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

REPLY BRIEF FOR THE PETITIONERS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. Both questions presented warrant this Court's review 2
B. The Fifth Circuit incorrectly resolved both questions presented 5

TABLE OF AUTHORITIES

Cases:

Aiken Cnty., *In re,* 725 F.3d 255 (D.C. Cir. 2013) 11
Axon Enter., Inc. v. *FTC*, 598 U.S. 175 (2023) 5
Beyond Nuclear, Inc. v. *U.S. Nuclear Regulatory Comm'n*, No. 20-1187, 2024 WL 3942343 (D.C. Cir. Aug. 27, 2024) 4
Bullcreek v. *Nuclear Regulatory Comm'n*, 359 F.3d 536 (D.C. Cir. 2004) 4
Chicago, Milwaukee, St. Paul & Pacific R.R., *In re,* 799 F.2d 317 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987) 2
Don't Waste Mich. v. *U.S. Nuclear Regulatory Comm'n*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023) 7
Erie-Niagara Rail Steering Comm. v. *Surface Transp. Bd.*, 167 F.3d 111 (2d Cir. 1999) 2
Huawei Techs. USA, Inc. v. *FCC*, 2 F.4th 421 (5th Cir. 2021) 6
Leedom v. *Kyne*, 358 U.S. 184 (1958) 5
National Parks Conservation Ass'n v. *FERC*, 6 F.4th 1044 (9th Cir. 2021) 7
Skull Valley Band of Goshute Indians v. *Nielson*, 376 F.3d 1223 (10th Cir. 2004), cert. denied, 546 U.S. 1060 (2005) 4
Texas v. *United States*, 891 F.3d 553 (5th Cir. 2018) 11

Statutes: Page

Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* 4
42 U.S.C. 2073(a)(4) 9
42 U.S.C. 2093(a)(4) 9
42 U.S.C. 2111 7
42 U.S.C. 2111(a) 9
Hobbs Act, 28 U.S.C. 2341 *et seq.* 1
28 U.S.C. 2344 .... 1, 5, 6, 8
Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* 9
42 U.S.C. 10151(a) 9

Miscellaneous:

42 Fed. Reg. 34,391 (July 5, 1977) 11
Nuclear Waste Management: Hearings Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess. (1978) 10, 11

In the Supreme Court of the United States

No. 23-1300

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

REPLY BRIEF FOR THE PETITIONERS

The Fifth Circuit panel below relied on a judge-made ultra vires exception to the directive in the Hobbs Act, 28 U.S.C. 2341 *et seq.*, that only "part[ies] aggrieved" by an agency's "final order" may petition for review in a court of appeals, 28 U.S.C. 2344. Respondents barely defend that holding, and they acknowledge that the panel revitalized a circuit conflict. The en banc Fifth Circuit refused to correct the panel's error, and the court's justiciability holding will have significant consequences.

On the merits as well, the Fifth Circuit expressly disagreed with decisions of other courts of appeals and decades of agency practice by holding that the Nuclear Regulatory Commission (Commission) lacks statutory authority to license the private offsite storage of spent nuclear fuel. Respondents agree that the question whether

the Commission possesses such authority is important, and their defense of the Fifth Circuit's merits analysis is unpersuasive. This Court should grant the petition for a writ of certiorari and review both questions presented.

A. Both Questions Presented Warrant This Court's Review

1. As respondents acknowledge (Texas Br. in Opp. 19), four courts of appeals have expressly rejected the proposition that nonparties to agency adjudications may seek Hobbs Act review of agency orders alleged to be ultra vires. Respondents argue (*id.* at 18-20) that this disagreement is unimportant because the ultra vires exception is rarely applied. But the history of the exception demonstrates its significance.

