Nos. 23-1300 and 23-1312

In the Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

STATE OF TEXAS, ET AL.

INTERIM STORAGE PARTNERS, LLC, PETITIONER

v.

STATE OF TEXAS, ET AL.

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

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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QUESTIONS PRESENTED

The Nuclear Regulatory Commission, an independent agency already insulated from *executive* oversight, asks this Court to hold that its own rules insulate it from *judicial* review of its compliance with a *legislative* mandate on where to store the nation's nuclear waste—a question Congress has already answered. Indeed, decades ago, Congress denied the Commission's former chairman's request for the very authority the Commission now claims. The questions presented are:

1. Whether the State whose very land, water, and air stand to be polluted by spent nuclear waste may challenge a license to store that waste either as a "party aggrieved" under, or in accord with an ultra vires exception to, the Administrative Orders Review Act, commonly called the Hobbs Act. 28 U.S.C. §2344.

2. Whether the Atomic Energy Act and the Nuclear Waste Policy Act, which never mention temporary offsite storage of spent nuclear fuel by private parties, nonetheless authorize the Commission to license such a facility, notwithstanding Congress's express command that the nation's nuclear waste is to be stored in Yucca Mountain, Nevada.

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INTRODUCTION

Decades ago, Congress decided that the federal government should store the nation's nuclear waste deep underground in a facility located in Yucca Mountain, Nevada. *See In re Aiken County*, 645 F.3d 428, 431 (D.C. Cir. 2011). For various reasons—mostly political, some practical—construction of that facility has stalled. Congress, however, has not revisited its command. *See* 42 U.S.C. §10172(a)(1). Rather than complying, the Commission has now determined that up to 40,000 metric tons of nuclear waste should be stored above-ground in Texas's Permian Basin, the site of the world's most productive oil field and the only source of safe water for hundreds of miles. The Commission and its licensee also declare that without the Commission's consent during agency proceedings, neither Texas nor local landowners can complain about such brazen disregard of statutory law. The Fifth Circuit correctly rejected both contentions, and this Court's review is not warranted.

To start, the Fifth Circuit correctly rejected petitioners' attempts to insulate the Commission's decision from judicial review. Digging up a decades-old, rarely implicated circuit split, the Commission complains that the Fifth Circuit improperly relied on an "ultra vires exception" to the Hobbs Act. Yet the Fifth Circuit has explained why even if there were no ultra vires exception, Texas would still be a "party aggrieved," NRC.Pet. App.17a, and thus enjoy a statutory right of judicial review. Thus, even if petitioners were correct about an ultra vires exception—and they are not—an entirely independent ground supports the judgment below.

The Court similarly need not get involved in the merits of this dispute. Under our constitutional system, a federal agency—independent or otherwise—"literally

has no power to act ... unless and until Congress authorizes it to do so by statute." *FEC v. Cruz*, 596 U.S. 289, 301 (2022). Here, Congress specified that the nation would dispose of its nuclear waste at a government-owned facility at Yucca Mountain. Petitioners cannot point to a single provision in the Atomic Energy Act or the Nuclear Waste Policy Act that the Fifth Circuit overlooked and that permits the Commission to evade that requirement by re-labeling disposal long-term "storage." As Interim Storage Partners (ISP) is conspicuously *not* the federal government, and Yucca Mountain is indisputably *not* in Texas, the Commission cannot license ISP to operate a *de facto* disposal facility in Texas. By no means can the Commission solve its Yucca Mountain problem by disregarding clear statutory language.

STATEMENT

I. Statutory Background

In 1954, Congress enacted the Atomic Energy Act, granting regulatory authority over nuclear energy to the Atomic Energy Commission that has since been redistributed to the Nuclear Regulatory Commission and the Department of Energy. 42 U.S.C. §§2011 *et seq*. Under the current division of power, the Commission "retains jurisdiction over nuclear plant licensing and regulation," while the Department is charged with "energy research and development." *County of Rockland v. NRC*, 709 F.2d 766, 769 n.2 (2d Cir. 1983).

"Prior to the late 1970's," there was little concern over the disposal of nuclear waste because "it was accepted that spent fuel would be reprocessed." *Idaho v. DOE*, 945 F.2d 295, 298-99 (9th Cir. 1991). Nuclear power plants were thus built to store spent fuel for later reprocessing. *See* NRC, *Spent Fuel Storage: Intent to Prepare Generic Environmental Impact Statement on Handling*

and Storage of Spent Light Water Power Reactor Fuel, 40 Fed. Reg. 42,801, 42,801 (Sept. 16, 1975). In the "mid-70's," the reprocessing concept "collapsed" for technological and political reasons. *Idaho*, 945 F.2d at 298-99. Because spent nuclear fuel remains radioactive and cannot truly be gotten rid of, it must be stored "for time spans seemingly beyond human comprehension." *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012).

During the debate over how to address this problem, the Commission conceded it would need new statutory authority from Congress to license "waste management facilities as a third category [of facility] in addition to production and utilization facilities."[1] In asking for this authority, the Commission's chairman admitted to Congress that "waste facilities are neither production nor utilization facilities as defined by the Atomic Energy Act," and that no other statutory authority provided a basis for the Commission's licensing authority over a private waste facility. *Id.* "[T]he Commission's regulations," it explained, "deal[t] with the handling of spent fuel and other high-level wastes ... only to the extent that such activities are related to *on-site* activities carried on by the licensee." *Natural Resources Defense Council Denial of Petition for Rulemaking*, 42 Fed. Reg. 34,391, 34,392 (July 5, 1977) (emphasis added).

In 1982, Congress responded by enacting the Nuclear Waste Policy Act (NWPA) to comprehensively address what it acknowledged was "a national problem" and a "major subject[] of public concern." 42 U.S.C.

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[1] *See* NUREG-0527, *Regulation of Federal Radioactive Waste Activities: Report to Congress on Extending the Nuclear Regulatory Commission's Licensing or Regulatory Authority to Federal Radioactive Waste Storage and Disposal Activities* at G-10 (Sept. 1979), https://perma.cc/3ASZ-CCQW.

