

Nos. 23-1300, 23-1312

In the
Supreme Court of the United States

NUCLEAR REGULATORY COMMISSION, et al.,
Petitioners,

v.

STATE OF TEXAS, et al.,
Respondents.

INTERIM STORAGE PARTNERS, LLC,
Petitioner,

v.

STATE OF TEXAS, et al.,
Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF FOR *AMICUS CURIAE* NUCLEAR
ENERGY INSTITUTE, INC. IN SUPPORT OF
PETITIONERS**

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INTEREST OF AMICUS CURIAE

The Nuclear Energy Institute (NEI) is the trade association for the commercial nuclear energy industry. NEI has hundreds of members involved in all aspects of the industry, including companies licensed to operate commercial nuclear power plants and store commercial spent nuclear fuel in the United States. One of NEI's core functions is to represent its members' interests in litigation that raises issues of critical concern to the industry. The cases here fit that bill, as the Fifth Circuit's decision in this case severely undermines the industry's ability to rely on administrative licensing proceedings before the Nuclear Regulatory Commission (NRC) and upsets settled expectations regarding the legality of away-from-reactor storage facilities for spent nuclear fuel.¹

SUMMARY OF ARGUMENT

The Fifth Circuit's bull-in-a-china-shop decision here upset the commercial nuclear energy industry's settled understandings regarding two enormously consequential issues and rejected the contrary views of all five courts of appeals that had examined those issues beforehand. While it "may be 'possible'" that everyone save the Fifth Circuit got those issues wrong for several decades, the "more plausible hypothesis" is that the Fifth Circuit fumbled the ball. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). This Court should confirm as much by vacating or

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

reversing the decision below, which will restore the certainty and common sense that had prevailed in this area for 40 years up until this point.

The Fifth Circuit's Hobbs Act holding may seem merely procedural, but it would have an outsized substantive impact on the nuclear industry. Nuclear-related projects are extremely capital-intensive, and in contrast to other industries where most regulations are prohibitory, NEI members cannot undertake nuclear-related activity without first obtaining a license from the NRC. Those licensing proceedings are lengthy and costly, making it especially important that industry members have the assurance that substantial investments of time and resources are not laid to waste by late-breaking objectors who wish to challenge the legality of NRC licenses despite never surfacing as parties in the NRC's administrative licensing proceedings. And those assurances are especially critical now, as the Nation is looking to industry members to substantially increase their nuclear-energy production in the coming years to meet rising energy demands. While other circuits have correctly interpreted the Hobbs Act to preclude non-parties from springing unwanted surprises at the back-end of administrative licensing proceedings, the Fifth Circuit green-lighted this kind of sandbagging here. None of that court's divergent reasoning withstands scrutiny.

The Fifth Circuit's conclusion that away-from-reactor facilities that store spent nuclear fuel are unlawful is equally disruptive and out-of-step with precedent. The NRC and other circuits have agreed for decades that such facilities are fully consistent

with the Atomic Energy Act (AEA). That consensus, in turn, has spurred industry members to invest in those facilities, which offer enormous efficiency gains and opportunities for economic growth. But the court of appeals' decision here casts a pall over those facilities based on a novel and flawed reading of the AEA. The court's alternative theories—based on the Nuclear Waste Policy Act (NWPA) and the “major questions doctrine”—are no more persuasive. The NWPA has nothing to do with the temporary storage of spent nuclear fuel *by private entities*, but rather addresses storage and permanent disposal *by the federal government*. And the major questions doctrine is designed to preclude agencies from belatedly leveraging obscure statutory provisions to assert novel, controversial, and economically burdensome powers beyond their core competencies. The NRC's issuance of licenses for away-from-reactor storage facilities involves the exact opposite dynamic: The NRC determined nearly half-a-century ago that the AEA's plain text authorizes licenses for away-from-reactor storage facilities and has consistently maintained that position ever since; the regulation of spent nuclear fuel is obviously within the wheelhouse of the federal agency explicitly charged with regulating nuclear-related issues; the facilities at issue would substantially reduce rather than increase costs; and no one disputes the legality of storing spent nuclear fuel at decommissioned sites with no ongoing reactor operations, and away-from-reactor storage facilities are not significantly different.

