Nos. 23-1300 and 23-1312

In the Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

INTERIM STORAGE PARTNERS, LLC, PETITIONER

v.

STATE OF TEXAS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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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 in No. 23-1300 were the respondents in the court of appeals. They are the United States Nuclear Regulatory Commission and the United States of America.

Respondents in No. 23-1300 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 in No. 23-1300 also include Interim Storage Partners, LLC, an intervenor-respondent in the court of appeals—and the petitioner in No. 23-1312.

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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In the Supreme Court of the United States

No. 23-1300

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 78 F.4th 827. The order of the court of appeals denying rehearing en banc (Pet. App. 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 (Pet. App. 31a-52a). The petitions for

writs of certiorari were filed on June 12, 2024, and were granted on October 4, 2024. The jurisdiction of this Court rests on 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*, 1a-27a.

STATEMENT

A. Legal Background

1. The Atomic Energy Act

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). The Act grants the Nuclear Regulatory Commission (Commission) "extensive and sometimes exclusive authority to regulate nearly every aspect of the nuclear fuel life cycle." *Virginia Uranium, Inc.* v. *Warren*, 587 U.S. 761, 768 (2019) (opinion of Gorsuch, J.). As amended, the Act generally prohibits certain activities absent a license issued by the Commission, while authorizing the Commission to license such activities as long as they comply with the agency's health, safety, common-defense, and security standards. The Act authorizes the Commission to issue licenses to possess or transfer 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."

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 approximately five years, after which it can either remain in the pool or be placed into "dry" storage. Office of Pub. Affairs, U.S. Nuclear Regulatory Commission, *2022-2023 Information Digest* 60-61 (Feb. 2023). Such spent nuclear fuel consists of source material, special nuclear material, and byproduct material. See 10 C.F.R. 72.3; see also Pet. App. 21a, 54a. To possess or transfer any amount of spent fuel, an individual or entity must obtain from the Commission a materials license to possess the spent fuel's components. The Commission can issue a single license for 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).

When nuclear power was first developed, the prevailing expectation was that spent nuclear fuel would be reprocessed. See *Idaho* v. *U.S. Dep't of Energy*, 945 F.2d 295, 298 (9th Cir. 1991), cert. denied, 504 U.S. 956 (1992). In the 1970s, however, reprocessing became infeasible for various reasons, see *ibid.*, and the Commission accordingly recognized that the nuclear power industry would need more space for temporary storage of spent

fuel, 45 Fed. Reg. 74,693, 74,693 (Nov. 12, 1980); see Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* 20 (Jan. 2012) (Blue Ribbon Commission Report).

Throughout the 1970s, the Commission repeatedly expressed its understanding that the agency's materials-licensing authority included the power to license storage of spent fuel either "onsite" or "offsite," *i.e.*, either at or away from the site of the nuclear reactor facility where the spent fuel was generated. See pp. 38-39, *infra*. In 1980, following notice-and-comment rulemaking, see 45 Fed. Reg. at 74,693, the Commission issued regulations that established licensing requirements for interim onsite or offsite storage of spent fuel, including "dry" storage as an alternative to pool storage. See 10 C.F.R. Pt. 72.

When adopting those regulations, the Commission invoked the statutory provisions just discussed—Sections 2073, 2092, 2093, 2111, and 2201(b)—as the basis for its formal process for licensing temporary storage of spent fuel. 45 Fed. Reg. at 74,699. The Commission emphasized that the new regulations applied only to "temporary storage," which the agency defined as "interim storage of spent fuel for a limited time only, pending its ultimate disposal." *Id.* at 74,694. 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. The Commission also made clear that it was not claiming new authority, but instead was "codify[ing] certain existing regulatory practices and better defin[ing] licensing requirements" for offsite storage. *Id.* at 74,693.

2. The Nuclear Waste Policy Act

a. Two years after the Commission promulgated the regulations described above, 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. 10101(9), 10131-10145. The Act also directed the Department of Energy (DOE) to provide limited interim storage of spent fuel if certain conditions were met. See 42 U.S.C. 10151-10157.

As relevant here, the Policy Act included a congressional finding that the private owners and operators of nuclear power plants "have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical," onsite storage, while "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." 42 U.S.C. 10151(a)(1) and (2).

The Policy Act did not otherwise address the Commission's authority to license private offsite or onsite storage of spent nuclear fuel. It did not modify the Atomic Energy Act provisions that authorized the Commission to license temporary possession of spent fuel, and it did not disturb the Commission's 1980 regulations.

b. 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 J.A. 305 (available in color at https://www.nrc.gov/docs/ML2111/ML21116A041.pdf). Pursuant to Commission licenses for offsite temporary storage, spent nuclear fuel is currently stored at eight privately owned nuclear reactor sites that have ceased all reactor operations. See *ibid.* (Big Rock Point, Fort Saint Vrain, Haddam Neck, Humboldt Bay, Maine Yankee, Rancho Seco, Trojan, Yankee Rowe). At three of those sites, the Commission has renewed the materials licenses that authorize the offsite storage of spent fuel after terminating the facilities licenses that had previously allowed the reactors to operate. See *ibid.* (Fort Saint Vrain, Trojan, Rancho Seco). The Commission has also issued four licenses authorizing private parties to temporarily store spent fuel at sites where no nuclear reactor has ever been located. See *ibid.* (GE Morris, Private Fuel Storage, Interim Storage Partners, Holtec).

Approximately 91,000 metric tons of spent fuel are currently in private storage, either at or away from the nuclear reactor sites where the spent fuel was generated, and civilian nuclear power plants create an additional 2000 metric tons of spent fuel each year. Office of Nuclear Energy, U.S. Dep't of Energy, *Spent Nuclear Fuel and Reprocessing Waste Inventory* 3, 12 (Aug. 2024) (Spent Nuclear Fuel Inventory); Blue Ribbon Commission Report 14. Approximately 1900 metric tons of spent fuel are currently stored away from the nuclear reactor sites where the spent fuel was generated, Spent Nuclear Fuel Inventory 6-7, 10, 12, and an additional 12,300 metric tons are stored at sites where reactors are no longer operational, *id.* at 6, 12.

Because the amount of spent fuel continues to grow, temporary storage of spent fuel remains necessary to facilitate ongoing operation of nuclear reactors and the decommissioning of retired reactors. See, *e.g.*, *Dairyland Power Coop.* v. *United States*, 645 F.3d 1363, 1367-1368 (Fed. Cir. 2011) (storage facility necessary to complete decommissioning); *Energy Nw.* v. *United States*, 641 F.3d 1300, 1303-1304 (Fed. Cir. 2011) (storage facility that allowed continued generation of power). Such storage is essential to continued operations because "no currently available or reasonably foreseeable reactor and fuel cycle technology developments" "have the potential to fundamentally alter the waste management challenge this nation confronts over at least the next several decades." Blue Ribbon Commission Report 100 (emphasis omitted).

c. 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). Congress has authorized the Commission to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of" the Atomic Energy Act. 42 U.S.C. 2201(p). Under the Commission's regulations, a person will be granted leave to intervene in a licensing proceeding if that 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).