§10131(a)(2), (7). The NWPA tasked the Department with establishing a suitable location for a permanent geologic repository to indefinitely store the nation's radioactive waste and spent nuclear fuel deep below the Earth's surface. 42 U.S.C. §10132. And it made the Commission responsible for licensing that repository, ensuring that it is safe and environmentally benign. *Id.* §10134. Conspicuously absent from the NWPA is the authority sought by the Commission to license private, off-site storage facilities.

Congress amended the NWPA in 1987 to direct the Department to consider Yucca Mountain—and *only* Yucca Mountain, *id.* §10172(a)—as the site for the nation's first permanent geologic repository, *id.* §10134. True, the NWPA provided limited interim measures to deal with spent nuclear fuel, such as temporary storage at a *federal* facility if necessary to avoid a commercial reactor shut-down. *Id.* §§10151-10157. But "[t]he statute is obviously designed to prevent the Department 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); *see also* 42 U.S.C. §10168(d)(1).

Progress on the Yucca Mountain facility has been halting at best. "[B]y the mid-1990s, the Department of Energy made clear that it could not meet" a statutory deadline to begin accepting waste by January 31, 1998, and that deadline "came and went without the federal government accepting any waste." *Texas v. United States*, 891 F.3d 553, 555-56 (5th Cir. 2018) (discussing 42 U.S.C. §10222(a)(5)(B)). In 2008, the Department submitted a license application for the Yucca Mountain facility. *Id.* at 556. But the Commission, "by its own admission," refused to follow the instruction to evaluate that

application, stating it "has no current intention of complying with the law." *Aiken County*, 725 F.3d at 258. That led the D.C. Circuit to order the Commission to "promptly continue with the legally mandated licensing process." *Id.* at 267. Yet the licensing process remains stalled. *Texas*, 891 F.3d at 557. Congress has never revised its directive that Yucca Mountain is the appropriate repository for the nation's nuclear waste.

II. ISP's Application and License for a "Consolidated Interim Storage Facility"

In 2016, ISP—a private party—applied for a license to operate a "consolidated interim storage facility," where it could store up to 40,000 metric tons of spent nuclear fuel in dry-cask, above-ground storage in Andrews County, Texas. C.I.No.5.1.[2] The license would be valid for 40 years, but it could be renewed for an additional 20, *see* C.I.No.1148. Nuclear waste, of course, can remain radioactive for "hundreds of millions of years." EPA, *Radioactive Waste*, https://perma.cc/U8D7-DG2T.

Many stakeholders, including Texas, objected to the issuance of such a license. Consistent with longstanding precedent regarding how to comply with the Hobbs Act, Governor Greg Abbott submitted a comment letter addressing problems with the ISP facility. C.I.No.1128. The Texas Commission on Environmental Quality (TCEQ) similarly objected to the "unprecedented implications" of the license and the "significant unease" it created. C.I.No.1148. TCEQ warned that because "the U.S. Department of Energy has been unsuccessful in developing a permanent geologic repository," a consolidated

[2] "C.I._" refers to the Revised Certified Index of Records, the cited portions of which can be found in the appendices at docket numbers. 101-1 and 103-1 in the Fifth Circuit.

interim storage facility in Texas "will become the permanent solution for dispositioning the nation's spent nuclear fuel." *Id.* In September 2021, the Commission overrode these objections and licensed ISP's proposed facility. NRC.Pet.App.53a.

III. Proceedings in the Court of Appeals

Texas, Governor Abbott, and TCEQ petitioned for review in the Fifth Circuit. NRC.Pet.App.9a. ISP intervened to defend its license. NRC.Pet.App.9a. The Fifth Circuit made three rulings relevant here.

First, applying longstanding circuit precedent, the Fifth Circuit held that Texas did not need to have participated in proceedings before the Commission because Texas fit within an "ultra vires exception to the [Act's] party-aggrieved status requirement." NRC.Pet.App.18a (italicization altered); *see* NRC.Pet.App.18a-20a. Alternatively, the Fifth Circuit explained why Texas *would* be a "party aggrieved" even without an ultra vires exception. NRC.Pet.App.17a-18a. The Hobbs Act permits a "party aggrieved by the final order" to "file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. §2344. To be a "party aggrieved," the Hobbs Act "requires only that a petitioner have participated—in some way—in the agency proceedings." NRC.Pet.App.17a. Texas easily satisfied that requirement by submitting comments. NRC.Pet.App.17a.

Second, on the merits, the Fifth Circuit held the Commission is not entitled to deference because "[w]hat 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 half a century." NRC.Pet.App. 29a-30a. Congress said as much, emphasizing that "high-level radioactive waste and spent nuclear fuel have

become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations." 42 U.S.C. §10131(a)(7); NRC.Pet.App.29a-30a. The Commission thus needs clear statutory authorization to license private facilities to store nuclear waste offsite. NRC.Pet.App.30a. Here, the AEA does not clearly delegate such authority, and the NWPA affirmatively "belies the Commission's arguments to the contrary." NRC.Pet.App.30a.

Third, the Fifth Circuit rejected the Commission's assertion that because it has the authority to issue licenses for the *possession* of nuclear material, it "has broad authority to license *storage* facilities for spent nuclear fuel." NRC.Pet.App.21a (emphasis added). Looking to the AEA's text, the Fifth Circuit concluded the Commission may issue such licenses to possess specified material "only for certain enumerated purposes—none of which encompass storage or disposal of material as radioactive as spent nuclear fuel." NRC.Pet.App.22a. The Commission's contrary argument, the Fifth Circuit explained, "cannot be reconciled with the [NWPA]," NRC.Pet.App.25a, which "creates a comprehensive statutory scheme for addressing spent nuclear fuel accumulation," NRC.Pet.App.29a. "[P]rioritiz[ing] construction of the permanent repository," that scheme "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." NRC.Pet.App.29a.

The Fifth Circuit declined to rehear the case en banc. NRC.Pet.App.31a. Judge Higginson dissented and argued that the Fifth Circuit's ultra vires exception should be eliminated. NRC.Pet.App.45a-52a. In response,

Judge Jones, joined by five other judges, explained why the State would be a "party aggrieved" regardless of any ultra vires exception. NRC.Pet.App.33a-44a.