The Fifth Circuit recognized the exception in dicta in 1984. Pet. 16. After that, four courts of appeals carefully considered and rejected the exception, finding it "dubious for several reasons," *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 799 F.2d 317, 335 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987); "[un]persuasive," *Erie-Niagara Rail Steering Comm.* v. *Surface Transp. Bd.*, 167 F.3d 111, 112 (2d Cir. 1999) (per curiam); and inconsistent with the Hobbs Act's "plain meaning," *ibid.*; see Pet. 28-29. But when given the opportunity to reconsider its outlier approach in light of those criticisms, the Fifth Circuit below reaffirmed the exception and subsequently declined to rehear the case en banc. Another Fifth Circuit panel has already relied on the decision below to review (and vacate) a Commission license for a different offsite storage facility. See

Pet. 28.[1] And Fifth Circuit litigants have already invoked the exception in a case involving a different Hobbs Act agency. See 23-60641 C.A. Doc. 41, at 7-10 (5th Cir. Feb. 9, 2024).

Texas suggests (Br. in Opp. 19) that the Hobbs Act is unimportant. But the Hobbs Act provides the primary mechanism for judicial review of certain actions of several agencies—including the Federal Communications Commission and the Department of Transportation. See Pet. 5-6. And the Fifth Circuit has not articulated a basis for limiting the ultra vires exception to the Hobbs Act.

Texas asserts (Br. in Opp. 8-16) that this case would be a poor vehicle to consider the ultra vires exception because respondents were in fact parties aggrieved under the Hobbs Act. But the Fifth Circuit expressly declined to resolve that question, and its holding that respondents' challenges were reviewable rested entirely on the ultra vires exception. See Pet. App. 18a. In any event, respondents' argument that they are parties aggrieved is wrong and conflicts with numerous decisions of other courts of appeals. See pp. 6-8, *infra*.

2. In holding that the Commission lacks statutory authority to license temporary offsite storage of spent nuclear fuel, the Fifth Circuit acknowledged it was parting ways with the D.C. and Tenth Circuits. See Pet. App. 24a-25a (noting but declining to follow decisions from those courts). Contrary to respondents' assertion (Texas Br. in Opp. 32-33), those decisions did not rely

---

[1] The government has filed a petition for a writ of certiorari in that follow-on case asking that the petition be held pending the Court's disposition of this case. See Pet. 8, *United States Nuclear Regulatory Comm'n* v. *Fasken Land & Minerals, Ltd.*, No. 23-1341 (filed June 25, 2024).

on mere assumptions about the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* Both courts recognized, rather than simply assumed, that the Commission possesses "authority under the [Atomic Energy Act] to license and regulate private use of private away-from-reactor spent fuel storage facilities." *Bullcreek* v. *Nuclear Regulatory Comm'n*, 359 F.3d 536, 542 (D.C. Cir. 2004); see *Beyond Nuclear, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, No. 20-1187, 2024 WL 3942343, at *3-*4 (D.C. Cir. Aug. 27, 2024) (adopting that reading of *Bullcreek*); *Skull Valley Band of Goshute Indians* v. *Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004) (citing *Bullcreek* for the proposition that the Act confers such authority), cert. denied, 546 U.S. 1060 (2005). The brevity of the courts' analyses of that question does not negate the existence of a circuit conflict.

Respondents do not contest the practical significance of the merits question. The decision below effectively precludes the Commission from licensing private offsite storage within the Fifth Circuit. Respondents agree (Texas Br. in Opp. 20-21, 26; Fasken Br. in Opp. 15-17) that the question whether such storage may be licensed is important, and they do not dispute that the Commission and the nuclear-power industry have relied for more than 40 years on the potential availability of offsite storage. See Pet. 30-31; Nuclear Energy Inst. Amicus Br. 2-4, 12-15. Fasken suggests (Br. in Opp. 12-13) that offsite storage is relatively unimportant. But even on Fasken's count (*ibid.*), seven private licensed offsite storage sites are currently located at decommissioned nuclear facilities. The Fifth Circuit's decision casts doubt on the Commission's ability to renew such licenses because those facilities are no longer at the site of a nuclear reactor.