3. The Hobbs Act

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" "for the granting, suspending, revoking, or amending" of a "license." 42 U.S.C. 2239(a)(1)(A) and (b)(1); see 28 U.S.C. 2342(4). The Act also gives the courts of appeals exclusive jurisdiction to review final orders and rules issued by several other federal agencies, including the Federal Communications Commission, the Department of Agriculture, the Department of Transportation, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, the Federal Maritime Commission, and the Surface Transportation Board, as well as final noncitizen removal orders. 28 U.S.C. 2342; see 8 U.S.C. 1252(a)(1); 42 U.S.C. 2000e-16c(c).

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 materials 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

"[w]ithin 60 days after the date of publication of this notice, any persons" "whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene." *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 (together, Fasken). The Commission denied those intervention requests. See, *e.g.*, *In re Interim Storage Partners LLC*, 93 N.R.C. 244 (2021); *In re Interim Storage Partners LLC*, 92 N.R.C. 463 (2020).

Previously in 2014 and 2015, Texas agencies and officials, including then-Governor Perry, had publicly expressed support for a private, offsite storage facility for spent fuel in Texas—which could help store spent fuel from the multiple nuclear power plants located in the State. J.A. 1-3, 6-11, 99-100; see Pet. App. 6a. After ISP applied for a license in 2018, 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. Two years after the deadline for seeking intervention, however, both Governor Abbott and the Texas Commission on Environmental Quality submitted comments on the draft Environmental Impact Statement (EIS) related to ISP's application. J.A. 115-122, 201-208; see 83 Fed. Reg. at 44,071. Ten months later—and days before the Commission ultimately issued the license—Governor Abbott sent a letter to the Commission about ISP's application. J.A. 215-220. None of Texas's submissions requested leave to intervene in the agency proceeding. See J.A. 115-122, 201-208, 215-220.

In September 2021, the Commission issued the materials license, which authorizes ISP to store up to 5000 metric tons of spent nuclear fuel for 40 years. Pet. App. 53a-59a; 86 Fed. Reg. 51,926 (Sept. 17, 2021). Before issuing the license, the Commission considered alternative storage options. J.A. 293-294. In issuing the license, the Commission concluded that "the activities authorized by this license can be conducted without endangering public health and safety"; that "such activities will be conducted in compliance with the Commission's regulations"; and that "[t]he issuance of this license will not be inimical to the common defense and security." J.A. 286; see J.A. 276, 290 (similar).

b. In addition to the court below, two other courts of appeals have issued decisions related to ISP's license. First, some of the putative intervenors, including Fasken, sought D.C. Circuit review of the Commission's orders denying their requests to intervene. The D.C. Circuit upheld those Commission orders. *Don't Waste Mich.* v. *U.S. Nuclear Regulatory Comm'n*, No. 21-1048, 2023 WL 395030, at *2-*3 (Jan. 25, 2023) (per curiam). The putative intervenors did not seek further review of that decision.

Second, New Mexico sought to challenge the Commission's licensing decision through a petition for review filed in the Tenth Circuit. Like Texas, New Mexico had not attempted to intervene in the Commission's adjudication; New Mexico instead had only commented on the draft EIS. *State ex rel. Balderas* v. *United States Nuclear Regulatory Comm'n*, 59 F.4th 1112, 1116 (10th Cir. 2023). The Tenth Circuit dismissed New Mexico's petition, concluding that New Mexico was not a party aggrieved under the Hobbs Act and that the court

should not recognize an ultra vires exception to the party-aggrieved limitation. *Id.* at 1116-1124.

2. Respondents petitioned for review of the ISP license in the Fifth Circuit, and the court ruled in their favor.

a. The Fifth Circuit held that it could consider respondents' claims even though respondents had not intervened in the agency proceedings. Pet. App. 14a-20a. The court first discussed whether respondents were "part[ies] aggrieved" under the Hobbs Act, 28 U.S.C. 2344. Pet. App. 15a-18a. The court suggested that, in order to acquire "party" status, "the Hobbs Act requires only that a petitioner have participated—in some way—in the agency proceedings," and that respondents may have adequately participated "through comments" and by "seeking intervention." *Id.* at 17a.

The Fifth Circuit ultimately "d[id not]" "resolve" the party-aggrieved issue, however, because the court had previously recognized an ultra vires exception to that requirement. Pet. App. 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 (brackets and citation omitted). The court held that, under that exception, it could review respondents' claims that the "Commission lacks the statutory authority to license" offsite storage. *Id.* at 20a.

b. On the merits, the Fifth Circuit held that the Commission "has no statutory authority to issue the license." Pet. App. 21a; see *id.* at 21a-30a. The court recognized that "there are thousands of metric tons of spent fuel in various sites where commercial reactors no longer operate." *Id.* at 6a. The court also recognized

that the Atomic Energy Act "confers on the Commission the authority to issue licenses for the possession of" special nuclear material, source material, and by-product material, and that those products "are constituent materials of spent nuclear fuel." *Id.* at 21a. The court concluded, however, 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, which authorizes the offsite storage of spent fuel. Pet. App. 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 fuel. *Id.* at 22a.

The Fifth Circuit further held that the Commission's issuance of offsite storage licenses "cannot be reconciled with" the Policy Act. Pet. App. 25a; see *id.* at 25a-29a. The court noted that the Policy Act requires the government to pursue a permanent repository to dispose of spent fuel and authorizes limited federal 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, that statute "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.

Although the Fifth Circuit viewed the statutory scheme as "unambiguous," Pet. App. 29a, it held that the Commission's interpretation would not be entitled to deference in any event based on the major questions doctrine, *id.* at 29a-30a.

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

Judge Jones, joined by five other judges, concurred in the denial of rehearing en banc. Pet. App. 33a-44a. Opining on the question the panel had declined to reach, she invoked the presumption of judicial review and concluded that respondents had sufficiently "'participated' in the proceeding" to be parties aggrieved under the Hobbs Act. *Id.* at 37a.

Judge Higginson, joined by three other judges, dissented from the denial of rehearing en banc. Pet. App. 45a-52a. He contrasted the Hobbs Act's "'party aggrieved'" requirement with "the broader judicial review provision of the Administrative Procedure Act under which a 'person' 'aggrieved by agency action' may petition for review." *Id.* at 48a (quoting 28 U.S.C. 2344 and 5 U.S.C. 702). In light of that plain-text distinction, he saw no basis for the panel's "troubling dicta" suggesting that respondents were "'part[ies] aggrieved.'" *Id.* at 45a (citation omitted).

Judge Higginson also criticized the panel's reliance on the ultra vires exception. He emphasized that the exception "arose from [the Fifth Circuit's] atextual dicta in a footnote over forty years ago"; had been consistently rejected by other courts of appeals; and would permit "courts [to] pick and choose when to abide by Congress's limits." Pet. App. 45a, 51a.

