Nos. 23-1300, 23-1312

IN THE

Supreme Court of the United States

NUCLEAR REGULATORY COMMISSION, *et al.*,

Petitioners,

v.

TEXAS, *et al.*,

Respondents.

INTERIM STORAGE PARTNERS, LLC,

Petitioner,

v.

TEXAS, *et al.*,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* HOLTEC INTERNATIONAL IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

INTEREST OF AMICUS CURIAE

Holtec International (Holtec)[1] is the owner and licensee of a spent fuel storage facility license issued by the Nuclear Regulatory Commission (the "Commission"[2] or "NRC") and vacated by the Fifth Circuit in *Fasken Land & Minerals, Ltd. v. NRC*, No. 23-60377, 2024 WL 3175460, at *1 (5th Cir. Mar. 27, 2024) (per curiam). Holtec and the Federal Government have filed pending petitions for certiorari on that decision. See Docket Nos. 23-1341, 23-1352.

The Fifth Circuit decision vacating Holtec's license was a summary decision based entirely on the erroneous decision in *Texas v. NRC*, ISP. Pet. App. 1a-31a,[3] on review here. As a result, resolution of this case will also decide whether the Fifth Circuit had the right to hear the case challenging Holtec's license and whether Holtec has a valid Commission license for its own facility.

Holtec is filing this amicus brief for two reasons: first, to explain how the Fifth Circuit decision in this case has subjected Holtec's license to needlessly

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to its preparation or submission.

[2] Both the NRC and its predecessor, the Atomic Energy Commission, are referred to as the "Commission" herein.

[3] This amicus brief incorporates by reference the appendix filed by Petitioner Interim Storage Partners in conjunction with its Petition for Review. All citations to "ISP. Pet. App." refer to such appendix submitted by the Petitioner found within Docket No. 23-1312.

duplicative litigation in multiple circuit courts, and second, to provide legislative history and historical context behind both the Atomic Energy Act and the Nuclear Waste Policy Act beyond that included in the Interim Storage Partners' ("ISP's") and the Federal Petitioners' briefs.

SUMMARY OF ARGUMENT

For over six years, a single challenger has forced Holtec to defend its spent fuel storage license in repeated and often meritless litigation spanning multiple jurisdictions. Fasken Land and Minerals and Permian Basin Land and Royalty Owners ("Fasken") first filed a procedurally-improper motion with the Commission to dismiss Holtec's license application on September 14, 2018—asserting that the Commission lacked the authority to issue Holtec's license. Fasken then filed numerous other contentions against the license over the next several years, continually disregarding Commission procedures while polishing and reusing repetitive and untimely claims, before pursuing Commission appeals in an equally haphazard fashion. The Commission rightfully rejected each of Fasken's challenges, and Fasken sought review of these Commission's decisions in the D.C. Circuit in July 2021 as allowed under the Hobbs Act. See Petition for Review, *Fasken Land & Minerals, Ltd. v. NRC*, No. 21-1147 (D.C. Cir. July 25, 2021), ECF No. 1904236.

The D.C. Circuit independently reviewed and affirmed these Commission decisions on appeal, finding that "the Commission reasonably determined that Fasken did not meet [the Commission's] regulatory criteria because the contentions were procedurally defective, untimely, and immaterial."

Beyond Nuclear, Inc. v. NRC, 113 F.4th 956, 970 (D.C. Cir. 2024). Fasken did not seek rehearing or petition for certiorari of this decision.

This should have marked an end to Fasken's litigation on the Holtec license. But Fasken did not rest upon its Hobbs Act challenge in the D.C. Circuit. Fasken took another bite at the apple, pursuing a second, parallel circuit court challenge—two years after initiating the first—in the Fifth Circuit. There, Fasken finally freed itself from its numerous procedural and substantive failings before the Commission and succeeded in vacating the Holtec license. *Fasken Land & Mins.*, 2024 WL 3175460 at *1.

"If at first you don't succeed, try, try again," should not be a viable litigation strategy for judicial review of Commission decisions under the Hobbs Act. The Hobbs Act has a number of procedural guardrails intended to prevent multiple, staggered proceedings in the circuit courts. The only reason that Fasken was able to take its opportunistic approach in Holtec's case is because the Fifth Circuit decision in *Texas* jettisoned those guardrails in cases where a litigant alleges that the agency has exceeded its statutory authority.

That cannot be right. The Hobbs Act does not turn off when a litigant challenges an agency's interpretation of its statutory authority. To decide otherwise would engender chaos. If this Fifth Circuit decision were to become governing law for the circuit courts, then a litigant like Fasken could always file two challenges in parallel, limited only by the generous venue provision of the Hobbs Act which allows litigation in either the D.C. Circuit or the

petitioner's home circuit. In cases with multiple litigants, even more circuit courts could be brought into the fray. Multiple courts would then have to hear the case based solely on an allegation that the agency acted outside its statutory bounds.

Such a system would risk causing a disproportionate number of circuit splits, as different circuits hearing simultaneous challenges may come to differing conclusions on the extent of an agency's authority—as happened to Holtec. While the Fifth Circuit decided that the Commission acted outside its statutory authority under the Atomic Energy Act, the D.C. Circuit ruled the opposite when deciding the first-filed proceeding on the Holtec license. For this reason alone, the decision below should be overturned.

