's decision in *American Trucking Associations, Inc. v. ICC,* 673 F.2d 82, 84 (5th Cir. 1982), *cert. de-*

U.S.C. § 702 ("A *person* suffering legal wrong because of agency action, or adversely affected or *aggrieved* by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." (emphasis added)). We don't dispute that terminological distinction. But shortly afterward, the D.C. Circuit held that "party aggrieved" under the Hobbs Act must be interpreted flexibly in light of the nature of the administrative proceeding. *Water Transp. Ass'n v. ICC,* 819 F.2d 1189, 1192 (D.C. Cir. 1987); *see also ACA Int'l v. Fed. Communications Comm'n*, 885 F.3d 687, 711 (D.C. Cir. 2018); *Reyblatt v NRC,* 105 F.3d 715, 720 (D.C. Cir. 1997) (submitting comments in a rulemaking proceeding confers "party" status for Hobbs Act purposes). The court held in *Water Transp.* that the "degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." 819 F.2d at 1192.

Decisions from other courts concur. *See Nat'l Ass'n Of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1250 (11th Cir. 2006) (holding that entities "participated in the proceedings" and "independently established their status as 'party aggrieved' by "submitting comments and notice of ex parte communications"), *opinion modified on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006); *Clark & Reid Co., Inc. v. United States*, 804 F.2d 3, 6 (1st Cir. 1986) ("[W]e do not equate the regulatory definition of a 'party' in an ICC proceeding with the participatory party status required for judicial review under the Hobbs Act"); *Am. Civil Liberties Union v. FCC*, 774 F.2d 24, 26 (1st Cir. 1985) (observing that

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*nied,* 103 S. Ct. 1272 (1983), as being in accord with the "party" requirement. We don't dispute this either.

entities could have "participate[d] in the proceedings or review process as individual parties" if they had "filed comments with the agency or petitioned for reconsideration of the FCC's final order"). Another indicium of the necessity for a practical judicial interpretation of this term arises from the fact that the Hobbs Act covers several quite different agencies and several types of proceedings: rulemaking, adjudication, and licensing. What makes for "party aggrieved" should be consistently interpreted and not left to the varying rules of practice of each agency for each type of proceeding.

*Simmons* itself supports finding that Fasken and Texas are each a "party aggrieved." *Simmons* was a challenge to an ICC ratemaking proceeding, and the court held that Simmons, who had participated "by submitting comments" in another aspect of the proceeding (the "railroad docket") could not be a "party aggrieved" as to the "motor carrier docket" aspect in which it had filed nothing. *Simmons,* 716 F.2d at 42, 45. The court's analysis centered on whether to allow Simmons to challenge the outcome of that part of the proceeding where it hadn't submitted any comments at all. That Simmons had standing under the Hobbs Act to challenge the deregulatory rule on the railroad docket—by virtue of filing comments—was uncontested. By analogy here, Fasken "participated" in the proceeding with comments, submissions, attendance at hearings, and factual submissions. And the state of Texas "participated" by filing comments that made its position plain. Indeed, NRC acknowledged the state's position in its final environmental impact statement. 85 Fed. Reg. 27,447, 27,448 (May 8, 2020). The agency became well aware of the petitioners' concerns. Under *Water*

*Transp.* and its progeny, Fasken and Texas should qualify for "party aggrieved" status.

Going back to the courts' presumption of judicial review of agency action, the presumption may be overcome "only on a showing of clear and convincing evidence of a contrary legislative intent." *Abbott Labs. v. Gardner,* 387 U.S. 136, 141, 87 S. Ct. 1507, 1511 (1967); *Traynor v. Turnage,* 485 U.S. 535, 542, 108 S. Ct. 1372, 1378 (1988); *see also Rhode Is. Dept. of Env. Mgmt. v. United States*, 304 F.3d 31, 41-42 (1st Cir. 2002). As the First Circuit also pointed out, requiring intervention for "party aggrieved" status is "circular . . . [t]he NRC cannot now claim that by refusing to grant the Commonwealth's requests to become a party, the NRC's decisions are beyond review." *Massachusetts,* 878 F.2d at 1520.

We acknowledge that the D.C. Circuit and Tenth Circuit have counterintuitively adopted NRC's circular position.[2] This panel's position, however, relies on the above citations from the D.C. Circuit and other courts. The bottom line for Hobbs Act "party aggrieved" status is to participate in agency proceedings, which both Fasken and Texas did; federal courts should not be bound to defer to varying agency rules and procedures to interpret this singular statutory language—whose purpose after all is to facilitate judicial review. NRC

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[2] *See, e.g., Ohio Nuclear-Free Network v. NRC,* 53 F.4th 236, 239 (D.C. Cir. 2022); *NRDC v NRC,* 823 F.3d 641, 643 (D.C. Cir. 2016); *State ex rel. Balderas v NRC,* 59 F.4th 1112, 1117 (10th Cir. 2023). In *Balderas,* the court denied review to New Mexico, which had submitted comments only on the environmental impact statement issued after the licensure. That decision is distinguishable at least from Fasken's position.

admits that the panel correctly noted judicial consensus that the "degree of participation necessary to achieve party status varies according to the formality with which the proceeding is conducted." Federal Respondents' Pet. for Reh'g En Banc at 7. Consequently, according to the nature of the proceedings, the *fact* and *scope* of the petitioner's "participation" should be determinative for judicial review, not the NRC's denial of "participation" to Fasken. NRC's insistence on strict compliance with its intervention rules is rather bold, not only from the standpoint of eliminating judicial review, but also because NRC quotes the statute that the Commission "*shall* admit any such person as a party . . . " *Id.*

And to the point that this decision has "created" a circuit conflict, we disagree in part. These petitioners satisfy "party aggrieved" status under the numerous cases that apply a broader standard of "participation." There is no circuit conflict with such cases. The conflict here is with the *Balderas* decision's denial of New Mexico's standing to challenge the ISP license. Inasmuch as the conflict is about statutory standing to appeal, a finding of standing means that our court will perform its duty of judicial review.