SUMMARY OF ARGUMENT

I. Under the Hobbs Act, only "part[ies] aggrieved" may file petitions for review of covered agency actions. 28 U.S.C. 2344. In the context of adjudications, the term "party" has a precise legal meaning, and generally refers to a person by or against whom a proceeding is

brought. Because none of the respondents in this case was admitted as a party to the Commission's licensing adjudication, none is a "party aggrieved" by the licensing decision under the Hobbs Act.

The Fifth Circuit's outlier ultra vires exception to the Hobbs Act's "party aggrieved" requirement is irreconcilable with the statutory text. It also is inconsistent with this Court's treatment of the Hobbs Act's other limitations, and with the rules that typically govern litigation in court. Even a narrow version of the exception would require courts 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. No one has offered a principled defense of the exception, which originated in dicta in a footnote in a 1982 Fifth Circuit decision and lacks any grounding in this Court's precedents.

Respondents primarily contend that they were in fact parties aggrieved under the Hobbs Act. That argument lacks merit. Texas did not become a party to the Commission's licensing adjudication by commenting on the Commission's draft EIS or sending a letter to the Commission. Fasken's unsuccessful attempt to intervene likewise did not make it a party for purposes of challenging the Commission's licensing decision. Respondents' contrary arguments are inconsistent with legal norms that govern adjudications generally, including the fundamental distinction between parties and amici.

II. The Atomic Energy Act authorizes the Commission to license temporary offsite storage of spent nuclear fuel, and the Policy Act does not disturb that authority.

A. Congress enacted the Atomic Energy Act to encourage private development of nuclear technology, including nuclear power. Nuclear power, in turn, generates spent nuclear fuel. The Atomic Energy Act authorizes the Commission to license the possession and use of spent fuel's three component parts, and the statutory provisions that confer that licensing authority do not limit storage or possession of nuclear materials to a specific location.

The Commission has consistently understood the Atomic Energy Act to authorize the agency to license offsite storage. The Fifth Circuit and respondents have identified nothing in the Act that distinguishes for relevant purposes between onsite and offsite storage. To the contrary, the textual analyses set forth in the court's opinion and respondents' filings logically suggest that the Atomic Energy Act does not authorize the Commission to license storage of spent fuel *anywhere*. That reading would entirely gut the Act because nuclear power plants cannot operate without creating spent fuel—and that fuel *must* be stored.

B. The Fifth Circuit construed the Policy Act to authorize the Commission to license temporary storage of spent nuclear fuel, but only at the site of a nuclear reactor. But the Policy Act did not give the Commission any new authority to license private storage of spent fuel, nor did it cut back on the authority the Commission already possessed. To the extent the Policy Act addresses licensing, it contemplates that licensing will be conducted under the framework laid out in the Atomic Energy Act. The Fifth Circuit and respondents rely on what they perceive to be the Policy Act's general purposes, but they identify no specific provision of the Act that precludes licensing of private offsite storage. Their

arguments also conflate *storage* and *disposal* of spent fuel and reflect a misreading of Commission documents.

C. The major questions doctrine is inapplicable where, as here, the statutory text is clear. In any event, the question of *where* spent fuel may be stored does not involve an extraordinary grant of regulatory authority, and the Commission has recognized and exercised its offsite licensing authority for decades.

ARGUMENT

I. RESPONDENTS DID NOT SATISFY THE STATUTORY PREREQUISITES FOR OBTAINING JUDICIAL REVIEW UNDER THE HOBBS ACT

The Hobbs Act limits judicial review to "part[ies] aggrieved" by an agency decision. 28 U.S.C. 2344. There is no textual basis for the Fifth Circuit's outlier ultra vires exception to that party-aggrieved requirement. Respondents primarily assert that they were in fact parties aggrieved under the Act. But Texas did not become a party to the Commission's licensing adjudication by submitting comments on the draft EIS and sending a letter to the Commission, and Fasken did not become a party by unsuccessfully seeking to intervene.

A. Under The Hobbs Act, Only Parties Aggrieved May File Petitions For Review

1. The Hobbs Act gives the courts of appeals exclusive jurisdiction to review certain final orders of specified agencies, including the Commission. 28 U.S.C. 2342. 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). Congress has enacted other statutory provisions that permit only "part[ies] aggrieved" to seek judicial review of specified agency actions. See, *e.g.*, 5 U.S.C. 1508 (determinations and orders of the Merit Systems Protection Board); 12 U.S.C. 1848 (orders of the Board of Governors of the Federal Reserve System); 19 U.S.C. 2395 (determinations of the Secretary of Commerce).

When Congress "employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'" *FAA* v. *Cooper*, 566 U.S. 284, 292 (2012) (citation and internal quotation marks omitted). In the context of adjudications, 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 omitted). "[A]ll others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties." *Ibid.*; see 7 *The Oxford English Dictionary* 515 (1933) (*Oxford*) (defining "party" as "[e]ach of the two or more persons (or bodies of people) that constitute the two sides in some proceeding, as the litigants in an action at law"); *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).

This Court has repeatedly treated the term "party" as a term of art that generally requires participation as a litigant in a proceeding. See, *e.g.*, *United States ex rel.*

Eisenstein v. *City of New York*, 556 U.S. 928, 932-933 (2009) (brackets and citation omitted) (explaining that "[a] 'party' to litigation is 'one by or against whom a lawsuit is brought,'" and that the government is not a "party" to a False Claims Act suit where it "has not exercised its right to intervene"); *Smith* v. *Bayer Corp.*, 564 U.S. 299, 313 (2011) (similar). The Court recently reiterated in a different context that "party" means "a person who constitutes" "one or the other of the two sides in an action or affair; one concerned in an affair; a participator." *Truck Ins. Exch.* v. *Kaiser Gypsum Co.*, 602 U.S. 268, 278 (2024) (brackets and citation omitted). The Court has also identified one important reason *why* party status matters: "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); see *United States ex rel. State of Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917).

2. Other federal statutory provisions 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, 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.). That inference is particularly appropriate because Congress enacted the Hobbs Act just four years after it enacted the APA. See Administrative Orders Review Act

of 1950, ch. 1189, 64 Stat. 1129; APA, ch. 324, 60 Stat. 237.

Section 8 of the Hobbs Act, 28 U.S.C. 2348, reinforces that understanding. That provision 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." *Ibid.* By contrast, other entities that were not parties before the agency "whose interests are affected by the order of the agency[] may intervene in any" court of appeals "proceeding to review the order." *Ibid.* In other words, Section 2348 "authorize[s] intervention by some people who had not participated in the administrative proceeding and who therefore could not have brought their own action for judicial review." Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 319 n.214 (2020). The Act's distinction between parties to an agency proceeding and nonparties that may intervene in the courts of appeals "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 reinforces the conclusion 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."

