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., *RESPONDENTS*.

INTERIM STORAGE PARTNERS, LLC, *PETITIONERS*

v.

STATE OF TEXAS, ET AL., *RESPONDENTS*.

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

Brief for *Amici Curiae* State of Utah and Six Other States in Support of Respondents

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INTEREST OF *AMICI CURIAE*

Spent nuclear fuel is a high-level radioactive waste that remains toxic for millions of years. To both manage this waste and protect the American public from harms that could result from an accident involving spent nuclear fuel, Congress directed the Nuclear Regulatory Commission (NRC) to consider licensing a single, permanent government-owned repository for storing spent nuclear fuel at Yucca Mountain, Nevada.

Rather than follow congressional directives on this hot-button political issue, the NRC—an independent agency in the "fourth branch of Government," *Seila Law LLC v. Consumer Fin. Prot. Bureau,* 591 U.S. 197, 240 (2020) (Thomas, J., concurring in part and dissenting in part)—instead decided it could license privately owned away-from-reactor spent nuclear fuel storage facilities in any other state too. But no statute gives the NRC such immense power.

Amicus State of Utah has an interest in this case because the NRC licensed a de facto permanent private facility to store up to 40,000 metric tons of spent nuclear fuel in Utah over the State's decades-long objections. *Amici* States have an interest in this case because they recognize the NRC could similarly license such facilities within their States over their objections and against Congress's statutory directives. Not to mention the fact the highly radioactive waste may be transported through untold States on its way to the offsite private storage facility.

Any independent agency necessarily poses constitutional concerns. But those concerns quickly turn from abstract to concrete and become much more

alarming when that agency—the NRC—ignores express congressional mandates and devises its own plan about who, how, and where to store something so divisive and dangerous as spent nuclear fuel. This directly attacks core State sovereign interests, congressional power, executive power, and the people's right to self-government through elected representatives.

INTRODUCTION AND SUMMARY OF ARGUMENT

On the merits, the Fifth Circuit correctly held that the NRC lacks authority to license private, away-from-reactor spent nuclear fuel storage installations. Respondents ably defend that decision; *amici* States won't repeat those arguments here. Rather, the States emphasize that the limited-removal zone *Humphrey's Executor* created within which independent agencies now operate has allowed the NRC to go rogue. The NRC has expanded its authority as an independent agency, stripped States of congressionally mandated rights provided under the National Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq*. ("NWPA"); developed a licensing scheme in direct opposition to both the NWPA and the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq*. ("AEA"); refused to carry out its executive function of reviewing the licensing application for Yucca Mountain; and creatively expanded its ability to extend license terms outside formal rulemaking. Short of overturning *Humphrey's Executor*, the Court should affirm the decision below, making clear the NRC lacks authority to defy its statutory limits by licensing private away-from-reactor spent nuclear fuel storage facilities.

ARGUMENT

I. *Humphrey's Executor's* Approval of Independent Agencies Like the NRC Allows for Politically Unaccountable Abuses of Power.

The Court has long emphasized the constitutional directive that the "executive Power" is vested in the President and that "entire" power belongs to the President alone. *Seila Law,* 591 U.S. at 213 (quoting U.S. Const. art. II, § 1, cl. 1). And because no one person could perform all executive duties, the constitution assumes that lesser executive officers will help discharge those responsibilities. *Id.* The President's executive authority includes the power to appoint, oversee, control—and as the Court has long recognized—to remove executive officers. *Id.* at 213-14 (stating "[t]he President's removal power has long been confirmed by history and precedent"). In short, "[s]ince 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010).

Despite an unrestricted removal power's importance to the President's exercise of the entire "executive Power," a dubious exception persists. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court "permitted Congress to give for-cause removal protections to a multimember body of experts [the FTC], balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power." *Seila Law*, 591 U.S. at 216.

Humphrey's Executor's notion that executive officials serving in executive branch agencies might not be exercising any executive power hasn't aged well, *Seila Law*, 591 U.S. at 216 n.2, assuming it ever made much sense. *See In re Aiken Cnty.*, 645 F.3d 428, 441 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (citing Geoffrey P. Miller, *Independent Agencies,* 1986 Sup. Ct. Rev. 41, 93 ("*Humphrey's Executor,* as commentators have noted, is one of the more egregious opinions to be found on pages of the United States Supreme Court Reports.")). As the Court noted nearly 40 years ago, "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988). Indeed, viewed properly, any administrative agency action, whether legislative or judicial in form, necessarily must be an exercise of executive power "under our constitutional structure." *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013).