The *Texas* decision cannot be further justified by claiming that the Commission acted well outside of its statutory authority. In fact, the legislative histories of both the Atomic Energy Act and the Nuclear Waste Policy Act demonstrate that the Commission was acting well within the bounds of its statutory authority in issuing licenses for spent fuel storage. This brief includes a detailed recounting of those legislative histories supporting the Commission's authority to issue licenses for uses like spent fuel storage, well beyond the history incorporated into ISP's and the Federal Petitioners' briefs.

For these reasons, the decision below should be overturned.

ARGUMENT

I. The Fifth Circuit's Hobbs Act Ruling Has Subjected Holtec To Unnecessary And Repetitive Multi-Circuit Litigation.

The Hobbs Act, 28 U.S.C. 2341 *et seq.*, governs judicial review of the orders of several federal agencies, including the Commission, and allows "part[ies] aggrieved by [a] final [agency] order" to "file a petition to review . . . in the court of appeals" of the agency order "within 60 days after" the order is issued. 28 U.S.C. § 2344. In this case, however, the Fifth Circuit applied "an exception" to these requirements "where 'the agency action is attacked as exceeding [its] power.'" See ISP. Pet. App. 19a. The Fifth Circuit then applied this exception to Holtec's case, allowing Fasken to challenge the Commission's issuance of the Holtec license despite Fasken's ongoing Hobbs Act challenge in the D.C. Circuit. This result demonstrates how the Fifth Circuit's *ultra vires* exception to the Hobbs Act was (and can be) used as an end run around the requirements of the Hobbs Act. Fasken was allowed to pursue multiple claims against a single agency action in multiple circuit courts, with no regard for the Hobbs Act's 60-day filing deadline, subjecting the Holtec license to unnecessary litigation and creating an open conflict between two circuits on the license itself.

A. Fasken Has Subjected The Holtec License To Repetitive And Unnecessary Litigation Across Multiple Circuit Courts.

1. Holtec's licensing journey started in early 2018, when the Commission first docketed its spent fuel storage license application in the Federal Register. 78

Fed. Reg. 12,034 (Mar. 18, 2024). Shortly after, the Commission started the public engagement process needed to develop an environmental impact statement, soliciting comments and holding public meetings. See, *e.g.*, 83 Fed. Reg. 13,802 (Mar. 30, 2018); 83 Fed. Reg. 14,897 (Apr. 6, 2018); 83 Fed. Reg. 22,714 (May 16, 2018).

After months of public engagement, the Commission started the adjudicatory proceeding for the Holtec license on July 16, 2018, by publishing a notice in the Federal Register. See 83 Fed. Reg. 39,919 (Jul. 16, 2018). This notice provided the public an opportunity to participate by: (1) requesting a formal evidentiary hearing to challenge Holtec's application; and (2) petitioning for leave to intervene in the proceeding. *Id.*

Fasken responded to this notice on September 14, 2018, by filing a procedurally improper motion to dismiss Holtec's license application based on the Commission's asserted lack of authority to issue the Holtec license. The Secretary of the Commission generously treated this motion as a petition to intervene, a hearing request, and a proposed contention. Thus, Fasken's first proffered contention in the Commission proceeding alleged that the Holtec application should be rejected because it purportedly contemplated storage contracts with the U.S. Department of Energy and such contracts would be illegal under the Nuclear Waste Policy Act. *In re Holtec Int'l*, CLI-20-04, 91 NRC 167, 173-174 (Apr. 23, 2020). Other organizations, Beyond Nuclear and Sierra Club filed similar claims. *Id.*

An Atomic Safety and Licensing Board appointed by the Commission rejected Fasken's contention, and

Fasken appealed that decision to the Commission itself. *Id.* at 175-176. On April 23, 2020, the Commission affirmed the Board decision rejecting these claims because "the license itself would not violate the [Nuclear Waste Policy Act] by transferring the title to the fuel" to Department of Energy and that Act "does not prohibit a nuclear power plant licensee from transferring spent nuclear fuel to another private entity." *Id.* at 176.

After the Board decided these initial contentions and terminated the adjudicatory proceeding, Fasken attempted to file several new contentions "primarily claiming that Holtec's application did not adequately disclose the control of subsurface mineral rights at the facility nor the extent of extraction operations in the vicinity of the facility." *Beyond Nuclear*, 113 F.4th at 969-970. The Board rejected these contentions, and Fasken appealed some of the Board decisions to the Commission. The Commission decided that these contentions "were procedurally defective, untimely, and immaterial." *Id.* "[A]ny challenge to Holtec's assertions about the ownership of subsurface mineral rights should have been made when Holtec's initial environmental report was published," and Fasken could not justify its belated attempts having "fail[ed] to demonstrate that [any purportedly new] information was previously unavailable or materially different from information available during the licensing proceeding." *Id.*

2. Shortly after its claims were rejected by the Commission, Fasken filed its first circuit court challenge to the Holtec licensing proceeding via a procedurally-appropriate Hobbs Act challenge in the D.C. Circuit. See Petition for Review, *Fasken Land &*

Minerals, Ltd. v. NRC, No. 21-1147 (D.C. Cir. June 25, 2021), ECF No. 1904236. Holtec had been in the D.C. Circuit since 2020, when Don't Waste Michigan and Beyond Nuclear first filed their petitions for review under the Hobbs Act. These petitions, a subsequent petition from Sierra Club, and the Fasken petition described above, were consolidated by the D.C. Circuit into one proceeding. *Beyond Nuclear*, 113 F.4th at 961.