B. A Nonparty To An Agency Proceeding May Not Obtain Hobbs Act Review Of The Agency's Final Order, Even If That Order Is Alleged To Exceed The Agency's Authority

1. a. In exercising review authority here, the Fifth Circuit invoked a judge-made ultra vires exception to the Hobbs Act's party-aggrieved requirement. That approach disregarded the Hobbs Act's plain text. See pp. 16-19, *supra*. This Court has refused to adopt a similar exception to the Act's 60-day filing window that would have permitted "judicial review [to] be sought at any time" so long as an "agency order[]" is "*seriously* mistaken." *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 280 (1987). The Court has likewise held that litigants cannot evade the 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 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.

b. The ultra vires exception is also untethered to the norms that govern litigation in court. As discussed, a Commission licensing proceeding is an adjudication that involves the agency and a party seeking a license. A person with a sufficient interest may intervene and thereby become a party to a Commission proceeding,

with the concomitant 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. "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." *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 799 F.2d 317, 335 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987). The same is true of "review of administrative action." *Ibid.*

By undermining the norms of party litigation, 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 also "has grave consequences for regulated entities' settled expectations and careful investments in costly, time-consuming agency proceedings." Pet. App. 45a (Higginson, J., dissenting). Here, for example, after the Commission provided public notice of ISP's application, ISP proceeded through the regulatory approval process and license adjudication for more than three years, only to have its license invalidated at the behest of entities that never became parties to the agency proceedings. And because the Hobbs Act covers numerous agencies, the ultra vires exception threatens not only nuclear energy, but also "a wide range of industries—including agriculture, transportation, development, and communications." *Ibid.*

c. Implementing the Fifth Circuit's ultra vires exception would require judicial line-drawing that has little

connection to the substance of a claim. An agency might in some sense be said to exceed its authority whenever it takes an action that the applicable law forbids. On that view, "'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." *Chicago*, 799 F.2d at 335.

Alternatively, to prevent the ultra vires exception from swallowing the Hobbs Act's party-aggrieved limitation, 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 Pet. App. 51a-52a (Higginson, J., dissenting). Respondents' claims, for example, could be framed either as an assertion that the Commission has exercised a power it purportedly does not have (*i.e.*, the power to license possession for offsite storage of spent fuel) or as an assertion that the agency has unlawfully exercised a power that it does have (*i.e.*, the power to license private entities to possess spent fuel in some circumstances).

The distinctions the Fifth Circuit drew confirm that even a purportedly limited version of the ultra vires exception will require a court to engage in obscure and indeterminate line-drawing. The court reviewed respondents' claim that "the Commission lacks the statutory authority to license the facility"; found that it could review (but ultimately did not address) respondents' claim that a specific provision in the license violated the Policy Act; and found that it could not review other claims, including that "the license issuance violated the [APA]." Pet. App. 20a. All those claims could equally well be described either as claims that the Commission acted out-

side its statutory authority, or as claims that the Commission unlawfully exercised authority that it has. The availability of judicial review 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").

2. a. Neither the Fifth Circuit nor respondents have articulated a principled rationale for the ultra vires exception—which has been rejected by every other court of appeals to consider it.[*] The panel below merely cited two prior decisions in which the Fifth Circuit had "recognize[d] an *ultra vires* exception." Pet. App. 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. *Id.* at 85 n.4. Two years later, the court summarily noted that the exception existed before relying on it to review claims brought by nonparties. *Wales Transp., Inc.* v. *ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). Both decisions cited Interstate Commerce Commission (ICC) cases decided *before* Congress brought judicial review of ICC orders within the Hobbs Act's

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[*] See *State ex rel. Balderas* v. *United States Nuclear Regulatory Comm'n*, 59 F.4th 1112, 1123-1124 (10th Cir. 2023); *National Ass'n of State Util. Consumer Advocates* v. *FCC*, 457 F.3d 1238, 1249-1250 (11th Cir. 2006), cert. denied, 552 U.S. 1165 (2008); *Erie-Niagara Rail Steering Comm.* v. *Surface Transp. Bd.*, 167 F.3d 111, 112-113 (2d Cir. 1999) (per curiam); *Chicago*, 799 F.2d at 334-335.

ambit. See *American Trucking*, 673 F.2d at 85 n.4; *Wales Transp.*, 728 F.2d at 776 n.1; 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.* v. *Surface Transp. Bd.*, 167 F.3d 111, 112 (2d Cir. 1999) (per curiam).

b. Respondents likewise barely defend the ultra vires exception. Fasken argues (Br. in Opp. 33) that this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), supports the exception. But even where *Kyne* applies, it contemplates district court review under a generally applicable grant of authority. See *id.* at 187, 189. Respondents, by contrast, sought and obtained court of appeals review under a specialized statute that limits review to "part[ies] aggrieved." 28 U.S.C. 2344.

In any event, 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, *e.g.*, *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. Cf. *Port of Bos. Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970) (A person that "had every opportunity to participate" in agency proceedings and "then to seek timely review in the Court of Appeals"—but "chose not to do so"—"cannot force collateral redetermination of the same issue in a different and inappropriate forum."). When Fasken asserted a statutory right to intervene and the agency denied its intervention motion, the D.C. Circuit reviewed Fasken's assertion and concluded that Fasken was not entitled to intervene.

Texas describes *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), as allowing a nonparty to an agency proceeding "to challenge whether the Commission exceeded its authority by holding that proceeding in the first place." Br. in Opp. 17. But this case is entirely unlike *Axon*. The *Axon* plaintiffs filed suit in district court at the outset of the agency adjudications; asserted "that some fundamental aspect of the [agency's] structure violates the Constitution" and "made the entire proceeding unlawful"; argued that "being subjected to" "an illegitimate proceeding causes legal injury (independent of any rulings the [agency] might make)"; and sought judicial orders that would prevent the adjudications from continuing. 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 court below did not suggest that respondents were injured by the *proceedings* adjudicating ISP's license

application or that the Commission had "exceeded its authority," Texas Br. in Opp. 17, simply by conducting the adjudication; it instead held that "[t]he Commission has no statutory authority to *issue the license*," Pet. App. 21a (emphasis added). Such challenges to an agency's final order can be brought under the Hobbs Act—but only by a "party aggrieved."

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; it is an unambiguous statutory limitation on the availability of judicial review. Texas also claims that, in light of this Court's decision in *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024), "it would make little sense to imply an administrative-exhaustion requirement." Br. in Opp. 18. But enforcing the statutory party-aggrieved requirement does not "imply" anything. *Ibid.* And *Loper Bright* addressed the standards that a court in reviewing agency action should apply *where such review is authorized*. That decision has no bearing on the question whether respondents are entitled to Hobbs Act review in the first place.

C. Respondents Were Not "Part[ies]," Within The Meaning Of The Hobbs Act, To The Commission's Licensing Adjudication

Respondents principally argue (Texas Br. in Opp. 8-16; Fasken Br. in Opp. 24-32) that they were entitled to invoke the Hobbs Act's judicial-review provision because they were actually parties to the Commission's adjudication of ISP's license application. The Fifth Circuit panel found that it "d[id]n't need to resolve" that issue, Pet. App. 18a, and only six of the 16 judges who voted on the en banc petition endorsed respondents'

view, see *id.* at 32a-33a (Jones, J., concurring). Neither Texas nor Fasken was a party aggrieved.