In light of the split of authorities, is "party aggrieved" status an issue of overarching significance? Not at all. The Hobbs Act jurisdictional provision is rarely debated, as anyone trying to research this term will quickly ascertain. This is likely for a couple of reasons. First, much agency activity covered by the Hobbs Act is conducted in a closed circle of experts, lobbyists and lawyers well familiar with the rules and proclivities of the administrators; therefore, arguments over statutory standing seldom arise. Second, with

"participation" as the bottom line from a judicial standpoint,[3] which is also the baseline of D.C. court opinions (albeit with varying applications of the term), substantive judicial review occurs only where "parties" have actually "participated" in the challenged proceedings. Fasken and Texas were no strangers to NRC here. Indeed, the NWPA specifically required "consultation" with the states before siting of spent nuclear fuel may occur anywhere.[4] That provision as well should have garnered Texas "party aggrieved" status.

For these reasons, the panel decision is comfortably footed on statutory standing under the Hobbs Act.

**2. The *Ultra Vires* Exception to the "Party Aggrieved" Requirement**

Even if Texas and Fasken were not "parties aggrieved" under the Hobbs Act, the panel nevertheless had jurisdiction to hear their appeal. As explained in the opinion, this court has long recognized an exception to the "party aggrieved" requirement regarding challenges to the lawfulness of the agency's action. Texas and Fasken each argued that the NRC's actions were unauthorized either by the AEA or the NWPA. *Texas*, 78 F.4th at 839-40. Accordingly, the panel relied on the rule that "a person may appeal an agency action even if

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[3] D.C. court opinions also reasonably foreclose *de minimis* participation as a basis for Hobbs Act judicial review. *See ACA Int'l*, 885 F.3d at 711; *Water Transp. Ass'n*, 819 F.2d at 1192-93.

[4] 42 U.S.C. § 10155(d)(1)-(2) requires the Department of Energy to exercise very limited interim storage of spent nuclear fuel through "a cooperative agreement under which [the] *State . . . shall have the right* to participate in a process of consultation and cooperation") (emphasis added). Needless to say, no such consultation or cooperation occurred here.

not a party to the original agency proceeding . . . if the agency action is attacked as exceeding [its] power" or if the appellant "challenges the constitutionality of the statute conferring authority on the agency." *Am. Trucking Associations, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982); *accord Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984).

Texas and Fasken challenged the lawfulness of the NRC's actions and the legality of the NRC's conduct. But this court's exception to the "party-aggrieved" requirement is criticized as a relic of ages past that perished in the early 1980s. Of course, the Supreme Court has not overruled our *ultra vires* exception, and this court has recognized its existence in at least two more recent cases. *See Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005) (noting other courts' disagreement); *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993).[5]

Three reasons are posited to overrule *ultra vires* jurisdiction to review the statutory or constitutional basis for agency actions. First, it is contended that our court decisions crafted the rule based on cases that predate Congress's bringing the ICC within the ambit of the Hobbs Act. That is just wrong. *Wales* and *American Trucking* both postdate Hobbs Act review of ICC actions *and* cite the Hobbs Act. There is no ground to

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[5] To be sure, other courts have rejected applying *ultra vires* review in cases involving the Hobbs Act. *See Balderas*, 59 F.4th at 1123-24; *Nat'l Ass'n Of State Util. Consumer Advocates*, 457 F.3d at 1249; *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112-13 (2d Cir. 1999); *Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 334-35 (7th Cir. 1986).

attribute our courts' decisions to judicial mistakes, and consequently, *Wales* and *American Trucking* can be reconciled as to both holdings.

Second, this court's *ultra vires* exception was not made out of whole cloth. A similar rule is acknowledged by the Supreme Court, this court, and our sister circuits in various contexts. *See, e.g., Leedom v. Kyne*, 358 U.S. 184, 190, 79 S. Ct. 180, 185 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.");[6] *Kirby Corp.*, 109 F.3d at 269 (acknowledging "judicial review is proper under the rule set forth in *Kyne*, despite there being a statutory provision prohibiting such review, because the agency's challenged action is so contrary to the terms of the relevant statute that it necessitates judicial review independent of the review provisions of the relevant statute"); *see also, e.g., Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 233 (4th Cir. 2008) (recognizing there is "a nonstatutory exception to the [APA] § 704 finality requirement in cases in which agencies act outside the scope of their delegated powers and contrary to 'clear and mandatory' statutory prohibitions"); *Rhode Island Dep't of Envtl. Mgmt.*, 304 F.3d at 42 ("[E]ven after the passage of the APA, some residuum of power remains with the district court to review agency action that is *ultra vires*."); *Chamber of Com-*

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[6] The parties did not cite *Leedom,* and I agree that the Supreme Court clarified its application in *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 112 S. Ct. 459 (1991). Nonetheless, *Leedom* represents the principle that the Article III courts are not totally closed to plaintiffs who claim agency action has violated the agency's statutory mandate or the Constitution.

