Nos. 23-1300, 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 STATE RESPONDENTS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

BENJAMIN W. MENDELSON
SARA B. BAUMGARDNER
Assistant Solicitors General

Counsel for State Respondents

QUESTIONS PRESENTED

The Nuclear Regulatory Commission, an independent agency already insulated from *executive* oversight, asks this Court to hold that the Commission's own rules insulate it from *judicial* review of its compliance with a *legislative* mandate on where to store the nation's spent nuclear fuel. The questions presented are:

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

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

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INTRODUCTION

Decades ago, Congress determined that the federal government should dispose of the nation's spent nuclear fuel deep underground in a permanent facility in Yucca Mountain, Nevada. For various reasons—mostly political, some practical—construction of that facility has stalled and now is all but "dead." Nico Portuondo, *The Return of Yucca Mountain? GOP Floats Waste Site's Revival*, E&E NEWS (Apr. 11, 2024), https://perma.cc/ZS52-ZC4K. "By law," however, "Yucca Mountain is still the government's official plan to deal with the more than 85,000 metric tons of spent nuclear fuel that has piled up at more than 100 locations across the country." *Id.*; *see also* 42 U.S.C. §10172(a)(1).

After ignoring its statutory duties for decades, in recent years, the federal government has begun focusing on what it claims is a policy workaround: so-called "interim storage projects." Portuondo, *supra*. Rather than placing spent fuel in a facility dedicated to permanent (and safe) disposal, private facilities away from reactors will store waste on a nominally temporary basis. Congress, however, has never authorized such a scheme. In any event, how can storage be temporary if there is little prospect of "an eventual permanent repository"? *Id.*

Here, the Nuclear Regulatory Commission purports to allow a private entity to store thousands of tons of spent nuclear fuel above Texas's Permian Basin—the world's most productive oil field and the only source of safe water for hundreds of miles. Although the Commission describes this scheme as an "interim" measure, the license has a forty-year term, is renewable, and is unaccompanied by any plan to transfer the waste to a nonexistent permanent repository.

Nothing about this license is lawful. Congress has already legislated a solution to the nation's nuclear-waste problem: permanent storage in Yucca Mountain. No statute mentions, let alone authorizes, private interim offsite storage. Instead, the only interim storage Congress has permitted is in federal facilities, and only under defined circumstances. Because the Commission has created its own plan "without any legal basis," *In re Aiken County*, 725 F.3d 255, 266 (D.C. Cir. 2013), its actions cannot stand.

Nonetheless, the Commission and its licensee contend that Texas and local landowners may not challenge this unlawfulness, even arguing that an agency's rules can limit a federal court's jurisdiction. This position contravenes statutory language and creates a morass of line-drawing problems. Regardless, "[n]onstatutory review of federal agency action is available" where, as here, "an agency action is *ultra vires*." Jared P. Cole, *An Introduction to Judicial Review of Federal Agency Action* at 3 n.33, CONG'L RSCH. SERV. (Dec. 7, 2016).

STATEMENT

I. Statutory and Regulatory Background

A. Enacted in 1954, the Atomic Energy Act (AEA) granted authority over certain aspects of nuclear power. Congress has since redistributed that authority to the Nuclear Regulatory Commission and the Department of Energy. 42 U.S.C. §§2011 *et seq.*; *see id.* §5842. The Commission has "jurisdiction over nuclear plant licensing and regulation," while the Department is primarily charged with "energy research and development." *County of Rockland v. NRC*, 709 F.2d 766, 769 n.2 (2d Cir. 1983).

As the nuclear-energy market boomed following the AEA's enactment, nuclear waste from spent nuclear fuel piled up. "Prior to the late 1970's," however, that was

unconcerning. *Idaho v. DOE*, 945 F.2d 295, 298-99 (9th Cir. 1991). Because "it was accepted that spent fuel would be reprocessed," *id.*, power plants built capacity onsite to store spent fuel briefly before reprocessing.

But in the "mid-70's," the reprocessing concept "collapsed." *Idaho*, 945 F.2d at 298-99. The nation thus had nowhere to place a growing stockpile of material that remains radioactive "for time spans seemingly beyond human comprehension." *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012). Although acknowledging that onsite storage facilities could be expanded with "negligible" environmental impacts, NRC, NUREG-0404, *Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel* at ES-5 (Mar. 1978), the Commission proposed "installations built specifically" for long-term storage "that are not coupled to either a nuclear power plant or a fuel reprocessing plant," NRC, Proposed Rule, *Storage of Spent Fuel in an Independent Fuel Spent Storage Installation*, 43 Fed. Reg. 46,309, 46,309 (Oct. 6, 1978).

Despite a lack of legal authority, the Commission plowed ahead. *See, e.g.*, NRC, Final Rule, *Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation*, 45 Fed. Reg. 74,693 (Nov. 12, 1980). This development prompted alarm. Some commenters warned of the significant "transportation risks" associated with moving nuclear waste. *Id.* at 74,696. Others "expressed a concern that the promulgation of a rule covering" this issue "would decrease pressures on both industry and government to solve the radioactive waste problem." *Id.* at 74,693.

B. In 1982, Congress enacted the Nuclear Waste Policy Act (NWPA) to resolve this "national problem" and "major subject[] of public concern" for which

"[f]ederal efforts" had thus far "not been adequate." 42 U.S.C. §10131(a)(2)-(3), (7). Finding that "State and public participation in the planning and development of repositories is essential in order to promote public confidence," *id.* §10131(a)(6), the NWPA tasked the Department with establishing a permanent repository to place the nation's spent nuclear fuel deep underground, *id.* §10132. And it made the Commission responsible for licensing that repository. *Id.* §10134. In 1987, Congress amended the NWPA to specify Yucca Mountain, *id.* §10172(a), as the site for the first repository, *id.* §10134, which was to begin operations no later than January 31, 1998, *id.* §10222(a)(5)(B).

The NWPA also directed how spent fuel should be stored in the interim. Specifically, should onsite storage prove inadequate, Congress permitted storage of spent fuel (1) temporarily at a *federal* facility to avoid a commercial reactor's shutdown, *id.* §§10151-57; or (2) temporarily at a *federal* facility for so-called "monitored retrievable storage," *id.* §§10161-69.

C. Although the NWPA "is obviously designed to prevent the Department from delaying the construction of Yucca Mountain as the permanent facility while using temporary facilities," *NARUC v. DOE*, 736 F.3d 517, 519 (D.C. Cir. 2013), delay ensued. "[B]y the mid-1990s, the Department of Energy made clear that it could not meet the 1998 deadline"; it did not submit a license application for Yucca Mountain until 2008, *Texas v. United States*, 891 F.3d 553, 555-56 (5th Cir. 2018). Then, "by its own admission," the Commission refused to "comply[] with the law" requiring it to evaluate that application, prompting the D.C. Circuit to issue a writ of mandamus. *Aiken*, 725 F.3d at 258.

But even that order did not prevent agency intransigence. *Texas*, 891 F.3d at 557. Instead, the Commission turned to "interim" facilities, which it hoped would garner local support. Portuondo, *supra*. Yet interim storage faces at least three obstacles: (1) Many local communities do not support it; (2) storage is hardly "interim" where there are no efforts to build a permanent repository; and (3) most fundamentally, the statutory directive that spent nuclear fuel be stored in Yucca Mountain remains in effect. *Id.*

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

In 2016, Interim Storage Partners' (ISP's) predecessor applied for a license to operate a "consolidated interim storage facility" where it could house thousands of metric tons of spent nuclear fuel in dry-cask, above-ground storage in Andrews County, Texas, less than a mile from the Texas–New Mexico border. The license would be valid for forty years, but ISP may seek to renew it for an additional twenty. J.A.205-06.

Texas strenuously objected. On Texas's behalf, Governor Greg Abbott submitted comments explaining why spent fuel is too "dangerous" to be placed anywhere other than in "a deep geologic repository" and definitely should not be stored on "a concrete pad" atop an oil field where 250,000 active oil and gas wells capture 40% of America's oil reserves. J.A.117-18. If something were to happen—be it terrorism or an accident—the result would devastate the world's largest producing oil field and would significantly harm "the entire country." J.A.122.

The Texas Commission on Environmental Quality (TCEQ) warned that because the Commission has disregarded Yucca Mountain, ISP's facility could "become the

permanent solution" for the nation's nuclear waste. J.A.206. Although the Commission says that it "expects" that the waste will eventually be "shipped to a permanent geologic repository," J.A.206, the Commission never addressed what would happen if—as has been the case for decades—no permanent facility eventuates, J.A.207. New Mexico's Governor raised similar concerns, warning of "significant risk" that the nation's spent nuclear fuel will stay in Texas forever. J.A.212. Nevertheless, the Commission licensed ISP's proposed facility in 2021. Pet.App.53a.

III. Proceedings in the Court of Appeals

Texas, Governor Abbott, and TCEQ (collectively, "Texas") petitioned for review in the Fifth Circuit, ISP intervened, and the Fifth Circuit made two rulings relevant here.