In short, the Fifth Circuit got two exceptionally important questions exceptionally wrong, and its decision will have far-reaching and destabilizing

consequences for the nuclear industry if allowed to remain standing. This Court should vacate or reverse.

ARGUMENT

I. The Fifth Circuit’s Hobbs Act Ruling Undermines The Nuclear Industry’s Reliance On Administrative Licensing Proceedings Before The Nuclear Regulatory Commission.

Since the dawn of the atomic era, the federal government has exercised near-total control over nuclear energy in the United States. The AEA of 1946—the Nation’s first nuclear-related statute—“contemplated that the development of nuclear power would be a Government monopoly.” *Duke Power Co. v. Carolina Env’t Study Grp., Inc.*, 438 U.S. 59, 63 (1978); see Pub. L. No. 79-585, 60 Stat. 755. Congress passed the AEA of 1954, see Pub. L. No. 83-703, 68 Stat. 919, to make clear that “the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes,” but such private-sector involvement has always remained subject to pervasive “federal regulation and licensing.” *Duke Power*, 438 U.S. at 63; see also 42 U.S.C. §2011(b) (declaration of policy that the AEA is designed to “strengthen free competition in private enterprise”). Hence, unlike other industries, where the default assumption is that private enterprises have liberty to operate until the government restricts them via regulation, the default assumption in the nuclear industry is nearly the opposite. See, e.g., 42 U.S.C. §§2073, 2093, 2111 (requiring licenses to possess various nuclear materials); see also, e.g.,

Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 783 (D.C. Cir. 1968) (“Congress ... enact[ed] a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency[.]”).

Members of the nuclear industry thus have always understood that wholly unregulated activity is a non-starter and that obtaining licenses from the NRC is a prerequisite of doing business. Given that obligation, industry members must expend significant resources participating in the NRC’s administrative licensing proceedings. As these cases (which involve licensing proceedings that first started in 2018) vividly illustrate, those proceedings are costly and lengthy, sometimes spanning years as applicants work with interested parties and the NRC to resolve varying objections to nuclear-related projects. *See* 10 C.F.R. Part 2, App. B (providing timeline for Subpart L procedures, which apply to most license application proceedings); 10 C.F.R. §170.20 (explaining that NRC staff currently charge applicants \$317/hour to review applications); NRC, *Resource Estimates for Common Licensing and Oversight Activities in Storage and Transportation* (last updated May 1, 2023), <https://rb.gy/4it0m> (estimating that NRC staff may bill 21,220 hours to license new storage facilities). Precisely because running the licensing gauntlet for an extraordinarily capital-intensive project is no mean feat, industry members can ill-afford late-breaking surprises after receiving licenses at the end of the NRC’s administrative process.

That is more true now than ever. Today, 94 commercial nuclear power reactors located in 28

states provide nearly 20% of the Nation’s electricity. See U.S. Energy Info. Admin., *Frequently Asked Questions (FAQ), How Many Nuclear Power Plants Are in the United States, and Where Are They Located?*, <https://rb.gy/68bg0> (last updated May 8, 2024); U.S. Energy Info. Admin., *Frequently Asked Questions (FAQ), What Is U.S. Electricity Generation by Energy Source?*, <https://rb.gy/6xjg7> (last updated Feb. 29, 2024). That contribution is indispensable to the Nation’s energy supply: Nuclear energy is the most efficient source of carbon-free electricity in the country, and it is responsible for half of the emissions-free electricity nationwide, annually providing nearly 800 billion megawatt-hours of 24/7 electricity—“the equivalent of removing 100 million cars off of the road.” Office of Nuclear Energy, U.S. Dep’t of Energy, *Advantages and Challenges of Nuclear Energy* (Mar. 29, 2021), <https://rb.gy/wuu9t>. And the nuclear industry is also a key contributor to the Nation’s economy: It adds \$63.8 billion in economic value annually; it directly employs approximately 74,000 people in high-quality, long-term jobs with salaries 50% higher on average than those of other electricity-generation sources; and it is responsible for an additional 183,000 secondary jobs. See Oxford Economics, *The Economic Contribution of the US Nuclear Power Industry*, <https://rb.gy/45kdch> (Oct. 2024).