*merce of U.S. v. Reich*, 74 F.3d 1322, 1330-31 (D.C. Cir. 1996) ("The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power. . . . It does not follow, then, that the President's broad authority under the Procurement Act precludes judicial review of executive action for conformity with that statute—let alone review to determine whether that action violates another statute." (citation and quotations omitted)). Courts apply this exception for good reason. Indeed, "[w]ere such unauthorized [agency] actions to go unchecked, chaos would plainly result." *Dart*, 848 F.2d at 224. Thus, "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Id.*

Third, two additional misconceptions should be dispelled. The first is that the *ultra vires* exception means no more than that an agency "got it wrong" per APA standards. *See Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 799 F.2d 317, 334-35 (7th Cir. 1986). That is plainly not what *Wales* and *American Trucking* stand for. Instead, and as the above cases demonstrate, 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. None of the cases cited above have misunderstood this term or misapplied the rule to challenges involving less than an absence of statutory or constitutional authority. The "got it wrong" criticism is misleading hyperbole. Second, we need not speculate about any limits on who can challenge agency action as *ultra vires,* because in this case there is no doubt whatsoever about the petitioners' Article III standing. Nor is there doubt that NRC's rejection of "party aggrieved"

status, if that were to be decided, has denied them any other avenue of redress.

If ever there were a case in which an agency acted *ultra vires*, it should be this case. And these petitioners should have Hobbs Act standing to contest the NRC's illegal licensing.

STEPHEN A. HIGGINSON, *Circuit Judge*, joined by GRAVES, DOUGLAS, and RAMIREZ, *Circuit Judges*, dissenting from denial of rehearing en banc:

To hold that the Nuclear Regulatory Commission lacked authority to license private, away-from-reactor storage of spent nuclear fuel without a clear delegation from Congress, the panel disregarded a clear limitation that Congress imposed on our own authority.

Through the Hobbs Act, Congress provided for judicial review of a Nuclear Regulatory Commission "final order entered in any proceeding" under the Atomic Energy Act "for the granting, suspending, revoking, or amending of any license." 42 U.S.C. § 2239(b)(1), (a)(1)(A). But, like challenges to all agency actions governed by the Hobbs Act, Congress limited jurisdiction to where "[a]ny party aggrieved by the final order" seeks judicial review of the order. 28 U.S.C. § 2344. The panel erred when it ignored this limitation, deepening one circuit split that arose from our court's atextual dicta in a footnote over forty years ago and threatening to create another with new, troubling dicta of its own.

This 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 created to prevent this uncertainty. *See* Amicus Nuclear Energy Institute Br. 4-7. And it does so across a wide range of industries—including agriculture, transportation, development, and communications—because the Hobbs Act's exclusive jurisdiction provision governs actions taken by many agencies. *See* 28 U.S.C. § 2342(1)-(7).

I.

This case concerns a license issued by the Commission to a private company, Interim Storage Partners, for operation of a temporary, away-from-reactor spent nuclear fuel storage facility in Andrews County, Texas. Two private entities—Permian Basin Land and Royalty Owners and for-profit oil and gas extraction organization Fasken Land and Minerals (collectively, "Fasken")—sought to intervene in the licensing proceeding but were denied. Their petitions for review in the D.C. Circuit of the orders denying intervention were either dismissed or denied. *Don't Waste Michigan v. NRC*, No. 21-1048, 2023 WL 395030, at *1-3 (D.C. Cir. Jan. 25, 2023) (per curiam). Texas never sought to intervene in the licensing proceeding. Instead, it sent letters to the Commission both during a public comment period on a draft environmental impact statement performed on the license and after Texas passed a law prohibiting storage of spent nuclear fuel.

Fasken and Texas petitioned for review of the license in this court and licensee Interim Storage Partners intervened. Texas argued, as relevant here, that the license should be vacated because the Commission does not have the authority to license private entities for temporary, away-from-reactor storage of spent nuclear fuel. The panel concluded that it had jurisdiction under the Hobbs Act, granted the petitions for review, and vacated the license. *Texas v. NRC*, 78 F.4th 827, 837-40, 844 (5th Cir. 2023).

The panel suggested that, while neither Fasken nor Texas were parties in the licensing proceeding that produced the challenged order, it may be that "particip[ation]—in some way—in the agency proceedings,

which Texas did through comments and Fasken did by seeking intervention and filing contentions," was sufficient. *Id.* at 838. But the panel rested its assertion of jurisdiction on our court's "*ultra vires* exception to the party-aggrieved status requirement." *Id.* at 839. Under the exception, there are "'two rare instances' where a 'person may appeal an agency action even if not a party to the original agency proceeding'—(1) where 'the agency action is attacked as exceeding [its] power' and (2) where the person 'challenges the constitutionality of the statute conferring authority on the agency.'" *Id.* (quoting *Am. Trucking Ass'ns v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam)). The panel concluded that two of the challenges attacked the Commission as exceeding its power: Texas's argument that "the Commission lacks the statutory authority to license the facility" and Fasken's argument that "the Commission violated the National Environmental Policy Act and Administrative Procedure Act by allowing a licensing condition that violates the Nuclear Waste Policy Act." *Id.* at 839-40.

II.

Lest troubling dicta again be elevated to binding precedent without examination, I write first to explain why the panel is wrong to suggest, without so holding, that Texas and Fasken might be "part[ies] aggrieved" under the plain text of the Hobbs Act. The panel intimates that requiring that a "party aggrieved" be a party to the underlying proceeding here would "impose an extra-textual gloss by requiring a degree of participation not contemplated in the plain text of the statute." *Id.* at 839. But giving effect to the words that Congress

chose—and refusing to read in words that it did not choose—does no such thing.

The Hobbs Act's narrow, exclusive-jurisdiction provision limits review to those petitioners who are a "party aggrieved by the final order," 28 U.S.C. § 2344, in contrast with the broader judicial review provision of the Administrative Procedure Act under which a "person" "aggrieved by agency action" may petition for review, 5 U.S.C. § 702. I don't disagree that party status, because the Hobbs Act encompasses a variety of agency actions, turns on the nature of the agency proceedings. But in these proceedings the answer is clear. With the Atomic Energy Act, Congress carefully delineated the only process by which the Commission could make a "person" a "party" in the licensing proceeding context: "[T]he 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).[1] Where the Commission denies a *person's* attempt to become a *party*—that is, where the Commission denies intervention—Congress provided for judicial review of that denial under the Hobbs Act. *Id.* § 2239(b)(1).

