Nos. 23-1300, 23-1312

In the Supreme Court of the United States

NUCLEAR REGULATORY COMMISSION, ET AL.,
PETITIONERS

v.

TEXAS, ET AL.

INTERIM STORAGE PARTNERS, LLC, PETITIONER

v.

TEXAS, ET AL.

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

BRIEF OF AMICI CURIAE NEW MEXICO AND MICHIGAN IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE

New Mexico and Michigan have a strong interest in protecting principles of federalism and ensuring that states have recourse to challenge federal agency decisions. This is particularly true when such decisions affect the safety and wellbeing of the people within their borders.

Although the nuclear industry helps protect and power our nation, determining where to store the waste it generates is a difficult question; the improper storage of intensely radioactive nuclear waste would be catastrophic. As such, Amici States have an especially strong interest in deciding whether to allow consolidation of the nation's spent nuclear fuel within their borders.

Petitioners advance an unduly limited reading of "aggrieved party" under the Hobbs Act, contrary to Congress's consent-based siting policy. That policy, provided for by the Nuclear Waste Policy Act, ensures, in relevant part, that a state have a voice in determining whether it will host a nuclear waste repository. Petitioners' cramped reading also fails to ensure critical state interests are properly considered, results in inconsistent application of the term "party aggrieved" across agencies, denies review to impacted parties who participated in underlying agency proceedings, and is ultimately contrary to the clear intent of Congress that final agency determinations be subject to judicial review.

Amici States thus have a strong interest in ensuring that the Nuclear Regulatory Commission's actions are subject to judicial review. Amici support

Respondents in their efforts to ensure that all aggrieved parties may challenge agency action.

SUMMARY OF ARGUMENT

Despite the need for a permanent facility to store spent nuclear fuel (SNF), such a facility has not yet been built. Two companies—Interim Storage Partners, LLC (ISP) and Holtec International, LLC (Holtec)—saw a business opportunity in this failure and sought to build above-ground storage facilities large enough to hold all of the nation's SNF on an "interim"—but effectively indefinite—basis. ISP and Holtec chose the Permian Basin of eastern New Mexico and west Texas, home to the most productive oil field in the world and one of the nation's most threatened aquifers. The Nuclear Regulatory Commission (NRC) issued Holtec and ISP licenses to operate their facilities on 40-year renewable terms over objections from the host states and denied every attempt by opponents to intervene in the proceedings.

Respondents sought judicial review of NRC's actions in the Fifth Circuit, which Petitioners fought on both jurisdictional and merits grounds. Petitioners advance a definition of "party aggrieved" under which NRC's actions effectively deny such status to its opponents and thus prevent judicial review. In light of NRC's suffocation of public participation in licensing proceedings, Petitioners' proposed definition of "party aggrieved" effectively precludes the possibility of judicial review of NRC's final decisions. The Court should not suffer such a misguided and self-interested position, particularly when Congress has made clear that a host state or tribe's disapproval of a proposed

site controls, unless overruled by Congress. *See* 42 U.S.C. § 10135.

Contrary to Petitioners' position, the "party aggrieved" requirement in the Hobbs Act should be read to include all those who participated in the proceedings below. This reading accomplishes many important goals, including (a) satisfying congressional intent to subject final agency decisions to judicial oversight and ensure that parties who are impacted by proceedings involving atomic energy and nuclear waste are heard, (b) ensuring proper consideration of states' critical environmental and safety concerns, and (c) preventing NRC's restrictive regulations from rendering meaningful challenge to agency action practically impossible.

Alternatively, when NRC has exceeded its statutory authority as it has in this case, a state should be able to seek judicial review of NRC decisions under the Fifth Circuit's established *ultra vires* exception. New Mexico and Michigan support and echo Respondents' request to affirm the Fifth Circuit's vacatur of ISP's license and urge the same affirmance of the Fifth Circuit's decision on Holtec.

ARGUMENT

Congress delegated to NRC the authority to license nuclear facilities and regulate their safety. In doing so, Congress struck an important balance: it gave NRC "a virtually unique substantive freedom" to resolve nuclear safety issues *in exchange for* "a virtually unique procedural responsibility" to admit interested parties to its proceedings and ensure judicial review. Richard Goldsmith, *Regulatory Reform & the Revival of Nuclear Power*, 20 Hofstra L.

Rev. 159, 163-64 (1991). Indeed, NRC has a statutory duty to allow "*any person* whose interest may be affected" by "*any proceeding*" under Chapter 23 of the Atomic Energy Act (AEA) to request and participate in a hearing, and thus become a "party to such proceeding." 42 U.S.C. § 2239(a)(1)(A) (emphases added).

Instead of allowing all such interested parties to participate in its proceedings, however, NRC has promulgated an impenetrable thicket of procedural regulations, making intervention and participation in hearings all-but-impossible. Petitioners exacerbate this problem by narrowly interpreting the Hobbs Act to permit only intervenors to seek redress in the Court of Appeals. 28 U.S.C. § 2344; NRC Br. 13-14; ISP Br. 16. Such an interpretation frustrates Congress's commands that "[a]ny final order entered in any proceeding"—including those at issue here—"*shall* be subject to judicial review,"[1] 42 U.S.C. § 2239(b) (emphasis added), and that "any person whose interest may be affected" by "any proceeding" under the AEA should be heard, 42 U.S.C. § 2239(a)(1)(A).

The Fifth Circuit's determination that it had jurisdiction to review NRC's statutory authority to

[1] Contrary to NRC's suggestion, the NRC licensing process is *not* "akin to litigation between two parties" (NRC Br. at 27), nor is it an adversarial process. In an adversarial process, judicial review is ensured by the losing party's ability to challenge the outcome. But in a licensing proceeding before NRC, unless intervention has been granted to a petitioner opposing the license, there *is* no losing party once NRC accepts the application.

make the relevant siting decisions was correct, and its decision should be affirmed.