Unsurprisingly, then, the Nation is looking not only to preserve its existing nuclear-energy supply,

but to nearly *triple* production over the next 25 years.² See U.S. Dep’t of Energy, *Pathways to Commercial Liftoff: Advanced Nuclear 1* (Mar. 2023), <https://rb.gy/y76ga8>. And to achieve that goal, industry members will have to renew and amend their existing licenses, as well as obtain new licenses. It is therefore imperative that industry members have “[p]redictable” administrative licensing proceedings and guarantees about their finality. *Id.* at 34.

Although the Hobbs Act allows for judicial review of any NRC “final order entered in any proceeding” under the AEA “for the granting, suspending, revoking, or amending of any license,” 42 U.S.C. §2239(b)(1), (a), the statute is written to establish clear limits on that process and provides that courts have jurisdiction *only* in circumstances where a “party aggrieved by the final order” seeks judicial review, 28 U.S.C. §2344. As numerous courts have recognized, the Hobbs Act’s use of the term “party”—as opposed to a more expansive term like “person,” see 5 U.S.C. §702; cf. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S.Ct. 2440, 2451-56 (2024) (contrasting the Administrative Procedure Act with the Hobbs Act)—plainly constrains the scope of judicial review. That language means that only those who “participat[e] in the appropriate and available administrative

² Growth in nuclear energy is essential because overall electricity demand has recently skyrocketed, due in part to the electricity needs of energy-hungry facilities like data centers. See GridStrategies, *The Era of Flat Power Demand Is Over* 3 (Dec. 2023), <https://rb.gy/0pf3um> (“Over the past year, grid planners nearly doubled the 5-year load growth forecast,” and “[t]he main drivers are investment in new manufacturing, industrial, and data center facilities.”).

procedure”—*i.e.*, as “parties to the ... proceedings”—may invoke a court’s jurisdiction. *Gage v. U.S. Atomic Energy Comm’n*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973); *see Simmons v. ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983) (Scalia, J.) (“To give meaning to that apparently intentional variation, we must read ‘party’ as referring to a party before the agency, not a party to the judicial proceeding This seems to us the only plausible reading[.]”); *see also Matson Navigation Co. v. DOT*, 77 F.4th 1151, 1156-57 (D.C. Cir. 2023) (Rao, J.); *Beethoven.com LLC v. Libr. of Cong.*, 394 F.3d 939, 945-46 (D.C. Cir. 2005) (Sentelle, J.); *Sierra Club v. NRC*, 825 F.2d 1356, 1360-61 (9th Cir. 1987). Accordingly, when “intervention in agency adjudication or rulemaking is prerequisite to participation therein, standing to seek judicial review of the outcome will be denied to those who did not seek—or who sought but were denied—leave to intervene.” *Ohio Nuclear-Free Network v. NRC*, 53 F.4th 236, 239 (D.C. Cir. 2022); *see New Mexico ex rel. Balderas v. NRC*, 59 F.4th 1112, 1116-19 (10th Cir. 2023) (similar). That rule thus cabins the universe of potential judicial challengers and allows the industry to plan ahead. *Cf. Ala. Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002) (explaining that the Hobbs Act’s language “would be defeated if the nonparty could file its own petition for review as a matter of right”).

The Fifth Circuit’s decision here upends this decades-old understanding and severely undermines the nuclear industry’s ability to rely on NRC administrative licensing proceedings, as it allows objectors to bypass the licensing proceedings entirely and belatedly challenge NRC licenses in court. *See*

Pet.App.45a³ (Higginson, J., dissenting from denial of rehearing en banc) (citing NEI’s *amicus* brief in support of rehearing en banc and explaining that “[t]his exercise of jurisdiction has grave consequences for regulated entities’ settled expectations and careful investments in costly, time-consuming agency proceedings, inviting spoilers to sidestep the avenues for participation that Congress carefully created to prevent this uncertainty”). Although the court of appeals thought that the Hobbs Act and precedent require this destabilizing result, law and logic point in the opposite direction.