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[1] Indeed, Congress relied on the "person" versus "party" distinction throughout the Atomic Energy Act. For example, after the conclusion of certain licensing proceedings for the construction of plants, the Commission must publish a notice of intended operation before fuel is loaded into the plant so that "any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether" the construction complies with the license. *Id.* § 2239(a)(1)(B)(i). This distinction made by Congress contemplates that a person may not be party to a licensing proceeding for a plant's construction but may later challenge whether subsequent construction complies with the license.

Pursuant to this congressionally devised process, Fasken sought to become a party to the proceeding and, when the Commission denied intervention, obtained full review of that denial in the D.C. Circuit. *Don't Waste Michigan*, 2023 WL 395030, at *1-3. Texas never sought to become a party.

Without the answer that Congress supplied, the panel relied on what it guessed Congress intended as "the function of the 'party aggrieved' status requirement." *NRC*, 78 F.4th at 838. This put the panel in the more difficult position of attempting to discern what degree of participation in the agency proceeding was enough. *Id.* at 838-39. But no such inquiry is required here or even permitted because, in the context of Commission licensing proceedings, Congress has answered the question already.

III.

The panel rested its assertion of jurisdiction, with neither merits endorsement nor analysis, on this court's judge-made, *ultra vires* exception to Congress's jurisdictional limitation. *Id.* at 839-40. Because courts have "no authority to create equitable exceptions to jurisdictional requirements," *Bowles v. Russell*, 551 U.S. 205, 214 (2007), the exception should be eliminated.

This court, in dicta in a footnote over forty years ago, asserted that the Hobbs Act's "party aggrieved" requirement does not limit review where "the agency action is attacked as exceeding [its] power." *Am. Trucking Ass'ns*, 673 F.2d at 85 n.4 (internal quotation marks and citation omitted).[2] That assertion, though made in

[2] This was never explained as an outgrowth of the much narrower exception that the Supreme Court recognized in *Leedom v. Kyne*,

1982, relied exclusively on Interstate Commerce Commission cases from 1968 and earlier—seven years before Congress brought judicial review of that body's orders within the ambit of the Hobbs Act. *See* Pub. L. No. 93-584, §§ 3, 4, 88 Stat. 1917 (1975). As the Second Circuit explained, the exception "rests upon" these "pre-1975 cases" "without any acknowledgment of the intervening change in governing procedure" and with "no compelling support for the proposition that, despite the plain statutory language to the contrary, such petitions remain valid today." *Erie-Niagara Rail Steering Comm. v. Surface. Transp. Bd.*, 167 F.3d 111, 112 (2d Cir. 1999) (per curiam).

No other circuit has adopted our court's exception to the Hobbs Act, and four circuits have rejected it. *Balderas v. NRC*, 59 F.4th 1112, 1123-24 (10th Cir. 2023); *Nat'l Ass'n of State Util. Consumer Advocs. v. FCC*, 457 F.3d 1238, 1249 (11th Cir. 2006) (Pryor, J.), *modified on other grounds on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006); *Erie-Niagara Rail Steering Comm.*, 167 F.3d at 112-13; *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986) (Easterbrook, J.). Indeed, the Tenth Circuit in *Balderas* re-

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358 U.S. 184, 190 (1958). There, the Supreme Court explained that "the inference would be strong that Congress intended the statutory provisions governing . . . general jurisdiction . . . to control" where "there is no other means" to "protect and enforce" a "right" that Congress has created. *Id.* (internal quotation marks and citations omitted). But the Court has underscored that this narrow exception does not apply where there is a "meaningful and adequate opportunity for judicial review." *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991). Nor does it apply where Congress has spoken "clearly and directly" to judicial review. *Id.* at 44.

jected the exception when New Mexico invoked it to challenge the same license at issue here. 59 F.4th at 1123-24. In the Seventh Circuit, Judge Easterbrook explained that our court's atextual exception reads out the "party" limitation that Congress imposed because "'exceeding the power' of the agency may be a synonym for 'wrong,' so that the statute then precludes review only when there is no reason for review anyway." *In re Chicago*, 799 F.2d at 335.

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. The panel concluded that it had jurisdiction over Fasken's argument that "the Commission violated the National Environmental Policy Act and Administrative Procedure Act by allowing a licensing condition that violates the Nuclear Waste Policy Act" because the argument "centers on the contention that the Commission acted beyond its statutory authority by issuing a license with a condition expressly prohibited by the Nuclear Waste Policy Act." *NRC*, 78 F.4th at 840. But this asks judges to speculate 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.

The panel concluded that it had jurisdiction over Texas's argument that "the Commission lacks the statutory authority to license the facility" because that argument "attacks the Commission for licensing a facility without the authority to do so under the Atomic Energy Act, and in conflict with the Nuclear Waste Policy Act." *Id.* at 839-40. The panel, however, determined that it

lacked jurisdiction over Texas's arguments that "the license issuance violated the Administrative Procedure Act" (unlike, inexplicably, Fasken's Administrative Procedure Act challenge) and the "National Environmental Policy Act by failing to assess the risks of a potential terrorist attack." *Id.* But why are these latter two not also "attack[s]" on the "agency action" as "exceeding [its] power"? *Am. Trucking Ass'ns*, 673 F.2d at 85 n.4. An agency exceeds its power whenever it violates the law. That includes when, for example, its action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Our exception reads out the difference, discussed above, that Congress created between broader judicial review under the Administrative Procedure Act and narrower judicial review under the Hobbs Act. And "[t]he merits of that policy are for the Congress rather than us to determine." *Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40, 43 (D.C. Cir. 1983) (Scalia, J.).