1. The Commission uses adjudication to decide whether to grant an application for a nuclear materials license. See 5 U.S.C. 551(4)-(9); 42 U.S.C. 2231, 2239(a)(1)(A) and (B)(iv). Accordingly, a Commission licensing proceeding is an adjudication involving the agency and a party seeking a license. Under the Commission's intervention procedures for licensing adjudications, additional persons may request and obtain party status, present their concerns in evidentiary hearings, and seek judicial review of an adverse agency order. See 10 C.F.R. 2.309. A licensing proceeding therefore is akin to litigation between two parties, in which persons with a sufficient interest may intervene and (if necessary) seek further review.

Texas never sought to intervene in the Commission adjudication here, 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 Comm'n*, No. 21-1048, 2023 WL 395030, at *2-*3 (Jan. 25, 2023) (per curiam). Respondents therefore were not "part[ies] aggrieved" in the agency adjudication. 28 U.S.C. 2344.

2. Texas argues (Br. in Opp. 9-11) that it became a "party aggrieved" by commenting on the Commission's draft EIS, which the agency prepared to satisfy its obligations under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* That contention elides the distinction between parties and amici that is fundamental to adjudications. All courts of appeals that have

addressed the question have rejected arguments that comments on a draft EIS or comparable agency actions confer party status in an adjudication or similar Hobbs Act proceeding. See, *e.g.*, *State ex rel. Balderas* v. *United States Nuclear Regulatory Comm'n*, 59 F.4th 1112, 1117-1119 (10th Cir. 2023); *Ohio Nuclear-Free Network* v. *U.S. Nuclear Regulatory Comm'n*, 53 F.4th 236, 238-240 (D.C. Cir. 2022); *Packard Elevator* v. *ICC*, 808 F.2d 654, 656 (8th Cir. 1986), cert. denied, 484 U.S. 828 (1987).

Citing decisions 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. That argument is likewise misplaced. The courts of appeals have correctly recognized that the requirements for "party" status under the Hobbs Act may vary depending on the type of agency proceeding involved. See, *e.g.*, *Water Transp. Ass'n* v. *ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987). Under that approach, submitting a comment to an agency may be enough to make a person a "party" to an informal rulemaking. But the Commission uses adjudication as the mechanism for acting on materials-license applications, and it has established procedures through which persons may seek party status in those adjudications. See pp. 7, 27, *supra*. Just as sending the court a letter or submitting an amicus brief is not sufficient to obtain party status in judicial proceedings, Texas's comments on the Commission's draft EIS—and Governor Abbott's letter to the Commission—did not make Texas a party to the adjudication here.

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") makes clear that "aggrieve[ment]" (*i.e.*, harm) and "party" status are *both* essential prerequisites to Hobbs Act judicial review. 28 U.S.C. 2344. In any event, Texas *could have had* its day in court if it had intervened in the Commission proceedings.

3. Fasken argues (Br. in Opp. 24-32) that its *attempt* to intervene in the adjudication made it a "party aggrieved" for all purposes, including challenging the final licensing decision. But the Atomic Energy Act delineates the "process by which the Commission could make a 'person' a 'party' in the licensing proceeding context." Pet. App. 48a (Higginson, J., dissenting) (quoting 42 U.S.C. 2239(a)(1)(A)). 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. Cf. *Marino*, 484 U.S. at 304 ("[D]enials of" motions to intervene "are, of course, appealable."). If a court of appeals concludes that the Commission erred in denying intervention, it may require the Commission to reopen its proceeding and allow the person full party participation. See, *e.g.*, *S. C. Loveland Co.* v. *United States*, 534 F.2d 958, 963-964 (D.C. Cir. 1976) (requiring reopening).

Contrary to Fasken's argument, however, an *unsuccessful* attempt to intervene does not make a person a "party aggrieved" for purposes of challenging the final licensing decision. For Commission adjudications like this one, Fasken's approach 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. See *Eisenstein*,

556 U.S. at 933 ("[I]ntervention is the requisite method for a nonparty to become a party to a lawsuit."). In accord with those basic principles, 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.*, 2023 WL 395030, at *3; *National Parks Conservation Ass'n* v. *FERC*, 6 F.4th 1044, 1049 & n.4 (9th Cir. 2021).

Fasken also suggests that the Commission's rules establishing criteria for intervention in the agency's adjudications are unfair and "unlawful," and that the Commission is impermissibly "'control[ling] the courthouse door.'" Br. in Opp. 28, 30 (citation omitted). But while the Commission's intervention rules are judicially reviewable, Fasken has not previously challenged those rules in court, either directly or as applied in Fasken's D.C. Circuit challenge to the denial of its request to intervene in the ISP licensing adjudication. Fasken's contention that it *should have been* allowed to intervene is not properly presented in Fasken's current challenge to the license itself.

II. THE COMMISSION HAS STATUTORY AUTHORITY TO LICENSE TEMPORARY OFFSITE STORAGE OF SPENT NUCLEAR FUEL

In the nuclear age's infancy, Congress enacted the Atomic Energy Act to spur private industry to use nuclear energy for peaceful purposes, including to generate electricity. That effort succeeded. Today, nearly 20 percent of the Nation's electricity is generated by nuclear power, a low-cost, reliable, and 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?* (Feb. 29, 2024). And the use of nuclear power is expected to increase

significantly in the coming decades. See Office of Nuclear Energy, U.S. Dep't of Energy, *Newly Signed Bill Will Boost Nuclear Reactor Deployment in the United States* (July 10, 2024).

Nuclear power generates spent nuclear fuel. The Atomic Energy Act authorizes the Commission to license private entities to temporarily store spent fuel—both at and away from nuclear reactors. The Policy Act did not repeal, limit, or expand that authorization. The contrary views expressed by the Fifth Circuit and respondents lack any sound textual basis.

A. The Atomic Energy Act Authorizes The Commission To License Temporary Storage Of Spent Nuclear Fuel Away From Nuclear Reactors

1. The Atomic Energy Act's plain text authorizes offsite storage of spent fuel

a. The Atomic Energy Act gave 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); see *Train* v. *Colorado Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 5-6 (1976). The Atomic Energy Act establishes a default rule that broadly prohibits possession or transfer of the three basic types of material—special nuclear material, source material, and byproduct material—covered by the Act. 42 U.S.C. 2077(a), 2092, 2111(a). But the Act authorizes the Commission to grant licenses that allow possession, transfer, or use of those materials. 42 U.S.C. 2073(a), 2093(a), 2111(a). The upshot is that nuclear material is strictly regulated and controlled by the Commission through a chain of li-

censed custody, making the Commission generally responsible for ensuring the safe possession and use of nuclear materials in all locations at all times.

b. As enacted in 1954, the Atomic Energy Act did not define either "nuclear fuel" or what became known as "spent nuclear fuel," which results from irradiating nuclear material in a reactor. Spent nuclear fuel contains each of the three licensed materials—special nuclear material, source material, and byproduct material—whose possession and transfer the Commission is authorized to license. See 10 C.F.R. 72.3 (defining "[s]pent nuclear fuel"). The Atomic Energy Act provisions that authorize the storage of those materials unambiguously allow the Commission to grant licenses for their storage—and thus to grant licenses for storage of spent fuel—both at and away from the site of a reactor.