First, although Texas did not intervene before the agency by seeking a hearing, the State fits within the "ultra vires exception to the [Hobbs Act's] party-aggrieved status requirement." Pet.App.18a-20a; *see also, e.g.*, *Leedom v. Kyne*, 358 U.S. 184, 188-89 (1958) (recognizing *ultra vires* review). Alternatively, the Fifth Circuit suggested that Texas would be a "party aggrieved" under the Hobbs Act because it "participated—in some way—in the agency proceedings," namely by submitting comments, Pet.App.17a-18a.

Second, the Fifth Circuit held that "[w]hat to do with the nation's ever-growing accumulation of nuclear waste is a major question that—as the history of the Yucca Mountain repository shows—has been hotly politically contested for over half a century." Pet.App.29a-30a; *see also* 42 U.S.C. §10131(a)(7). The Commission accordingly needs clear authorization to license private offsite storage facilities. Pet.App.30a. Yet the AEA does not

delegate such authority, and the NWPA affirmatively "belies the Commission's arguments." Pet.App.31a.

In reaching this conclusion, the Fifth Circuit rejected the Commission's assertion that because it may license the possession of other nuclear materials, it "has broad authority to license storage facilities for spent nuclear fuel." Pet.App.22a. After all, the Commission may license possession of specified materials "only for certain enumerated purposes—none of which encompass storage or disposal of material as radioactive as spent nuclear fuel." Pet.App.22a. The Commission's contrary argument, the Fifth Circuit explained, "cannot be reconciled with the [NWPA]," Pet.App.26a, which "creates a comprehensive statutory scheme for addressing spent nuclear fuel accumulation," Pet.App.29a.

The Fifth Circuit declined to rehear the case en banc. Pet.App.32a. Judge Higginson dissented and argued for the elimination of that court's *ultra vires* exception. Pet.App.45a-52a. In response, Judge Jones explained why the State would be a "party aggrieved" regardless of any such exception. Pet.App.33a-44a.

SUMMARY OF ARGUMENT

What to do with the nation's spent nuclear fuel implicates a host of difficult technological, environmental, and political considerations. Thankfully, that "policy debate is not" this Court's "concern." *Aiken*, 725 F.3d at 257. Because Congress has decided how to handle spent nuclear fuel, all that matters is that Yucca Mountain is not in Texas and ISP is not the federal government. Petitioners' efforts to evade these foundational points fail.

I. Jurisdiction exists for two reasons. *First*, Texas is a "party aggrieved" under the Hobbs Act because it participated in agency proceeding by filing comments—which is both the best reading of the statute and the only

reading that makes sense given that the *same* provision governs challenges to adjudications and rulemakings. Petitioners have no good answer, instead insisting that the Act is a chameleon, with the meaning of "party aggrieved" depending on whether an agency promulgates a rule or issues an order, and that agencies can create jurisdictional exhaustion requirements. Such a strained reading flunks multiple canons of construction and is a recipe for confusion.

Second, Texas can sue to challenge the Commission's acts as *ultra vires*. Although Petitioners make much of the fact that the Hobbs Act nowhere mentions *ultra vires* review, courts have engaged in nonstatutory review for centuries. If, contrary to reality, the Hobbs Act is unavailable here, *ultra vires* review applies.

II. On the merits, Petitioners argue that Congress never prohibited private interim, offsite storage facilities. Because "an agency literally has no power to act … until Congress confers power upon it," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), however, the question is not what Congress *prohibited*, but what Congress *allowed*. Petitioners have no good answer for the fact that Congress repeatedly allowed offsite storage at a *federal* facility, not a private one.

This, moreover, "is a major questions case," *West Virginia v. EPA*, 597 U.S. 697, 724 (2022), or, at minimum, a no-elephants-in-mouseholes case. Where an "issue is one of deep economic and political significance," Congress must delegate clearly because "extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 405 (2024) (citation omitted). Here, Congress recognized that where to house spent nuclear fuel is a "national problem"

and a "major … public concern." 42 U.S.C. §10131(a)(2), (7). Congress answered that "major" question, *id.*, both as to interim offsite storage, *id.* §§10151-57, and permanent disposal, *id.* §10172(a). Congress's clear answer was Yucca Mountain or interim *federal* facilities—not a *private* facility in Texas.

ARGUMENT

I. Texas May Challenge ISP's Unlawful License.

Under the Hobbs Act, a "party aggrieved" by a final order may seek review in the court of appeals. 28 U.S.C. §2344. Because ISP all but concedes (at 10) that Fasken is a party aggrieved, whether Texas is one too is academic. If the Court reaches this question, however, Texas properly sought review as a party aggrieved or because the Commission acted *ultra vires*.

A. Texas is a "party aggrieved."

1. Texas is a "party aggrieved" because it participated in agency proceedings.

a. The Court's "statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise here." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 667 (2021). As part of that analysis, courts "should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context." *Abramski v. United States*, 573 U.S. 169, 179 n.6 (2014). A provision "that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Id.* Here, applying this rule leads to one conclusion: To be a "party aggrieved," Texas must only have participated in some way in the agency proceeding.

As the Commission's own authority recognizes, NRC.Br.17, the term "party" in common parlance "is not

restricted to strict meaning of plaintiff or defendant in a lawsuit, being defined as one concerned in or privy to a matter, as in the relation of accessory or confidant, and again a partial person, one who takes sides." BLACK'S LAW DICTIONARY 1278 (4th ed. 1951). The term includes any "person concerned or having or taking part in any affair, matter, transaction, or proceeding." *Id*; *see also, e.g.*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1416 (2d unabridged ed. 1987). Indeed, the Court has used "person … aggrieved" and "aggrieved party" interchangeably. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (quoting 5 U.S.C. §702). Thus, absent a contrary, specialized meaning, "party" means "participator." XI THE OXFORD ENGLISH DICTIONARY 282 (2d. ed. 1989).

That ordinary meaning controls here. Because of the Hobbs Act's breadth, the term "party" must apply to "several quite different agencies and several types of proceedings," including adjudications and rulemakings. Pet.App.38a. After all, the Hobbs Act's "clear words" make "no distinction between orders which promulgate rules and orders in adjudicative proceedings." *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973). Yet no one disputes that filing comments makes one a "party aggrieved" for a rulemaking challenge. *Id.* Accordingly, where a party filed comments setting forth its legal position, it makes no sense to require further participation in an evidentiary hearing because notice-and-comment rulemaking does not require hearings. *See, e.g.*, *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 545 (1978).

b. This plain-text reading of "party aggrieved" also comports with statutory context. For one thing, the Hobbs Act expressly explains that unless hearings are

otherwise required by law, they are not necessary to seek review. "When the agency has not held a hearing before taking the action of which review is sought," a "court of appeals shall determine whether a hearing is required by law" and may "pass on the issues presented" otherwise. 28 U.S.C. §2347(b)(1)-(2). The court may also transfer the litigation to a district court for a hearing. *Id.* §2347(b)(3). Because jurisdiction attaches irrespective of whether an agency hearing occurred, it cannot be that a court lacks jurisdiction unless a party seeks a hearing.

The Hobbs Act's intervention provision reinforces that point. *Contra* NRC.Br.19; ISP.Br.25-26. A party in interest in an agency proceeding *may* intervene (often as a defendant) "as of right" in subsequent court proceedings brought by some other person, but those "whose interests are affected by the order of the agency" and who are not a party in interest must seek leave to intervene in such litigation. 28 U.S.C. §2348. By its terms, this provision governs who may *intervene* in court, but says nothing about who may *institute* judicial proceedings. That Congress distinguished between instituting review and intervention precludes conflating the concepts. Nor could the Act work otherwise—there is no party in interest in rulemaking.

Alabama Power Co. v. FCC, 311 F.3d 1357 (11th Cir. 2002), is not to the contrary. *Contra* NRC.Br.19; ISP.Br.25-26. There, the Eleventh Circuit recognized that a "'party aggrieved' is one who *participated* in the agency proceeding," *id.* at 1366 (emphasis added)—Texas's position. But multiple adjudications occurred in that case. *Id.* at 1365-67. The court concluded that participating in *one* adjudication does not make someone a party aggrieved by a *different* adjudication. *Id.* Whether an entity that *had* participated in some other way in the

agency proceeding could seek review was not at issue. *Id.* at 1366-67.

c. Reading the word "party" to mean "participant" also comports with the purpose of the "party aggrieved" requirement: namely, "to ensure that the agency had the opportunity to consider the issue that petitioners are concerned with." Pet.App.17a; *see Gage*, 479 F.2d at 1219. This allows agencies to compile the administrative record, the "focal point" for judicial review. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985).