The Fifth Circuit first posited that the Hobbs Act’s “plain text”—*i.e.*, the “party aggrieved” language—offers “no” indication that intervention in the NRC’s administrative proceedings is ever necessary to challenge an NRC order, but rather indicates that participating “in some way” (such as by shooting off “comment[s]” to the NRC) suffices. Pet.App.15a, 17a. But the term “party” in the legal context is regularly understood to require formal participation in legal proceedings. *See, e.g.*, Party, *Black’s Law Dictionary* 1278 (4th ed. rev. 1968) (“‘Party’ is a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, ... and all others who may be affected by the suit ... are persons interested, but not parties.”). For example, when the Federal Rules of Appellate Procedure refer to a “party” who may appeal a district court judgment, *see* Fed. Rs. App. P. 3-4, no one thinks that any person who just mailed “comments” to the

³ “Pet.App.” refers to the appendix filed with the petition in No. 23-1300.

court qualifies. To the contrary, as Judge Easterbrook explained in another Hobbs Act case, “[i]f a non-party tried to appeal from a judgment of a district court,” courts would “dismiss the appeal” out of hand. *In re Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 799 F.2d 317, 335 (7th Cir. 1986). Consistent with that understanding, both the D.C. Circuit and the Tenth Circuit have held in similar contexts (and in stark contrast to the Fifth Circuit here) that those who fail to “properly intervene[] in the underlying NRC proceeding ... are not ‘part[ies] aggrieved’ either. *Ohio Nuclear-Free Network*, 53 F.4th at 239; see *Balderas*, 59 F.4th at 1116-19.

The Fifth Circuit “ultimately” declined to rest its decision on its flawed plain-text theory—thus “threatening” a “circuit split” “with new, troubling dicta,” Pet.App.45a (Higginson, J., dissenting from denial of rehearing en banc)—because it opted to apply “an *ultra vires* exception to the party-aggrieved status requirement.” Pet.App.18a. But as the court of appeals could not help but notice, see Pet.App.19a n.3, other circuits have “squarely rejected” this exception, *Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005); see *Balderas*, 59 F.4th at 1123-34 (collecting cases). Understandably so: The exception has no grounding whatsoever in statutory text, but rather emanates from dubious dicta in a 40-year-old footnote in a case involving the Interstate Commerce Commission (ICC).⁴ See *Am. Trucking Ass’ns, Inc. v.*

⁴ In *American Trucking*, the Fifth Circuit relied on ICC-related cases from 1968, 1923, and 1919 when discussing the supposed *ultra vires* exception to the Hobbs Act. See 673 F.2d at 85 n.4.

ICC, 673 F.2d 82, 85 n.4 (5th Cir. 1982). The court below nonetheless pronounced itself “bound” by that dicta because another Fifth Circuit panel subsequently applied it (again in a footnote in another ICC-related case). Pet.App.19a n.3 (citing *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984)). While that approach to dicta is itself problematic, see, e.g., *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2277 (2024) (Gorsuch, J., concurring), the only salient point is that the *ultra vires* exception is now firmly entrenched as the law of the Fifth Circuit in light of the decision below. Accordingly, as long as that decision remains standing, it will only encourage forum-shoppers to assert their late-breaking objections to NRC licenses there instead of elsewhere.

There is every reason for this Court to correct the Fifth Circuit’s profoundly mistaken understanding of the Hobbs Act. After all, there is never any basis for courts to exercise jurisdiction “just because that would be a good idea.” *In re Chicago*, 799 F.2d at 335. And the *ultra vires* exception is the very opposite of a good idea, as it leaves nuclear-industry members in the worst of all worlds: required to endure arduous administrative licensing proceedings and required to endure burdensome litigation initiated by those who never participated in them (even though they could

That reasoning makes no sense at all, as the Hobbs Act did not even apply to the ICC *until 1975*. Thus, “[t]o the extent that non-parties were once permitted to appeal ICC decisions, that avenue was closed by the clear language of the Hobbs Act when it became applicable to the ICC in 1975.” *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 113 (2d Cir. 1999).

have pressed *ultra vires* arguments had they done so, see *Balderas*, 59 F.4th at 1123; 10 C.F.R. §2.309(f)(1)(i).⁵ That state of affairs is intolerable.

II. The Fifth Circuit’s Holding That Away-From-Reactor Storage Facilities Are Unlawful Upsets The Nuclear Industry’s Settled Expectations.