I. THE COURT SHOULD READ "PARTY AGGRIEVED" IN LINE WITH CONGRESSIONAL INTENT, NOT NRC'S ARTIFICIALLY RESTRICTED VIEW.

A. Congress Intended "Party Aggrieved" to Include Anyone Aggrieved by a Final Order, Across Agencies and Administrations.

Congress clearly stated that "[a]ny final order entered in any proceeding" "shall be subject to judicial review." 42 U.S.C. § 2239(b)(1). Congress similarly commanded that "any person whose interest may be affected" by "any proceeding" under the AEA should be heard. 42 U.S.C. § 2239(a)(1)(A).

The Fifth Circuit correctly noted that "the *function* of the 'party aggrieved' status requirement is to ensure that the agency had the opportunity to consider the issue that petitioners are concerned with." Pet.App.17a (emphasis added). Indeed, "executive determinations generally are subject to judicial review," as is evident by the strong "presumption favoring judicial review of administrative action." *Gerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (citations omitted); *see also Leedom v. Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."); *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988) ("If the wording of a preclusion clause is less than absolute, . . . [j]udicial review is favored when an

agency is charged with acting beyond its authority."); *cf. Kirby Corp. v. Peña*, 109 F.3d 258, 261 (5th Cir. 1997) (noting that "the government bears a 'heavy burden' when arguing that Congress meant to prohibit all judicial review").

In short, if the agency had a chance to consider the issues now on review, then the "party aggrieved" status requirement has served its purpose. *See Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1219 (D.C. Cir. 1973) ("The 'party' status requirement operates to preclude direct *appellate* court *review* without a record which at least has resulted from the fact-finder's focus on the alternative regulatory provisions which petitioners propose."); *ACA Int'l v. FCC*, 885 F.3d 687, 711-12 (D.C. Cir. 2018) (emphasizing the centrality of having presented a view to the agency to qualify as an aggrieved party).

As such, reading "party aggrieved" to include those who participated in agency proceedings and whose interests may be affected by that agency's final orders satisfies congressional intent. This question has recurred across agencies and administrations, and many courts have settled on this same reading. *See, e.g.*, *Massachusetts v. United States*, 522 F.3d 115, 131 (1st Cir. 2008) (stating that whether one is a party aggrieved for Hobbs Act purposes depends on whether "the would-be petitioner 'directly and actually participated in the administrative proceedings'" (quoting *Clark & Reid Co. v. United States*, 804 F.2d 3, 5 (1st Cir. 1986))); *Reytblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 720 (D.C. Cir. 1997) ("Petitioners clearly [enjoy 'party' status] because each participated in the Commission's informal rulemaking by filing comments."); *Nat'l*

Ass'n of State Util. v. FCC, 457 F.3d 1238, 1250 (11th Cir. 2006) (holding that entities that "participated in the proceedings by submitting comments and notice of *ex parte* communications . . . independently established their status as 'part[ies] aggrieved'"), *opinion modified on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006); *Am. C.L. Union v. FCC*, 774 F.2d 24, 26 (1st Cir. 1985) (observing that entities had the chance to "participate in the proceedings or review process as individual parties" if they had "filed comments with the agency or petitioned for reconsideration of the FCC's final order"); *cf. Simmons v. Interstate Com. Comm'n*, 716 F.2d 40, 42, 45 (D.C. Cir. 1983) (analyzing, not whether entity was a "party aggrieved" as to the proceeding they had submitted comments on, but whether entity was a "party aggrieved" as to a related proceeding they had not submitted comments on). Amici urge the Court to do the same here.

Further, contrary to Petitioners' arguments, "the regulatory definition of a 'party' in an [agency] proceeding" should not be equated "with the participatory party status required for judicial review under the Hobbs Act." *Clark*, 804 F.2d at 6 . The Court is not "bound by [NRC]'s description of [an] entity as a party." *Balderas v. U.S. Nuclear Regul. Comm'n*, 59 F.4th 1112, 1117 (10th Cir. 2023). Rather, the power to construe who is a "party" to a Hobbs Act petition is reserved for the Court. *See Clark*, 804 F.2d at 6. And it is for Congress, not an agency, to strip federal courts of the power of such review. *See Kucana v. Holder*, 558 U.S. 233, 251-52 (2010).

Here, Texas participated in NRC's proceedings by submitting comments on the draft Environmental

Impact Statement (EIS), and Fasken participated by attempting intervention. NRC certainly had plenty of opportunities to consider the issues that aggrieved Fasken, Texas, and other commentors.[2] Texas and Fasken are "part[ies] aggrieved" under a plain language reading of the Hobbs Act and in accordance with congressional intent. 28 U.S.C. § 2344; *see also, e.g.*, *Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1177-78 (9th 2021) (finding that States were "parties aggrieved" when state agencies submitted comments to federal agency).

Although the Fifth Circuit ultimately did not decide whether Texas was a "party aggrieved," it indicated its agreement with this reading. Pet.App.17a-18a. And as the Fifth Circuit observed in denying *en banc* review, allowing NRC to "control[] the courthouse door" by confining access to judicial review to successful intervenors would violate fundamental principles governing review of agency decisions. Pet.App.34a. NRC's suggested definition of "party aggrieved" under the Hobbs Act—under which only license applicants and successful intervenors qualify—would permit NRC's own overly-restrictive procedural standards for intervention to bar judicial review of its actions. A plain language reading in accordance with congressional intent is far superior.

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[2] This is particularly so when the NWPA requires *consultation with states* on SNF issues, and Texas attempted to provide such consultation. *See* Pet.App.40a ("[T]he NWPA specifically required 'consultation' with the states before siting of [SNF] may occur anywhere." (citing 42 U.S.C. § 10155(d)(1)-(2))).

B. This Reading Ensures Proper Consideration of Important State Interests.

In addition, this plain reading allows for consideration of serious environmental and safety concerns regarding the proposed "interim" SNF storage facilities at issue here.