REASONS FOR DENYING THE PETITION

I. Whether the Rarely Litigated Hobbs Act Contains an Ultra Vires Exception Does Not Merit the Court's Attention.

According to the Commission (at I, 11-19), this case merits certiorari because the Fifth Circuit improperly added an ultra vires exception to the Hobbs Act—in 1982. But this case presents a poor vehicle to determine whether such an exception exists because it would not affect the judgment below: The Fifth Circuit also correctly explained why it would conclude that Texas is a "party aggrieved" under the Hobbs Act even without an ultra vires exception. NRC.Pet.App.20a. In any event, the Commission's arguments would allow the very agency that acts unlawfully to bar the courthouse door.

A. This is a poor vehicle to resolve whether there is an ultra vires exception to the Hobbs Act.

1. The Fifth Circuit correctly explained why Texas is a party aggrieved under the Hobbs Act. This conclusion flows directly from "the plain text of the Hobbs Act," NRC.Pet.App.17a, which permits a "party aggrieved by the final order" to "file a petition to review the order in the court of appeals wherein venue lies," 28 U.S.C. §2344, but imposes no specific limitations on how an individual may become a "party." "When a statute is 'reasonably susceptible to divergent interpretation,'" courts are to "adopt[] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review," absent "clear and convincing evidence" to the contrary. *Kucana*

v. Holder, 558 U.S. 233, 251, 252 (2010) (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)).

Because the term "party" is undefined, courts look to its ordinary meaning as defined not just by "dictionary definitions of its component words" but also "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015); *see also Fischer v. United States*, 144 S.Ct. 2176, 2183 (2024). Courts thus do not "interpret each word in a statute with blinders on" because a word that "may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Abramski v. United States*, 573 U.S. 169, 179 n.6 (2014).

Here, Congress chose the broad term "party aggrieved." 28 U.S.C. §2344. As contemporaneous dictionaries show, "party" was understood since the time of the Hobbs Act to include any "person concerned or having or taking part in any affair, matter, transaction or proceeding." BLACK'S LAW DICTIONARY 1278 (4th ed. 1951); *accord, e.g.*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1416 (2d unabridged ed. 1987); THE OXFORD ENGLISH DICTIONARY XI, 281-82 (2d. ed. 1989).

This broad understanding of "party" is confirmed by statutory context. After all, the Hobbs Act uses the term "party aggrieved" in a single sentence that covers *both* agency adjudications and rulemakings. 28 U.S.C. §2344; *see Reytblatt v. NRC*, 105 F.3d 715, 720-21 (D.C. Cir. 1997). The Commission admits as much. NRC.Pet.19 n.2. Yet no one disputes that someone who submits comments in a rulemaking from one of the handful of agencies subject to the Hobbs Act, *see* 28 U.S.C. §2342, may seek review. *See, e.g.*, NRC.Pet.19 n.2 (citing *Water*

Transp. Ass'n v. ICC, 819 F.2d 1189, 1192 (D.C. Cir. 1987)).

Such a broad understanding is also consistent with the purpose of the requirement—namely, "to ensure that the agency had the opportunity to consider the issue that petitioners are concerned with." NRC.Pet.App.17a; *see also Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1219 (D.C. Cir. 1973). The "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). By imposing a "party aggrieved" requirement, the Hobbs Act facilitates "[t]he task of the reviewing court" in "apply[ing] the appropriate APA standard of review," *id.* at 743-44, by ensuring that the future petitioner's grievances are made part of the administrative record. As the Commission admits, this case presents no such concerns: Texas made its views of the ISP license known to the Commission using the process that the Fifth Circuit blessed 42 years ago. *See* NRC.Pet.6-7.

2. In contending that the Fifth Circuit nonetheless lacked jurisdiction, the Commission insists that "party" "'has a precise meaning in legal parlance' and generally means 'he or they by or against whom a suit is brought.'" NRC.Pet.12 (quoting BLACK'S, *supra*, at 1278). The Commission's own authority, however, states that "party" "is *not* restricted to strict meaning of plaintiff or defendant in a lawsuit." BLACK'S, *supra*, 1278 (emphasis added). Those concepts are given a *different* name with which Congress was doubtless familiar: "litigant." *Id.* at 1082. Because Congress chose to use the general term *party* rather than the specific term *litigant*, the Hobbs Act "requires only that a petitioner have participated—

in some way—in the agency proceedings, which Texas did through comments." NRC.Pet.App.17a.

The Commission's view that one must nonetheless be a "recognized party to the underlying agency proceeding," NRC.Pet.12, presents another problem: It is effectively an administrative exhaustion requirement that appears nowhere in the Hobbs Act, 28 U.S.C. §2344, and that the agency controls. NRC.Pet.5 (summarizing Commission processes). On the Commission's view, a challenger must intervene to exhaust—but the Commission may simply deny intervention. Thus, no judicial review.

Congress knows how to draft mandatory exhaustion requirements. *See, e.g.*, 7 U.S.C. §6912(e); 42 U.S.C. §1997e(a). Courts must not create one that does not exist in the statute, *see, e.g.*, *Darby v. Cisneros*, 509 U.S. 137, 154 (1993), especially where the agency may make them impossible to fulfill. And, as the Fifth Circuit explained, "neither the Hobbs Acts nor the Atomic Energy Act impose a mandatory exhaustion requirement." NRC.Pet. App.16a n.2. To the contrary, the AEA states 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). (emphases added). It also states that "[a]ny final order entered in any proceeding of the kind" is subject to judicial review, *id.* §2239(b)(1). Tellingly absent is any language requiring an interested party to *seek* a hearing in the first instance.

Just months ago, this Court held that: (1) a party may sue a federal agency when it is injured, *Corner Post, Inc. v. Board of Governors*, 144 S.Ct. 2440 (2024); (2) challengers may be entitled to have a jury decide facts, *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024); and (3) the agency gets

no deference on the law it administers, *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024). Those decisions would have little value if an agency may reach an agreement with the beneficiary of a challenged action while preventing those harmed by that action from ever having a day in court. The "traditional tools of statutory construction" do not permit the Commission to arrogate to itself authority to limit who can access the federal courts. *Id.* at 2264. Certainly, nothing in the Hobbs Act overcomes the general presumption in favor of judicial review of administrative decisions. *See Kucana*, 558 U.S. at 237.