The Fifth Circuit’s conclusion that away-from-reactor storage facilities are unlawful is similarly disruptive. For decades, the nuclear industry has operated on the understanding that such facilities *are* lawful. The NRC began issuing licenses for such facilities in the 1970s when nuclear reactors first began exhausting their storage capacity. See NRC, *Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel 8-2* (Aug. 1979), <https://rb.gy/u6k5v>. The NRC promulgated regulations specifically tailored to such licensing issues in 1980. See 45 Fed. Reg. 74,693, 74,693 (Nov. 12, 1980); 10 C.F.R. Part 72. The only circuits to address the subject before the Fifth Circuit did so here subsequently confirmed the NRC’s authority. See *Bullcreek v. NRC*, 359 F.3d 536, 538

⁵ This case illustrates the wisdom of ventilating argument during the administrative proceedings. Texas, for example, has belatedly pressed misguided arguments about purported concessions that the NRC made in the 1970s regarding its statutory authority vis-à-vis away-from-reactor storage facilities. See *Tex.BIO.3* & n.1. Had Texas made those arguments in a timely fashion during the administrative proceedings, the NRC and ISP could have debunked them then instead of now, see *NRC.Br.47*; *NRC.Cert.Reply.10-11*; *ISP.Cert.Reply.7-8* & n.1—and spared this Court the trouble of hearing factually incorrect assertions.

(D.C. Cir. 2004); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004). And the reason for this unanimity is obvious, as the AEA has stated since the 1950s that the NRC may issue licenses for the possession of each of the three components that comprise spent nuclear fuel: source material, special nuclear material, and byproduct material. *See* 42 U.S.C. §§2073(a), 2093(a), 2111(a); *see also id.* §2201(b); *Train v. Colo. Pub. Int. Rsch. Grp., Inc.*, 426 U.S. 1, 5 (1976) (“The comprehensive regulatory scheme created by the AEA embraces the production, possession, and use of three types of radioactive materials source material, special nuclear material, and byproduct material.” (footnotes omitted)).

All of this has spurred private industry to invest in away-from-reactor storage facilities, which offer significant operational and financial efficiencies. *See also* 42 U.S.C. §2011(b) (noting AEA’s policy of “strengthen[ing] free competition in private enterprise”). Unlike fossil-fuel-fired power plants, which emit carbon dioxide and other air pollutants to the atmosphere, nuclear generation’s primary byproduct is contained in the solid fuel that it uses to produce electricity. After generating electricity for approximately five years, spent nuclear fuel assemblies are removed from the reactor and safely stored initially in a concrete and steel fuel pool. When the spent fuel is sufficiently cool—after a few years of underwater storage—it is transferred and stored in dry casks, which are large, steel-reinforced concrete containers. Over the past three decades alone, the industry has safely loaded and placed 3,600 of these containers into storage, largely at the sites of the

reactors themselves.⁶ And the industry has had to undertake these temporary storage tasks because the Department of Energy failed to fulfill its legal obligations under the NWPA to start accepting spent fuel from commercial nuclear reactors for permanent disposal by January 31, 1998. *See, e.g.*, 42 U.S.C. §10222(a)(5)(B).

Although the nuclear industry has demonstrated that storing spent nuclear fuel at dozens of different reactor sites in dozens of different states is safe, it is well-recognized that this approach is highly inefficient. That is because each reactor site is responsible for staffing and other costs associated with meeting security, monitoring, maintenance, and other requirements for spent nuclear fuel storage. And that is especially true at the dozens of reactor sites that are decommissioned and have “no ongoing reactor operations.” Lance N. Larson, Cong. Rsch. Serv., *Nuclear Waste Storage Sites in the United States* 1-2 (updated May 3, 2019), <https://rb.gy/7sq01>. Thus, in the absence of away-from-reactor storage facilities, the private sector is required to expend vast resources for the sole purpose of storing relatively small amounts of spent nuclear fuel at each nuclear reactor site—resources that industry could use for other productive ends—particularly at sites no longer producing nuclear energy. *See, e.g.*, C.I.355 at 8-8, *Don’t Waste Mich. v. NRC*, No. 21-1048 (D.C. Cir. filed June 23, 2022) (NRC noting that annual operation and

⁶ All the spent fuel produced by the U.S. nuclear energy industry “since the 1950s ... could fit on a single football field at a depth of less than 10 yards.” U.S. Dep’t of Energy, *5 Fast Facts About Spent Nuclear Fuel* (Oct. 3, 2022), <https://rb.gy/le3ag>.

maintenance costs for storing spent fuel at decommissioned reactor sites are ten times greater than those at sites with an operating reactor).