In the present context, the narrow reading advanced by Petitioners would preclude proper consideration of the serious concerns raised by Texas, Fasken, New Mexico, and others affected by siting determinations for SNF facilities. Affected parties tried to raise concerns in the NRC proceedings, but NRC overrode host states' and others' concerns and issued the licenses. This is a final determination that should be subject to judicial review.

Particularly concerning to Amici, Texas, New Mexico, and other entities raised various concerns with licensing SNF storage facilities in the Permian Basin due to its unsuitable geology, valuable resources, and national security risk. They also submitted comments on the draft EIS in the Holtec and ISP licensing proceedings covering the gamut of safety, environmental, economic, and social issues, discussed below. New Mexico even attempted to address its concerns through collaboration with NRC in the Holtec proceedings by entering into a memorandum of understanding (MOU) with NRC (at NRC's invitation) to assist it with preparation of the Holtec EIS. *See* MOU between NMED and NRC (dated July 24, 2019), available at

https://www.nrc.gov/docs/ML1920/ML19206A094.pdf. NMED provided comments on working versions of NRC's draft EIS per the MOU, including raising concerns about the inadequacy of EIS's analysis of groundwater and geology issues around the site. As with other comments and objections submitted to NRC, these were ignored.

NRC's decision to license the facilities over such objections violated Congress's command that a host state or tribe's disapproval of a proposed site controls, unless overruled by Congress. *See* 42 U.S.C. § 10135. Federal courts must be able to step in and reverse NRC when it acts contrary to congressional intent. This is all the more important when dealing with some of the serious and substantial concerns that were raised by the participants in the present case, discussed below.

i. De Facto permanent repositories

Among the various safety, environmental, economic, and social issues raised in the NRC proceedings, one of the most concerning to Amici is that, notwithstanding its designation as "interim," the ISP facility is a *de facto* permanent repository for SNF. New Mexico Governor Lujan Grisham commented that, "[w]ith no active planning for a permanent repository for SNF underway, there is significant risk that this and other facilities proposed as interim storage facilities become de facto permanent repositories," J.A.212. Texas Governor Abbott stated that it would be "naïve to believe" that the proposed facilities are "interim" and that the possibility of a permanent repository in sixty years is a "rosy assumption[]," J.A.120.

These concerns are not unfounded. NRC itself has revised its "findings" over the years about when a permanent geologic repository for SNF would become available. *See Continued Storage of Spent Nuclear Fuel*, 79 Fed. Reg. 56,238, 56,240-41 (Sept. 19, 2014). Most recently in 2010, NRC downgraded those promises to an assertion that a permanent repository would be available only "when necessary." *Id.* at 56,241. Following the D.C. Circuit's vacatur of the 2010 version of that rule, *New York v. N.R.C.*, 681 F.3d 471 (D.C. Cir. 2012), NRC stopped making such predictions, instead promulgating a rule to preclude discussion of the environmental impacts of the continued indefinite storage of SNF "beyond the licensed life for operation of a reactor," and supplant site-specific considerations with a "generic" EIS. 79 Fed. Reg. at 56,238; *see also* First Am. Compl. at 16-17, ¶¶ 67-76, ECF No. 7 (filed May 17, 2021), in *State ex rel. Balderas v. U.S. Nuclear Regul. Comm'n*, No. 21-CV-0284, 2022 WL 22898317 (D.N.M. Mar. 10, 2022) (noting NRC's "limited program planning and support and continued management activities . . . for Yucca's licensing application"; asserting that "the NRC is counting on Congress changing the law to allow the DOE to enter into temporary storage contracts with the proposed [consolidated interim storage facilities (CISFs)]"; and describing NRC "call[s] for industry and NRC to work together to open a *de facto* permanent storage facility like . . . Holtec").

The design of the ISP and Holtec facilities also reveals their intended purpose as the nation's *de facto* permanent repositories: the combined total capacity of these two facilities would be 143,680 metric tons of uranium (MTUs)—far more than the *total current national inventory* of such waste, which is

approximately 96,000 metric tons.[3] But the scale of this undertaking was obfuscated by the licensees' plans to develop the facilities in phases: the facilities are licensed to accept 5,000 metric tons (ISP) and 8,680 metric tons (Holtec) of spent fuel in their *initial* first phase, but both facilities plan to vastly increase the amount of waste stored—ISP in eight phases of 5000 tons per phase (to store 40,000 tons in total), and Holtec in nineteen additional phases of 5,000 tons per phase (to store 103,680 tons in total). ISP Final EIS at xvi, available at https://www.nrc.gov/docs/ML2120/ML21209A955.pdf; Holtec Final EIS at xxii, available at https://www.nrc.gov/docs/ML2218/ML22181B094.pdf; J.A. at 212.

ii. Lack of consent

Various parties indicated a clear lack of consent to siting the SNF facility in Texas, as well as in New Mexico. *See, e.g.*, J.A.211-14 (letter in opposition to ISP from N.M. Governor Lujan Grisham); *id.* at 215-16 (letter in opposition to ISP from Tex. Governor Abbott); Comment of N.M. State Legislature in opposition to Holtec (Sept. 22, 2020), available at https://www.nrc.gov/docs/ML2026/ML20268C343.pdf (asserting many local governments' and Tribes' opposition to Holtec); Comment of Governor Lujan Grisham in opposition to Holtec (Sept. 22, 2020), available at https://www.nrc.gov/docs/ML2026/ML20269A025.pdf; Comment of Indian Affairs Department in opposition to Holtec (Sept. 22, 2020),

[3] GAO, *Commercial Spent Nuclear Fuel* at 6 (estimating that there were approximately 86,000 metric tons of SNF stored on-site at the end of 2019, increasing by approximately 2,000 tons per year).