This D.C. Circuit proceeding included challenges to the Commission's authority to issue the Holtec license. Fasken itself initially sought review of the Commission's disposition of its statutory authority claims by challenging the Commission's decision on that issue in its petition for review. Petition for Review, *Fasken Land & Minerals, Ltd.*, No. 21-1147 (D.C. Cir. June 25, 2021), ECF No. 1904236 (petitioning for review of CLI-20-04). But Fasken later chose to abandon its statutory authority claims, instead focusing only on its geological and mineral rights concerns. See *Beyond Nuclear*, 113 F.4th at 969-70. Two other parties, however, continued to challenge the Commission's statutory authority to issue the Holtec license. *Id.* at 963-65. The proceeding was put into abeyance at the request of the Commission, pending issuance of the Holtec license, *id.* at 962, which was later issued on May 9, 2023. 88 Fed. Reg. 30,801 (May 12, 2023).

3. Two months after the Commission issued Holtec's license, and two years after it initiated its first challenge in the D.C. Circuit, Fasken filed another challenge in the Fifth Circuit. Fasken reiterated its underlying claims against the Commission's authority to issue the license but did

not explain the timeliness of pursuing these claims years after the Commission had first rejected them. See generally, Initial Brief of Fasken, No. 23-60377 (5th Cir. Oct. 2, 2023), ECF No. 51. Nor did Fasken justify its pursuit of claims in two separate courts of appeals. *Id.* Instead, Fasken filed its claims under the cloak of a challenge to the Commission's purportedly *ultra vires* issuance of the Holtec license, *id.* at 14, relying on the Fifth Circuit's *ultra vires* exception applied in the *Texas* case. ISP. Pet. App. 19a, 41a-45a.

The Federal Government moved to transfer Fasken's Fifth Circuit challenge to the D.C. Circuit in light of the ongoing D.C. Circuit proceeding. See *Fasken Land & Mins.*, 2024 WL 3175460 at *1. In addition, Holtec argued that venue was improper in the Fifth Circuit given Fasken's non-Hobbs Act claims. Brief of Holtec, *Fasken Land & Minerals, Ltd.*, No. 23-60377 at 23-25 (5th Cir. Dec. 8, 2023), ECF No. 74. However, in briefing the parties all recognized that a decision in the *Texas* case would bind a Fifth Circuit panel regarding the substantive issues on the Commission's authority to issue the Holtec license and the existence of an *ultra vires* exception to the Hobbs Act. *Fasken Land & Mins.*, 2024 WL 3175460 at *1.

After a final decision was rendered in *Texas*, the Fifth Circuit found that because the Holtec proceeding involved a "materially identical license in a materially identical procedural posture" that absent the "[c]ourt granting rehearing en banc," *Texas* controlled the decision on the Holtec license. *Id.* Consequently, the court granted Fasken's petition for review and vacated Holtec's spent fuel storage facility license,

while also denying the Federal Government's motion to transfer the case to the D.C. Circuit as moot. *Id.*

The Fifth Circuit, however, did not address the propriety of allowing Fasken two bites at the apple in two separate circuit courts against a single Commission licensing proceeding.

4. After the Fifth Circuit issued its decision, the D.C. Circuit issued a decision on Fasken's earlier-filed claims and the claims filed by other challengers in the Holtec licensing proceeding. This decision, and the Fifth Circuit decision, reached diametrically opposite conclusions as to the Commission's authority to issue the Holtec license. The D.C. Circuit correctly found that "[t]he [Atomic Energy Act] 'authorized the NRC to regulate the possession, use, and transfer of the constituent materials of spent nuclear fuel' and to license the storage of spent nuclear fuel at onsite and away-from-reactor storage facilities." *Beyond Nuclear*, 113 F.4th at 964 (citing *Bullcreek v. NRC*, 359 F.3d 536, 538, 542-43 (D.C. Cir. 2004)). "[T]he [Nuclear Waste Policy Act] does not affect 'the NRC's authority under the [Atomic Energy Act] to license and regulate private use of private away-from-reactor spent fuel storage facilities.'" *Beyond Nuclear*, 113 F.4th at 964. The D.C. Circuit also rejected Fasken's various other claims regarding the geology and mineral rights at the Holtec site. *Id.* at 969-70.

B. The Fifth Circuit's *Ultra Vires* Exception Gave Life To Fasken's Excessive Multiple Circuit Court Challenge.

The Hobbs Act sets the procedures for appealing decisions of several administrative agencies, including the Commission. Congress intended that

the Hobbs Act would ensure the "elimination of multiple suits challenging the same [agency] order [and] limitation of the time for filing review to 60 days after entry of the order." *Simmons v. ICC*, 716 F.2d 40, 44 (D.C. Cir. 1983) (citing H.R. Rep. No. 1569, at 4-6, 93d Cong., 2d Sess. (1974), S. Rep. No. 500, at 3-4, 93d Cong., 1st Sess. (1973)). "By creating a strict time frame for review and bypassing district courts, Congress hoped [the Hobbs Act would] increase the speed, efficiency and consistency of judicial review." See also *Carpenter v. DOT*, 13 F.3d 313, 316 (9th Cir. 1994).