Consolidating security, monitoring, inspection, and other operational efforts at private, away-from-reactor storage facilities—which can store spent fuel from multiple different reactors—thus creates enormous efficiencies and reduces overall fuel management costs, especially for spent fuel currently stored at decommissioned reactor sites. Indeed, in this very case, the NRC found that the away-from-reactor storage facility that Interim Storage Partners is seeking to build would save well over \$600 million as compared to storing spent nuclear fuel at existing locations. *See* CA5.App.714. And those remarkable figures do not even account for the economic opportunities associated with redeveloping the land that decommissioned reactor sites occupy. *See, e.g.,* IAEA, *Redevelopment of Nuclear Facilities After Decommissioning* 57-66 (2006), <https://rb.gy/8gp05>.

Due to those clear advantages, the private sector has invested capital in (and the NRC has granted licenses for) private, away-from-reactor storage facilities for decades. *See* p.12-13, *supra*; *see also* NRC, *U.S. Independent Spent Fuel Storage Installations (ISFSI)* (June 2023), <https://rb.gy/sxpao>. And as these cases underscore, there is a strong interest in developing these facilities, which would only grow in importance as nuclear production increases to satisfy the massive growth in electricity demand seen across the country.

The Fifth Circuit's decision, however, calls into question the legality of every existing and future

away-from-reactor storage facility—all based on a reading of the statutory text that is wrong across the board. For instance, the court conceded that the AEA includes two sections (42 U.S.C. §§2073(a) and 2093(a)) specifically authorizing the NRC to issue licenses to possess two constituent components of spent nuclear fuel (source material and special nuclear material) for certain enumerated purposes, including research and development, and that those same sections *separately* empower the NRC to issue those same licenses for “other” purposes—namely, other uses that the NRC deems “appropriate” or “other” uses “approved by the [NRC] as an aid to science or industry.” Pet.App.22a. But the court nonetheless insisted that those capacious catchall provisions do not authorize the NRC to issue licenses for away-from-reactor storage facilities, on the theory that “[p]rinciples of statutory interpretation require these grants be read in light of the other, more specific purposes listed—namely for certain types of research and development.” Pet.App.22a.

That reasoning is self-evidently wrong, as “research and development” is simply not what the “specific listed items share in common” in §§2073(a) and 2093(a). *Harrington v. Purdue Pharma L.P.*, 144 S.Ct. 2071, 2083 (2024). After all, some of the other specific listed items are wholly unrelated to research and development, but rather address other issues like “utilization or production facilities for industrial or commercial purposes”—as the Fifth Circuit itself grudgingly acknowledged. Pet.App.22a-23a (discussing 42 U.S.C. §§2073(a)(3), 2093(a)(3), 2133(a)). Confronted with that obstacle, the best response that the court could muster is that those non-

research-and-development subjects do “not” specifically relate to “storage” of spent nuclear fuel either. Pet.App.22a. But the entire point of a catchall provision is to give the agency discretion to do things that are “not specifically contemplated,” *Republic of Iraq v. Beatty*, 556 U.S. 848, 860 (2009)—otherwise, the catchall serves no purpose,⁷ see *Loper Bright*, 144 S.Ct. at 2263 (“In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion.”); *Dep’t of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 53 (2024) (“Proper respect for Congress cautions courts against lightly assuming that any of the statutory terms it has chosen to employ are ‘superfluous’ or ‘void’ of significance.”). And interpreting the catchall provisions of §§2073(a)(4) and 2093(a)(4) as authorizing the NRC to grant licenses for the away-from-reactor storage of spent nuclear fuel is hardly a “radical[]” idea. *Harrington*, 144 S.Ct. at 2083. The other subsections of §§2073(a) and 2093(a) address the possession and use of nuclear materials for a wide variety of activities that occur along various different points of the nuclear cycle—spanning everything from “research and development activities” to “medical therapy” to “utilization or production facilities for industrial or commercial purposes”—and authorizing away-from-reactor

⁷ See also Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954, as Amended, S. Rep. No. 85-1944, at 1 (2d Sess. 1958) (explaining that the purpose of §2073(a)(4) is “to authorize the Commission to issue licenses for the possession of special nuclear material within the United States for uses which do not fall expressly within the present provisions of subsection [§2073(a)]”).

storage facilities is plainly an “appropriate” way to “aid” those activities and ensure efficient operations. 42 U.S.C. §§2073(a)(1)-(3), 2093(a)(1)-(3), 2133(a)).