This case proves as much. The Commission received Texas's objections while the proceeding was ongoing. J.A.117-22, 203-08. But the Commission had already rejected such legal arguments. *See, e.g.*, *Private Fuel Storage L.L.C.*, 56 N.R.C. 390, 392 (Dec. 18, 2002). It thus would serve no purpose to require Texas to seek an evidentiary hearing to advance a legal argument the Commission had already rejected.

d. Finally, if any doubts existed, the "strong presumption favoring judicial review of administrative action" squelches it. *Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 196 (2021) (citation omitted). Nothing suggests that Congress overcame that presumption by embedding in the Hobbs Act a term whose meaning supposedly changes depending on the form of proceeding an agency uses. And Congress plainly did not enact such a chameleon-like provision to allow an agency to block judicial review by denying intervention based on its view of the *merits*, as happened to Fasken and would have happened to Texas.

2. The Commission may not limit a court's jurisdiction.

Beyond what the Hobbs Act *says*, the Court should not lose sight of what the Hobbs Act *is*—a jurisdictional

statute. Jurisdictional statutes trigger special rules of interpretation that also require affirmance.

a. Because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," *Hamer v. Neighborhood Housing Servs. of Chi.*, 583 U.S. 17, 19 (2017), it follows that "[w]ithin constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider" and "under what conditions," *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007). "Separation-of-powers concerns, moreover, caution … against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana v. Holder*, 558 U.S. 233, 237 (2010). Because Congress does not lightly let foxes guard henhouses, it is "axiomatic" that "agencies can neither grant nor curtail federal court jurisdiction." *Carlyle Towers Condo. Ass'n, Inc. v. F.D.I.C.*, 170 F.3d 301, 310 (2d Cir. 1999).

Here, neither the AEA nor the Hobbs Act authorizes the Commission to impose jurisdictional requirements on federal courts—and certainly not clearly enough to overcome the clear-statement rule. The AEA says that "the Commission *shall* grant a hearing upon the request of any person whose interest may be affected by the proceeding, and *shall* admit such person as a party to such proceeding." 42 U.S.C. §2239(a)(1)(A) (emphases added). If someone requests a hearing, the Commission thus must make that person a party. *But see supra* p. 12 (noting that the Commission blocked Fasken from intervening); *infra* pp. 16-17, 24. But it does *not* say someone *must* request a hearing to seek judicial review. If it did, the AEA would superimpose a jurisdictional requirement onto the Hobbs Act—a different statute addressing many agencies having nothing to do with the AEA.

Nor does the Hobbs Act require following agency-created rules before seeking judicial review. Of course, when *Congress* conditions judicial review on compliance with agency procedures, those procedures can be jurisdictional. *E.g.*, *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1303 (D.C. Cir. 1997). But when Congress wants compliance with them to be "a condition precedent to judicial review," 47 U.S.C. §155(c)(7), it says so—*expressly*, *id.*; *see also, e.g.*, 15 U.S.C. §717r(a); 42 U.S.C. §1997e(a). Indeed, Congress explicitly enacted a jurisdictional exhaustion requirement for the FCC (another agency covered by the Hobbs Act) in the Communications Act but did not do so for the NRC in the AEA. *See* 47 U.S.C. §405(a), (b)(2); *see also, e.g.*, 15 U.S.C. §717r(a); 42 U.S.C. §1997e(a).

b. Congress's use of "party aggrieved" is also not a permission slip for agencies to create jurisdictional exhaustion requirements for three additional reasons.

First, "[w]hen a statute is reasonably susceptible to divergent interpretation," the Court "adopt[s] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Kucana*, 558 U.S. at 251. The Court has "consistently applied that interpretive guide" and "assumes that Congress legislates with knowledge of the presumption," *id.* at 251-52 (cleaned up). Because Congress has not clearly indicated that the Commission can impose jurisdictional requirements, the presumption holds.

Second, Congress "does not hide elephants in mouseholes" or "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Here, far from the "clear and convincing evidence"

needed "to dislodge the presumption," *Kucana*, 558 U.S. at 252, "Congress intended to provide for initial court of appeals review of *all* final orders in licensing proceedings whether or not a hearing before the Commission occurred or could have occurred," *Lorion*, 470 U.S. at 737 (emphasis added).

Third, exhaustion requirements are essentially never jurisdictional. *E.g.*, *Santos-Zacaria v. Garland*, 598 U.S. 411, 417 (2023). So even if the AEA imposes such a requirement (it doesn't), it would not bar review.

c. Reading "party aggrieved" as "participant" also avoids jurisdictional confusion. "[A]dministrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 79 (2010). Not only do complex jurisdictional rules "encourage gamesmanship" and "eat[] up time and money," but they burn "[j]udicial resources," as courts must raise such issues *sua sponte*. *Id.* at 94.

Here, ascribing jurisdictional consequences to the distinction between rulemaking and adjudication is a recipe for confusion. The line between the two can be paper thin—especially after *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Congress defined "rule" as "the whole *or a part* of an agency statement of general *or particular* applicability" and "adjudication" largely as what's left over. 5 U.S.C. §551(4)-(7) (emphases added). Decades of bewilderment have ensued. *See* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 ADMIN. L. REV. 1077 (2004). An agency's choice of label is not dispositive, *e.g.*, *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1284-85 (D.C. Cir. 2005), and an agency may solicit comments in an adjudication, *e.g.*, *Neustar, Inc. v. FCC*, 857 F.3d 886, 895 (D.C. Cir. 2017), while holding an evidentiary hearing in a

rulemaking, *e.g.*, *Vt. Yankee*, 435 U.S. at 524. And the FCC—perhaps the most common Hobbs Act litigant—sometimes switches between the two categories in the middle of a *single* proceeding or issues one decision that is both a rulemaking *and* an adjudication. *See Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 535-36 (D.C. Cir. 2007).

If "party aggrieved" means "participant," such confusion between rulemaking and adjudication is relatively harmless because courts can tell whether a litigant filed comments or otherwise participated in agency proceedings. But if the existence of a federal court's jurisdiction depends on which category applies, commenters will be forced to flood agencies with motions to intervene in the face of *any* ambiguity. Moreover, if failure to follow an agency's procedural rules can bar judicial review, courts will have to determine in every case—potentially *sua sponte*, and without knowing the full universe of relevant rules or even having access to the full record—whether every procedure was followed. And if failure to follow only certain rules may bar "party" status, courts will have to determine which rules are jurisdictional before doublechecking whether those particular rules were followed. Courts also will be forced to resolve ancillary litigation regarding alleged violations of the rules and develop new doctrines to prevent agencies from creating jurisdictional traps or using ticky-tack violations to defeat judicial review.

d. Finally, the principle that jurisdiction and the merits are distinct also supports jurisdiction. Whether a claim is meritorious "does not implicate subject-matter jurisdiction, *i.e.*, the court's … *power* to adjudicate the case." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). Yet here, the Commission refused to let

Fasken intervene—thereby, in Petitioners' view, precluding review of the subsequent licensing order—because the Commission believed Fasken was wrong on the merits. *See In re Interim Storage Partners LLC*, 90 N.R.C. 31, 52 (2019). Nothing in "party aggrieved" empowers agencies to control access to courts by making such threshold merits determinations.

3. Petitioners' counterarguments fail.

Petitioners advance at least six counterarguments. None persuades.

First, the Commission asks the Court (at 17-18) to use cases construing the False Claims Act or arising in the class-action context to interpret the Hobbs Act term "party." But the presumption that "the same term has the same meaning" is not an ironclad rule *even* when the term appears "in a single statute." *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). After all, "most words have different shades of meaning and consequently may be variously construed." *Id.*

Here, the Hobbs Act is a *different* statute—one with its own context and history. And it would be particularly inappropriate to look across contexts with respect to the meaning of the term "party," as the Court has already recognized that the meaning of that specific term varies. For example, another of Petitioners' cases—this one in the bankruptcy context—adopts Texas's view of the "ordinary meaning" of "party": namely, "one concerned in an affair; a participator." *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268, 278 (2024) (quoting WEBSTER'S NEW INT'L DICTIONARY 1784 (2d. ed. 1949)).

Second, Petitioners make much of the distinction between the terms "party aggrieved" in the Hobbs Act and "person ... aggrieved" in §702 of the APA. NRC.Br.18; ISP.Br.24. This Court, however, read "person …

aggrieved" and "aggrieved party" interchangeably in *Darby*. 509 U.S. at 146. To be sure, then-Judge Scalia reasoned that to "give meaning to that apparently intentional variation, [courts] must read 'party' 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). But he said nothing about the question here: how someone *becomes* a "party" before an agency. And when he joined this Court, he explained that "person … aggrieved" requires only that a plaintiff (1) "identify some agency action that affects him" and (2) "show that he has suffered legal wrong because of the challenged agency action." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990) (quotation marks omitted). It does *not* require intervening in agency proceedings.

Third, the Commission relies (at 19-20) on the AEA's distinction between "person" and "party." But the question is whether Texas may seek review under the *Hobbs Act*, not the AEA. The Hobbs Act covers many agencies—not just the Commission—so the AEA does not dictate the Hobbs Act's meaning. Nor does the Commission's argument work on its own terms. The relevant AEA provision, 42 U.S.C. §2239(a)(1)(A), shows that *one way* to become a party is to request a hearing. Because the Hobbs Act applies to rulemakings and adjudications alike, that cannot be the only way to become a party. Neither does the AEA *require* anyone to seek a hearing.