available at https://www.nrc.gov/docs/ ML2026/ ML20268C342.pdf (asserting that the All Pueblo Council of Governors "opposes the transportation of [SNF] across Pueblo lands, now and in the future" and that "the Pueblos were not afforded meaningful consultation with the NRC or the U.S. Department of Transportation on this project")[4]; *see also Holtec*,[5] 91 N.R.C. 167, 198 (2020) (Alliance for Environmental Strategies' contention stating that "there is no factual basis for Holtec's assertions in its [environmental report] that there is community support for the project," which was dismissed by the Atomic Safety and Licensing Board (the Board) and affirmed by NRC). NRC ignored these objections, contrary to NRC's own stated intent to apply a "consent-based approach to siting nuclear waste storage facilities." Pet.App.5a; *see* J.A.98-99 ("Of paramount importance to this licensing action was the Blue Ribbon Commission's recommendation to adopt a new consent-based approach.").[6]

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[4] Although former N.M. and Tex. Governors Susana Martinez and Rick Perry expressed early support for establishing facilities within their states, over the next year, NRC received comments from the present Governors expressing their concerns that any such facility would become a *de facto* permanent disposal facility. Governors Lujan Grisham and Abbott explicitly withdrew any earlier support by their predecessors.

[5] Names of NRC cases in the Holtec and ISP proceedings are abbreviated to "Holtec" and "ISP" for brevity.

[6] Our nation shifted to a consent-based approach after the decision to establish the Yucca Mountain repository drew widespread opposition in its host state, Nevada. As recently as

iii. Environmental justice

New Mexico and its stakeholders raised profound concerns about the environmental justice impact of both the ISP and Holtec facilities.

> [I]ndefinite storage of commercial SNF joins the ranks of uranium mining and milling, legacy contamination at national laboratories, and disposal of defense waste at the Waste Isolation Pilot Plan (WIPP), all of which have long presented risks to [New Mexico's] public health and the environment in the State of New Mexico.

J.A.182 (NMED comment on ISP draft EIS).

NMED also objected that the draft EIS failed to consider the "high percentage of minority and low-income populations in . . . New Mexico who have already suffered disproportionately high adverse human health and environmental effects from nuclear energy and weapons programs of the United States." J.A.184. Such objections were ultimately disregarded.

The Board also rejected the Alliance for Environmental Strategies' environmental justice challenge in *Holtec* because NRC needed only to "identify minority and low-income populations near proposed nuclear sites so that it can determine whether the environmental impacts associated with a given site will be different for those populations *when*

2021, the DOE reaffirmed its intent to "build trust and confidence with stakeholders and the public by demonstrating a consent-based approach to siting." *Notice of Request for Info. (RFI) on Using a Consent-Based Siting Process to Identify Fed. Interim Storage Facilities*, 86 Fed. Reg. 68,244, 68,245 (Dec. 1, 2021).

compared to the general population of the surrounding area, not the country as a whole." *Holtec*, 91 N.R.C. at 198 (emphasis added). By comparing the demographics of the proposed site with "surrounding area[s]," instead of with that of the United States as a whole, NRC all but ensured that a minority-majority state—like Amicus New Mexico—would *never* be able to successfully raise environmental justice concerns. *See* J.A.183 (NMED noting that the ISP draft EIS "identifies 58.8 percent of the population in Lea County, New Mexico as Hispanic or Latino," which is "significantly greater than in the United States' general population").

Similarly, in the ISP proceeding, NRC rejected the Sierra Club's concerns that ISP used only a four-mile radius around the site to determine the "level of minority population," when a fifty-mile radius would have been more appropriate from an environmental-justice perspective. *ISP*, 90 N.R.C. 31, 83 (2019). NRC faulted the Sierra Club for "fail[ing] to show how ISP's compliance with NRC guidance violates NEPA or NRC regulations," and characterized the wider radius (used for the Yucca Mountain EIS) as the Sierra Club's "prefer[ence]." *Id.* at 84.

NRC and the Board also rejected concerns based in community support or opposition. For example, the Board stated that "community support or opposition in a license application does not lend any weight to the environmental justice analysis to be conducted by the applicant," ultimately finding that Holtec followed NRC guidance on environmental justice analysis. *Holtec*, 89 N.R.C. 353, 457 (2019).

Finally, New Mexico is especially concerned that NRC denied intervention to any petitioner that raised environmental justice concerns even though NRC knew about the cumulative impact of already-existing nuclear-related projects in the area, conceding in both facilities' final EISs that the combined impact of all these nuclear facilities "could potentially contribute to cumulative disproportionately high and adverse human health or environmental effects within 80 km [50 mi] of the proposed CISF project." ISP Final EIS at 5-48; Holtec Final EIS at 5-45; *see also* ISP Final EIS at 5-49 (pointing the finger to Holtec's impact on environmental justice and failing to consider the cumulative impact); Holtec Final EIS at 5-43 (same as to ISP).

iv. Terrorism concerns

Storing the nation's SNF on the world's largest producing oilfield in the Permian Basin would pose significant risks of terrorist attacks. New Mexico echoed Texas Governor Abbott's concerns on this point. J.A.118-19 (Governor Abbott's comments); *id.* at 213 (Governor Lujan Grisham's comments). As Governor Abbott explained, "[p]iling [SNF] up on the surface of the Permian Basin . . . would allow a terrorist with a bomb or a hijacked aircraft to cause a major radioactive release," which, "on top of the tragic loss of human life," "would disrupt the country's energy supply by shutting down the world's largest producing oilfield." J.A.118-19. NRC held that "no terrorism analysis under NEPA is required" outside the Ninth Circuit, *ISP*, 90 N.R.C. at 108, and explained in the Holtec proceedings that "terrorist attacks are too far removed from the natural or expected consequences of agency action to require

environmental analysis in an NRC licensing proceeding," *Holtec*, 91 N.R.C. at 210. Still, New Mexico's concerns about increased risk of terrorism remain.

v. Canisters' age and risk of leaking

NMED commented that the "SNF cannisters that would be shipped to the proposed ISP facility have already been stored for decades," J.A.180, and elaborated that "[t]he Design Life for the storage facility and cask, canisters, and assemblies is eighty (80) years" while "[t]he Service Life for the SNF storage site is one hundred and twenty (120) years," J.A.175; *see also* GAO, *Commercial Spent Nuclear Fuel* at 29, GA0-21-603, available at https://www.gao.gov/assets/gao-21-603.pdf ("[T]he safety of long-term dry cask storage is unknown, and the risks, such as environmental and health risks, of on-site storage increase the longer the fuel is stored.").