* * *

For these reasons, I respectfully dissent from denial of rehearing en banc.

## APPENDIX C

### LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1, Part 72, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued authorizing the licensee to receive, acquire, and possess the power reactor spent fuel and other radioactive materials associated with spent fuel storage designated below; to use such material for the purpose(s) and at the place(s) designated below; and to deliver or transfer such material to persons authorized to receive it in accordance with the regulations of the applicable Part(s). This license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, as amended, and is subject to all applicable rules, regulations, and orders of the Nuclear Regulatory Commission now or hereafter in effect and to any conditions specified herein.

This license is conditioned upon fulfilling the requirements of 10 CFR Part 72, as applicable, the attached Appendix A (Technical Specifications), and the conditions specified below.

Licensee

1. Interim Storage Partners LLC (ISP)
2. WCS CISF 9998 Highway 176 West Andrews, Texas, 79714

3. License No. SNM-2515
   Amendment No. 0

4. Expiration Date Sept. 13, 2061

5. Docket or Reference No. 72-1050

6. Byproduct, Source, and/or Special Nuclear Material

   A. Spent nuclear fuel elements from commercial nuclear utilities licensed pursuant to 10 CFR Part 50, including those stored under either a Part 50 general license or Part 72 specific license, and associated fuel assembly control components and associated radioactive materials related to the receipt, transfer, and storage of that spent nuclear fuel.

   B. Greater than Class C Waste, reactor related material generated as a result of plant operations and decommissioning where radionuclide concentration limits of Class C waste in 10 CFR 61.55 are exceeded.

7. Chemical and/or Physical Form

   A. Intact fuel assemblies, damaged fuel assemblies, failed fuel and fuel debris, as allowed by Materials License SNM-2510, Amendment 4; Table 1-1c or Table 1-1j of Certificate of Compliance No. 1004, Amendments 3 through 13; Table 1-1t of Certificate of Compliance No. 1004, Amendments 10 through 13; Section 2.1 of Certificate of Compliance No. 1029, Amendments 0, 1, and 3; Section B 2.1 of Certificate of Compliance No. 1025, Amendments 0 through 6; Section B 2.1.2 of Certificate of Compliance No. 1015, Amendments 0 through 5; Table B 2-

1 of Certificate of Compliance No. 1031, Amendments 0 through 3 Revision 1, and 4 through 5, modified as described in Condition 9 below.

B. Greater than Class C Waste, as activated and potentially surface contaminated metals comprised of miscellaneous solid waste resulting from segmentation and decommissioning processes.

8. Maximum Amount That Licensee May Possess at Any One Time Under This License

A. 5,000 Metric Tons (MT) total of Uranium and Mixed-Oxide (MOX) in the form of intact spent fuel assemblies, damaged fuel assemblies, failed fuel assemblies, and fuel debris. In addition, the cumulative amount of material received and accepted during the licensed term of the facility may not exceed 5,000 MT of Uranium plus MOX.

B. 231.3 MT (510,000 pounds) of Greater than Class C Waste.

9. Authorized Use: The material identified in 6.A, 6.B, 7.A and 7.B above is authorized for receipt, possession, storage, and transfer at the WCS Consolidated Interim Storage Facility (WCS CISF), as described in the WCS CISF Final Safety Analysis Report (FSAR) as updated. Storage of fuel is authorized only in canisters referenced in Section 2.1 of the Attachment, Appendix A Technical Specifications and all fuel with assembly average burnup greater than 45 GWd/MTHM shall be canned inside the canister.

10. Authorized Place of Use: The licensed material is to be received, possessed, transferred, and stored at the WCS CISF, geographically located within Andrews County, Texas.

11. The Technical Specifications contained in the Appendix attached hereto are incorporated into the license. The Licensee shall operate the installation in accordance with the Technical Specifications in the Appendix.

12. The licensee shall follow WCS ERP-100, "Consolidated Emergency Response Plan," Revision 02-08-2019, and as it may be further revised in accordance with 10 CFR 72.44(f).

13. The Licensee shall:

    (1) follow the Physical Protection Plan entitled, "WCS Consolidated Interim Storage Facility (CISF) Physical Security Plan," Revision 5, dated September 18, 2019, as well as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);

    (2) follow the Training and Qualification Plan entitled, "WCS Consolidated Interim Storage Facility (CISF) Training and Qualification Plan Appendix B to the CISF Physical Security Plan," dated September 18, 2019, as well as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);

    (3) follow the Safeguards Contingency Plan entitled "WCS Consolidated Interim Storage Facility (CISF) Safeguards Contingency Plan Appendix C to the CISF Physical Security Plan," dated September 18, 2019, as well

as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);

(4) follow the "Additional Security Measures for the Physical Protection of Dry Independent Spent Fuel Storage Installations," dated September 28, 2007; and

(5) follow the "Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations," dated December 19, 2007.

14. Construction of the WCS CISF shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a facility with the initial capacity as specified by the Licensee to the NRC. Construction of any additional capacity beyond the initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.

15. The Licensee shall, in its contracts with clients:

(1) include provisions requiring clients to retain title to the material identified in 6.A, 6.B, 7.A or 7.B, and include provisions allocating legal and financial liability among the Licensee and the client(s);

(2) include provisions requiring clients to periodically provide credit information, and, when necessary, additional financial assurances such as guarantees, prepayment, or payment bond(s);

(3) include a provision requiring the Licensee not to terminate the license prior to furnishing storage services covered by the contract.