B. The Fifth Circuit Incorrectly Resolved Both Questions Presented

Respondents offer no persuasive defense of either of the Fifth Circuit's holdings.

1. a. Respondents barely defend the Fifth Circuit's ultra vires exception to the Hobbs Act's party-aggrieved requirement. See Texas Br. in Opp. 17-18; Fasken Br. in Opp. 32-33. That exception is inconsistent with the Hobbs Act's text and with basic principles governing adjudications. See Pet. 11-18.

Fasken's defense of the ultra vires exception (Br. in Opp. 32-33) relies solely on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), which is inapposite here. See Pet. 17-18. Texas argues that the Fifth Circuit "merely declined to read into the Hobbs Act an atextual exhaustion rule." Br. in Opp. 17 (emphasis omitted). But the "party aggrieved" requirement, 28 U.S.C. 2344, is scarcely atextual. Rather, it is a congressionally imposed limitation on the availability of judicial review, under which only "part[ies]" to certain agency proceedings may challenge the agency's "final order." *Ibid.*

Texas describes the ultra vires exception as "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." Br. in Opp. 17 (citing *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175 (2023)). But this case is entirely unlike *Axon*. The *Axon* plaintiffs filed suit in district court at the outset of the agency adjudications, seeking judicial orders that would prevent the adjudications from continuing. See 598 U.S. at 182. Texas, by contrast, filed a petition for review in the Fifth Circuit after the Commission's licensing adjudication had concluded, invoking the Hobbs Act provision that authorizes review of

the agency's "final order." 28 U.S.C. 2344. And the Fifth Circuit did not suggest that the Commission had "exceeded its authority" simply by conducting the adjudication; it instead held that "[t]he Commission has no statutory authority to issue the license," Pet. App. 21a. Such challenges to an agency's final order may be brought under the Hobbs Act—but only if the petitioner is a "party aggrieved." See, *e.g.*, *Huawei Techs. USA, Inc.* v. *FCC*, 2 F.4th 421, 435-447 (5th Cir. 2021).

b. In contending that they were entitled to invoke the Hobbs Act's judicial-review provision, respondents principally argue (Texas Br. in Opp. 8-16; Fasken Br. in Opp. 24-32) that they were actually parties to the Commission's adjudication of ISP's license application. The Fifth Circuit determined, however, that it "d[id]n't need to resolve" that issue "because the Fifth Circuit recognizes an exception to the Hobbs Act party-aggrieved status requirement that's dispositive." Pet. App. 18a. And although Judge Jones's opinion concurring in the denial of rehearing en banc concluded that respondents were parties aggrieved, only six of the 16 judges who voted on the en banc petition endorsed that view. See *id.* at 32a-33a. In any event, respondents are not parties aggrieved under the Hobbs Act; indeed, all other courts of appeals that have addressed arguments like respondents' have rejected them. See Pet. 19.

Fasken argues (Br. in Opp. 24-32) that its *attempt* to intervene made it a "party aggrieved" for all purposes, including challenging the final licensing decision. Persons that unsuccessfully seek to intervene in a Commission adjudication are "parties aggrieved" by the agency's denial of intervention and may obtain judicial review of *that denial*. But just as a person who is denied leave to intervene in a district court case cannot appeal that

court's merits decision, Fasken cannot appeal the Commission's decision to grant ISP a license unless and until Fasken is actually granted leave to intervene. Courts have consistently held that an agency's denial of an intervention motion permits review only of the intervention denial. See, *e.g.*, *Don't Waste Mich.* v. *U.S. Nuclear Regulatory Comm'n*, No. 21-1048, 2023 WL 395030, at *3 (D.C. Cir. Jan. 25, 2023) (per curiam); *National Parks Conservation Ass'n* v. *FERC*, 6 F.4th 1044, 1049 (9th Cir. 2021). And Fasken obtained such review in the D.C. Circuit—which upheld the denial of intervention. See Pet. 6-7.[2]