Fourth, Petitioners argue that agencies must be able to create procedures for their own proceedings, and ISP invokes the specter of someone "slipping a handwritten note under the door of the agency headquarters after the deadline for comments has passed." ISP.Br.27. But filing comments *after* a proceeding is over is not participation.

Timely submitting comments in connection with a pending proceeding is different in kind.

ISP's example, moreover, reveals the danger of Petitioners' position. Under their logic, an agency could deprive the indigent of judicial review simply by promulgating rules with onerous formatting requirements like barring handwritten comments or demanding that all submissions be on 8.5" x 14" paper. Petitioners' view that submitting comments to an agency has no more jurisdictional significance than filing an amicus brief is also wrong. NRC.Br.28; ISP.Br.26. Congress directs how someone becomes a party in court or before an agency. Here, no one disputes that under the Hobbs Act, filing comments to an agency *can* make someone a party for purposes of judicial review. The only question is whether agency-created procedures can curtail that right to review for some proceedings.

Fifth, Petitioners lean heavily on a handful of lower-court decisions, NRC.Br.28; ISP.Br.25, but such cases underscore why jurisdiction exists here. For example, *Ohio Nuclear-free Network v. NRC*, 53 F.4th 236 (D.C. Cir. 2022), claims that "invocation of the appropriate and available administrative procedure … is the statutorily prescribed prerequisite for this court's jurisdiction to entertain a petition to review a final NRC order," *id.* at 240 (quotation marks and alterations omitted). But that is not what the Hobbs Act says, and Petitioners cannot wring an exhaustion requirement out of the word "party." *NRDC v. NRC*, 823 F.3d 641 (D.C. Cir. 2016), and *State ex rel. Balderas v. NRC*, 59 F.4th 1112 (10th Cir. 2023), are unpersuasive for similar reasons.

In all events, even if these cases were correct a year ago, they are anachronisms today. Consider *Balderas*, which held that "to assess status as a party," courts must

focus on "the practices of the agency." 59 F.4th at 1117. The Tenth Circuit reasoned that "if the Commission had required intervention and New Mexico didn't seek leave to intervene," then courts "would lack jurisdiction under the Hobbs Act." *Id.* But agency practices cannot define a jurisdictional statute. Because agencies no more "administer" the Hobbs Act than they "administer" 28 U.S.C. §1331, such analysis would not work even under *Chevron*. *See Chevron U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 842 (1984). But it cannot possibly be correct after *Loper Bright*.

Nor does it matter how long the Commission's rules have existed. *Contra* ISP.Br.25. The Commission can create rules for its proceedings. The question here is whether compliance with those rules is a jurisdictional requirement for judicial review. The Commission's rules do not purport to govern a court's jurisdiction. And even if they did, "[a] regulation's age is no antidote to clear inconsistency with a statute." *Brown v. Gardner*, 513 U.S. 115, 122 (1994). Because Texas is a "party aggrieved" under the Hobbs Act, jurisdiction exists.

Finally, Petitioners retreat to policy. ISP complains (at 28) that "[i]f any person can sue in court," there would be no point in having "extensive safety-based adjudicatory hearings at the agency level at all." But it is not true that "any person" may seek review—a person must have participated in agency proceedings and have standing. Moreover, an "extensive safety-based adjudicatory hearing[]," ISP.Br.28, may make sense for factual objections, but not for questions of law, *cf. Carr v. Saul*, 593 U.S. 83, 92-93 (2021). Even if exhaustion of legal issues could be relevant, it would have been futile here because the Commission "predetermined" its view of the State's arguments. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992);

supra p. 12. ISP's rhetoric, moreover, elides that the Hobbs Act does not require hearings. *Supra* pp. 10-11.

In fact, to the extent policy is relevant, it cuts against Petitioners. The rule from this case will apply not only to governments and energy companies, but also to victims of housing discrimination and small farmers. *E.g.*, 28 U.S.C. §2342(2), (6). Many people lack the resources or training to intervene in complex agency proceedings. Petitioners' logic would also allow agencies covered by the Hobbs Act to add onerous, confusing, or pointless hoops before such a commenter can be a "party" to a rulemaking. The Court should not ascribe to Congress the intent to deprive anyone of his or her day in court.

B. Courts may enjoin *ultra vires* action.

1. Nonstatutory review applies here.

In all events, courts need not rely on a specific statute where, as here, agency action is *ultra vires*.

a. Nonstatutory review has been a feature of our law for centuries. "Indeed, the most famous case of all, *Marbury v. Madison*, was a nonstatutory review case," and "Chief Justice Marshall himself applied nonstatutory review again in the well-known case of *Osborn v. Bank of the United States*." Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1625 (1997). In neither case did the plaintiff have a "specific, statutory mechanism" to sue under, yet the Court held that relief was available via mandamus or the common law. *Id.* at 1633. And throughout much of the early republic, takings lawsuits were resolved not through statutory causes of action—which did not exist until the Tucker Act—but through nonstatutory relief. *United States v. Lee*, 106 U.S. 196 (1882); *accord DeVillier v. Texas*, 601 U.S. 285, 292-93 (2024); *Knick v. Township of Scott*, 588 U.S. 180, 197-201 (2019).

Those challenging agency action also historically have not relied on a cause of action like the APA's to challenge *ultra vires* action. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 948, 972 & n.271 (2017). Review was available where an agency head "exceeded his authority or this court should be of opinion that his action was clearly wrong." *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109 (1904). Hence, "[l]ong before the APA, the 'main weapon in the arsenal for attacking federal administrative action' was a suit in equity seeking injunctive relief." *Fed. Express Corp. v. U.S Dep't of Com.*, 39 F.4th 756, 763 (D.C. Cir. 2022) (quoting KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §18.4, at 179 (3d ed. 1994)).

Such review has continued into modern times. No statute provided a cause of action in, for example, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Siegel, *supra*, at 1636, 1672 & n.265. And "review of federal agency action is available when an agency action is *ultra vires*, that is, when the agency has plainly violated an unambiguous and mandatory legal requirement." Cole, *supra*, at 3 n.33 (citing, *inter alia*, *Kyne*, 358 U.S. at 188-89; *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689-90 (1949)). Courts thus need not rely on statutory causes of action "to strike down an [agency] order … made in excess of [the agency's] delegated powers and contrary to a specific prohibition in the Act." *Kyne*, 358 U.S. at 188.

b. The Fifth Circuit properly applied this longstanding body of law, explaining that *ultra vires* review allows a person who was "not a party to the original agency proceeding" to seek review "where," *inter alia*, "the agency action is attacked as exceeding [its] power." Pet.App.19a.

As Judge Jones explained, the doctrine "literally refers to being 'outside' the agency's power, *i.e.* in defiance of the limits placed by Congress in the agency's governing statute or the Constitution." Pet.App.43a. Such analysis echoes *Larson*, where this Court explained that if an "officer's powers are limited by statute, his actions beyond those limitations" are "*ultra vires*" and so "may be made the object of specific relief." 337 U.S. at 689.

For reasons explained by the Fifth Circuit and set forth below, "[t]he Commission has no statutory authority to issue the license." Pet.App.21a; *infra* Part II. It is not a close question. An apt term to describe such defiance of Congress is *ultra vires*.

2. Petitioners' counterarguments again fail.

Petitioners deride *ultra vires* review as atextual, NRC.Br.20; ISP.Br.19, yet ignore history. "Statutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993). It is implausible that Congress displaced longstanding common law with the phrase "party aggrieved." *E.g.*, *Fed. Express*, 39 F.4th at 763 (nonstatutory review survived APA's enactment).

Nor is *ultra vires* a synonym for "wrong," and it does not require courts to draw "highly malleable distinctions" between claims. *Contra* ISP.Br.22; NRC.Br.15. Courts have long protected against *ultra vires* action. Petitioners' concerns, moreover, ring particularly hollow now that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright*, 603 U.S. at 413. Nothing about an administrative record, the "focal point for judicial review," *Lorion*, 470 U.S. at 743, speaks to what a statute means.

Petitioners insist that cases like *Kyne* are irrelevant because "there is a meaningful and adequate opportunity for judicial review under the relevant statute." ISP.Br.21 (referencing *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991)). Fasken was refused intervention because the Commission did not think Fasken's arguments were meritorious. The same would have happened to Texas; after all, the Commission previously rejected Texas's primary legal objections. This conflation of the merits and jurisdiction misreads the Hobbs Act, but if Petitioners were correct, it would be proof positive there is *not* "a meaningful and adequate opportunity for judicial review." Petitioners cannot have it both ways.

II. Congress Has Not Authorized the Commission to License Private, Offsite Storage Facilities.

Congress mandated that spent nuclear fuel should be permanently disposed of at Yucca Mountain. Congress just as clearly mandated that temporary storage may take place at only one of two locations: the reactor site or a federally operated facility. That language controls.