The Commission points (at 19) to two lower-court cases agreeing that under agency rules, States are not a party aggrieved merely because they submitted comments. Decided before *Loper Bright*, these cases "evaluate" a party's level of participation—and thereby its aggrieved status—"based on the practices of the agency" and the agency's rules. *State ex rel. Balderas v. NRC*, 59 F.4th 1112, 1117 (10th Cir. 2023); *Ohio Nuclear-Free Network v. NRC*, 53 F.4th 236, 238-40 (D.C. Cir. 2022). But agencies have never had the power to determine a court's jurisdiction through rulemaking, *see, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004), and they certainly don't now, *see Loper Bright*, 144 S.Ct. at 2273; *accord* NRC.Pet.App.34a-35a (Jones, J.). This point is particularly true for rules that would negate the presumption of reviewability. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967).

It is no response that Texas could have obtained review had it sought and been denied leave to intervene because the agency would have asserted that the State was not aggrieved in the larger agency proceedings. *Cf. Don't Waste Mich. v. NRC*, No. 21-1048, 2023 WL 395030, at *3

(D.C. Cir. Jan. 25, 2023). Not only was such a box-checking exercise not required by Fifth Circuit precedent when Texas had to decide whether to ask the Commission's permission to intervene, but it further highlights the self-serving nature of the Commission's position: Only leave to intervene could authorize Texas to seek judicial review, but only the Commission could grant leave to intervene. The Commission effectively contends that it may act as its own overseer. *Contra Axon Enterprises, Inc. v. FTC*, 598 U.S. 175, 180 (2023).

3. In a tacit acknowledgment that any ruling by this Court on the ultra vires exception will not save the permit at hand, the Commission makes four additional arguments why litigation is required to transform a participant in the agency process into a "party aggrieved." NRC.Pet.12-14. All are wrong.

First, relying on *Simmons v. ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983), the Commission insists that the Fifth Circuit conflates the term "person ... aggrieved" as used in the APA and the term "party aggrieved" as used in the Hobbs Act. Not so. As noted above, those are not the only options available to Congress. *Supra* pp.10-11. Moreover, the term "person ... aggrieved" in the APA, 5 U.S.C. §702, imposes only two requirements: (1) that the plaintiff "identify some 'agency action,'" and (2) that he "show that he has suffered legal wrong" as a result. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990). The "person ... aggrieved" language in the APA does *not* require participation in an agency proceeding like the term "party aggrieved" does in the Hobbs Act.

Simmons is not to the contrary. There, the petitioner commented on only the first of two rulemakings of which it later sought judicial review under the Hobbs Act. 716 F.2d at 42. To preserve the distinction between "party"

and "person," the court held that the Hobbs Act must have used "party aggrieved" to mean "a party before the agency, not a party to the judicial proceeding," *id.* at 43—relying on the very Fifth Circuit decision to which petitioners attribute the circuit split, *id.* at 42 (citing, *inter alia*, *Am. Trucking Ass'ns v. ICC*, 673 F.2d 82, 84 (1982) (per curiam)). But, as Judge Jones noted, it "was uncontested" that the petitioner was a "party aggrieved" by the first rulemaking in which he participated, NRC.Pet.App.37a—underscoring that "party aggrieved" and "litigant" are not synonymous in this context, *supra* pp.10-11.

Second, the Commission insists (at 13) that "party aggrieved" should nonetheless be treated like a party to a court proceeding because the Hobbs Act affords intervention rights to a "party in interest in the proceeding" not afforded to "[c]ommunities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency." 28 U.S.C. §2348. But §2348 supports the *State*'s view. Courts presume "that 'identical words used in different parts of the same statute' carry 'the same meaning.'" *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85 (2017) (quoting *IBB, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)). And only individuals who participated in the agency proceeding are called "parties"—no matter whether their interests would be affected. It would also make sense to give such participants intervention as of right if they are also parties aggrieved who can initiate a separate suit that must, as a matter of law, be transferred to and consolidated with the earlier-filed suit. 28 U.S.C. §2112(a).

The State's interpretation is consistent with the cases the Commission cites. For example, *Alabama Power Co. v. the Federal Communications Commission*, 311 F.3d

1357 (11th Cir. 2002), correctly recognizes that a "'party aggrieved' is one who *participated* in the agency proceeding, *id*. at 1366 (emphasis added). In that case, multiple adjudications occurred. *Id.* at 1365-67. The court found that being a participant in *one* adjudication does not make one a party aggrieved by a *different* adjudication. *Id.* Whether the petitioner could have sought review had it participated in some other way in the agency proceeding was not at issue. *Id*. at 1366-67.

Third, the Commission makes much (at 12) of the fact that the AEA's hearing provision uses both "person" and "party." But it is the Hobbs Act, not the AEA's hearing provision, that is at issue, and it is always perilous to try to extrapolate meanings across statutes. *Env't Def. v. Duke Energy Corp*., 549 U.S. 561, 574 (2007). That is particularly so because the AEA's hearing provision applies to both licensing proceedings and *rulemaking proceedings*. 42 U.S.C. §2239(a)(1)(A); *see* 10 C.F.R. §§2.1(a), (d) 2.805(b); 2.1500. Accordingly, when the AEA 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) (emphasis added), it means that a "person" is one interested in the Commission's actions who becomes a "party" when he participates in some way in the agency proceeding, whether a rulemaking or an adjudication.

Fourth, the Commission is wrong (at 14) to rely on *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 762 (2002) (*FMC*). That case asked whether sovereign immunity precluded the Federal Maritime Commission from adjudicating a private party's complaint against a State, *id.* at 792—a context that inherently uses the term "party" to mean

"litigant." *But see supra* pp.10-11. As a result, ordinary rules of issue preservation and appellate procedure would hold that "if a party fails to appear before the [Commission], it may not then argue the merits of its position in an appeal of the Commission's determination filed under [the Hobbs Act]. *FMC*, 535 U.S. at 762.