16. The Licensee shall obtain onsite and offsite insurance coverage in the amounts committed to by ISP in the ISP license application.

17. To conform with the requirements of 10 CFR 72.42, the Licensee shall submit a request for license amendment(s) to incorporate any technically applicable provisions of the Aging Management Programs (AMPs) and Time-Limited Aging Analyses (TLAAs) approved in future renewals of NAC Systems CoCs 1015 and 1025 and 1031, for all applicable NAC spent fuel canisters and storage overpacks.

    The Licensee shall submit the amendment request(s) within 120 days of the effective date of the applicable CoC approval. In the event that the current CoC holder for CoC 1015 and/or 1025 and/or 1031 does not submit a timely renewal as defined in 10 CFR Part 72.240, the Licensee shall submit a license amendment request, incorporating AMP and TLAA information compliant with 10 CFR 72.42, within one (1) year following the timely renewal deadline defined in 10 CFR 72.240(b) for the applicable CoC.

18. The Licensee shall submit a startup plan as described in Chapter 13 of the WCS CISF FSAR, as updated, to the NRC at least 90 days prior to receipt and storage of the material identified in 6.A, 6.B, 7.A or 7.B at the facility.

19. Prior to commencement of operations, the Licensee shall have an executed contract with the U.S. De-

partment of Energy (DOE) or other SNF Title Holder(s) stipulating that the DOE or the other SNF Title Holder(s) is/are responsible for funding operations required for storing the material identified in 6.A, 6.B, 7.A or 7.B at the CISF as licensed by the U.S. Nuclear Regulatory Commission.

20. Prior to receipt of the material identified in 6.A, 6.B, 7.A or 7.B, the Licensee shall have a financial assurance instrument required pursuant to 10 CFR 72.30 acceptable to the U.S. Nuclear Regulatory Commission.

21. This license is effective as of the date of issuance shown below.

FOR THE NUCLEAR REGULATORY COMMISSION

/s/ SHANA R. HELTON
SHANA R. HELTON, Director
Division of Spent Fuel Management
Office of Nuclear Material
Safety and Safeguards

Date of issuance Sept. 13, 2021

Attachments: Appendix A—WCS Consolidated Interim Storage Facility Technical Specifications

## APPENDIX D

1. 28 U.S.C. 2343 provides:

**Venue**

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

2. 28 U.S.C. 2344 provides:

**Review of orders; time; notice; contents of petition; service**

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. 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. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the

agency and on the Attorney General by registered mail, with request for a return receipt.

3. 28 U.S.C. 2348 provides:

**Representation in proceeding; intervention**

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

4. 42 U.S.C. 2073 provides:

**Domestic distribution of special nuclear material**

**(a) Licenses**

The Commission is authorized (i) to issue licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export under the terms of an agreement

for cooperation arranged pursuant to section 2153 of this title, special nuclear material, (ii) to make special nuclear material available for the period of the license, and, (iii) to distribute special nuclear material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title;

(4) for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter.

**(b) Minimum criteria for licenses**

The Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of special nuclear material depending upon the degree of importance to the common defense and security or to the health and safety of the public of—

(1) the physical characteristics of the special nuclear material to be distributed;

(2) the quantities of special nuclear material to be distributed; and

(3) the intended use of the special nuclear material to be distributed.

**(c) Manner of distribution; charges for material sold; agreements; charges for material leased**

(1) The Commission may distribute special nuclear material licensed under this section by sale, lease, lease with option to buy, or grant: *Provided, however*, That unless otherwise authorized by law, the Commission shall not after December 31, 1970, distribute special nuclear material except by sale to any person who possesses or operates a utilization facility under a license issued pursuant to section 2133 or 2134(b) of this title for use in the course of activities under such license; nor shall the Commission permit any such person after June 30, 1973, to continue leasing for use in the course of such activities special nuclear material previously leased to such person by the Commission.

(2) The Commission shall establish reasonable sales prices for the special nuclear material licensed and distributed by sale under this section. Such sales prices shall be established on a nondiscriminatory basis which, in the opinion of the Commission, will provide reasonable compensation to the Government for such special nuclear material.

(3) The Commission is authorized to enter into agreements with licensees for such period of time as the Commission may deem necessary or desirable to distribute to such licensees such quantities of special nuclear material as may be necessary for the conduct of the licensed activity. In such agreements, the Commission may agree to repurchase any special nuclear material licensed and distributed by sale which is not consumed in the course of the licensed activity, or any uranium remaining after irradiation of such special nuclear material, at a repurchase price not to exceed the Commis-

sion's sale price for comparable special nuclear material or uranium in effect at the time of delivery of such material to the Commission.

(4) The Commission may make a reasonable charge, determined pursuant to this section, for the use of special nuclear material licensed and distributed by lease under subsection (a)(1), (2) or (4) and shall make a reasonable charge determined pursuant to this section for the use of special nuclear material licensed and distributed by lease under subsection (a)(3). The Commission shall establish criteria in writing for the determination of whether special nuclear material will be distributed by grant and for the determination of whether a charge will be made for the use of special nuclear material licensed and distributed by lease under subsection (a)(1), (2) or (4), considering, among other things, whether the licensee is a nonprofit or eleemosynary institution and the purposes for which the special nuclear material will be used.