Among other requirements, the Hobbs Act only allows litigation from a "party aggrieved by [a] final [agency] order." 28 U.S.C. § 2344. Because Congress in the Hobbs Act chose the phrase "party aggrieved," circuit courts other than the Fifth Circuit have only allowed challenges from either: (1) parties to the agency's underlying proceeding, or (2) non-parties challenging an agency decision denying the litigant party status. See ISP. Pet. App. 15a-18a. In short, a non-party must challenge the agency's decision denying its petition to intervene and denying it party status. And a challenger like Fasken must justify its numerous procedural failings and untimely and immaterial claims before the agency on judicial review.

The Fifth Circuit, however, uniquely relied on "an exception" to this "party-aggrieved status requirement" "where 'the agency action is attacked as exceeding [its] power.'" See ISP. Pet. App. 19a. This exception, as applied to Holtec's case, allowed Fasken to challenge the Commission's issuance of the Holtec license without addressing its party-aggrieved status.

The result demonstrates how the Fifth Circuit's *ultra vires* exception to the Hobbs Act was (and can be) used as an end run around the requirements of the Hobbs Act, as Fasken was allowed to pursue multiple claims against a single agency proceeding in multiple circuit courts, with no regard for the Hobbs Act's 60-day filing deadline.

Fasken participated in the Commission's licensing proceeding on the Holtec license by filing a petition to intervene that was ultimately rejected, and Fasken never gained party status. Fasken nevertheless initiated a procedurally-proper Hobbs Act appeal of the Commission's decision rejecting its petition to intervene and its potential party status in the D.C. Circuit. That court ultimately faulted Fasken for its numerous, repeated procedural and substantive failings in the Commission's proceeding below. *Beyond Nuclear*, 113 F.4th at 969-970.

Years after filing in accordance with the Hobbs Act in the D.C. Circuit, Fasken filed its second circuit court petition in the Fifth Circuit again challenging the Holtec licensing proceeding, this time under the cloak of a challenge to the Commission's purportedly *ultra vires* issuance of the Holtec license. Fasken was thus able to side-step its first-filed Hobbs Act petition in the D.C. Circuit and escape its underlying claims that failed before the Commission. And Holtec was burdened with litigation in multiple circuit courts, initiated years apart, on its spent fuel storage license. Having flouted the requirements of the Hobbs Act, Fasken initiated *duplicate* judicial reviews in the hope of improving its chance of success, not as a means to *ensure* judicial review in the first instance.

In the end, two irreconcilable decisions were issued on the Holtec license. The Fifth Circuit vacated the Holtec license based on the decision in *Texas. Fasken Land & Mins.*, 2024 WL 3175460 at *1. The D.C. Circuit then issued its own decision upholding the Commission's authority to issue the Holtec license. *Beyond Nuclear, Inc.*, 113 F.4th at 956, 969-70. It cannot be that Congress intended for the Hobbs Act to allow such an incongruous result. Yet, the Fifth Circuit's *ultra vires* exception almost guarantees more duplicative, tardy, and unnecessary litigation and the creation of numerous incompatible circuit court decisions going forward.

If this Court were to affirm the Fifth Circuit's *ultra vires* exception, making it the standard across all circuit courts, any challenger to a Commission proceeding could disregard the need to participate as a party before the Commission and simply wait until after the eleventh hour to file challenges. Or, like Fasken, a challenger could use the *ultra vires* exception to escape an inconvenient record below. The challenger could then initiate litigation in more than one circuit court, just like Fasken, since the Hobbs Act venue provision allows for two possible venues (the D.C. Circuit and the circuit where the challenger resides or has its principal office). 28 U.S.C. § 2343. The addition of other challengers, residing in other circuits, could extend the litigation even further to encompass even more circuit courts. A mere allegation that the agency has exceeded its statutory authority could scatter litigation across the circuit courts, leading to more circuit splits like the Holtec proceeding and eliminating any benefits to the speed, efficiency and consistency of judicial review through the Hobbs Act.

For this reason, the Fifth Circuit's decision allowing an *ultra vires* exception should be rejected and overturned.

II. Legislative History Demonstrates That The Commission Has Acted Well Within Its Statutory Authority.

There also was no *ultra vires* action in this case. The Fifth Circuit's finding that the Commission was acting outside its statutory authority is simply wrong and contrary to decades of legislative history underpinning both the Atomic Energy Act and the Nuclear Waste Policy Act.

A. The History Of The Atomic Energy Act Shows That The Commission Has The Authority To Issue Licenses For Spent Fuel Storage.

In the decision on review, the Fifth Circuit claimed that the Atomic Energy Act "authorizes the Commission to issue such [special nuclear material] licenses only for certain enumerated purposes," and particularly that the Commission could only issue licenses "for various types of research and development," or "utilization and production facilities." ISP. Pet. App. 22a-23a. According to the Fifth Circuit, the Commission cannot issue licenses for "storage or disposal of material as radioactive as spent nuclear fuel." ISP. Pet. App. 22a.