First, the Atomic Energy Act authorizes the Commission to license "possession" of special nuclear material "for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter." 42 U.S.C. 2073(a)(4). In this statutory context, the term "other uses" has a broad meaning that necessarily includes storing special nuclear material. Cf. *Dubin* v. *United States*, 599 U.S. 110, 118-119 (2023). The Commission may grant licenses that allow licensees to "transfer or receive [special nuclear material] in interstate commerce," or to "transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export" such material. 42 U.S.C. 2073(a). Temporary storage is a practical necessity in order for licensed persons to interact with special nuclear material in the enumerated ways. For example, a licensee can "possess" special nuclear material for any duration only if the licensee can safely store the material. *Ibid.* A licensee

that "receive[s] possession of or title to" special nuclear material likewise must ensure that the material is stored safely. *Ibid.*

Ensuring the safe storage of special nuclear material is also "appropriate to carry out the purposes" of the Atomic Energy Act. 42 U.S.C. 2073(a)(4). "'[A]ppropriate' is 'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors'" and "leaves agencies with flexibility." *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015) (citation omitted); see *Loper Bright Enters.*, 144 S. Ct. at 2263 (citing *Michigan*). Section 2073(a)(4)'s reference to "such other uses as *the Commission determines* to be appropriate," 42 U.S.C. 2073(a)(4) (emphasis added), confirms Congress's intent that the Commission would use its expertise and judgment.

A "primary purpose of" the Act "was, and continues to be, the promotion of nuclear power." *Pacific Gas*, 461 U.S. 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." 42 U.S.C. 2013(d); see 42 U.S.C. 2011. Safely storing spent fuel so that reactors can continue operating or can be safely decommissioned is "appropriate," indeed necessary, to achieve those purposes.

Reading Section 2073(a)(4)'s catchall language to permit the licensing of special-nuclear-material storage "bring[s] within [the] statute categories similar in type to those specifically enumerated." *Paroline* v. *United States*, 572 U.S. 434, 447 (2014) (citation omitted). The preceding sections cover three categories of use: certain "research and development activities," 42 U.S.C.

2073(a)(1); "use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134," 42 U.S.C. 2073(a)(2); and "use under a license issued pursuant to section 2133" for a production or utilization facility, including a nuclear power reactor, 42 U.S.C. 2073(a)(3). The Commission and its predecessor have licensed about one half of the nation's power reactors under the provision referred to in Section 2073(a)(2) and the remainder under the provision referred to in Section 2073(a)(3). See U.S. Nuclear Regulatory Comm'n, *List of Power Reactor Units* (Sept. 30, 2024). Because the spent fuel stored in a spent-fuel storage installation results from the activities referenced in two of the enumerated categories, such storage is "similar in type" to the activities expressly authorized in those categories. *Paroline*, 572 U.S. at 447 (citation omitted).

Second, the Atomic Energy Act authorizes the Commission to issue licenses for source material in the same enumerated categories for which the agency may license special nuclear material. 42 U.S.C. 2093(a)(1)-(3). And, similar to Section 2073(a), Section 2093(a) includes a provision that authorizes licenses "for any other use approved by the Commission as an aid to science or industry." 42 U.S.C. 2093(a)(4).

The term "any other use approved by the Commission" is a capacious phrase that authorizes the Commission to exercise its expertise and judgment to advance the purposes of the Atomic Energy Act. 42 U.S.C. 2093(a)(4). The plain meaning of "[a]id" is "[h]elp, assistance, support." 1 *Oxford* 194. And "industry" includes the nuclear power industry because power reactors are expressly covered by Section 2093(a)(2) and (3),

and because one of the Act's central purposes is to facilitate development of nuclear energy. Storing spent fuel away from a power reactor "[h]elp[s]," "assist[s]," and "support[s]" *ibid.*, the nuclear power "industry," 42 U.S.C. 2093(a)(4), by offering the persons who operate power reactors a place to store the source material contained in spent fuel.

Third, the Atomic Energy Act authorizes the Commission to issue licenses to those "seeking to use byproduct material for research and development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed." 42 U.S.C. 2111(a). That provision generally tracks the categories covered by Sections 2073(a) and 2093(a). "[I]ndustrial" means "[p]ertaining to" and "resulting from" "industry." 5 *Oxford* 236. Storing byproduct material is a "use" of the material that pertains to and results from the nuclear power industry, and it also is a "useful application[]" of byproduct material because it permits continued reactor operations and decommissioning of closed reactor sites. 42 U.S.C. 2111(a).

In short, the Atomic Energy Act's plain language ties possession of the three components of spent nuclear fuel to uses that advance the Act's statutory purposes—including the central purpose of safely facilitating nuclear power generation. Power generation would be impossible without the safe storage of spent fuel. And nothing in the Act limits storage (or possession more generally) of nuclear materials to a specific location.

2. The Atomic Energy Act's structure and purposes, and the Commission's longstanding interpretation, support the agency's claim of authority to license offsite storage of spent fuel

a. The Atomic Energy Act's materials-licensing provisions impose no geographic or location-based limits. Rather, the provisions contemplate licenses under which materials will be transported between locations, change hands, and even switch legal ownership. Thus, 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" "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 authorized broad geographic movement of those materials, without distinguishing between materials located at a nuclear reactor site and those located elsewhere.

b. The Commission's separate licensing authority for facilities reinforces the agency's materials-licensing authority. Congress has barred private entities from manufacturing or operating utilization or production facilities without a license, 42 U.S.C. 2131, while authorizing the Commission to issue "facilities licenses" for such facilities, 42 U.S.C. 2133, 2134(a) and (b). A "production facility" is equipment or a device that is capable of producing special nuclear material, and a "utilization facility" is equipment or a device, including a nuclear

power reactor, that makes use of special nuclear material. 42 U.S.C. 2014(v) and (cc). Even when the Atomic Energy Act requires a facilities license, such as to operate a nuclear power plant, the licensee must also obtain materials licenses to possess nuclear fuel and spent fuel, though the Commission issues all the licenses in the same document. See 42 U.S.C. 2201(h); see also, *e.g.*, 56 Fed. Reg. 55,695, 55,695 (Oct. 29, 1991); *In re Consolidated Edison Co. of New York, Inc.*, 2 A.E.C. 30, 41-42 (1962).

The Atomic Energy Act does not require a facilities license for any other type of "facility" that houses nuclear fuel. For example, a fuel fabrication facility converts enriched uranium into fuel for nuclear reactors, which is a vital step in the nuclear-fuel cycle. See U.S. Nuclear Regulatory Comm'n, *Stages of the Nuclear Fuel Cycle* (Dec. 2, 2020). But a fuel fabrication facility is *not* a production or utilization facility under the Act, so the Commission issues it a materials license but not a facilities license. See, *e.g.*, 87 Fed. Reg. 56,987 (Sept. 16, 2022). The same holds true for the other types of facilities that are essential to the generation of nuclear power but are licensed only under the Commission's materials-licensing authority. See, *e.g.*, U.S. Nuclear Regulatory Comm'n, *Locations of Fuel Cycle Facilities* (Sept. 1, 2023).