The Sierra Club likewise noted that the "containers in which the waste will be transported to and stored at the ISP site are licensed for a period of 20 years," but "many of the containers will already have been in service for years prior to being shipped to the ISP." *ISP*, 90 N.R.C. at 80. The Sierra Club raised related concerns that "storage of high burnup fuel and seismic events from hydraulic fracturing in the area would crack a canister." *Id.* at 74. Fasken similarly commented on ISP's draft EIS that recent studies have shown that the "phenomenon" of Chloride-Induced Stress Corrosion Cracking (CISCC) of welded storage canisters is likely to occur at the ISP and Holtec sites—that is, "in the midst of the massive Salado ('Salt') Formation." J.A.151; *see id.* at 152-60

(discussing threat of CISCC in these areas, recent research on the phenomenon, and NRC's own public statements about such a risk). Fasken highlighted the DOE's and NRC's "revised research priorities that clearly show" their concern with CISCC. J.A.160.

The Board dismissed the Sierra Club's contention regarding cracked canisters because it was "in essence a challenge to NRC's cask certificate of compliance (CoC) program and is thus outside the scope of this proceeding." *ISP*, 90 N.R.C. at 74. And NRC refused to admit contentions about the canisters' safety, claiming that they "impermissibly challenge the Continued Storage Rule and [we]re therefore outside the scope of this proceeding." *Id.* at 67; *see id.* at 81, 101 (same).

Relatedly, the Sierra Club contended that the canisters might leak at some point. NRC deemed the Sierra Club's concerns inadmissible because "the Commission's decision in *Private Fuel Storage* established that cracked and leaking canisters in storage, transport, or otherwise is not a credible scenario," *id.* at 80-81 (citing *Private Fuel Storage*, 60 N.R.C. 125, 136-37 (2004)), even though that assertion relies on the 1995 Emergency Planning Rule, 60 Fed. Reg. 32,430 (June 22, 1995), which predates most of the canister designs at issue in the ISP proceeding. *Compare ISP*, 90 N.R.C. at 81 n.336 (listing six cask systems approved by ISP and their certificate of compliance numbers), *with* 10 C.F.R. § 72.214 (listing initial certification years for four of these six cask design systems as 2000, 2003, and 2009).

vi. Repackaging and further transport

Petitioners in the ISP proceeding also raised contentions about repackaging SNF and transporting it to a final geological repository, pointing out concomitant additional safety risks. These concerns were echoed by the states in comments. *See, e.g.*, J.A.175 ("[M]oving SNF multiple times increases the likelihood of accidents within the State of New Mexico and elsewhere."); *id.* at 213 ("Transporting [SNF] across the nation is complex and extremely dangerous.").

In one instance, the Board dismissed such a contention on the basis that the ISP license is "for a 40-year license" and therefore its environmental report "relies on the Continued Storage Rule and Continued Storage [Generic]EIS." *ISP*, 90 N.R.C. at 92. Without acknowledging the inevitable necessity for repackaging, the Board parroted that "ISP's application does not set forth any intent to repackage spent fuel or any analysis of the costs of repackaging the fuel" and that "the Continued Storage Rule does not require a spent fuel storage facility applicant under Part 72 to include such an analysis beyond the license term." *Id.* The Board concluded that such a contention was "outside the scope of this proceeding." *Id.* The D.C. Circuit affirmed the denial of intervention in the Holtec proceeding on an identical contention, because the petitioners "identif[ied] no legal requirement for a dry transfer system [(a method of repackaging)] at Holtec's facility, under the Continued Storage Rule or otherwise." *Beyond Nuclear, Inc. v. U.S. Nuclear Regul. Comm'n*, 113 F.4th 956, 968 (D.C. Cir. 2024).

Also in the ISP proceeding, petitioner Sustainable Energy and Economic Development Coalition raised concerns about the safety risks inherent in transporting SNF to the site. But NRC held that those concerns were "outside the scope of th[at] proceeding," stating that "ISP did not seek approval for waste transportation, packaging, or repackaging activities" and that "the title holders of [SNF]—which include private companies—would be responsible for transporting waste to the proposed facility, not ISP." *ISP*, 92 N.R.C. 457, 460 (2020). NRC further rejected any challenge to transportation safety as an impermissible attack on 10 C.F.R. Part 71. *Id.*

vii. Emergency response burdens

Finally, various petitioners raised concerns with the burden that would be placed on emergency response personnel both near the facilities and *en route* to them. "Safe transportation of [SNF] requires both well-maintained infrastructure and highly specialized emergency response equipment and personnel that can respond quickly to an incident at the facility or on transit routes." J.A.213. As Governor Lujan Grisham stated, "New Mexico residents cannot afford and should not be expected to bear the costs associated with transporting material to the proposed CISF or responding to an accident on transport routes or near the facility." *Id.*

NRC rejected these concerns, finding it was both too early and too late to raise them. *See, e.g.*, *Holtec*, 91 N.R.C. at 209 (affirming the Board's decision that "Joint Petitioners' concerns that emergency response officials would need disclosure of transportation routes [were] outside the scope of th[e] licensing

proceeding" because "NRC reviews and approves [SNF] transportation routes separately"); *ISP*, 93 N.R.C. 244, 248 (2021) (affirming the Board's decision that Fasken should have raised emergency-response costs earlier because, like the draft EIS, ISP's environmental report "also omitted that information and Fasken did not challenge the omission"). Indeed, NRC took the view that "[s]tates are . . . responsible for protecting public health and safety during transportation accidents involving radioactive materials." ISP Final EIS at 4-74 to -75. NRC rejected petitioners' concerns based on NRC's position that "how the States may distribute funding for first responder training and equipment to local municipalities is not within NRC's authority and is beyond the scope of this EIS." *Id.*

* * *

All told, myriad grave objections were raised throughout the NRC proceedings. NRC consistently rejected such concerns, ultimately issuing license**s** for SNF facilities despite host-state objections. NRC's proposed definition of "aggrieved party"—which precludes objectors, commentors, and attempted intervenors from seeking judicial review of its final determinations—not only violates logic, the plain reading of the statute, and congressional intent, but also prevents necessary judicial review of safety, environmental, economic, and social issues that impact participants, states, and the country as a whole.