This is, however, simply contrary to both basic logic and the history of the Atomic Energy Act. Congress enacted the Atomic Energy Act to ensure federal government regulation of the nuclear industry, including special nuclear material—which is used to produce nuclear fission—and the other

highly radioactive materials that are in spent fuel.[4] It is backwards for the Fifth Circuit to claim that the federal government should lose authority as nuclear materials become more radioactive. It makes far more sense that Congress would expect the Commission to extend its authority over nuclear materials to cover any postulated regulatory gaps, particularly over special nuclear material or especially radioactive materials. The plain text of the statute and legislative history support the latter interpretation.

1. There is no doubt that the Commission exercises expansive authority over special nuclear materials. As first enacted in 1946, the Atomic Energy Act "created a government monopoly for the production and use of fissionable material." *N. States Power Co. v. Minnesota,* 447 F.2d 1143, 1148 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). While Congress amended the Act in 1954 to end the government's total monopoly over special nuclear material, initially by allowing leasing of special nuclear material to Commission licensees, the revised Act continued to demonstrate Congress' intent that the federal government would exercise complete regulatory

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[4] Fresh nuclear fuel is composed of source material (uranium) enriched with a limited quantity of special nuclear material (uranium-235) capable of producing nuclear fission. Once nuclear fuel is used, nuclear fission and radiation exposure cause spent fuel to be comprised of the original source and special nuclear material, plus fission products from split atoms (which are considered byproduct material) and new special nuclear material like plutonium. See Backgrounder on Radioactive Waste: High-Level Waste, U.S. Nuclear Reg. Comm'n, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html (last updated Jan. 26, 2024). These various nuclear materials are intermingled throughout spent fuel and cannot be separated without significant effort.

control over special nuclear material. These 1954 amendments added a provision to the Act setting forth the conditions under which the Commission could lease special nuclear material:

> The Commission is authorized to issue licenses for the possession of, to make available for the period of the license, and 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 31; (2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 104; or (3) for use under a license issued pursuant to section 103.

42 U.S.C. § 2073(a), Pub. L. No. 83-703, § 53, 68 Stat. 919, 930 (1954).

There is no indication that Congress initially intended for this licensing system to have any regulatory gap in federal authority over special nuclear material. In fact, there could be no gap since special nuclear material was all owned by the federal government and leased out pursuant to § 2073(a). However, to the extent any gap existed, Congress deliberately closed it four years later by adding § 2073(a)(4) and delegating authority to the Commission to self-identify any such gaps in its licensing authority. Specifically, Congress authorized the Commission to issue licenses and lease material "for such other uses as the Commission determines to be appropriate to carry out the purposes of [the Atomic Energy Act]." 42 U.S.C. § 2073(a)(4). This

expansion of authority was intended "to authorize the Commission to issue licenses for the possession of special nuclear material . . . for uses which do not fall expressly within the present provisions of subsection 53a [42 U.S.C. § 2073(a)(1)-(3)]," allowing the Commission to issue "licenses for incipient new [i]ndustrial uses." Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954, H.R. Rep. No. 85-2272, at 1 (2d Sess. 1958). Thus, Congress intended for the Commission to issue licenses under 42 U.S.C. § 2073(a)(4) for purposes beyond those already enumerated in § 2073(a)(1)-(3).

When Congress gave the Commission broad authority to issue licenses for special nuclear material under § 2073(a)(4), the 1954 Act already had a similar, but not identical, provision allowing the Commission to issue licenses for *source* material "for any other use approved by the Commission as an aid to science or industry." 68 Stat. 933 (Aug. 30, 1954); 42 USC § 2093(a)(4). The Fifth Circuit uses a canon of statutory interpretation to equate these catch-all source material and special nuclear material licensing provisions. ISP. Pet. App. 22a. But the special nuclear material authority uses broader terms, and this Court assumes that "the legislature says what it means and means what it says." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79 (2017) (cleaned up)).

The textual difference between these two provisions is easily explained. The broad authority under § 2073(a)(4) allows the Commission to fill licensing gaps for special nuclear material where it is appropriate "to carry out the purposes of [the Atomic

Energy Act]." One of those purposes is *to maintain federal government control over special nuclear material*. See 42 U.S.C. § 2013(c) ("It is the purpose of [the Atomic Energy Act] to … provid[e] for—a program for Government control of the possession, use, and production of . . . special nuclear material."). Thus, the Commission can issue a § 2073(a)(4) license so long as it is appropriate to maintain government control over special nuclear material. Requiring the Commission to identify an aid to science or industry would undermine that broader goal.