**(d) Determination of charges**

In determining the reasonable charge to be made by the Commission for the use of special nuclear material distributed by lease to licensees of utilization or production facilities licensed pursuant to section 2133 or 2134 of this title, in addition to consideration of the cost thereof, the Commission shall take into consideration—

(1) the use to be made of the special nuclear material;

(2) the extent to which the use of the special nuclear material will advance the development of the peaceful uses of atomic energy;

(3) the energy value of the special nuclear material in the particular use for which the license is issued;

(4) whether the special nuclear material is to be used in facilities licensed pursuant to section 2133 or 2134 of this title. In this respect, the Commission shall, insofar as practicable, make uniform, nondiscriminatory charges for the use of special nuclear material distributed to facilities licensed pursuant to section 2133 of this title; and

(5) with respect to special nuclear material consumed in a facility licensed pursuant to section 2133 of this title, the Commission shall make a further charge equivalent to the sale price for similar special nuclear material established by the Commission in accordance with subsection (c)(2), and the Commission may make such a charge with respect to such material consumed in a facility licensed pursuant to section 2134 of this title.

**(e) License conditions**

Each license issued pursuant to this section shall contain and be subject to the following conditions—

(1) Repealed. Pub. L. 88-489, § 8, Aug. 26, 1964, 78 Stat. 604.

(2) no right to the special nuclear material shall be conferred by the license except as defined by the license;

(3) neither the license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of this chapter;

(4) all special nuclear material shall be subject to the right of recapture or control reserved by section 2138 of this title and to all other provisions of this chapter;

(5) no special nuclear material may be used in any utilization or production facility except in accordance with the provisions of this chapter;

(6) special nuclear material shall be distributed only on terms, as may be established by rule of the Commission, such that no user will be permitted to construct an atomic weapon;

(7) special nuclear material shall be distributed only pursuant to such safety standards as may be established by rule of the Commission to protect health and to minimize danger to life or property; and

(8) except to the extent that the indemnification and limitation of liability provisions of section 2210 of this title apply, the licensee will hold the United States and the Commission harmless from any damages resulting from the use or possession of special nuclear material by the licensee.

**(f) Distribution for independent research and development activities**

The Commission is directed to distribute within the United States sufficient special nuclear material to permit the conduct of widespread independent research and development activities to the maximum extent practicable. In the event that applications for special nuclear material exceed the amount available for distribution, preference shall be given to those activities which are most likely, in the opinion of the Commission, to contribute to basic research, to the development of peace-

time uses of atomic energy, or to the economic and military strength of the Nation.

5. 42 U.S.C. 2092 provides:

**License requirements for transfers**

Unless authorized by a general or specific license issued by the Commission which the Commission is authorized to issue, no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to, or import into or export from the United States any source material after removal from its place of deposit in nature, except that licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant.

6. 42 U.S.C. 2093 provides:

**Domestic distribution of source material**

**(a) License**

The Commission is authorized to issue licenses for and to distribute source material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title; or

(4) for any other use approved by the Commission as an aid to science or industry.

**(b) Minimum criteria for licenses**

The Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of source material depending upon the degree of importance to the common defense and security or to the health and safety of the public of—

(1) the physical characteristics of the source material to be distributed;

(2) the quantities of source material to be distributed; and

(3) the intended use of the source material to be distributed.

**(c) Determination of charges**

The Commission may make a reasonable charge determined pursuant to section 2201(m) of this title for the source material licensed and distributed under subsection (a)(1), (a)(2), or (a)(4) and shall make a reasonable charge determined pursuant to section 2201(m) of this title, for the source material licensed and distributed under subsection (a)(3). The Commission shall establish criteria in writing for the determination of whether a charge will be made for the source material licensed and distributed under subsection (a)(1), (a)(2), or (a)(4), considering, among other things, whether the licensee is a nonprofit or eleemosynary institution and the purposes for which the source material will be used.

7. 42 U.S.C. 2111 provides:

**Domestic distribution**

**(a) In general**

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 2112 or section 2114 of this title. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. The Commission may distribute, sell, loan, or lease such byproduct material as it owns to qualified applicants with or without charge: *Provided, however*, That, for byproduct material to be distributed by the Commission for a charge, the Commission shall establish prices on such equitable basis as, in the opinion of the Commission, (a) will provide reasonable compensation to the Government for such material, (b) will not discourage the use of such material or the development of sources of supply of such material independent of the Commission, and (c) will encourage research and development. In distributing such material, the Commission shall give preference to applicants proposing to use such material either in the conduct of research and development or in medical therapy. The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission or who uses such material in violation of law

or regulation of the Commission or in a manner other than as disclosed in the application therefor or approved by the Commission. The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.

**(b) Requirements**

**(1) In general**

Except as provided in paragraph (2), byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, may only be transferred to and disposed of in a disposal facility that—

(A) is adequate to protect public health and safety; and

(B)(i) is licensed by the Commission; or

(ii) is licensed by a State that has entered into an agreement with the Commission under section 2021(b) of this title, if the licensing requirements of the State are compatible with the licensing requirements of the Commission.

**(2) Effect of subsection**

Nothing in this subsection affects the authority of any entity to dispose of byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, at a disposal facility in accordance with any Federal or State solid or hazardous waste law, includ-

ing the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

**(c) Treatment as low-level radioactive waste**

Byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, disposed of under this section shall not be considered to be low-level radioactive waste for the purposes of—

(1) section 2 of the Low-Level Radioactive Waste Policy Act (42 U.S.C. 2021b); or

(2) carrying out a compact that is—

(A) entered into in accordance with that Act (42 U.S.C. 2021b et seq.); and

(B) approved by Congress.

8. 42 U.S.C. 2239 provides in pertinent part:

**Hearings and judicial review**

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections[1] 2183, 2187, 2236(c) or 2238 of this title, 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. The Commission shall hold a hearing after

[1] So in original. Probably should be "section".

thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

* * * * *

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 and chapter 7 of title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a).

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation estab-

lished under the USEC Privatization Act [42 U.S.C. 2297h et seq.].