C. The Correct Reading of "Party Aggrieved" Also Prevents NRC's Restrictive Regulations from Rendering Meaningful Challenge to Agency Action Practically Impossible.

NRC's 1989 promulgation of procedural rules limiting intervention and participation in licensing proceedings were popular with industry, but not the public. Summarizing comments on the proposed rule, NRC observed that "various industry groups" supported the rulemaking because it "would streamline the hearing process and make it more efficient." *Rules of Prac. for Domestic Licensing Proc.—Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,168 (Aug. 11, 1989). By contrast, "[s]tates, local governments, public interest groups, intervenors and individuals generally opposed the proposals on the ground that they would curtail the public's role in the licensing process and meaningful public participation in licensing proceedings would be eliminated." *Id.* In short, the "central thrust of the new rules was to make intervention and participation in the Commission's licensing proceedings more difficult." Goldsmith, 20 Hofstra at 191.[7]

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[7] Until now, NRC's procedural regulations constricting intervention have been blessed by the D.C. Circuit under the auspices of the *Chevron* doctrine. *See Union of Concerned Scientists v. U.S. Nuclear Regul. Comm'n*, 920 F.2d 50, 52 (D.C. Cir. 1990) (denying challenge to 1989 procedural rules); *Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 823 F.3d 641, 649 (D.C. Cir. 2016) (evaluating NRC's "interpretation of the AEA's hearing requirement under the familiar two-step *Chevron* analysis" and citing *Union of Concerned Scientists* for the court's "oblig[ation] to defer to the operating procedures employed by an

As discussed in more detail below, NRC's procedural rules constrict public participation in four ways relevant here. The rules (i) impose heightened pleading standards that shift the burden of proof to the intervention petitioner; (ii) prevent challenges to safety issues decided in generic rulemakings; (iii) render review of NEPA issues even more remote; and (iv) make reopening the record almost impossible. As such, adopting NRC's proposed reading of "party aggrieved" would not only violate principles of statutory interpretation and congressional intent, but also prevent proper consideration of important state interests through judicial review.

i. Heightened pleading standards

The hurdles that a state or any petitioner must meet to be considered for intervention in an NRC proceeding are high. Assuming a petitioner can demonstrate regulatory standing under 10 C.F.R. § 2.309(d), subsection (f) requires that a petitioner "set forth with particularity the contentions sought to be raised," and for each contention, the request must "[p]rovide a specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. § 2.309(f)(1). These contentions must remain "within the scope of the proceeding," and so not raise any generic safety concerns NRC deems previously

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agency"). But neither the D.C. Circuit nor this Court have revisited NRC's procedural regulatory scheme since this Court overruled *Chevron* last year. *Loper Bright Enters. v. Raimondo*, ___ U.S. ___, 144 S. Ct. 2244 (2024). *Beyond Nuclear*, 113 F.4th 956, was briefed before *Loper Bright*, so no *Chevron*-based arguments were before the D.C. Circuit. After *Loper Bright*, NRC's procedural rules are no longer entitled to deference, particularly when the agency uses them to abrogate the statutory right to judicial review as explained more fully below.

determined in a rulemaking, § 2.309(f)(1)(iii); *see* § I(C)(ii), *infra*, and the "issue raised in the contention" must be "material to the findings NRC must make to support the action that is involved in the proceeding," § 2.309(f)(1)(iv).

A petitioner must also—in the short window of sixty days after notice of the application is published—"[p]rovide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing," and include "references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue." § 2.309(f)(1)(v). The petitioner must "show that a genuine dispute exists with the applicant/licenses on a material issue of law or fact," which materiality NRC constrains by defining the scope of the licensing proceeding narrowly. § 2.309(f)(1)(vi).

In short, a petitioner must effectively prove its case on the merits as a condition of intervention. *See* 54 Fed. Reg. at 33,169 (summarizing comments that "one immediate effect of the proposed amendments would be to shift the burden of proof from the license applicant to the intervenor," which is particularly unfair when, by contrast, "license applicants are not required to furnish all the necessary documentation supporting the application at the time the application is first submitted").

To achieve such a feat in such a timeframe would be extraordinary. This is particularly noteworthy when no similar time-limited requirements are imposed on license applicants, who instead work

collaboratively with NRC staff to finesse their applications. *See, e.g.*, NRC, *Holtec International - HI-STORE CISF*, available at https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html (showing numerous rounds of requests and response between NRC staff and Holtec, during and after the 60-day period for intervention petitions); NRC, *Interim Storage Partners*, available at https://www.nrc.gov/waste/spent-fuel-storage/cis/waste-control-specialist.html (same for ISP).

Such draconian demands no doubt played a role in the complete lack of successful interventions in the Holtec and ISP proceedings. *ISP*, 90 N.R.C. at 42 (stating that none of the over forty proffered contentions met NRC's standards for a hearing); *id.* at 118 (denying all contentions but one, which was denied in another proceeding); *Holtec*, 89 N.R.C. at 358 ("Because no petitioner has both demonstrated standing and *proffered an admissible contention*, this proceeding is terminated." (emphasis added)); *Beyond Nuclear*, 113 F.4th at 970 (affirming NRC's denials in Holtec); *Don't Waste Mich. v. U.S. Nuclear Regul. Comm'n*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023) (same for ISP).