Shortly after the addition of § 2073(a)(4), the Commission described, in testimony before the Joint Committee on Atomic Energy, how it could use this authority for a variety of fuel-cycle related purposes—including the accumulation and storage of spent fuel by a middleman like Holtec. As the Commission explained, when the Atomic Energy Act was enacted Congress expected that most fuel cycle services would be rendered by the Commission "because of commercial unavailability." See *Amending the Atomic Energy Act and Authorization of Stanford Accelerator Project, Hearing before the Joint Committee on Atomic Energy*, at 4, 86th Cong., 2d Sess. (1959). Thus, whenever a reactor group needed fuel cycle services, "the reactor group would deal directly with the Commission." *Id.*

This did not occur. Instead, "the Commission assisted and witnessed the growth of an industry capable of performing many of the services previously furnished by the Commission." *Id.* With this expansion of private industry, the Commission expected that "[a] natural outgrowth" would be an arrangement "whereby a given fuel cycle supplier [i.e.

a § 2073(a)(4) or § 2093(a)(4) licensee], not a section 103 or 104 licensee, would furnish or arrange for all steps in the fuel cycle for a given reactor operator." *Id.*

This would include collecting and accumulating spent fuel before its return to the U.S. government. The Commission explained to Congress that "there would be considerable merit" "in having the fuel from a number of reactors delivered in a single batch to the Commission for processing," and "[t]he most convenient manner in so doing would be to have a middle-man accumulate the [irradiated] fuel under a section 53 a. (4) [i.e. § 2073(a)(4)] or a section 63 a. (4) [i.e. § 2093(a)(4)] license at his own financial responsibility and deliver to [the Commission] for his own account." *Id.* In short, Congress has known, since 1959, that the Commission could license spent fuel storage by middlemen like Holtec under § 2073(a)(4).[5]

Further emphasizing the lack of any gap in the Commission's authority over special nuclear material, in 1959, Congress added a new section to the Atomic Energy Act, 42 U.S.C. § 2021, to allow states to assume limited responsibilities over some nuclear materials upon entering into an agreement with the Commission. This Agreement State program did not, however, allow the Commission to delegate *any* authority over quantities of special nuclear material

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[5] This conversation arose regarding a proposed modification to the Act allowing the Commission to directly enter into service contracts with § 2073(a)(4) and § 2093(a)(4) licensees. Congress subsequently passed this modification. Pub. L. 86–300, § 1, 73 Stat. 574 (1959); 42 U.S.C. § 2201(m) (allowing contracts with "persons licensed under section 2133, 2134, 2073(a)(4), or 2093(a)(4) of this title").

sufficient to form a critical mass. 42 U.S.C. § 2021(b). All special nuclear material in sufficient quantities (like spent fuel) *must* be licensed and regulated by the Commission, as there is no other regulator with authority.

In the sixty years since creating the Agreement State program, Congress has never reduced the Commission's authority over special nuclear material. Congress has, however, advanced the Commission's special nuclear material authority two times: first, when ending the government monopoly over special nuclear materials ownership, and second, when privatizing uranium enrichment.

First, in a change meant to enable private ownership of special nuclear material, Congress expanded the Commission's authority to issue special nuclear material licenses under § 2073(a) beyond the mere "possession of" special nuclear material to allow private entities to hold "licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to . . . special nuclear material." Pub. L. 88-489, §§ 5-8, 78 Stat. 603, 604 (1964). This expansion filled a gap created when the government ended its monopoly over the ownership of special nuclear material, but it did not alter the activities licensed by the Commission.

Years later, Congress in 1990 expanded the Commission's special nuclear material licensing authority to cover uranium enrichment facilities. Congress did *not* do this by adding a new subpart for enrichment to the Commission's authority under § 2073(a) or by revising § 2073(a) to clearly allow the Commission to issue facility licenses for special

nuclear material. Instead, Congress only needed to remove uranium enrichment from the definition of a production facility in 42 U.S.C. § 2014(v). This single change reallocated the Commission's licensing authority over uranium enrichment facilities from a § 2134 production facility license to the broad special nuclear material licensing authority in § 2073(a)(4). See *Licensing Uranium Enrichment Plants: Oversight Hearing Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs*, at 13, 123, 101st Cong., 2d Sess. (Mar. 6, 1990) (addressing proposed changes to the Act and explaining the differences in requirements for licensing production and utilization facilities as contrasted to licensing materials). This was possible because the Commission had the preexisting authority to license facilities with special nuclear material under § 2073(a)(4).

In the seventy years since the Atomic Energy Act's enactment, Congress has consistently maintained the Commission's licensing authority to close any potential gaps in regulating special nuclear material, including over the nuclear fuel cycle and spent fuel storage. The Commission has used that authority accordingly. There is nothing to suggest that Congress ever intended to limit the Commission's authority over special nuclear material to only a subset of potential licensees or uses. The Fifth Circuit's decision otherwise is entirely inconsistent with this seventy-year history.

2. Contrary to the Fifth Circuit's decision, there is also nothing to suggest that the Commission somehow lost its authority over spent fuel due to the presence of material "with half-lives much longer than radium-

226." ISP. Pet. App. 24a. The Fifth Circuit engaged in a series of mental gymnastics to conclude that a disposal provision for byproduct material in § 2111(b) "cross-references the definition of byproduct materials in § 2014(e)(3)–(4), which refers to radium-226 and other material that 'would pose a threat similar to the threat posed by . . . radium-226 to the public health and safety.'" ISP. Pet. App. 23a-24a. "[B]ecause some of the isotopes in spent nuclear fuel [like plutonium-239[6]] have much longer half-lives than radium-226," there is "no plausible argument that spent nuclear fuel" "is the type [of] radioactive material contemplated in the disposal provision in § 2111(b)." ISP. Pet. App. 24a.