The Commission's authority to license the possession of materials at such facilities confirms that the Commission's materials-licensing authority sweeps well beyond the licensing of nuclear power plants. Contra Texas Br. in Opp. 27-29. Accordingly, the Commission has permissibly used its materials-licensing authority to license possession of materials for both offsite and onsite storage of spent fuel.

c. The Commission has consistently understood the Atomic Energy Act to authorize it to license the offsite storage of spent nuclear fuel. In 1971, the Commission's predecessor issued an Atomic Energy Act materials license to General Electric Company to store spent fuel at a standalone facility after the company abandoned its plans to operate a reprocessing facility. See *In re General Elec. Co.*, 22 N.R.C. 851 (1985). In 1974, the Commission's predecessor issued guidance discussing the licensing process for an "independent spent fuel storage installation." Directorate of Regulatory Standards, U.S. Atomic Energy Comm'n, *Regulatory Guide* 1 (Dec. 1974). The agency noted that such an installation would be "independent and separate from either a nuclear power plant or a fuel reprocessing plant" and "would be licensed under" the then-existing regulations for materials licenses. *Ibid.*

Throughout the 1970s, the Commission repeatedly indicated in other documents that it was authorized to license offsite storage of spent fuel. For example, in a notice of intent to prepare a generic environmental impact statement, the agency emphasized that one option to "increas[e] spent fuel storage capacity" was to "[l]icens[e]" "independent spent fuel storage facilities" away from nuclear reactors—which the Commission was already authorized to "address" "within the context of individual licensing reviews." 40 Fed. Reg. 42,801, 42,802 (Sept. 16, 1975). And the Commission's Atomic Safety and Licensing Appeal Board recognized when licensing a nuclear power plant that spent nuclear fuel generated by the facility could be "stor[ed] in offsite facilities" owned by private parties. *In re Kansas Gas & Elec. Co. Kansas City Power & Light Co.*, 5 N.R.C. 301, 321 (1977), aff'd, 7 N.R.C. 320 (1978).

That consistent approach culminated in the Commission's 1980 regulations establishing a formal process for licensing temporary storage of spent fuel, both at and away from nuclear reactors. See p. 4, *supra*. Two years later, the Commission relied on those regulations to issue a renewed materials license for the GE Morris offsite storage facility. *In re General Elec. Co.*, 15 N.R.C. 530 (1982). Since that time, the Commission has repeatedly licensed possession of spent fuel at independent storage installations, including at locations where no nuclear reactor is currently in operation and where no nuclear reactor has ever been in operation. See pp. 5-6, *supra*. The Commission's consistent interpretation of the Atomic Energy Act confirms that the Act authorizes the Commission to license the offsite storage of spent fuel.

3. The Fifth Circuit's and respondents' contrary analyses lack merit

Neither the Fifth Circuit nor respondents have offered a coherent competing interpretation of the Atomic Energy Act's materials-licensing provisions.

a. Because nuclear power plants cannot operate without creating spent fuel, issuance of facilities licenses for such plants would serve no practical purpose unless the Commission can also license the storage of spent fuel *somewhere*. The Fifth Circuit stated that "the Atomic Energy Act doesn't authorize the Commission to license a private, *away-from-reactor* storage facility for spent nuclear fuel." Pet. App. 29a (emphasis added). But neither the court nor respondents have explained how the Commission would be authorized to license private *onsite* storage of spent nuclear fuel under their view of the Atomic Energy Act. The court found

that the Act does not "encompass storage" of "spent nuclear fuel," *id.* at 22a; Texas argues that the Act "nowhere authorizes issuance of a materials license to possess spent nuclear fuel for any reason," Br. in Opp. 22; and Fasken claims that storage of spent fuel is impermissible because storage "keep[s] spent nuclear fuel from any use at all," Br. in Opp. 14. The logical import of those positions is that neither offsite nor onsite storage of spent fuel can be licensed under the Atomic Energy Act. And neither the court nor respondents have identified any provision of the Act that distinguishes between onsite and offsite storage.

b. The Fifth Circuit reasoned that Sections 2073(a)(4) and 2093(a)(4) were limited by the "more specific purposes listed" in Sections 2073(a)(1)-(2) and 2093(a)(1)-(2), which refer to "certain types of research and development." Pet. App. 22a. But that reading 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). That rule of construction is particularly salient here because Congress added Section 2073(a)(4) in 1958, four years after the enactment of the Atomic Energy Act, to *expand* the Commission's licensing authority. Act of Aug. 19, 1958, Pub. L. No. 85-681, § 1, 72 Stat. 632.

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 use of by-

product materials for industrial purposes and other useful applications—the court focused on Section 2111(b) and (c), which address *disposal* of low-level radioactive waste. Pet. App. 23a-24a. The court appears to have concluded that subsection (a) cannot be read to allow storage of spent fuel because subsections (b) and (c) address low-level radioactive waste, which "emit[s] radiation for significantly less time than spent nuclear fuel." *Id.* at 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.

c. Fasken argues (Br. in Opp. 14) that the Atomic Energy Act's materials-licensing provisions authorize licenses only for an "active, productive use." That limitation is untethered to the Act's text, which authorizes the Commission to issue licenses to "possess" or "own" nuclear materials for "other uses" that "carry out the purposes" of the Act, 42 U.S.C. 2073(a)(4), and as an "aid" to "industry," 42 U.S.C. 2093(a)(4). If Fasken's argument were correct, it would equally preclude any Atomic Energy Act licenses for *onsite* storage of spent nuclear fuel. But it would make no sense for Congress to authorize Commission licenses for the activities that *create* spent fuel without authorizing licenses for the continued *possession* of that material.

d. Texas suggests that, although the Atomic Energy Act authorizes the Commission "to license possession of 'byproduct material,' 'source material,' and 'special nuclear material,'" the Act does not authorize licenses for storage of spent nuclear fuel. Br. in Opp. 29 (citation omitted). As Texas recognizes, however, byproduct material, source material, and special nuclear material are the three "'constituent materials of spent nuclear fuel.'"

Ibid. (quoting Pet. App. 21a). Nothing in the Act's text suggests that a license for possession of the three constituent materials is insufficient to authorize the possession of spent nuclear fuel. Rather, the Act specifically provides that the Commission may issue a single license authorizing the possession of all three components. See 42 U.S.C. 2201(h). And in 1980, Congress amended the Act to make it a crime to intentionally destroy or damage "any nuclear waste storage facility licensed under this Act" or "any spent nuclear fuel from such a facility." Act of June 30, 1980, Pub. L. No. 96-295, § 204(a), 94 Stat. 787. That provision confirms Congress's understanding that the Commission may license the possession of spent fuel. Texas's argument also improbably suggests that, although Congress intended the Atomic Energy Act to provide a comprehensive framework for federal regulation of nuclear materials, the Act failed to address spent fuel—including by failing to generally prohibit its possession and by failing to account for *onsite* storage.