A. The Commission has limited authority to license offsite storage.

1. The AEA does not allow ISP's license.

a. Petitioners appear to agree that the AEA is silent regarding the key issue here—whether the Commission may license a private entity to possess or store spent nuclear fuel. As the Commission's Chairman recognized in 1978, the AEA "does not explicitly authorize regulation of radioactive waste facilities."[1] That silence is all but

[1] NRC, NUREG-0527, *Regulation of Federal Radioactive Waste Activities: Report to Congress on Extending the Nuclear Regulatory Commission's Licensing or Regulatory Authority to*

dispositive. Because agencies "are creatures of statute," they "have no inherent powers" and "may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act." *Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring).

Nor can Petitioners draw support from what Congress allowed the Commission to do. Unlike the sweeping grants of authority that generated concern in recent years, *see, e.g.*, *Gundy v. United States*, 588 U.S. 128 (2019), the AEA is highly reticulated. The Commission may "issue licenses to," among other things, "possess … special nuclear material," 42 U.S.C. §2073(a), "distribute source material within the United States to qualified applicants requesting such material," *id.* §2093(a), and "use byproduct material," *id.* §2111(a). Even then, licenses are purpose-specific: Licensees cannot do just *anything* with such materials; they can do only things like research and development, medical testing, or national defense. *Id.* §§2073(a), 2093(a), 2111(a), 2201(b).

Petitioners have not identified a statute that allows the Commission to license private, offsite possession of "spent nuclear fuel," the material at issue here. Rather, Congress distinguished "spent nuclear fuel" from "special nuclear material," "source material[]," and "byproduct material[]" when it required the Commission to "establish a system" to ensure the secure transfer of "*byproduct materials*, *source materials*, *special nuclear materials*, high-level radioactive waste, *spent nuclear fuel*, transuranic waste, and low-level radioactive waste."

Federal Radioactive Waste Storage and Disposal Activities at G-9 (Sept. 1979), https://www.google.com/books/edition/Regulation_of_Federal_Radioactive_Waste/ERpSAAAAMAAJ?hl=en&gbpv=0.

Id. §2210i(a)-(b) (emphases added). Indeed, Congress separately defined "special nuclear material," "source material," "byproduct material," and "spent nuclear fuel" in 42 U.S.C. §2014, confirming their separateness. Because the AEA expressly distinguishes "spent nuclear fuel" from materials the Commission may license, "it is fair to suppose that Congress considered the unnamed possibility" of authorizing licenses for such material "and meant to say no to it." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (quotation marks omitted).

b. Even if the AEA authorized licenses for *possessing* spent nuclear fuel, it does not do so for *storing* it. The Commission may grant licenses to "possess … special nuclear material," 42 U.S.C. §2073(a), "issue licenses for and to distribute source material," *id.* §2093(a), or license "use" of "byproduct material," *id.* §2111(a)—but only for particular activities. For example, the Commission may license an entity to "possess," *id.* §2073(a), "special nuclear material" or "source material" only for research and development, *id.* §§2073(a)(1)-(2), 2093(a)(1)-(2), "medical therapy," *id.* §§2073(a)(2), 2093(a)(2), "utilization or production facilities," *id.* §§2073(a)(3), 2093(a)(3); *see id.* §2133(a), or "such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter," *id.* §§2073(a)(4), 2093(a)(4). Likewise, it may license the "use" of "byproduct material" only for research and development, medical therapy, "industrial uses, agricultural uses, or such other useful applications as may be developed." *Id.* §2111(a).

The Commission did not license ISP to possess spent nuclear fuel for any of these purposes. Pet.App.55a. Neither Petitioner argues to the contrary—for example, that ISP's license concerns "research and development"

or "medical therapy." 42 U.S.C. §§2073(a)(1)-(2), 2093(a)(1)-(2), 2111(a).

Nor does ISP's license pertain to "utilization or production facilities," each of which also has a specific definition. *Id.* §§2073(a)(3), 2093(a)(3). A "[u]tilization facility" is "any equipment or device, except an atomic weapon," that the Commission has determined is "capable of making use of special nuclear material" in significant ways. *Id.* §2014(cc), (cc)(1); *see also id.* §2014(cc)(2). And a "production facility" includes "any equipment or device" that the Commission determines is "capable of the production of special nuclear material" in significant ways. *Id.* §2014(v)(1); *see also id.* §2014(v)(2). ISP's license does not authorize ISP to use "special nuclear material"—which is, again, different from "spent nuclear fuel," *supra* pp. 25-26—in any "equipment or device," 42 U.S.C. §2014(cc)(1)-(2). Neither does it authorize ISP to "make, produce, or refine" anything. *Id.* §2014(u).

The catchall provisions, *id.* §§2073(a)(4), 2093(a)(4), 2111(a), cannot fill this gap. "[C]ourts … interpret a 'general or collective term' at the end of a list of specific" terms "in light of any 'common attribute[s]'" the "specific items" share. *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022) (quotation marks omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012). Thus, a "general or collective term at the end of a list of specific items is typically controlled and defined by reference to the specific classes … that precede it." *Fischer v. United States*, 603 U.S. 480, 487 (2024) (quotation marks omitted).

The specific uses for which the Commission may license possession or use of the enumerated materials thus "control[s] and define[s]," *Circuit City Stores, Inc. v.*

Adams, 532 U.S. 105, 115 (2001), the "other uses" for which the Commission may license possession or use. Each of the specifically listed activities involves an affirmative, productive application of the material. *See* 42 U.S.C. §§2073(a), 2093(a), 2111(a). Storage (whether temporary or permanent) does not.

2. The NWPA also dooms ISP's license.

a. Even if the AEA, standing alone, were ambiguous, the NWPA requires affirming the Fifth Circuit's judgment. Statutes "dealing with the same subject," like the AEA and NWPA, "being *in pari materia*," "are to be interpreted together, as though they were one law." SCALIA & GARNER, *supra*, at 252 (emphasis omitted). "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947). So, "a 'later act can … be regarded as a legislative interpretation of [an] earlier act … in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (alteration in original) (quoting *United States v. Stewart*, 311 U.S. 60, 64-65 (1940)); *see id.* at 244 (indicating that this canon can help resolve textual ambiguities).

The NWPA limits the type of facilities the Commission may license to "provide for the permanent disposal of … spent nuclear fuel." 42 U.S.C. §10131(a)(4). Until the federal government fulfills the Yucca Mountain mandate, the Department may not consider, *id.* §10101(18), and the Commission may not license, a repository anywhere else, *id.* §§5842, 10172. Furthermore, Congress provided for temporary offsite storage—but only in *federal* repositories, and only under certain circumstances. *Id.* §§10151, 10155-56.

b. Numerous features of the NWPA confirm that the Commission cannot grant ISP's license. *First*, ISP's facility will likely be anything but temporary. For over thirty-five years, the Executive Branch has refused to comply with Congress's directives about Yucca Mountain. The Commission offers no reason to believe that the next forty years—or more—will be different. The Commission "apparently has no long-term plan other than hoping for a geologic repository," and if it "continues to fail in its quest to establish one," then spent nuclear fuel must "be stored" at purportedly "temporary" storage sites "on a permanent basis." *New York*, 681 F.3d at 479. Before granting this license, the federal government made clear that it would not pursue a facility in Yucca Mountain—the only authorized permanent repository. Any assurance that this license is temporary is thus unserious. The Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) (quotation marks omitted).

Second, even if a presumption of good faith required assuming that the ISP facility will be temporary, it would not save the license. Congress has declared that "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." 42 U.S.C. §10151(a)(1) (emphasis added); *accord id.* §10151(b)(1). It thus charged the Commission to "expedite … the addition of [any] needed new storage capacity at the site of each civilian nuclear power reactor" to meet

that end. *Id.* §10151(a)(2); *see also id.* §10152 (using "shall"). Congress thus indicated that outside of limited exceptions for federal facilities, reactors should store their own spent fuel onsite until a permanent national repository is built.

True, Congress recognized that sometimes, storage at a reactor site might not be able "reasonably [to] provide adequate storage capacity." *Id.* §10151(a)(3). In those circumstances, Congress ordered the federal government to "provide" limited "interim storage" capacity "of spent nuclear fuel" away from the reactor site. *Id.* Even then, however, Congress limited the circumstances under which the federal government may "provide" such storage: It may do so only at a *federal* facility. *Id.* §§10151-57. It may also construct "monitored retrievable storage" facilities, *id.* §§10161-69, but that category does not encompass ISP's proposed facility, *id.* §10161(b). Thus, the Commission may license interim storage only if it is (1) located at the reactor site or (2) federally owned and operated. *See* 42 U.S.C. §§10151, 10155. ISP's facility is neither.

Third, Congress declared that "[n]otwithstanding any other" law, "nothing in" the NWPA "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 the date of the NWPA's enactment. *Id.* §10155(h). Yet ISP's facility is not located at a reactor site and (of course) not federal.