The NRC is composed of five commissioners, each filling five-year terms. 42 U.S.C. § 5841(a)(1), (c). The commissioners may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5841(e). While the NRC performs some legislative-like policy-making functions and some judicial-like adjudication functions, the NRC performs a host of executive functions by regulating and issuing licenses for the design, construction, operation and security of commercial nuclear power plants, and enforcing the licenses' provision. *See generally id.* §§ 5841-5854; United States Nuclear Regulatory Comm'n, *Functions*, https://www.nrc.gov/about-nrc/organization/commfuncdesc.html (last visited Jan. 20,

2025) (stating the Commission "formulates policies, develops regulations governing nuclear reactor and nuclear material safety, issues orders to licensees, and adjudicates legal matters").

The President must "take care that the laws [are] faithfully executed" to the best of his ability. U.S. Const. art. II, § 3. But the NRC's exercise of executive power "without the Executive's [complete] oversight . . . subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Free Enter. Fund*, 561 U.S. at 498. The people's right to self-government—through their chosen elected leaders—then becomes illusory when those leaders lack full control over an ever-growing Executive Branch that "now wields vast power and touches almost every aspect of daily life." *Id.* at 499.

Neither Respondents nor *amici* States are calling for *Humphrey's Executor's* reversal in this case despite its flaws. Nor is anyone challenging here the limits on NRC commissioners' removability despite the problems that poses. But the *amici* States do emphasize how the NRC has taken advantage of its relative unaccountability to undermine States, defy Congress, and dangerously expand NRC powers. The agency's "comparative freedom from ballot box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting).

II. The NRC Has Stripped States of Their Rights.

The NRC has "huge policymaking and enforcement authority and greatly affect[s] the lives and liberties of the American people." *In re Aiken Cnty.*, 645 F.3d at 443 (Kavanaugh, J., concurring). And the NRC has used this authority to strip States of their rights with respect to storage of spent nuclear fuel. Under the NWPA, Congress mandated that States have a role in the disposal of spent nuclear fuel within their boundaries. The NWPA provides a comprehensive framework for disposing of spent nuclear fuel using three mechanisms: (1) permanent disposal in a deep geologic repository in Yucca Mountain, Nevada, Subtitle A, 42 U.S.C. §§ 10131-10145; and, if needed, (2) interim emergency storage at an already existing federal facility to avoid commercial reactor shut-down, Subtitle B, 42 U.S.C. §§ 10151-10157; and (3) interim storage at a federal monitored retrievable storage facility, Subtitle C, 42 U.S.C. §§ 10161-10169.

Within those three options, NWPA recognized the important role of States and local governments in allowing for storage of spent nuclear fuel inside their boundaries by providing them rights to participate in site-selection, veto the project subject to an override by both houses of Congress, and financial assistance. *See* 42 U.S.C. §§ 10135-10137 (State protections for permanent repository); *id.* §§ 10155(d), 10156(e) (State protections for emergency storage); *id.* §§ 10161(f), (h), 10166 (State protections for monitored retrievable storage). The NRC creatively and unilaterally sidestepped these pesky State rights by creating a new class of privately owned storage facilities not subject to those protections located far

away from the reactors generating the waste. All the while, the NRC remains free "from democratic accountability." *In re Aiken Cnty.*, 645 F.3d at 441 (Kavanaugh, J., concurring).

State involvement under the NWPA is a critical part of the statutory plan and in promoting public confidence in nuclear waste storage. 42 U.S.C. § 10131(a)(6) (finding that "State and public participation in the planning and development of repositories is essential in order to promote public confidence"). But because the NRC "lack[s] sufficient accountability to the President," Daniel Backman, *The Antimonopoly Presidency*, 133 Yale L.J. 342, 402 (2023), States have been unable to access the NRC through regular political access channels, and States have been denied congressionally authorized rights of participation, veto power and financial assistance. Indeed, the NRC argues in this case that Texas cannot challenge a license NRC granted for a private storage facility inside Texas's borders and affecting its citizens. *NRC.Br.*16-29. As then Judge Kavanaugh noted, "[b]ecause of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), *majority op. abrogated by Seila Law*, 591 U.S. 197. The threat has come true in this case.

III. The NRC Has no Authority to License Private Away-From-Reactor Storage Facilities Under the AEA and the NWPA.

Texas's brief shows that the NRC's licensing of private away-from-reactor storage facilities for spent nuclear fuel exceeds its authority under either the AEA or the NWPA. Tex.Br.24-31. *Amici* States add a couple points.

A. The NRC Can't Use Congressional Inaction to Expand Its Authority Under the AEA.

Under the AEA, the NRC may issue either a "material" license (related to byproduct, source or special nuclear material) or a "facility" license. 42 U.S.C. §§ 2014(e), (z), (aa), 2133, 2134. Although NRC undoubtedly has power under the AEA to issue a "facility" license to a reactor that would cover any spent nuclear fuel produced incident to reactor operations, it does not follow that the NRC also has the power to issue an independent "material" license for the storage of spent nuclear fuel, which is not listed in the AEA's definition of "material." 42 U.S.C. §§ 2014 (aa) (defining "special nuclear material"), (z) (defining "source material"), (e) (defining "byproduct material").