Moreover, timely intervention becomes even more onerous because the license application becomes a moving target at which the petitioner has one (early) shot. Although a petitioner must base its contentions on the applicant's initial environmental report, safety analysis, and license application, by the time the Board is reviewing a petitioner's contentions, NRC has already responded to deficiencies in the license application and given the applicant multiple chances

to correct, supplement, and amend the application. *See generally* NRC online dockets for Holtec and ISP.

So, a contention that was admissible under 10 C.F.R. § 2.309 at the time it was filed (within the 60-day window), may not remain so after the application has been revised. *See, e.g.*, *ISP*, 90 N.R.C. at 91 (affirming the Board's ruling that "intervening developments have mooted" certain of the joint petitioners' claims); *id.* at 105 (holding that joint petitioners' concerns were mooted when ISP withdrew its request for a certain exemption). This one-sided leniency stacks the deck even more against petitioners for intervention.

ii. Near impossibility of intervention based on safety issues

Even if one were able to make it past the heightened pleading standards, safety issues are virtually impossible to challenge in a licensing proceeding. NRC regulations prohibit an "attack" in the form "of discovery, proof, argument, or other means" on any "rule or regulation of [NRC] . . . concerning the licensing of production and utilization facilities . . . in any adjudicatory proceeding." 10 C.F.R. § 2.335(a). This means that generic safety or design rules cannot be challenged in a licensing proceeding, even if those generic rules do not consider site-specific factors that may be relevant, such as the nearby presence of fracking-induced seismic activity, salt dust storms, or pollutants from other nearby industrial operations.

In other words, NRC rejects any contentions that raise issues beyond NRC's self-determined scope of a licensing proceeding. *See, e.g.*, *ISP*, 90 N.R.C. 358,

367-68 (Dec. 13, 2019) (rejecting contention that raised "safety-related transportation issues" because "ISP has committed to accepting at its facility only transportation packages that have been approved by the NRC and licensed under Part 71," and "such claims try to expand a Part 72 application process into a dispute over the adequacy of the NRC's Part 71 requirements"). This issue has caught the attention of the Government Accountability Office: "[S]ome transportation issues associated with consolidated interim storage have not been considered because [SNF] management is compartmentalized." *Commercial Spent Nuclear Fuel: Congressional Action Needed to Break Impasse & Develop a Permanent Disposal Solution* at 31, GA0-21-603 (Sept. 2021), available at https://www.gao.gov/assets/gao-21-603.pdf.

In fact, the only way to challenge a generic rulemaking in an adjudicatory proceeding, whether on safety issues or canister design, is by obtaining a waiver under 10 C.F.R. § 2.335. Among other things, NRC requires that "[t]he sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) *would not serve the purposes for which the rule or regulation was adopted*." 10 C.F.R. § 2.335(b) (emphasis added). Although that requirement may seem reasonable, at least in some rules, NRC can write the "purpose" statement with this waiver in mind. *See, e.g.*, *Continued Storage of Spent Nuclear Fuel*, 79 Fed. Reg. 56,238, 56,239 (Sep. 19, 2014) ("The purpose of this final rule . . . is to preserve the *efficiency* of the NRC's licensing process." (emphasis added)). Thus, a

petitioner hoping to intervene and challenge any issue NRC deems already addressed by the Continued Storage Rule may only do so if its waiver petition argues that applying the Rule runs counter to the "efficiency" of NRC's proceedings.

Such a requirement renders intervention on generically determined safety or design issues nearly impossible. *See Exelon Generation Co., LLC*, 78 N.R.C. 199, 207 (Oct. 31, 2013) (NRC acknowledging that its "waiver standard is stringent by design. . . . When [NRC] engage[s] in rulemaking, [it is] 'carving out' issues from adjudication for generic resolution." (footnotes omitted)). Indeed, "to challenge the generic application of a rule, a petitioner seeking waiver must show that there is something *extraordinary* about the subject matter of the proceeding such that the rule should not apply." *Id.* (emphasis added). NRC has "rarely, if ever, granted a petition for waiver." *Nat. Res. Def. Council*, 823 F.3d at 649. Here, NRC used various petitioners' failure to seek a waiver as a reason to deny contentions that challenged various aspects of the EIS.

iii. Intervention on NEPA issues must be obtained before a draft EIS is even published

Yet another hurdle to intervention is NRC's requirement that any NEPA-related contentions be based on information in the applicant's initial environmental report. *See* 10 C.F.R. § 2.309(f)(2). Because a draft EIS is rarely available while the record is open, a would-be NEPA commenter does not have access to it at the time contentions must be filed. In the ISP proceedings, for example, the record closed

at the end of October 2018, but the draft EIS was not published until May 2020. *Compare Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility*, 83 Fed. Reg. 44,070, 44,070 (Aug. 29, 2018) (announcing start of intervention period), *with* 85 Fed. Reg. 27,447, 27,447 (May 8, 2020) (announcing publication of draft EIS for public comment).