Fasken also suggests (Br. in Opp. 28) that the Commission's rules establishing criteria for intervention in the agency's adjudications are unfair and "unlawful." Under the Fifth Circuit's approach, however, the applicability of the ultra vires exception does not depend on whether the challenger attempted to intervene in the agency proceedings or on the agency's reasons for denying any such request. And Fasken has not previously challenged the legality of the Commission's intervention rules, either in its D.C. Circuit challenge to the

[2] Contrary to Fasken's suggestion (Br. in Opp. 26-27), the government did not act improperly regarding the various petitions for review arising from the adjudication of ISP's license. Fasken filed a petition for review of the denial of intervention in the D.C. Circuit before it petitioned for review of ISP's license in the Fifth Circuit. The government moved to transfer Fasken's Fifth Circuit petition to the D.C. Circuit, but the Fifth Circuit denied that motion. C.A. Doc. 198-2 (Aug. 25, 2023). And 28 U.S.C. 2112 does not specifically address how improperly filed petitions should be handled. The government viewed Texas's petition and New Mexico's Tenth Circuit petition as improperly filed (because those States were not parties to the agency proceedings) and accordingly moved to dismiss those petitions.

intervention denial or through any other avenue. In any event, Fasken's contention that it should have been allowed to intervene is not properly presented in Fasken's current challenge to the license itself.

Texas argues (Br. in Opp. 10) that it became a "party aggrieved" by commenting on the Commission's draft Environmental Impact Statement. But the term "party" has an established meaning in the adjudication context, and Texas's contention that a single comment gave it party status elides the distinction between parties and amici that is fundamental to adjudications. See Pet. 11-13, 18.

Citing cases that involved rulemakings, Texas suggests (Br. in Opp. 9-10, 15) that the term "party" in Section 2344 should be read broadly because the Hobbs Act applies to both rulemakings and adjudications. Courts of appeals have correctly recognized, however, that the requirements for "party" status under Section 2344 may vary depending on the type of agency proceeding involved. See Pet. 19 n.2. Texas also asserts (Br. in Opp. 12) that its broad reading of "party aggrieved" is necessary to ensure that "those harmed by [agency] action" can "hav[e] a day in court." But Congress's use of the term "party aggrieved" (rather than "person aggrieved," see Pet. 12) makes clear that *both* "aggrieve[ment]" (*i.e.*, harm) *and* "party" status are essential prerequisites to judicial review under Section 2344. 28 U.S.C. 2344. In any event, Texas *could have had* its day in court if it had intervened in the Commission proceedings.

2. a. In arguing that the Atomic Energy Act does not authorize the Commission to license private offsite storage of spent nuclear fuel, respondents largely re-

peat the Fifth Circuit's flawed reasoning. As the petition explains (Pet. 19-23), the Act authorizes the Commission to issue licenses to possess the components of spent nuclear fuel to assist "science or industry," 42 U.S.C. 2093(a)(4); "to carry out the purposes" of the Act, 42 U.S.C. 2073(a)(4); and to further "industrial uses" "or such other useful applications as may be developed," 42 U.S.C. 2111(a). Respondents assert that those provisions do not mention storage, Texas Br. in Opp. 22, and that they authorize licenses only for "productive use," Fasken Br. in Opp. 19. But because interim storage of spent nuclear fuel is essential to the generation of nuclear power, which the Atomic Energy Act is intended to facilitate, interim storage fits comfortably within the specified purposes for which possession of spent nuclear fuel may be licensed. See Pet. 20-21.

Respondents also do not persuasively explain how the Commission would be authorized to license private *onsite* storage of spent nuclear fuel under their reading of the Atomic Energy Act. Texas suggests (Pet. 23-24) that the Nuclear Waste Policy Act of 1982 (Policy Act), 42 U.S.C. 10101 *et seq.*, is the source of the Commission's authority to license onsite storage. But the Policy Act clearly reflects Congress's understanding that private onsite storage of spent nuclear fuel was *already* permissible under pre-Policy Act law. See, *e.g.*, 42 U.S.C. 10151(a) (congressional finding that "the effective use of existing storage facilities at the site of each nuclear power reactor" should be "maximiz[ed], to the extent practical").