Here, by contrast, the State is *not* "seeking to contest the merits of a complaint filed against it by a private party" where it "must defend itself in front of the [Commission] or substantially compromise its ability to defend itself at all." *Id.* at 762. Instead, it is challenging a license that risks a public-health disaster by enabling the storage of up to 40,000 metric tons of nuclear waste in above-ground vessels over the world's most productive oil field, as well as the water supply for Midland-Odessa (among others). The issuance of that license over Texas's objections "aggrieves" Texas by any ordinary meaning of the term—regardless of whether the Hobbs Act contains an ultra vires exception.

4. Regardless, petitioners have not sought clarification of what it takes to be a "party aggrieved" within the terms of the Hobbs Act—only whether an ultra vires exception allows a stranger to the agency proceeding to seek judicial review. Because the Fifth Circuit's alternative analysis that Texas is a party aggrieved under the Hobbs Act even absent an ultra vires exception falls outside the scope of the question presented, this is a poor vehicle to decide that question. *See, e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993).

B. In applying the ultra vires "exception," the Fifth Circuit merely declined to read into the Hobbs Act an atextual exhaustion rule.

Even were Texas not a party aggrieved, review would be uncalled for because while the Commission (at 11), and ISP (at 1, 22-24) make much of the Fifth Circuit's "ultra vires" exception, it really is no exception at all. In 1982, the Fifth Circuit observed that this Court has recognized "two rare instances" in which a stranger to an agency proceeding could nonetheless appeal: (1) if the agency action is "attacked as exceeding the power of the Commission," or (2) the appellant "challenges the constitutionality of the statute conferring authority on the agency." *Am. Trucking*, 673 F.2d at 85 n.4 (citing, *inter alia*, *Edward Hines Yellow Pine Tr. v. United States*, 263 U.S. 143, 147 (1923); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 563-64 (1919)). In other words, this is not an exception at all because the Hobbs Act is about reviewing agency orders—not challenges to the "statute conferring authority on the agency." *Compare id.*, *with* 28 U.S.C. §2344. Instead, the putative "exception" is nothing more than a rule that appearing in a Commission proceeding is not required to challenge whether the Commission exceeded its authority by holding that proceeding in the first place. That is not the same thing as challenging an agency's use of authority. *Cf. Axon*, 598 U.S. at 185-88.

Nor is the term "ultra vires" a synonym for "wrong." *Contra* NRC.Pet.15. As Judge Jones explained, "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." NRC.Pet.App.43a. To the extent the Fifth Circuit has applied the rule, *but see infra* Part I.C., it has done so

only in cases involving an absence of statutory or constitutional authority. NRC.Pet.App.43a. This Court has done the same. *See, e.g.*, *Skinner & Eddy Corp.*, 249 U.S. at 562.

Apart from precedent, such a rule makes sense for two reasons. *First*, as explained above, unlike other statutes, the Hobbs Act contains no exhaustion requirement. *See* 28 U.S.C. §2344; NRC.Pet.App.16a n.2. If Congress had wanted to require a petitioner to make statutory interpretation and constitutional arguments to an agency, it could have done so. *Supra* p.11.

Second, it would make little sense to imply an administrative-exhaustion requirement in a post-*Chevron* world. After all, courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright*, 144 S.Ct. at 2273. The "focal point for [that] judicial review" remains the "administrative record" to which "the reviewing court is to apply the appropriate … standard of review." *Lorion*, 470 U.S. at 743-44. But now the Court has made clear that courts are "to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions" rather than deferring to the agency's judgment. *Id.* at 744. Under such a regime, it would be upside down to imply (let alone allow an agency to create) an exhaustion requirement not required by Congress. The Fifth Circuit was thus entirely correct to prevent the Commission from imposing an exhaustion requirement on Texas.

C. Any circuit split is old and recurs too infrequently to require this Court's attention.

Even were the Fifth Circuit wrong to apply the supposed ultra vires exception (and it wasn't), and even if that error would affect the outcome of this case (and it

wouldn't), that error *still* would not merit the Court's time. So far as Texas can determine, the Hobbs Act has resulted in only four decisions from this Court in over 70 years. The circuit split to which NRC (at 28) and ISP (at 23) pin their hopes of a fifth has existed for almost 40 years without intervention of this Court or problems to the handful of federal agencies to whom the Hobbs Act applies. That is hardly the recipe for a certworthy issue.

The Hobbs Act is far from a controversial statute. It applies to a small fraction of the hundreds of federal agencies that form the Executive Branch, *see* 28 U.S.C. §2342(1)-(7), and this Court has adjudicated only four cases interpreting the statute. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 3 (2019); *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 277 (1987); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69 (1970); *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 613 (1966).

The circuit split at issue has existed for nearly 40 of those 70 years. As noted above, the Fifth Circuit decided *American Trucking* in 1982. In 1986, the Seventh Circuit announced its disagreement. *See In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 799 F.2d 317, 334-35 (7th Cir. 1986). The Second Circuit followed suit in 1999, *see Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112 (2d Cir. 1999) (per curiam), the Eleventh in 2006, *see Nat'l Ass'n of State Util. Consumer Advocs. v. FCC*, 457 F.3d 1238, 1249 (11th Cir. 2006), and the Tenth last year in a case involving the same license at issue here, *see Balderas*, 59 F.4th at 1123-24.

As Fasken explains in its concurrently filed response (at Part II.A), the Fifth Circuit has no occasion to apply the ultra vires "exception" with any frequency. To the contrary, as the Commission admits (at 29), the Fifth

Circuit applied the ultra vires exception here "for the first time since 1984." The only other recent example is an unpublished opinion holding that the decision below (unsurprisingly) determined the outcome of a related case. *Compare Fasken Land & Minerals, Ltd. v. NRC*, No. 23-60377, 2024 WL 3175460, at *1 (5th Cir. Mar. 27, 2024) (per curiam), *with* ISP.Pet.iii (acknowledging the cases to be related).

Thus, even if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals," it could hardly be considered an "important matter" requiring this Court's attention. Sup. Ct. R. 10(a). This is particularly true because certiorari is a discretionary writ. Texas participated in the proceedings here by filing substantive comments—a point the Commission does not (and cannot) dispute. Under Fifth Circuit precedent, that was sufficient to secure Texas's right to challenge the lawfulness of the Commission's decision. The Court should not grant review where a party has acted consistent with circuit precedent, especially because under any plausible standard Texas is a "party aggrieved" regardless.