These provisions confirm that the Commission cannot license a private, offsite interim storage facility for spent nuclear fuel. ISP tries (at 3-4, 9-10) to portray this clear language as unfairly punishing industry for the

federal government's mistakes. But the statute says what it says, and it is for Congress—not the Commission—to change it. Regardless, equity hardly favors ISP. Under the NWPA, *Texas* was supposed to enjoy statutory protections, including a veto over siting of an interim-storage facility that only Congress could override. *See* 42 U.S.C. §§10136, 10155(d), 10156(e), 10166, 10169. Unfortunately, the Commission ignored those requirements, too.

3. The major-questions and no-elephants-in-mouseholes doctrines also apply.

a. Additional rules of interpretation further confirm that Congress never authorized this license.

The major-questions doctrine serves two purposes. *First*, it "is a tool for discerning—not departing from—the text's most natural interpretation." *Biden v. Nebraska*, 143 S.Ct. 2355, 2376 (2023) (Barrett, J., concurring). It starts from the premise that Congress "speak[s] clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'" *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (per curiam) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). *Second*, it helps effectuate nondelegation principles. "Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine." *West Virginia*, 597 U.S. at 740 (Gorsuch, J., concurring). Congress thus must speak clearly when delegating authority to address questions with a fraught "political history," including "Congress's creation of 'a distinct regulatory scheme'" and the "industry's 'significant' role in 'the American economy.'" *Nebraska*, 143 S.Ct. at 2382 (Barrett, J., concurring) (quoting *FDA*

v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).

Distinct in a critical respect from the major-questions doctrine, the no-elephants-in-mouseholes doctrine provides that even if a question is *not* major in terms of economic or political significance, an agency still cannot use ancillary provisions to alter "fundamental details of a regulatory scheme." *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA*, 71 F.4th 59, 67-68 (D.C. Cir. 2023) (quoting *Whitman*, 531 U.S. at 468); *see also Epic Sys. Corp. v. Lewis,* 584 U.S. 497, 515 (2018); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225-31 (1994). This doctrine does not sound in nondelegation concerns, *Heating*, 71 F.4th at 67-68; instead, it is particularized application of the "commonplace" rule that "the specific governs the general," which applies with special force where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions," *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (cleaned up).

b. It was "clear that from the very beginnings of commercial nuclear power," Congress "was aware of the absence of a permanent waste disposal facility." *NRDC v. NRC*, 582 F.2d 166, 170 (2d Cir. 1978). But indefinite private storage was not then regarded "as a feasible and acceptable method of disposal … of spent [nuclear] fuel." *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 244 (4th Cir. 1987). Instead, "[g]overnment and industry accepted reprocessing as the only practical method of disposing of spent fuel." *Id.* at 246; *supra* pp. 2-3. The AEA's failure to authorize offsite storage of spent nuclear fuel reflects this widespread belief.

So, when "the private reprocessing industry collapsed" in the 1970s, "the nuclear industry was confronted with an unanticipated accumulation of spent nuclear fuel" with no long-term plans for managing nuclear waste. *Idaho*, 945 F.2d at 298. Congress, in turn, recognized that this "accumulation"—which occurred decades after the AEA's enactment—created a "national problem," 42 U.S.C. §10131(a)(2), and that "spent nuclear fuel" is a "major subject[] of public concern," *id.* §10131(a)(7). It answered that "major" question by enacting the NWPA to solve "the problems of civilian radioactive waste disposal." *Id.* §10131(a)(3).

In the NWPA—a subsequent, more specific statute than the AEA—Congress decided that the "solution" to this "problem[]," *id.*, was a permanent national repository deep underground in Nevada, and until then, "limit[ed] temporary storage to private at-the-reactor storage or at federal sites," Pet.App.29a; *see supra* pp. 3-4. Yet given political sensitivities, Congress's decision "has been hotly politically contested for over a half century." Pet.App.30a. And it was not until decades after the NWPA's enactment—and after the Executive Branch made clear it would not obey Congress's directives regarding Yucca Mountain—that the Commission purported to issue a license like this one.

Where, as here, "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" courts "typically greet its announcement with a measure of skepticism." *Util. Air*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159). And where, as here, Congress enacts a comprehensive scheme to address a specific problem, agencies cannot invoke ancillary provisions of an older statute that do not mention that

problem to bypass Congress's scheme. To uphold this license, the Court "would have to conclude that Congress not only" hid "a rather large elephant in a rather obscure mousehole," but also "buried" that elephant "beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005).

B. Petitioners' theories again fall flat.

Petitioners again press numerous counterarguments. None supports reversal.

1. Petitioners misunderstand the separation of powers.

a. To start, the Commission repeatedly faults Texas (at, *e.g.*, 42, 45-46) for failing to identify where Congress *prohibited* it from issuing a license like ISP's. That's backwards. "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony." *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002); *see also La. Pub. Serv.*, 476 U.S. at 374. Courts do not "presume a delegation of power merely because Congress has not expressly withheld such power." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995).

b. Petitioners also argue that the major-questions doctrine is inapt. ISP.Br.38-39; NRC.Br.48-49. But that doctrine constitutes an additional reason to affirm; the Court can and should reject ISP's license based on the AEA's and NWPA's plain language alone. *See, e.g.*, *Nebraska*, 143 S.Ct. at 2375 (invoking major-questions doctrine in the alternative). In any event, the doctrine applies if a case involves questions of "vast 'economic and political significance.'" *Ala. Ass'n of Realtors*, 594 U.S. at

764 (quoting *Util. Air*, 573 U.S. at 324). ISP does not dispute that this case involves such questions. Nor could it when Congress declared that what to do with spent nuclear fuel is a "major" problem. 42 U.S.C. §10131(a)(7). Petitioners thus must show that Congress provided the Commission with clear authority. *Supra* pp. 24-25.

The Commission's insistence (at 49) that "this Court has never held that the major questions doctrine is implicated whenever a case is of some importance" misses the mark. The issue is of far more than "some importance"—Congress identified it as a "major subject[] of public concern." 42 U.S.C. §10131(a)(7). Furthermore, the lengths to which the Department and the Commission have gone for decades to escape the NWPA—and the reasons they have gone to those lengths—confirm the extraordinary political significance of this issue. Regardless, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions," *RadLAX*, 566 U.S. at 645 (cleaned up), precluding the Commission from straining to circumvent that scheme.

2. Petitioners misread the statutes.

Petitioners attempt to find authority by stitching together, Frankenstein-style, various pieces of the AEA. That is not how this Court reads statutes.

a. Both Petitioners' textual arguments founder at the outset by writing off the NWPA as irrelevant. *E.g.*, ISP.Br.15, 38-40; NRC.Br.42. But statutes "dealing with the same subject" "are to be interpreted together, as though they were one law." SCALIA & GARNER, *supra*, at 252 (emphasis omitted); *supra* p. 30. And "the meaning of one statute may be affected by other Acts, particularly where," as here, "Congress has spoken subsequently and more specifically to the topic at hand." *Brown &*

Williamson, 529 U.S. at 133; *see also* SCALIA & GARNER, *supra*, at 254-55 (citing, *inter alia*, *Stewart*, 311 U.S. at 64). Here, the NWPA clarified that spent nuclear fuel may be stored in only two types of facilities. *Supra* pp. 29-30.

The Commission attempts (at 43-44) to brush off the NWPA as immaterial to its licensing authority under the AEA, but the *only* lawful interim storage for spent nuclear fuel—the issue here—is either onsite or federal. *Supra* pp. 4, 29-30. The Commission is also wrong to rely on a provision that "ma[d]e it a crime to intentionally destroy or damage 'any nuclear waste storage facility licensed under'" the AEA, NRC.Br.42 (quoting Act of June 30, 1980, Pub. L. No. 96-295, §204(a), 94 Stat. 787). But no one disputes that storage facilities onsite are permissible; they must be. Even if Yucca Mountain were operational, waste must cool for years after being removed from a reactor before it can be safely transported—meaning that some form of temporary, onsite storage of spent nuclear fuel inheres in the use of nuclear fuel. NRC.Br.3. This statute thus says nothing about the relevant *locational* question regarding where storage will occur longer-term. Regardless, the phrase "nuclear waste" encompasses several types of waste; it does not equal "spent nuclear fuel." And post-NWPA, this provision refers to the onsite storage facilities or offsite federal storage facilities that the NWPA authorizes.

ISP is also off-base (at 39-42) when it argues that the NWPA is irrelevant because it often gives directives or authority to the Department, not the Commission. Congress, however, can address where and how to store spent nuclear fuel through any agency it wishes. Regardless, the Commission must still issue licenses for spent nuclear fuel—which is at issue here. *See* 42 U.S.C. §5842;

County of Rockland, 709 F.2d at 769 n.2. The cases upon which ISP relies (at 41-42) for the proposition that the NWPA did not repeal the AEA ignore that the Commission *never* had authority to license private, offsite storage of spent nuclear fuel. *Supra* pp. 24-28; *see infra* Part II.B.3 (discussing those cases). But if the AEA were ambiguous, the subsequent and more specific language of the NWPA would govern. *See Brown & Williamson*, 529 U.S. at 133.