The NRC posits that if Congress did not want it to license private away-from-reactor facilities, then Congress would have clearly said so in the NWPA. Specifically, the NRC notes that Congress was aware of its Part 72 regulations used to license private away-from-reactor storage facilities when it passed the NWPA and that Congress could have clearly forbidden the NRC from licensing away-from-reactor storage installations. NRC.Pet.25; NRC.Br.38-39 (arguing

that NRC's longtime view that it has this licensing authority confirms the authority exists.).

But this Court has expressly rejected the notion that Congress behaves so linearly. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946). Indeed, there may be many reasons why Congress did not expressly address the NRC's Part 72 regulations. And trying to explain them would "venture into speculative unrealities." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940). Whatever the reason, "certainly such inaction . . . can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring re-examination by this Court" *Id.*, *see also Boys Markets, Inc. v. Retail Clerks Union, Local 770***,** 398 U.S. 235, 242 (1970) (stating "the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision").

NRC "operates free of presidential direction and supervision," *In re Aiken Cnty.*, 645 F.3d at 439 (Kavanaugh, J., concurring), and must be held to account by this Court for exceeding its statutory authority based on perceived congressional inaction.

B. The NRC Ignores the NWPA's Legislative History.

It is misguided to argue that Congress could have, but failed to, direct NRC not to license private away-from-reactor storage facilities. Congress did just that when it passed the NWPA. *See* 42 U.S.C. § 10155(h) ("nothing in this chapter shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any

storage facility away from the site of any civilian nuclear power reactor and not owned by the Federal Government on January 7, 1983"). The NWPA's text refutes NRC's power grab. *See, e.g.,* Tex.Br.28-30. And even if the NWPA were unclear, legislative history dooms NRC's offsite-private-facility licensing scheme. Representative Lujan, the floor manager of the bill, noted "[w]e have been very careful to specify [in section 10155] that [away-from-reactor storage] would be only at existing Federal sites, so that any Member does not have to worry about whether or not a new interim storage facility is going to come into his district." 128 Cong. Rec. 28,034 (1982). Representative Broyhill followed up by noting "I would also say that we have special statutory language in [subsection (h)] . . . that would *exclude the use of private away-from-reactor facilities* for the storage of spent fuel." *Id.* at 28,040 (emphasis added).

Legislators likewise recognized that the NWPA is comprehensive, providing three, and only three, options for the storage of spent nuclear fuel. The principal Senate sponsor of the NWPA, Sen. McClure, stated in the 1982 debates: "[T]his bill is *a truly comprehensive approach* to the ultimate solution to disposition of the large and varied quantities of nuclear waste existing today in the United States and nuclear wastes which will be created in the years and decades ahead. . . . [the bill] provides a firm national policy for spent-fuel storage, with clear guidelines for future utility planning." *Id.* at 32,556 (emphasis added). Another senator concurred that "[w]e are on the verge today of establishing the framework for this Nation's first *comprehensive* nuclear waste management and disposal program – a significant achievement for the Congress and the country." *Id.* at

32,560 (*emphasis added*). Senator Moynihan further explained that "we have no comprehensive nuclear waste management program in place to deal with the tremendous volume of waste that will be generated by these plants . . . What we have before us today is a bill that will finally put us on the path to *comprehensive nuclear waste management*." *Id*. at 32,562-63 (emphasis added).

The House discussions also emphasized the NWPA's comprehensive nature. Representative Udall, a principal House sponsor of the NWPA, stated that "the passage of this bill will, for the first time, give us a national policy on high-level nuclear waste." *Id*. at 27,772. And Representative Lujan added that "[t]he last resort, interim storage facilities provided for in this act [under Subtitles B and C] are an integral part of a relatively small, but essential, subprogram which contributes to the comprehensive solution." *Id*. at 27,779.

"Article II confers on the President the general administrative control of those executing the laws. It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase." *In re Aiken Cnty*., 645 F.3d at 444 (Kavanaugh, J., concurring) (emphasis in original). Yet here, the buck stops with the NRC, despite the clear intention of the drafters to exclude private away-from-reactor storage of spent nuclear fuel.

IV. The NRC Refused to Follow the NWPA and Pursue Yucca Mountain Licensing.

This case isn't the only way NRC has defied its statutory duties. While issuing these licenses for

unauthorized offsite nuclear fuel waste storage facilities over the years—and over States' objections—the NRC was simultaneously refusing to perform its express legislative mandate under the NWPA to consider the Department of Energy's (DOE) license application for the deep geologic storage facility at Yucca Mountain. In doing so, the NRC abused its independent agency status by refusing to perform the laws and policies it is expressly directed to execute.

"Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). To make a long story short, Congress chose Yucca Mountain, Nevada, as the lone site for a permanent repository for spent nuclear fuel under the NWPA. 42 U.S.C. § 10172; *see also In re Aiken Cnty.*, 645 F.3d at 431-32. Congress required the DOE to submit an application to the NRC for a license to construct the facility and the NRC was required to consider the license application and issue a final decision within three years. 42 U.S.C. §§ 10134(b), (d). DOE finally did its part and submitted the application in 2008. Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008). But the NRC—or at least one commissioner—had its own agenda and refused to consider the license application. As described by one D.C. Circuit judge, "[a]lthough the Commission had a duty to act on the application and the means to fulfill that duty, former Chairman Gregory Jaczko orchestrated a systematic campaign of noncompliance. Jaczko unilaterally ordered Commission staff to terminate the review process in October 2010; instructed staff to remove key findings

from reports evaluating the Yucca Mountain site; and ignored the will of his fellow Commissioners." *In re Aiken Cnty*., 2012 WL 3140360, at *2 (D.C. Cir. 2012) (Randoph, J., dissenting).

The D.C. Circuit gave the NRC more time to comply under threat of a writ of mandamus. *Id.* at *1 (holding petition for writ of mandamus in abeyance). But still the NRC failed to act. Only after a stern rebuke and a grant of a petition for writ of mandamus did the NRC again begin to process DOE's application for Yucca Mountain. *In re Aiken Cnty.*, 725 F.3d 255 (D.C. Cir. 2013). Then-Judge Kavanaugh, writing for the majority, emphasized that Congress set the policy that the "President and subordinate executive agencies (as well as relevant independent agencies such as the Nuclear Regulatory Commission) [were] to implement within statutory boundaries." *Id.* at 257. The judiciary's "more modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress." *Id.* "Here," the court concluded, "the Nuclear Regulatory Commission has continued to violate the law governing the Yucca Mountain licensing process," so the court "grant[ed] the petition for a writ of mandamus. *Id.*

The D.C. Circuit had to step in because the NRC, unbeholden to anyone, had run amok. "Because the power to remove is the power to control, the President lacks control over an independent agency—that is, the President lacks the power to direct or supervise an agency such as the Nuclear Regulatory Commission." *In re Aiken Cnty.*, 645 F.3d at 442 (Kavanaugh, J., concurring). While the "President has power to cajole," *id.*, the NRC will not be cajoled, despite best efforts; it takes judicial correction and oversight.

V. The NRC Has Become Increasingly Brazen Carrying Out its Executive Functions.

The foregoing licensing problems are just two—very significant—examples of the NRC going too far. *Amici* States have watched the NRC grow increasingly creative with its limited grant of power, unbeholden to executive supervision. Not only has NRC given itself authority to license private away-from-reactor storage installations, but it has also given itself the power, without undergoing formal rulemaking, to extend licenses for these installations for an additional 20 years, without undergoing the rigors that a license renewal would undertake. *See* Letter from Steven D. Wahnschaffe, License Mgr., to NRC, Dir. Div. Fuel Mgmt. (Jan. 19, 2021), https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21048A151 (last visited Jan. 17, 2025) (notifying NRC that DOE intended to submit a request "seeking approval of a 20-year license extension" through a license amendment request, as opposed to relicensing); Letter from Shana R. Helton, Dir. Div. Fuel Mgmt., to Steven D. Wahnschaffe, License Mgr. (Feb. 11, 2022) https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21348A050 (last visited Jan. 17, 2025) (noting that the request "appears to be a viable licensing option" and that the NRC could simply extend timely renewal protections to the request). Although DOE recently submitted a request to NRC to terminate its license for the unconstructed facility, rather than to pursue a license amendment, NRC has not indicated that it otherwise believes formal relicensing, rather than the license amendment process, is the only appropriate avenue for extending license terms for 20 additional years.

"Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Free Enter. Fund*, 561 U.S. at 498. The NRC will continue on with these unauthorized licensing schemes until—like the D.C. Circuit had to do—this Court intervenes and reminds this independent agency that it must abide by its statutory limited authority.

CONCLUSION

"The Framers designed our constitutional structure with the idea that unaccountable power is inconsistent with individual liberty." *In re Aiken Cnty.*, 645 F.3d at 440 (Kavanaugh, J. concurring). The NRC has demonstrated time and again that it will use its relative unaccountability to implement its own agenda. The Court must bring the NRC back in line and hold that it lacks authority to license private away-from-reactor storage of spent nuclear fuel.

For the foregoing reasons and those explained in Respondents brief, the Court should affirm the Fifth Circuit's decision.

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