II. The Commission's Claimed Authority To License Privately Owned, Off-Site Nuclear Storage Facilities Is Also Uncertworthy.

It is also unnecessary for this Court to address the merits. Congress has already answered the question: the nation's nuclear waste must be stored in Nevada, not Texas. Petitioners' contrary arguments miss the mark.

A. The Commission lacks authority to issue the license.

Even before *Loper Bright*, this Court "expect[ed] Congress to speak clearly when authorizing an agency to

exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (per curiam) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). And it has been particularly skeptical of such assertions of power on issues with uniquely fraught "political histor[ies]" or comprehensive "regulatory scheme[s]." *Biden v. Nebraska*, 143 S.Ct. 2355, 2382 (2023) (Barrett, J., concurring) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)); *accord Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1273 (D.C. Cir. 1996).

This is a textbook example of such a case: Congress identified the "problem." 42 U.S.C. §10131(a)(2), (7). And Congress provided the solution—a "comprehensive statutory scheme for addressing spent nuclear fuel accumulation." NRC.Pet.App.29a. That scheme not only requires storage in Yucca Mountain, but it "plainly contemplates that" there may be pushback to the Yucca Mountain site and provides that "until there's a permanent repository, spent nuclear fuel is to be stored onsite at-the-reactor or in a federal facility." NRC.Pet.App.29a. That scheme does *not* include granting the Commission authority to issue offsite-storage licenses.

1. The Commission attempts to locate its authority in the licensing provisions of the AEA, which were enacted to "'encourage[] the private sector' to develop 'atomic energy for peaceful purposes under a program of federal regulation and licensing.'" NRC.Pet.2 (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983)); *see* 42 U.S.C. §2013. To that end, the AEA delegates the Commission authority to issue two types of licenses to private entities: "materials licenses" and "facilities licenses."

NRC.Pet.2 & n.1. Neither type, however, relates to temporary offsite storage of spent nuclear fuel.

Materials licenses entitle licensees to possess specified nuclear materials for statutorily defined ends. Section 2073(a), for example, authorizes licensees to possess "special nuclear material" for categories of "research and development," "medical therapy," and use under a facilities license. 42 U.S.C. §2073(a). Section 2093(a) does the same for "source material." *Id.* §2093(a). And §2111(a) licenses may be issued "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).

Despite defining the term "spent nuclear fuel," the AEA nowhere authorizes issuance of a materials license to possess spent nuclear fuel for any reason, let alone for the sole purpose of storing such material in a standalone facility. *Compare id.* §§2014 (aa) (defining "special nuclear material"), (z) ("source material"), (e) ("byproduct material"), *with id.* §2014(ee) ("spent nuclear fuel").

The AEA's facilities license provisions don't supply that authority either. Facilities licenses may be issued to private entities seeking to construct "utilization" and "production" facilities. 42 U.S.C. §§2133, 2134. The definitions of neither terms contemplate "storage" of spent nuclear material. *Id.* §2014 (cc) (defining "utilization facility"), (v) (defining "production facility")—as ISP acknowledges (at 17).

In short, as the Commission's own authority confirms, the AEA "does not specifically refer to the storage or disposal of spent nuclear fuel." *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004).

2. This straightforward textual analysis is bolstered by historical and statutory context. It was "clear that from the very beginning of commercial nuclear power [in the 1950s] the Congress was aware of the absence of a permanent waste disposal facility," *Nat. Res. Def. Council v. NRC*, 582 F.2d 166, 170 (2d Cir. 1978), but indefinite private storage was not then regarded "as a feasible and acceptable method of disposal ... of spent [nuclear] fuel," *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 244 (4th Cir. 1987). Instead, "Government and industry accepted reprocessing as the only practical method of disposing of spent fuel." *Id.* at 246. The AEA's failure to anticipate the need for repositories for spent nuclear fuel reflects that "widespread belief." NRC.Pet.App.4a.

It was not until the 1970s, when "the private reprocessing industry collapsed" that "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." NRC.Pet.App.26a (quoting *Idaho*, 945 F.2d at 298). "This led Congress to pass the [NWPA] in 1982" to "provide[] a comprehensive scheme to address the accumulation of nuclear waste." NRC.Pet. App.26a. Recognizing that "a national problem ha[d] been created," 42 U.S.C. §10131(a)(2), Congress adopted a national solution: "Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel," *id.* §10131(b)(2), "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 v. DOE*, 680 F.3d 819, 821 (D.C. Cir. 2012); *see* 42 U.S.C. §§10133-34. The NWPA was amended a few years later to identify Yucca Mountain

"as the only suitable site" for this purpose. NRC.Pet.App.27a; 42 U.S.C. §10172.

But the NWPA did not stop there. Recognizing the need for interim measures pending completion of the Yucca Mountain project, the Act takes pains to emphasize that "primary responsibility for providing interim storage of spent nuclear fuel" remains on "the persons owning and operating civilian nuclear power reactors." 42 U.S.C. §10151(a)(1). Section 10155(b)(1)(B)(i), for example, expressly directs reactor owners to pursue "expansion of storage facilities *at the site* of [their] power reactor[s]" should existing storage reach capacity before a permanent geologic repository becomes available. *Id.* §10155(b)(1)(B)(i) (emphasis added). Only if that proves impossible may reactor owners access limited federal storage. *Id.* §10151(a), (b).

Nowhere does the NWPA provide for private, off-site storage. To the contrary, §10155(h) punctuates that "nothing in this chapter shall be construed to encourage, authorize, or require the private ... use ... of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government." *Id.* §10155(h).

The NWPA also provides that the government may operate one "monitored retrievable storage" center, *id.* §10162(b), but only *after* the Commission has licensed the repository at Yucca Mountain, *id.* §10168(d)(1). This provision is "obviously designed to prevent the Department from delaying the construction of Yucca Mountain as the permanent facility while using temporary facilities." *Nat'l Ass'n of Regul. Util. Comm'rs*, 736 F.3d at 519. The NWPA thus "prioritizes construction of the permanent repository and limits temporary storage to private at-the-reactor storage or at federal sites."

NRC.Pet.App.29a. Nothing in the NWPA's structure or history supports anything like what the Commission is attempting to do here.