This tortured analysis is inconsistent with the history (and plain language) of the Atomic Energy Act. First, the Fifth Circuit's reliance on the Commission's authority over "types of byproduct material [that] may be disposed" under 42 U.S.C. § 2111(b), ISP. Pet. App. 23a, to establish the extent of Commission authority has it backwards. This provision of the Atomic Energy Act exists to clarify that the Commission's recently added (in 2005) authority over naturally occurring radioactive material would not alter the ability "to dispose of the newly added byproduct material at a disposal facility in accordance with [non-nuclear hazardous waste laws]." 72 Fed. Reg. 55,864, 55,880 (Oct. 1, 2007). As a result, materials like radium-226 "as defined in paragraphs (3) and (4) of [§ 2014(e)]," may be disposed of "at a disposal facility in accordance with any Federal or State solid or hazardous waste

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[6] Contrary to the Fifth Circuit decision, plutonium is specifically defined as special nuclear material in the Atomic Energy Act. 42 U.S.C. § 2014(aa).

law, including the Solid Waste Disposal Act." 42 U.S.C. § 2111(b)(2). This provision essentially *removes* these lower-impact materials from the more heightened requirements applied to the disposal of Commission-regulated materials like spent nuclear fuel.

The disposal provision in 42 U.S.C. § 2111(b) also has no relevance to the agency's foundational authority over *other* byproduct materials, like materials irradiated in a nuclear reactor found in spent fuel. Such material has been under Commission authority since the Atomic Energy Act's enactment in 1954, when byproduct material was first defined as "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material." Pub. L. No. 83-703, 68 Stat. 923 (Aug. 30, 1954).

Radium-226 was added to the definition of byproduct material decades later to cover *naturally occurring* radioactive material. Pub. L. No. 109-58, 119 Stat. 594, 806, 807 (Aug. 8, 2005). See 42 U.S.C. § 2014(e)(4) (granting the Commission authority over materials "similar to" radium-226 for "discrete source[s] of *naturally occurring* radioactive material"). This expansion of Commission authority into naturally occurring radioactive material, which only came about in the Energy Policy Act of 2005, was not intended to, and did not, reduce the Commission's long-standing authority over materials irradiated in a nuclear reactor. *Id.* at § 2014(e)(1).

The Fifth Circuit's decision never addresses the Commission's authority over materials irradiated in a nuclear reactor, set forth in § 2014(e)(1), reading that

clause out of existence in favor of the 2005 additions regarding naturally occurring radioactive material. This is another reason that the Fifth Circuit decision is contrary to the plain language of the Act and should not be upheld.

B. The History Of The Nuclear Waste Policy Act Further Demonstrates The Commission's Authority To Issue Licenses For Spent Fuel Storage.

This Court extends "'great respect' to the 'contemporaneous' and consistent views of the coordinate branches about the meaning of a statute's terms." *Loper Bright Enters. v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244, 2283 (2024). And this Court has upheld the "contemporaneous construction" of a law by "those who were called upon to act under the law and were appointed to carry its provisions into effect," where "that construction seems to have received, very shortly after, the sanction of the legislature." *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210, 6 L. Ed. 603 (1827).

This is such a case. The Commission has licensed spent fuel storage facilities for fifty years and enshrined its ability to issue such licenses in a rulemaking over forty years ago. Congress subsequently recognized that history, and the existence of an already-licensed and operating spent fuel storage facility, and left the Commission's authority intact while developing the Nuclear Waste Policy Act. In the decades since, the Commission has issued numerous licenses for spent fuel storage, and two circuit courts have upheld that authority. Yet, Congress has never acted to revoke the Commission's authority to issue these licenses. Clearly the

"'contemporaneous' and consistent view" from the agency, Congress, and the Circuit Courts is that the Commission has the authority to license spent fuel storage facilities under the Atomic Energy Act.

The Commission started issuing licenses for spent fuel storage in the 1970s, when General Electric Company was issued a special nuclear materials license under 10 C.F.R. pt. 70, "Domestic Licensing of Special Nuclear Material," to store spent fuel at its away-from-reactor Morris, Illinois facility. See 39 Fed. Reg. 32,345, 32,456 (Sept. 6, 1974) (regarding continuation of special nuclear materials license to receive and possess spent fuel); see also *Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979) (rejecting Illinois' challenge to the Morris special nuclear materials license). Within a few years, however, the Commission recognized that its special nuclear material licensing regulations, including Part 70, were "designed for relatively short-term possession in conjunction with operations," and there was a "need for a new regulation covering the requirements for extended spent fuel storage under static storage conditions involving no operations on such materials." 43 Fed. Reg. 46,309 (Oct. 6, 1978) (proposed 10 C.F.R. pt. 72). This led to the promulgation of 10 C.F.R. Part 72 to enable the Commission to review applications and issue licenses for spent fuel storage. 45 Fed. Reg. 74,693 (Nov. 12, 1980) (final 10 C.F.R. pt. 72).[7]

Years after the GE Morris facility was first licensed and the Commission promulgated Part 72,

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[7] The GE Morris facility license was transitioned from a Part 70 license to a Part 72 license after issuance of Part 72. See 47 Fed. Reg. 20,231 (May 11, 1982) (noting docket and license number change).