ISP also gets the NWPA wrong when it argues (at 42) that the NWPA "was all about permanent *disposal* of spent nuclear fuel by [the Department], not *temporary possession* of spent nuclear fuel by private parties." Putting aside that no one can claim with a straight face that this license is really a "temporary" measure, ISP's argument fails because the NWPA expressly addresses interim storage. 42 U.S.C. §§10151-57.

ISP faults (at 39-40) the Fifth Circuit for "invok[ing]" NWPA provisions and insists (at 40) that §10155(h) "merely limits" the NWPA's "scope" with no effect on the AEA. But the Commission issued ISP's license under rules that "appl[y] only to 'temporary storage,' which the agency defined as 'interim storage.'" NRC.Br.4 (quoting 45 Fed. Reg. at 74,694); *see* Pet.App.53a. That is the precise issue that the NWPA governs. ISP thus ignores the *in pari materia* canon and Congress's specific limits on storage options for spent nuclear fuel.

b. Petitioners also attempt to ground the Commission's authority in the AEA's general purpose statements and findings. *E.g.*, ISP.Br.29-31 (citing 42 U.S.C. §§2011-12). But although "statements of purpose" may help clarify ambiguities, "by their nature," they "cannot override a statute's operative language." *Sturgeon v. Frost*, 587 U.S. 28, 57 (2019) (cleaned up).

Even if ISP could avoid this conclusion by calling policy statements "delegations," ISP.Br.31-32 (citing 42 U.S.C. §2011(b))—and it cannot—it would fare no better. The cited statement provides that "the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise." 42 U.S.C. §2011(b). If that were a delegation of regulatory authority, it would be unconstitutional, for it is hard to imagine less of an intelligible principle. As a policy statement, however, it cannot answer the question here because "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Instead, the AEA's and NWPA's specific operative terms control.

c. Petitioners also argue that because the AEA permits the Commission to license possession of "special nuclear material," "source material," and "byproduct material," it may issue licenses regarding "spent nuclear fuel" on the theory that spent nuclear fuel "is composed of" special nuclear material, source material, and byproduct material. ISP.Br.29-32; NRC.Br.32-35. That is like saying that because the Federal Aviation Administration may regulate hydrogen-fueled aircraft and oxygen equipment on planes, it also may license water. Regardless, the Commission does not have a general power to license possession of such materials—it may do so only for specified purposes, none of which is storage. *Supra* pp. 26-28.

"In a given statute," especially one like the AEA that involves "terms with some heft and distinctiveness," the "same term usually has the same meaning[,] and different terms usually have different meanings." *Pulsifer v. United States*, 601 U.S. 124, 149 (2024). Courts thus

presume that "'Congress'[s] choice of words is … deliberate' and deserving of judicial respect." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 364 (2018). "[D]efined meanings" thus cannot "be replaced with another" potentially "permissible meaning of the word"—"the definition is virtually conclusive." SCALIA & GARNER, *supra*, at 228.

Here, Congress demonstrated that "spent nuclear fuel"—a defined term—constitutes more than the sum of its parts. After all, the AEA lists "spent nuclear fuel" as a separate, independent item from "byproduct materials, source materials," and "special nuclear materials." 42 U.S.C. §2210i(b). Yet none of the licensing provisions of the AEA references "spent nuclear fuel." "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *DHS v. MacLean*, 574 U.S. 383, 391 (2015). Furthermore, "'spent nuclear fuel' means fuel that has been withdrawn from a nuclear reactor following irradiation, *the constituent elements of which* have not been separated by reprocessing." 42 U.S.C. §10101(23) (emphasis added). The Commission cannot break down "spent nuclear fuel" into its constituent parts.

In fact, the Commission's own rules preclude such parsing. "[S]pent nuclear fuel" "includes the special nuclear material, byproduct material, source material, *and other radioactive materials associated with fuel assemblies*." 10 C.F.R. §72.3 (emphasis added). Even the Commission thus recognizes that "spent nuclear fuel" is more than the sum of "special nuclear material," "source material," and "byproduct material." *Id.* And nothing in the AEA authorizes licensing offsite storage of those "other radioactive materials." *Id.*

d. ISP fares no better (at 30-32) by repeating the words "possession" and "use" in 42 U.S.C. §2201(b). The

Commission may "issue licenses to … *possess* … special nuclear material." *Id.* §2073(a) (emphasis added). And "[n]o person may … *possess* … any byproduct material" unless the Commission issues a license for the specific enumerated purposes. *Id.* §2111(a) (emphasis added). But the Commission cannot license possession of *spent nuclear fuel* at all or *any* material other than for an enumerated purpose. *Supra* pp. 24-28.

e. Petitioners fall back on the AEA's catchall provisions. ISP.Br.30-31, 34-36; NRC.Br.33-35; *see also* Holtec.Br.16-18. Not only do none of these provisions refer to "spent nuclear fuel"—itself dispositive—but courts "interpret a 'general or collective term' at the end of a list of specific items in light of any 'common attribute[s]'" the "specific items" share. *Sw. Airlines*, 596 U.S. at 458. The "common attribute" that the "specific items" in §§2073(a), 2093(a), and 2111(a) share are active, affirmative uses of the same type as the enumerated activities. *Supra* pp. 26-28. Storage is different.

If the Commission could deem *any* "use[]" an "appropriate" one (or "approve[]" such a use) to carry out the AEA's purposes, 42 U.S.C. §§2073(a)(4), 2093(a)(4), the catchall provisions would swallow the specifically enumerated terms, rendering them meaningless. *See Fischer*, 603 U.S. at 487-88. And if the Commission can license private offsite storage of spent nuclear fuel merely because it would help the Commission regulate "source materials," NRC.Br.34 (citing 42 U.S.C. §2093(a)(4)), then entire provisions of the AEA would be superfluous because the Commission could make the same argument with respect to "byproduct material" and "special nuclear material"—both of which have their *own* licensing provisions. 42 U.S.C. §§2073, 2111.

ISP asserts (at 35) that *ejusdem generis* is inapt because it "requires a 'long and detailed list of specific directions,' with a common 'link.'" But the Court did not "require[]" a "long and detailed list of specific directions" in *Harrington v. Purdue Pharma LP*, 603 U.S. 204, 217 (2024). Rather, the Court noted that the Bankruptcy Code contains such lists, while making clear that the same rule applies to "a list discussing 'cars, trucks, motorcycles, or any other vehicles.'" *Id.*; *e.g.*, *Fischer*, 603 U.S. at 487-88. Only two specific terms need precede the general one. *See* SCALIA & GARNER, *supra*, at 206. Nor need the statute expressly state a "link" between the listed items—the list itself *is* the link. *Harrington*, 603 U.S. at 218. *Contra* ISP.Br.35.

ISP also insists (at 36) that *ejusdem generis* cannot apply because the general terms here do not count as catchall terms. But even the Commission refers to them (at 33) as "catchall" language. And ISP's notion (at 36) that these provisions "ensure that the agency can fully implement the congressionally defined purposes of the AEA" is just another version of its view that policy statements are "latent well[s] of authority." *Kentucky v. Biden*, 23 F.4th 585, 606 (6th Cir. 2022) (rejecting a similar theory based on *Sturgeon*).

For its part, rather than contending that *ejusdem generis* does not apply, the Commission argues (at 33-34) that because it has licensed reactors under §§2133 and 2134—which §2073(a)(2) and (3) reference—it may also license possession of "spent fuel stored in a spent-fuel storage installation" under §2073(a)(4)'s catchall provision because spent fuel "results from the activities referenced in" §2073(a)(2) and (3). But §2073(a) authorizes the Commission to license only "*special nuclear material*"—not "byproduct material" or "source material," and

certainly not "spent nuclear fuel." 42 U.S.C. §2073(a) (emphasis added). Regardless, just because spent fuel "results from" certain activities, NRC.Br.34, it hardly follows that it is like those activities in the relevant ways. Sewage is not food merely because it results from eating. "When general words" like §2073(a)(4)'s "follow an enumeration of two or more things, they apply only to … things of the same general kind or class specifically mentioned." SCALIA & GARNER, *supra*, at 199.

The Commission also errs when it argues (at 32, 34) that it may license storage of special nuclear material and source material because storage may be a practical necessity. No one disputes that storage is necessary—the question, though, is where? Congress made *onsite* storage the default option for temporary storage. *See* 42 U.S.C. §10151(a)(1). The only exception is for federal repositories. Nor do the phrases "for such other uses as the Commission determines to be appropriate," *id.* §2073(a)(4), or "any other use approved by the Commission as an aid to science or industry," *id.* §2093(a)(4), authorize the Commission to use its "expertise" to go beyond the class of items Congress enacted. *Contra* NRC.Br.34, 48. Such arguments would not have worked under *Chevron*, let alone today.