Notably, the Commission (at 23-24) and ISP (at 21) assure the Court that it need not bother with the NWPA, which they insist deals primarily with where the federal government, rather than private entities, may store nuclear waste. Yet the NWPA contains a welter of provisions dealing directly with private waste storage, including the issue of where to put privately produced waste pending completion of the Yucca Mountain project. A court cannot ignore the fact that Congress has clearly addressed this specific issue.

3. The statutory history surrounding the Yucca Mountain project is more evidence that this is one of those instances in which "commonsense principles of communication" dictate that we "'expect Congress to speak clearly if it wishes to assign [that task] to an agency.'" *Biden*, 143 S.Ct. at 2380 (Barrett, J., concurring) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

Far from clearly providing the authority asserted here, reading the AEA to authorize the Commission to license private off-site storage facilities would render the NWPA almost nonsensical—and would fly in the face of representations made by the Commission's former Chairman during the debates leading to the passage of the NWPA. *Supra* p.3. It is a bedrock principle that "[a]ny word or phrase that comes before a court for interpretation is part of" the "*corpus juris*." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252 (2012)). "It is a logical consequence of this contextual principle that the meaning of" an earlier provision may be clarified or even

"change in light of a subsequent enactment." *Id.* at 254-55.

Here, the entire point of the NWPA is to create "a *comprehensive* scheme for the interim storage and permanent disposal of" spent nuclear fuel, which is irreconcilable with the authority that the Commission claims. *Ind. Mich. Power*, 88 F.3d at 1273 (emphasis added). That scheme "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." NRC.Pet.App.29a.

Furthermore, the history of the Yucca Mountain project also makes plain why the Commission now retreats from what the scheme clearly contemplates. The Commission doesn't think that Yucca Mountain is politically feasible, so it has shifted its focus elsewhere. Yet "no matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate ... must always be grounded in a valid grant of authority from Congress." *Brown & Williamson*, 529 U.S. at 161 (citation omitted).

Indeed, the Court need not rely on political and historical context alone. In the NWPA itself Congress expressly identified "high-level radioactive waste and spent nuclear fuel" as "major subjects of public concern." 42 U.S.C. §10131(a)(7). That is, this case doesn't just present a major question: It presents an *answered* major question. To borrow from Justice Barrett's hypothetical in *Biden v. Nebraska*, because the proverbial parent has specified how the weekend should go, the babysitter is not at liberty to make different plans. 143 S.Ct. at 2379-80 (Barrett, J., concurring).

That same principle rebuts the insistence of both the Commission (at 27) and ISP (at 2) that even if the question of where the nation's nuclear waste should be permanently stored is a major question, the issue of temporary storage is not. Assuming a 60-year license can be deemed temporary, Congress was "obviously" concerned about temporary storage when it enacted the NWPA because of the tendency for temporary storage to become permanent. *Nat'l Ass'n of Regul. Util. Comm'rs.*, 736 F.3d at 519. That is why, for example, Congress conditioned the stop-gap measure of monitored retrievable storage on the issuance of a license for the construction of a repository in Yucca Mountain. *Id.*; 42 U.S.C. §10168(d)(1). Furthermore, given that nuclear waste is hazardous for thousands of years, the prospect that such waste will be moved from a "temporary" site 60 years from now through an inherently dangerous transport process does nothing to lessen the political and economic significance.

4. Nevertheless, the Commission insists (at 20-21) that its authority to issue licenses for the possession of "special nuclear material," 42 U.S.C. §2073, "source material," *id.* §2093, and "byproduct material," *id.* §2111, "plainly allow the Commission to grant licenses for offsite storage of spent nuclear fuel" because special nuclear material, source material, and byproduct material are "the three components of spent nuclear fuel for purposes connected to generating nuclear power." But that argument conflates distinct statutory powers and ignores the limited statutory purpose for which those authorities may be invoked.

To begin, the Commission conflates its authority to license nuclear *facilities* with its separate authority to license possession of certain nuclear *materials*. The AEA

authorizes the Commission to license only two types of facilities: "utilization" and "production" facilities. *Id.* §§2133, 2134. These are carefully defined terms that do not contemplate a standalone facility to store spent nuclear fuel far away from a nuclear reactor. *See id.* §2014(v), (cc). The Commission has neither contended otherwise nor claimed the license at issue falls within some other kind of facility license.[3]

That alone should have foreclosed issuance of the ISP license. ISP's predecessor-in-interest candidly applied for a license to "construct and operate a Consolidated Interim Storage *Facility*." C.I.No. 5.1. (emphasis added). Although the Commission ultimately issued something it styled as a "license for independent storage," NRC.Pet. App.53a, that document authorizes the possession of spent nuclear fuel only at an "[a]uthorized [p]lace of [u]se," detailed technical specifications for which are appended to the license, NRC.Pet.App.56a. As the putative use was, in fact, storage, NRC.Pet.App.53a, the ISP license is an extra-statutory storage-facilities license masquerading as a materials license.

Furthermore, as the Fifth Circuit recognized, the Commission's invocation of the AEA's materials-licensing provisions "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." NRC.Pet.App.22a.

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[3] Section 2111 arguably permits a disposal facility for certain types of significantly less hazardous "byproduct materials" specified in "paragraphs (3) and (4) of section 2014(e)." 42 U.S.C. §2111(b)(1). Petitioners seem to disclaim any reliance on this provision, which would not extend to the materials ISP seeks to store. *See* ISP.Pet.16.

That is, even if the ISP license could somehow be construed as a materials license, the AEA does not provide the Commission the power to possess "spent nuclear fuel" by conferring the authority to license possession of "byproduct material," "source material," and "special nuclear material"—even if they are "constituent materials of spent nuclear fuel." NRC.Pet.App.21a. "In a given statute," especially one like the AEA involving "terms with some heft and distinctiveness," "the same term usually has the same meaning[,] and different terms usually have different meanings." *Pulsifer v. United States*, 601 U.S. 124, 149 (2024).