Congress passed the Nuclear Waste Policy Act in an effort to address the question of the Federal Government's role in the *final disposition* of spent fuel. During consideration of the Nuclear Waste Policy Act, Congress explicitly recognized that the Commission was already licensing privately-owned away-from-reactor storage facilities. As the Commission's Executive Director for Operations testified during Congress' development of the Act:

> The Commission has stated with the issuance of its regulation, 10 C.F.R. Part 72, which provides the licensing criteria for independent spent fuel storage installations, that there are no compelling safety or environmental reasons generally favoring either reactor sites or away-from-reactor sites. Thus, Part 72 establishes the licensing framework for such storage either at reactor sites or away-from-reactors using either wet or dry storage technologies.

Radioactive Waste Legislation: Hearings on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. On Energy and the Environment of the House Comm. On Interior and Insular Affairs, at 326, 97th Cong., 1st Sess. (July 9, 1981). Nowhere do the hearings or debates suggest that these Part 72 licenses would become invalid after the Nuclear Waste Policy Act was enacted or that new licenses would not be issued. In fact, during the debates, Rep. Corcoran of Illinois recognized that the already-existing Morris, Illinois away-from-reactor storage facility would continue to operate and that delays in permanent disposal would "put[] even greater pressure on the [away-from-reactor] facility at

Morris." 128 Cong. Rec. 32,945 (1982). There is no hint that after the Nuclear Waste Policy Act became law, the GE Morris facility was expected to close or become the last of its kind.

The focus instead was on ownership of the Morris facility, as Rep. Corcoran worked to prevent the Federal Government from taking over the facility. See 128 Cong. Rec. 32,560 (1982) (expressing pleasure that "the compromise bill prohibits the Federal Government from taking over the interim spent fuel storage facility in Morris, Ill."). A Senate bill preceding the Nuclear Waste Policy Act would have "grant[ed] the Secretary of Energy the authority to 'construct, acquire or lease one or more [away-from-reactor] facilities.'" 128 Cong. Rec. 32,946 (1982). Rep. Corcoran objected and a provision was added to the Act (Section 10155(h)) to address "the heart of the problem that many of us have, that is, the concern about whether or not private [away-from-reactor] storage facilities would be vulnerable to a federal takeover under [the Act]." 128 Cong. Rec. 28,033 (1982). Thus, the Nuclear Waste Policy Act would limit the "use, purchase, lease, or other acquisition" of away-from-reactor storage facilities not already owned by the Federal Government. See 128 Cong. Rec. 32,560 (1982). It would also "prohibit the Secretary [of Energy] from providing capacity for the storage of spent nuclear fuel" at private facilities like Morris, Ill., see 128 Cong. Rec. 32,560 (1982), constraining the Federal Government's ability to provide storage at away-from-reactor facilities. It would not alter the ability of private parties to store spent fuel.

Congress is expected to "legislate 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). Congress was aware of the Commission's existing licenses for offsite spent fuel storage. Yet, after all of this discussion, the Nuclear Waste Policy Act neither explicitly nor implicitly repealed the Commission's existing authority to license privately-owned interim storage of spent fuel, whether at new facilities or already-existing facilities like GE Morris.

Since the issuance of the Nuclear Waste Policy Act, the Commission has issued numerous licenses for spent fuel storage facilities. See 69 Fed. Reg. 52,314 (Aug. 25, 2004) (listing thirty-eight Part 72 licenses as of date of publication). These licenses have been issued for spent fuel storage facilities both at and away-from-reactor sites and decommissioned reactor sites (where a reactor no longer exists). See, *e.g.*, 83 Fed. Reg. 42,527 (Aug. 22, 2018) (regarding spent fuel storage facility at decommissioned reactor site); 71 Fed. Reg. 10,068 (Feb. 28, 2006) (issuing materials license for away-from-reactor spent fuel storage facility).

One of these facilities was subject to extensive litigation in the courts, leading both the D.C. Circuit and the Tenth Circuit to find that the Commission has the statutory authority to issue licenses for privately-owned away-from-reactor spent fuel storage because the Atomic Energy Act unambiguously grants the Commission such authority, and the Nuclear Waste Policy Act did not revoke that authority. See

Bullcreek v. NRC, 359 F.3d 536, 538 (D.C. Cir. 2004), *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004). Thus, in addition to long-standing Commission practice, and Congressional assent, the Commission has also for decades exercised the unassailable, *court-approved* authority to license privately-owned, away-from-reactor spent fuel storage facilities, until the Fifth Circuit decided otherwise in this case and Holtec's case.

In summary, for decades, the three coordinate branches of U.S. government have all agreed on one thing: the Commission has the authority to issue licenses for spent fuel storage. The Fifth Circuit's decision in the underlying case is insufficient to alter that well established allocation of authority, and the Fifth Circuit's rationale must be overturned.

CONCLUSION

For the foregoing reasons, this Court should overturn the Fifth Circuit's decision in the underlying case and find that there is no *ultra vires* exception to the Hobbs Act and that the Commission has the authority to issue licenses for spent fuel storage.

Respectfully submitted,

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