The Commission fares no better with "byproduct material." NRC.Br.35. *Ejusdem generis* plainly applies to the catchall language "or such other useful applications as may be developed." 42 U.S.C. §2111(a). And the Commission cannot rest its supposed authority to license "spent nuclear fuel"—a *different* material—on its authority to license possession of "byproduct material" for certain uses. *Contra* ISP.Br.31; NRC.Br.35, 41.

f. Finally, ISP relies (at 29-30) on a grant of rulemaking power. That provision "authorize[s]" the

Commission to "establish … standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material … 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). But "spent nuclear fuel" is not "special nuclear material, source material, and byproduct material," and even if it were, ISP's license is not for defense or safety purposes. Because administrative law has no "adverse possession" rule "insulat[ing]" an agency's "disregard of statutory text," *Rapanos v. United States*, 547 U.S. 715, 752 (2006), agency rules and practices cannot confer authority that Congress never granted. Petitioners' invocations of 10 C.F.R. Part 72 thus fail.

Nor did the NWPA's enactment effectively ratify those regulations. *Contra, e.g.*, ISP.Br.40-41. 10 C.F.R. Part 72 had been "on the books," ISP.Br.4, 17, 32, 40, for a scant two years when Congress enacted the NWPA, *see* NRC.Br.43, and so was hardly settled. If anything, the NWPA's enactment vitiated those regulations (if they, indeed, mean what Petitioners claim), as Congress concluded that prior efforts to solve "the problems of civilian radioactive waste disposal ha[d] not been adequate," 42 U.S.C. §10131(a)(3), and permitted two, and only two, types of interim storage, neither of which applies here.

3. Petitioners cite inapposite cases.

Petitioners also repeatedly invoke a handful of lower-court cases, none of which support this license.

a. Petitioners' primary case is *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004), which ISP's other main case, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004), follows, *id.* at 1249-50. True, in *Bullcreek*, the D.C. Circuit stated that "[w]hile the AEA does not specifically refer to the storage or disposal

of spent nuclear fuel, it has long been recognized that the AEA confers on the [Commission] authority to license and regulate the storage and disposal of such fuel." 359 F.3d at 538. But that statement is pure *ipse dixit*, with no analysis of the statutory language. *Id.* at 538, 542-43. And the three cases the court cited addressed preemption of state law; none show that the Commission may "license and regulate the storage and disposal of" spent nuclear fuel. *Id.* at 538.

Bullcreek relied on only one decision from this Court: *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983). But that case concerned power-plant *construction* and said only that the AEA empowers the Commission to "license the transfer, delivery, receipt, acquisition, possession[,] and use of nuclear materials" generally—not spent nuclear fuel. *Id.* at 207. Relying on statutes addressing "special nuclear material," "source material," and "byproduct material," *see id.*, the Court addressed "spent nuclear fuel" only in connection with *onsite* storage and disposal, *e.g.*, *id.* at 195. Whether the Commission could similarly regulate *offsite* storage was not at issue.

Illinois v. General Electric Co., 683 F.2d 206 (7th Cir. 1982), is equally inapt. Illinois did not "question the Commission's authority to regulate the storage of spent nuclear fuel," *id.* at 215, unlike Respondents here. And in observing that Illinois "could not" have questioned that supposed authority, the court did not analyze the statutes it cited: §§2073 and 2111. *Id.* at 214-15. Neither empowers the Commission to license offsite possession of spent nuclear fuel for storage purposes. *Supra* pp. 24-28.

Jersey Central Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985), has no relevant

statutory analysis, *id.* at 1111-12. Instead, the court relied on regulations to aver that the Commission had "licensing and regulatory authority with respect to … the 'transfer, storage[,] or disposal of radioactive waste matter resulting from the separation in a production facility of special nuclear material from unradiated nuclear reactor fuel.'" *Id.* at 1111 (citation omitted); *see also id.* at 1112. Such "radioactive waste matter" is *not* spent nuclear fuel. *Compare id.* at 1111, *with* 42 U.S.C. §§2014(ee), 10101(23). In all events, statutes trump regulations.

b. Notwithstanding its shaky footing, the D.C. Circuit has claimed that *Bullcreek* "held that the AEA provided 'the [Commission] authority to license and regulate the storage and disposal of [spent nuclear] fuel.'" *Beyond Nuclear, Inc. v. NRC*, 113 F.4th 956, 965 (D.C. Cir. 2024) (quoting *Bullcreek*, 359 F.3d at 538). But as the Commission admitted at oral argument below, the Commission's AEA authority "wasn't even specifically challenged" in *Bullcreek*. Oral Argument at 30:56-31:02, *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023) (No. 21-60743), https://www.ca5.uscourts.gov/OralArgRecordings/21/21-60743—_8-29-2022.mp3; *see Bullcreek*, 359 F.3d at 541. *Contra* ISP.Br.33. Nor was it at issue in the cases *Bullcreek* cited. *See Pac. Gas*, 461 U.S. at 207; *Jersey Cent.*, 772 F.2d at 1111-12; *Gen. Elec.*, 683 F.2d at 215.

ISP counters (at 33) that if "any legitimate doubt" existed regarding the Commission's "authority under the AEA … , such doubts would have been aired in those proceedings, rather than conceded." But the Commission does not echo ISP's position—which ignores party presentation. *E.g.*, *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020). Regardless, the Court is bound by what Congress wrote, not D.C. Circuit precedent. *See,*

e.g., *Am. Hosp. Ass'n. v. Becerra*, 596 U.S. 724, 739 (2022).

4. Petitioners cite irrelevant examples.

Finally, ISP claims (at 32) that "[t]here are at least a dozen existing sites in the country where there is no operating reactor and where spent nuclear fuel is stored, at least seven of which are privately owned." The key word there is "operating"; each storage facility was built on the site of a reactor that was *operating at the time*. That is different in kind from what ISP proposes and confirms that reactors should store their own spent nuclear fuel until a permanent repository is built. As noted above, the AEA permits onsite storage of spent fuel because some amount of storage is inherent in the license of use. *Supra* p. 36. By contrast, even if the AEA contemplated transportation of spent nuclear fuel offsite (which is debatable), the new location would need a *separate* license, which Congress has nowhere authorized. Petitioners' contrary argument, *e.g.*, NRC.Br.40; ISP.Br.36-37, is thus a red herring.

For its part, the Commission also insists (at 38) that it "has consistently understood the [AEA] to authorize it to license the offsite storage of spent nuclear fuel." Whatever that "understanding" has been, it cannot contravene clear statutory text. *See, e.g.*, *Rapanos*, 547 U.S. at 752. And the Commission's examples of its "understanding" are underwhelming. When the Atomic Safety and Licensing Board wrote that "spent nuclear fuel … could be 'stor[ed] in offsite facilities,'" NRC.Br.38 (quoting *In re Kan. Gas & Elec. Co.*, 5 N.R.C. 301, 321 (1977)), it referred to three such facilities, *see In re Kan. Gas*, 5 N.R.C. at 320-21. One was G.E. Morris, discussed below; another, in West Valley, New York, was quickly shut down. *Id.* at 320-21; *see Jersey Cent.*, 772 F.2d at 1105.

The third, in Barnwell, South Carolina, never operated. *See In re Kan. Gas*, 5 N.R.C. at 320-21. The Commission has apparently not licensed an operating spent-nuclear-fuel storage facility since the collapse of the reprocessing industry or enactment of the NWPA.

Nonetheless, the Commission represents (at 6) that it has "issued four licenses authorizing private parties to temporarily store spent fuel at sites where no nuclear reactor has ever been located." That claim is misleading. Two are either the subject of this case or of related litigation now pending before this Court. The third, Private Fuel Storage, was issued decades after the NWPA's enactment and was the subject of *Bullcreek*. Notably, that facility was never built. J.A.302.

That leaves only G.E. Morris, NRC.Br.6, which supports Texas. Licensed in 1967 as a *reprocessing* facility, that facility was converted to storage in 1971—*before* the NPWA confirmed Congress's position that such facilities are not allowed. *In re Gen. Elec. Co.*, 22 N.R.C. 851 (1985); *Illinois v. NRC*, 591 F.2d 12, 13 n.1 (7th Cir. 1979). At the time, this site was the "only away-from-site facility" in the entire country that "accept[ed] spent nuclear fuel for storage," *Gen. Elec.*, 683 F.2d at 208, and much of the fuel at that facility was already onsite, *see S. Cal. Edison Co. v. United States*, 93 Fed. Cl. 337, 344 (Fed. Cl. 2010). Given that controversy about G.E. Morris likely explains Congress's prohibition on "encourag[ing]" parties to use such offsite storage, 42 U.S.C. §10155(h), it can hardly be said to support Petitioners' position that they could abandon Yucca Mountain.

CONCLUSION

The Court should affirm.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

BENJAMIN W. MENDELSON
SARA B. BAUMGARDNER
Assistant Solicitors General

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