The Fifth Circuit also acknowledged that the AEA contains another section—42 U.S.C. §2111(a)—that authorizes the NRC to issue licenses to possess the third component of spent nuclear fuel (byproduct material), but it dismissed that section as categorically irrelevant too, reasoning that other subsections of §2111 already addressed the “disposal” of byproduct material. Pet.App.23a-24a. That reasoning fares no better, as it conflates two fundamentally “different concepts,” as other courts have recognized: “storage” (which is temporary) and “disposal” (which is permanent). *Don’t Waste Mich. v. NRC*, 2023 WL 395030, at *1 (D.C. Cir. Jan. 25, 2023). A statute addressing the latter thus does not somehow foreclose agency action addressing the former.

The Fifth Circuit also seemed to think that it could discount the contrary views about the NRC’s authority expressed by the D.C. Circuit in *Bullcreek* and the Tenth Circuit in *Skull Valley* because those courts purportedly “assumed” that the AEA conferred authority on the NRC to license away-from-reactor storage facilities but did not squarely hold as much. See Pet.App.24a-25a. Not so. The D.C. Circuit’s decision in *Bullcreek* is quite clear in holding that the NRC may “licens[e] ... away-from-reactor spent nuclear fuel storage facilities for private nuclear generators” “[p]ursuant to its AEA authority.” 359 F.3d at 536, 538 (emphasis added); see also *id.* at 539 (“The NRC’s authority ... to license private generators to store spent nuclear fuel[] originated with the

AEA[.]”). The D.C. Circuit has also recently reaffirmed *Bullcreek*’s holding on multiple occasions, including since the Fifth Circuit issued the decision below. See *Beyond Nuclear, Inc. v. NRC*, 113 F.4th 956, 964 (D.C. Cir. 2024) (“The AEA ‘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.” (quoting *Bullcreek*, 359 F.3d at 538)); *Don’t Waste Mich.*, 2023 WL 395030, at *1 (“Under the Atomic Energy Act,” the NRC is “permit[ted]” to “license and regulate the storage ... of spent nuclear fuel.” (brackets omitted) (quoting *Bullcreek*, 359 F.3d at 538)). And the Tenth Circuit had no trouble identifying the D.C. Circuit’s holding and expressly adopting it as its own in *Skull Valley* (and reaffirming its agreement with *Bullcreek* in yet another recent decision). See, e.g., *Balderas*, 59 F.4th at 1122 (quoting *Bullcreek* for the proposition that “the Atomic Energy Act ... authorizes licensing and regulation of ‘private use of private away-from-reactor spent fuel storage facilities’” (emphases omitted)); *Skull Valley*, 376 F.3d at 1232 (explaining that *Bullcreek* “concluded that ... the Atomic Energy Act of 1954 ... authorizes the NRC to license privately-owned, away-from-reactor storage facilities”).

Aside from misconstruing the AEA and precedent applying it, the Fifth Circuit also offered two other theories in its effort to justify its destabilizing holding, but each is equally unavailing. First, the court insisted that the NWPA “doesn’t permit” away-from-reactor storage facilities. Pet.App.29a. But no one has ever suggested otherwise. That is because the NWPA principally focuses on “the establishment of a *federal*

repository for *permanent* storage”—*i.e.*, “disposal”—and is “not” the statute that governs “*temporary* storage by *private* parties,” which is the province of the AEA. *Balderas*, 59 F.4th at 1115, 1121 (emphases added); *Nat’l Ass’n of Regul. Util. Comm’rs v. DOE*, 680 F.3d 819, 821 (D.C. Cir. 2012) (“The [NWPA] made the federal government responsible for *permanently disposing* of spent nuclear fuel[.]”). The NWPA thus may have had relevance to the issue here if Congress repealed the NRC’s preexisting authority under the AEA to license private, away-from-reactor storage facilities. But the NWPA “does not repeal or supersede the NRC’s authority under the Atomic Energy Act to license private away-from-reactor storage facilities, rendering the NWPA’s “failure” to *independently* “authorize’ storage at private facilities” immaterial. *Bullcreek*, 359 F.3d at 537-39.