Moreover, successful intervention is a pre-requisite for obtaining judicial review of NEPA claims. *See Ohio Nuclear-free Network v. U.S. Nuclear Regul. Comm'n*, 53 F.4th 236, 240 (D.C. Cir. 2022) (dismissing NEPA objections for failure to obtain party status under Hobbs Act). Thus, by yoking NEPA challenges to its unfairly constrained adjudicatory process, NRC precludes judicial review of the EIS that would otherwise be separately available under the Administrative Procedure Act (APA). *See Friends of Lydia Ann Channel v. U.S. Army Corps of Eng'rs*, 701 Fed. Appx. 352, 358 (5th Cir. 2017) (noting that "Federal courts have long exercised jurisdiction over NEPA challenges pursuant to the APA").

iv. Standards to reopen the record are even harder to meet

Finally, although NRC theoretically offers an opportunity to reopen a closed record to request a hearing, this motion must meet additional heightened criteria: "A motion to reopen a closed record to consider additional evidence will not be granted" unless the motion presents "an *exceptionally grave* issue," "address[es] a significant safety or environmental issue," and "demonstrate[s] that a materially different result would be or would have

been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.326(a)(1)-(3) (emphasis added). Not only that, but the "motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim," and "be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised." 10 C.F.R. § 2.326(b). No attempts to reopen the record in either Holtec or ISP were successful. *See, e.g.*, *ISP*, 93 N.R.C. at 248 (affirming the Board's denial of Fasken's motion to reopen the record); *Holtec*¸ 91 N.R.C. 239, 251-52 (2020) (denying Sierra Club's motion to reopen).

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By erecting artificial barriers to participation, NRC has stacked the deck against states and organizations that will be affected by siting decisions for SNF storage. All told, NRC's procedural rules make public participation in licensing proceedings almost impossible. Judicial review of NRC licensing determinations would therefore be unattainable under a standard that requires successful intervention as a prerequisite to "party aggrieved" status under the Hobbs Act. The Court should instead follow Congress's clearly expressed intent by permitting parties who participated in NRC proceedings to challenge its decisions in court.

II. ALTERNATIVELY, THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT THE ULTRA VIRES EXCEPTION PROPERLY PRESERVES JUDICIAL REVIEW OF NRC ACTIONS.

The Fifth Circuit declined to resolve the question of whether Respondents are aggrieved parties under the Hobbs Act, *see* Pet.App.18a, instead deciding the question of standing based on an already-established *ultra vires* exception to the Hobbs Act. Specifically, the Fifth Circuit held that Respondents had standing to challenge the license when, as relevant here, "the agency action is attacked as exceeding [its] power," *id.* at 18a-19a (citing *Am. Trucking Ass'n v. Interstate Com. Comm'n*, 673 F.2d 82, 85 n.4 (5th Cir. 1982)).

Amici agree with the Fifth Circuit that an *ultra vires* exception to the "party aggrieved" requirement is necessary when an agency exceeds its statutory authority. Here, NRC exceeded its statutory authority by (i) licensing so-called consolidated interim storage facilities for SNF, even though the AEA gives it no such authority, and even though the Nuclear Waste Policy Act of 1982 (NWPA) makes exclusive provision for permanent geologic storage of the nation's nuclear waste through a process of consultation with affected States; and (ii) promulgating procedural regulations that abrogate the AEA's command that any person whose interest may be affected by an NRC proceeding may request and participate in a hearing, and that judicial review *shall* be available of any final action. *See* 42 U.S.C. § 2239(b). As such, the *ultra vires* exception is warranted.

Deciding this case under the *ultra vires* exception is also appropriate given the history and rationale of this exception: the Hobbs Act is the successor to older statutes originally governing the now-defunct Interstate Commerce Commission (ICC). *See* Interstate Commerce Act of 1887, P.L. 49-104, 24 Stat. 379 (creating the ICC); Mann-Elkins Act, P.L. 61-218, 36 Stat. 539, ch. 309 (1910) (creating a Commerce Court to review decisions of the ICC); Urgent Deficiencies Act of 1913, ch. 32 P.L. 63-32, 38 Stat. 208, 219-21 (1913) (replacing the Commerce Court with three-judge district-court panels, while maintaining the procedures created by the Mann-Elkins Act); *see, e.g.*, Jason Sigalos, *The Other Hobbs Act: An Old Leviathan in the Modern Administrative State,* 54 GA. L. REV. 1095 (2020) (discussing the legislative history of the act). The Hobbs Act replaced district court panels with direct Court of Appeals review, and extended it to other agencies, including NRC.

The Interstate Commerce Act did not contain any provision for judicial review. The Mann-Elkins Act and Urgent Deficiencies Act, like the Hobbs Act, limited participation in subsequent judicial proceedings to "the [ICC] and *any party or parties in interest to the proceeding before the commission*, in which an order or requirement is made." 36 Stat. at 543 (emphasis added); *see* 38 Stat at 220 ("The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by the Act shall be the same as that heretofore prevailing in the Commerce Court [under the Mann-Elkins Act]."). Nonetheless, this Court has consistently allowed judicial review under those Acts, even to non-parties to the administrative proceedings. *See Skinner &*

Eddy Corp. v. United States, 249 U.S. 557, 562-65 (1919) (construing the Urgent Deficiencies Act and holding that in situations where the ICC exceeded its statutory powers, "the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the commission"); *see also Interstate Com. Comm'n v. Diffenbaugh*, 222 U.S. 42, 49 (1911) (stating that, though the issue of jurisdiction was not raised by the parties, "[t]he plaintiffs are affected by the order, and it is just that they should have a chance to be heard, although not parties before the Commission").

There is a direct link between this Court's ICC precedent (described above) and the *ultra vires* exception used by the Fifth Circuit. *See, e.g., Am. Trucking,* 673 F.2d at 85 n.4 (citing, *inter alia*, *Skinner*, 249 U.S. at 563-64). The reasoning of those ICC cases, in which this Court determined that affected parties should have redress when an agency exceeds its powers, is especially relevant here. The ability to obtain review when an agency exceeds its authority should not be dependent on the state's status as a party to the administrative proceeding, especially where, as described in detail above, the ability for a state to intervene in NRC licensing proceedings is all but impossible, and the NRC actions have such potentially catastrophic consequences.

In short, if the Court declines to hold that Texas is a "party aggrieved" under the Hobbs Act, then it should uphold the Fifth Circuit's determination that, in proceedings before NRC, the *ultra vires* exception is warranted for a state to obtain judicial review.

CONCLUSION

The Court of Appeals judgment should be affirmed.

Respectfully submitted,

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