Before the Policy Act was enacted, the only evident source of authority for the Commission to license onsite storage was the existing provisions of the Atomic En-

ergy Act. As the petition explains (Pet. 23-26), the Policy Act authorized the creation and use of *federal* storage facilities if specified requirements were met and contemplated the *continued* use of private onsite storage. Nothing in the Policy Act, however, gave the Commission *new* authority to license private parties to store spent nuclear fuel anywhere. Rather, the source of the Commission's authority to license private *onsite* storage was and still is the pre-existing Atomic Energy Act provisions described above. Because those provisions impose no geographic limits on the locations where storage may be licensed and contemplate that spent nuclear fuel may change hands, they are properly read to authorize licenses for private *offsite* storage as well. See Pet. 21.

b. Contrary to respondents' assertions, the Commission has never conceded that it lacks authority to license private offsite storage of spent nuclear fuel. Rather, the pre-Policy Act Commission Statement that Texas cites (Br. in Opp. 3 & n.1, 25) addressed licensing of *federal* away-from-reactor storage facilities for spent nuclear fuel generated by the Department of Energy (DOE). See *Nuclear Waste Management: Hearings Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works* (*Hearings*), 95th Cong., 2d Sess. 546 (1978) (referring to questions regarding "statutory authority for [Commission] licensing of DOE waste management facilities") (reproducing Commission Statement cited at Texas Br. in Opp. 3 n.1). And even as to that question, the Commission's Chairman explained in contemporaneous Senate testimony that, while the Commission "would welcome statutory language which would make this authority unmistaka-

bly clear," it "believe[d] that a fair reading of [then-current law] grant[ed] the Commission authority to license DOE away-from-reactor spent fuel facilities." *Hearings* 488 (statement of Joseph Hendrie). Since 1980, the Commission's regulations have expressly established licensing requirements for offsite private storage of spent nuclear fuel. See Pet. 3-4. The 1977 Federal Register notice that Texas cites (Br. in Opp. 3) did not suggest that the Commission lacked *statutory* authority to license such storage, but simply acknowledged the limits of "the Commission's regulations" at that time. 42 Fed. Reg. 34,391, 34,392 (July 5, 1977).

c. Respondents fault (Texas Br. in Opp. 1, 4-5, 26) the government for failing to establish a permanent repository for spent nuclear fuel at Yucca Mountain. But the Commission has expended substantially all of the funds appropriated to it to license that repository, and Congress has not appropriated additional funds for more than a decade. See *Texas* v. *United States*, 891 F.3d 553, 556-557 (5th Cir. 2018); *In re Aiken Cnty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) ("[I]f Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward."). In any event, the status of that facility is beside the point. Federal law treats permanent disposal and temporary storage differently and, regardless of the degree of progress made towards establishing a permanent federal repository, the Commission has statutory authority to license temporary private offsite storage of spent nuclear fuel.

d. Contrary to respondents' arguments (Texas Br. in Opp. 20-21, 26) the major-questions doctrine is inapplicable here. That a court's resolution of a particular legal issue will have important economic and political

consequences does not alone suffice to trigger the doctrine. See Pet. 26-27. Fasken frames the purported "major question" as "[w]here to store the nation's spent nuclear fuel." Br. in Opp. 15. All agree, however, that the Commission may license the temporary storage of spent nuclear fuel *at the site* of a nuclear reactor. The disputed issue is whether *offsite* storage is an *additional* legally available option. That issue has none of the hallmarks of a "major question," particularly where Commission regulations adopting the agency's current view of its statutory authority have been in effect for more than 40 years.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

SEPTEMBER 2024