B. The Policy Act Took As Its Starting Point, And Preserved Intact, The Commission's Authority Under The Atomic Energy Act To License Private Temporary Offsite Storage Of Spent Nuclear Fuel

The Policy Act neither limited, repealed, nor expanded the Commission's authority under the Atomic Energy Act to license private storage of spent nuclear fuel. Rather, the Policy Act addressed separate issues. To the extent the Act touches on private storage, it confirms the Commission's authority to license private offsite storage.

1. a. The Policy Act did not vest the Commission with *any* type of new licensing authority. See 42 U.S.C.

10101 *et seq.* Instead, to the extent the Policy Act mentioned licensing, it contemplated that certain *federal* facilities would be licensed under the same preexisting Atomic Energy Act materials-licensing provisions that govern licenses for private storage. See 42 U.S.C. 5842(3), 10161(d). The stark absence of licensing authority in the Policy Act contrasts with the Atomic Energy Act's clear licensing provisions, in which Congress used plain language that expressly "authorized" the Commission to "issue licenses" to possess and use materials. See, *e.g.*, 42 U.S.C. 2073(a).

"Congress legislates against the backdrop of existing law," *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 587 U.S. 601, 611 (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 preexisting Atomic Energy Act provisions that authorize the Commission to license offsite storage of spent fuel. Just two years before Congress enacted the Policy Act, the Commission had promulgated regulations that created a framework for both onsite and offsite temporary storage. See p. 4, *supra*. 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 Comm'n*, 359 F.3d 536, 542 (D.C. Cir. 2004).

b. The Policy Act instead addressed specific issues distinct from the licensing of private temporary offsite storage of spent fuel. For example, the Act authorized an interim storage program, which was never implemented, that would have allowed limited *federal* storage

as a backstop to private storage. See 42 U.S.C. 10151-10157. The Act also 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.

In enacting those provisions, Congress did not override or restrict the Commission's preexisting Atomic Energy Act authority to license temporary offsite storage of spent nuclear fuel. For example, although the Policy Act authorized a federal interim storage program, that statute included a congressional "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). Another statutory finding explained that federal interim storage was intended "to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent fuel storage capacity at the site of such reactor." 42 U.S.C. 10151(b)(2).

Consistent with those findings and purposes, the Policy Act prioritized private onsite storage over federal storage, but it did not prohibit private offsite storage or limit the Commission's preexisting authority to license such storage. The Policy Act's only specific reference to private offsite storage of spent fuel states 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). In disclaiming any implication that the Policy Act itself "encourage[d]" or "require[d]" private offsite storage, *ibid.*, Congress did not prohibit or restrict such storage, but simply left in place the Commission's preexisting licensing authority under the Atomic Energy Act.

2. Neither the Fifth Circuit nor respondents have identified any Policy Act provision that bars the Commission from licensing offsite storage of spent fuel.

a. The Fifth Circuit primarily relied on what it perceived to be the "Congressional policy expressed in" and the "historical context surrounding" the Act. Pet. App. 21a. Based on its understanding of the Policy 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. But absent any specific Policy Act provision that could reasonably be construed to prohibit offsite storage of spent 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.

In any event, the licensing of private offsite storage does not contravene the general purposes that Congress identified. Since the Policy Act was enacted, most power reactor licensees have substantially expanded their onsite storage capacity; indeed, all but one nuclear

reactor has an onsite independent spent-fuel storage installation. U.S. Nuclear Waste Technical Review Bd., *Commercial Spent Nuclear Fuel* 1-2 & n.4 (Rev. 2, Jan. 2022). But if those onsite storage options are exhausted or become too expensive, transferring spent fuel to offsite storage promotes ongoing reactor operations, which the Policy Act itself is intended to facilitate. See 42 U.S.C. 10151(a)(3) and (b)(2).

The Fifth Circuit also suggested (Pet. App. 27a-28a) that the Policy Act provisions codified at 42 U.S.C. 10151-10157 are *themselves* the source of the Commission's authority to license private *onsite* storage of spent nuclear fuel. Based on that premise, the court suggested that the Policy Act's failure to affirmatively authorize private offsite storage means that such storage is prohibited. See Pet. App. 29a. The relevant Policy Act provisions, however, did not vest the Commission with *new* authority to license private onsite storage; they instead reflected Congress's understanding that such storage was already permissible. See, *e.g.*, 42 U.S.C. 10151(a)(1) (congressional finding that owners and operators of nuclear power plants should "maximiz[e], to the extent practical, the effective use of *existing* storage facilities at the site of each civilian nuclear power reactor") (emphasis added). And as explained above, the preexisting Atomic Energy Act provisions that authorize the Commission to issue materials licenses do not distinguish between onsite and offsite storage.

b. Fasken suggests (Br. in Opp. 18) that, under Section 10151, interim storage can occur only at the site of a nuclear reactor *or* at a federal storage facility. But Section 10151 does not prohibit (or even explicitly address) private offsite storage. To the extent that provi-

sion is relevant here at all, Congress's apparent recognition of "practical" limits on how much fuel can be stored onsite, 42 U.S.C. 10151(a)(1) and (b)(1), suggests a potential need for private offsite storage as an alternative to onsite and federal storage.

c. Contrary to Texas's assertions (Br. in Opp. 3 & n.1, 25), the Commission has consistently recognized and exercised its authority to license private offsite storage of spent fuel. See pp. 4, 38-39, *supra*. The pre-Policy Act Commission statement that Texas cites addressed licensing of *federal* away-from-reactor storage facilities for spent nuclear fuel generated by DOE. See *Nuclear Waste Management: Hearings Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 95th Cong., 2d Sess. 546 (1978) (*Hearings*) (referring to questions regarding "statutory authority for [Commission] licensing of DOE waste management facilities") (reproducing the Commission statement Texas cites). 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 unmistakably clear," the agency "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). 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 then-existing limits of "the Commission's regulations." 42 Fed. Reg. 34,391, 34,392 (July 5, 1977).

Texas also faults (Br. in Opp. 1, 4-5, 26) the government for failing to establish a permanent repository for

spent fuel at Yucca Mountain. But the Commission has expended substantially all 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 fuel.

C. The Major Questions Doctrine Is Inapplicable

The major questions doctrine has no role to play here because the statutory text and context clearly authorize the Commission to license offsite storage of spent fuel. In any event, the 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).

None of those circumstances is present here. Storage of spent nuclear fuel lies at the heart of the Commission's expertise and congressionally assigned role, and the Commission has clear 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." *West Virginia*, 597 U.S. at 723. That is particularly so because the Commission has issued such licenses for more than 40 years. Cf. *National Fed'n of Indep. Bus.* v. *Department of Labor, Occupational Safety & Health Admin.*, 595 U.S. 109, 119 (2022) (per curiam) (applying the major questions doctrine where the agency had "never before adopted" a "regulation of this kind"). And even assuming that temporary storage of spent 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.

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." Pet. App. 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 superintending the *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."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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APPENDIX

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 Commission'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

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[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 established 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 provide adequate storage capacity at the sites of such re-

actors 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. The restriction in the preceding sentence shall only apply until such time as the Secretary decides that such

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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.

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 sponsoring re-

questor/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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