(4) Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.], are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

9. 42 U.S.C. 10151 provides:

**Findings and purposes**

(a) The Congress finds that—

(1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical;

(2) the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor; and

(3) the Federal Government has the responsibility to provide, in accordance with the provisions of this part, not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably pro-

vide adequate storage capacity at the sites of such reactors when needed to assure the continued, orderly operation of such reactors.

(b) The purposes of this part are—

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor; and

(2) to provide, in accordance with the provisions of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

10. 42 U.S.C. 10155 provides in pertinent part:

**Storage of spent nuclear fuel**

**(a) Storage capacity**

(1) Subject to section 10107 of this title, the Secretary shall provide, in accordance with paragraph (5), not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel from civilian nuclear power reactors. Such storage capacity shall be provided through any one or more of the following methods, used in any combination determined by the Secretary to be appropriate:

(A) use of available capacity at one or more facilities owned by the Federal Government on January 7, 1983, including the modification and expansion of any such facilities, if the Commission determines that such use will adequately protect the public health and safety, except that such use shall not—

(i) render such facilities subject to licensing under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) or the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.); or

(ii) except as provided in subsection (c) require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), such[1] facility is already being used, or has previously been used, for such storage or for any similar purpose.[2]

(B) acquisition of any modular or mobile spent nuclear fuel storage equipment, including spent nuclear fuel storage casks, and provision of such equipment, to any person generating or holding title to spent nuclear fuel, at the site of any civilian nuclear power reactor operated by such person or at any site owned by the Federal Government on January 7, 1983;

(C) construction of storage capacity at any site of a civilian nuclear power reactor.

(2) Storage capacity authorized by paragraph (1) shall not be provided at any Federal or non-Federal site within which there is a candidate site for a repository.

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[1] So in original. Probably should be preceded by "if".

[2] So in original. The period should probably be a semicolon.

The restriction in the preceding sentence shall only apply until such time as the Secretary decides that such candidate site is no longer a candidate site under consideration for development as a repository.

(3) In selecting methods of providing storage capacity under paragraph (1), the Secretary shall consider the timeliness of the availability of each such method and shall seek to minimize the transportation of spent nuclear fuel, the public health and safety impacts, and the costs of providing such storage capacity.

(4) In providing storage capacity through any method described in paragraph (1), the Secretary shall comply with any applicable requirements for licensing or authorization of such method, except as provided in paragraph (1)(A)(i).

(5) The Secretary shall ensure that storage capacity is made available under paragraph (1) when needed, as determined on the basis of the storage needs specified in contracts entered into under section 10156(a) of this title, and shall accept upon request any spent nuclear fuel as covered under such contracts.

(6) For purposes of paragraph (1)(A), the term "facility" means any building or structure.

* * * * *

**(h) Application**

Notwithstanding any other provision of law, 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 January 7, 1983.

* * * * *

11. 10 C.F.R. 2.309 provides in pertinent part:

**Hearing requests, petitions to intervene, requirements for standing, and contentions.**

(a) *General requirements*. Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response

to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) *Timing.* Unless specified elsewhere in this chapter or otherwise provided by the Commission, the request or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the FEDERAL REGISTER.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER.

(3) In proceedings for which a FEDERAL REGISTER notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the FEDERAL REGISTER; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a FEDERAL REGISTER notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(c) *Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions*—(1) *Determination by presiding officer.* Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:

(i) The information upon which the filing is based was not previously available;

(ii) The information upon which the filing is based is materially different from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

(2) *Applicability of §§ 2.307 and 2.323.* (i) Section 2.307 applies to requests to change a filing deadline (requested before or after that deadline has passed) based on reasons not related to the substance of the filing.

(ii) Section 2.323 does not apply to hearing requests, intervention petitions, or motions for leave to file new or

amended contentions filed after the deadline in paragraph (b) of this section.

(3) *New petitioner.* A hearing request or intervention petition filed after the deadline in paragraph (b) of this section must include a specification of contentions if the petitioner seeks admission as a party, and must also demonstrate that the petitioner meets the applicable standing and contention admissibility requirements in paragraphs (d) and (f) of this section.

(4) *Party or participant.* A new or amended contention filed by a party or participant to the proceeding must also meet the applicable contention admissibility requirements in paragraph (f) of this section. If the party or participant has already satisfied the requirements for standing under paragraph (d) of this section in the same proceeding in which the new or amended contentions are filed, it does not need to do so again.

(d) *Standing.* (1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

(2) *Rulings*. In ruling on a request for hearing or petition for leave to intervene, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in paragraph (d)(1) of this section.

(3) *Standing in enforcement proceedings*. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

(e) *Discretionary Intervention*. The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention—

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(f) *Contentions.* (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must

include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (*i.e.*, fails to contain the necessary information required by §52.99(c)). If the requestor identifies a specific portion of the §52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

(3) If two or more requestors/petitioners seek to cosponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the spon-

soring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/ petitioners with respect to that contention.

* * * * *

(h) *Requirements applicable to States, local governmental bodies, and Federally-recognized Indian Tribes seeking party status.* (1) If a State, local governmental body (county, municipality or other subdivision), or Federally-recognized Indian Tribe seeks to participate as a party in a proceeding, it must submit a request for hearing or a petition to intervene containing at least one admissible contention, and must designate a single representative for the hearing. If a request for hearing or petition to intervene is granted, the Commission, the presiding officer or the Atomic Safety and Licensing Board ruling on the request will admit as a party to the proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each Federally-recognized Indian Tribe. Where a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/ government body will be considered separate participants.

(2) If the proceeding pertains to a production or utilization facility (as defined in § 50.2 of this chapter) located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe

seeking to participate as a party, no further demonstration of standing is required. If the production or utilization facility is not located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, the State, local governmental body, or Federally-recognized Indian Tribe also must demonstrate standing.

(3) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

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