Here, "spent nuclear fuel" is separately defined as "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) (emphasis added); *see id.* §2014(ee) (defining "spent nuclear fuel" by cross reference to §10101). A neighboring provision further distinguishes "byproduct material," "source material," and "special nuclear material," from "spent nuclear fuel" by separately listing "*byproduct materials*, *source materials*, *special nuclear materials*, high-level radioactive waste, *spent nuclear fuel*, transuranic waste, and low-level radioactive waste." *Id.* §2210i(b) (emphasis added); *see also id.* §2210h(2)(B) (similar). It is thus quite wrong to treat "spent nuclear fuel" as merely the sum of its component parts. *See Pulsifer*, 601 U.S. at 149.

ISP counters (at 17) that limiting the Commission's authority to issue materials licenses to those materials enumerated by the AEA would prevent nuclear power plants from handling (as they must) spent nuclear fuel. But a nuclear power plant is differently situated in that it operates pursuant to a utilization facility license. *See*

id. §2014(cc). Common sense—not to mention statutory text—dictates that a license to operate a nuclear power plant entails government permission to "withdraw[] [fuel] from a nuclear reactor following irradiation." 42 U.S.C. §10101(23) (defining "spent nuclear fuel"). And the NWPA expressly allows such facilities to store spent nuclear waste *on-site*. *Supra* p.21. But neither law nor logic suggests that by authorizing the Commission to license possession of one type of material, Congress must have authorized it to license possession of an entirely different and separately defined material. Quite the opposite. *Cf.* SCALIA & GARNER, *supra* at 107 (explaining the *expressio unius* canon).

Moving on, both the Commission (at 21-23) and ISP (at 15-18) twice try to expand the permissible purposes for which a materials license may be issued by ignoring the enumerated provisions in favor of selective quotes from the relevant sections' catchall provisions. Each ignores that "[w]hen Congress provides specific statutory obligations, [courts] will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated." NRC.Pet.App.22a (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)).

First, both the Commission (at 22) and ISP (at 15, 18) accuse the Fifth Circuit of violating the rule against superfluity by narrowing the catchall provisions of §2073 (addressing "special nuclear material") and §2093 ("source material") to such a degree that they are coterminous with preceding enumerated provisions allowing possession of separately defined nuclear materials for research and development purposes. But Congress did not authorize licensure of possession of "special nuclear material" and "source material" "for the conduct of" *all*

"research and development activities"—only those "of the types specified in section 2051." 42 U.S.C. §§2073(a)(1), 2093(a)(1). Section 2051, in turn, specifies six fields of nuclear research. *Id.* §2051(a). Similarly, §2073(a)(2) and §2093(a)(2) authorize licensure of possession of "special nuclear material" and "source material" for use "under a license issued pursuant to section 2134." *Id.* §§2073(a)(2), 2093(a)(2). And §2134 refers to particular medical, industrial, and commercial purposes carried out under a facilities license—which ISP conspicuously doesn't have. *Id.* §2134. Notably, the Commission does not dispute the Fifth Circuit's interpretation of §§2073(a)(3) and 2093(a)(3). *See* NRC.Pet.App.23a.

Second, the Commission (at 23) and ISP (at 16-17) fault the Fifth Circuit for failing to heed the "plain text" of §2111(a), which governs licenses to possess byproduct material. But the Commission understands §2111(a) to "authorize[] the Commission to license possession of byproduct materials for industrial purposes and other useful applications." NRC.Pet.23. It is hard to find daylight between that reading and the Fifth Circuit's conclusion—which largely consists of quoting the statute—that Congress has "authorize[d] 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.'" NRC.Pet.App.23a (quoting 42 U.S.C. §2111(a)). Both refer to byproduct material rather than spent nuclear fuel, and neither says anything about offsite storage.

Finally, the Commission reverts (at 23) to the AEA's overarching purpose of "facilitating the generation of nuclear power." Because "that would be impossible without

storage of spent nuclear fuel," the Commission reasons (at 23) that the AEA must permit it. But "[t]he question here is not whether something should be done; it is who has the authority to do it." *Biden*, 143 S.Ct. at 2372. Because "an agency literally has no power to act ... unless and until Congress confers power upon it," *Cruz*, 596 U.S. at 301, the operative question is "whether Congress in fact meant to confer the power the agency has asserted," *West Virginia v. EPA*, 597 U.S. at 687, 721 (2022). That cannot be inferred from general purposes because "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Agencies thus cannot rely on statements of purpose for substantive authority. *See, e.g.*, *Sturgeon v. Frost*, 139 S.Ct. 1066, 1086 (2019)

The Commission similarly maintains (at 22) that its longstanding regulatory practice of issuing licenses for temporary offsite storage "reinforces" its reading of the Atomic Energy Act. *See also* ISP.Pet.19 (similar). But both the major and the minor premise are wrong. As Fasken explains in its response (at 22), the Commission has no such practice. And even if it did, there is no "adverse possession" rule of administrative law that "insulates [agency] disregard of statutory text." *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality op.). "A regulation's age is no antidote to clear inconsistency with a statute." *Brown v. Gardner*, 513 U.S. 115, 122 (1994).

B. Petitioners' alleged circuit split is based on non-adjudicated assumptions.

The Commission (at 30) and ISP (at 16, 20) are also wrong that this Court's intervention is necessary to correct a circuit split regarding whether the AEA authorizes licensure of temporary, offsite storage facilities. In *Bullcreek v. NRC*, the D.C. Circuit held that the NWPA

did "not repeal or supersede" what it *assumed* to be the Commission's "authority under the [AEA] to license private away-from-reactor storage facilities." 359 F.3d at 537-38. But in doing so, as the Fifth Circuit summarized, the D.C. Circuit "provided no textual basis for its assumption," instead relying on inapposite authorities. NRC.Pet.App.25a. The other case cited by the Commission—*Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004)—"is just as unhelpful" because it "merely relies on *Bullcreek*." *Id.* The Fifth Circuit was under no obligation to adopt such an unreasoned position, and this Court need not step in to correct it.

This case, moreover, is not about assumed power—it is about an actual license. Petitioners do not claim that cases like *Bullcreek* arise in this posture, nor could they. The Court should thus wait to grant certiorari until a split arises about a license—which is unlikely to ever arise, given Congress's express directives regarding Yucca Mountain and the fact that the Commission itself has previously disclaimed the authority it now asserts.

CONCLUSION

The petitions should be denied.

Respectfully submitted.

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