Second, the Fifth Circuit declared that, “even if the statutes were ambiguous,” the major questions doctrine would foreclose the NRC’s ability to license away-from-reactor storage facilities. Pet.App.29a. That reasoning is even more misguided. The *raison d’être* of the major questions doctrine is to prevent an agency from invoking “ancillary” and “vague” provisions in “a long-extant statute” to assert “an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority” into an area of vast “economic and political significance.” *West Virginia v. EPA*, 597 U.S. 697, 721, 724 (2022). But the issue presented here involves well-nigh the *opposite* situation.

Most obviously, the NRC has interpreted the AEA to authorize the issuance of licenses for away-from-

reactor storage facilities for nearly *half-a-century*, which the Fifth Circuit did not even acknowledge. Even in a post-*Chevron* world, that is the sort of “consistent” and “longstanding” agency interpretation that warrants “respect,” not the silent treatment. *Loper Bright*, 144 S.Ct. at 2258; *see also Bittner v. United States*, 598 U.S. 85, 97 (2023) (“[T]his Court has long said that courts may consider the consistency of an agency’s views when we weigh the persuasiveness of any interpretation it proffers in court.”); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 964-65 (2017) (referencing historical practice that “the executive branch’s construction of an ambiguous statute would be ‘respected’ where that construction reflected an interpretation that was described as either contemporary with the statute’s enactment, or longstanding or customary, or both”). And that decades-long practice also easily distinguishes this case from those in which this Court has previously applied the major questions doctrine. *See, e.g., Biden v. Nebraska*, 143 S.Ct. 2355, 2372 (2023) (“The Secretary has never previously claimed powers of this magnitude[.]”); *NFIB v. OSHA*, 595 U.S. 109, 119 (2022) (“It is telling that OSHA, in its half century of existence, has never before adopted a ... regulation of this kind[.]”).

Nor is that the only reason why the major questions doctrine is plainly inapplicable here. The AEA provisions that the NRC has invoked, for example, are hardly ancillary or vague when it comes to the possession of spent nuclear fuel. That much is confirmed by the Fifth Circuit itself, which conceded that the AEA gives the NRC express and

unambiguous authority to issue licenses for the possession of the constituent components comprising spent nuclear fuel.⁸ See Pet.App.21a. Furthermore, as the name of the “Nuclear Regulatory Commission” gives away, it is hard to imagine something more squarely within the NRC’s “sphere of expertise” than the regulation of spent *nuclear* fuel pursuant to authority under the *Atomic Energy Act*. *NFIB*, 595 U.S. at 118. On top of that, far from “claim[ing] the authority to exercise control over ‘a significant portion of the American economy,’” *Nebraska*, 143 S.Ct. at 2373, the NRC is claiming the authority to license storage facilities that would significantly *reduce* economic costs as compared to storing spent nuclear fuel at existing reactor sites, see pp.14-15, *supra*. And the court below did not dispute that allowing storage at decommissioned sites that have no ongoing reactor operations is perfectly ordinary and lawful. See Pet.App.29a (finding it “plain[]” that “spent nuclear fuel” can “be stored onsite at-the-reactor”). The application of “common sense” here, *Nebraska*, 143 S.Ct. at 2384 (Barrett, J., concurring), would suggest that the facilities at issue in these cases—which likewise have no ongoing reactor operations and simply make already-occurring storage more efficient

⁸ Given the clarity of the statute, the major questions doctrine would not foreclose the NRC’s ability to license away-from-reactor storage facilities even assuming (contrary to law) that the doctrine applied, as the doctrine does not “require[] an unequivocal declaration from Congress authorizing the *precise* agency action under review.” *Nebraska*, 143 S.Ct. at 2378 (Barrett, J., concurring).

and economical⁹—are poor candidates indeed to trigger the “extraordinary” application of the major questions doctrine, *West Virginia*, 597 U.S. at 721. For all of these reasons, the Fifth Circuit’s decision cannot remain standing.

CONCLUSION

For the foregoing reasons, this Court should vacate or reverse.

Respectfully submitted,

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⁹ Of course, storage at away-from-reactor facilities involves transportation of spent nuclear fuel. But “[m]ore than 2,500 SNF shipments have been transported around the country without any radiological incidents over the past 55 years.” U.S. Dep’t of Energy, *5 Common Myths About Transporting Spent Nuclear Fuel* (May 26, 2020), <https://rb.gy/474jh5>.