Nos. 23-1300, 23-1312

In the
Supreme Court of the United States

NUCLEAR REGULATORY COMMISSION, et al.,
Petitioners,
v.
STATE OF TEXAS, et al., *Respondents*.

INTERIM STORAGE PARTNERS, LLC, *Petitioner*,
v.
STATE OF TEXAS, et al., *Respondents*.

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

BRIEF OF PERMIAN BASIN PETROLEUM ASSOCIATION AND NEW MEXICO FARM AND LIVESTOCK BUREAU AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The farmer, the cowman, and the oilman are friends today. Despite their differences, *amici* have a mutual interest in this case for two reasons.

First, *amici* have a mutual interest in protecting the businesses and property of their members from harm. This case concerns a license to store radioactive nuclear waste in the Permian Basin, where *amici*'s members do business. The license will impede safe oil and gas development in one of the largest oilfields in the world and threaten the only freshwater aquifers in the region.

Second, *amici* have a mutual interest in protecting the right of their members to a day in court. *Amici*'s members include family businesses that cannot pay Washington lawyers or read the Federal Register on a daily basis. Further, the time to intervene or comment in agency proceedings is often short, *see* 83 Fed. Reg. 44,070 (Aug. 29, 2018) (60 days), and the harm not always readily apparent from agency notices, *see Gage v. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973) ("The ultimate impact, or even the likelihood of enforcement, of proposed rules may be far from clear."). The Nuclear Regulatory Commission's argument against judicial review in this case is therefore a recipe for regulatory capture and lawlessness. It would favor politically powerful interests with the resources to participate in agency

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or its counsel made a monetary contribution intended to fund its preparation or submission.

proceedings and harm the public interest and the rule of law.

Amici are:

THE PERMIAN BASIN PETROLEUM ASSOCIATION ("PBPA"). Formed in 1961 by a group of oilmen concerned about the federal government's growing regulatory role, PBPA has grown from fewer than twenty members to over 1,000 member companies at its peak. PBPA represents the interests of exploration and production, service, midstream, and various other support services companies that operate in the Permian Basin.

THE NEW MEXICO FARM AND LIVESTOCK BUREAU. Formed in 1917 by New Mexico farmers and ranchers, the New Mexico Farm and Livestock Bureau is the voice of agriculture in New Mexico, advocating for farm, ranch, and dairy families.

SUMMARY OF ARGUMENT

From the beginning of the administrative state, federal agencies have argued that there is no general law of judicial review. The right to review, they say, must be conferred by the text of the review scheme at hand. This Court has rebuffed that argument time and again. This case should be no different.

First, the Fifth Circuit correctly applied the "ultra vires" doctrine. That doctrine is firmly rooted in traditional principles of equity codified in the Administrative Procedure Act ("APA"), which entitles a person suffering "legal wrong" to judicial review, even if they are not "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. A long line of cases going back to the early days of the Interstate Commerce Commission ("ICC") applied the ultra vires doctrine in suits brought by parties that did not participate in the underlying agency proceedings but had a legally protected interest at stake. When Congress later enacted special statutory review provisions to extend judicial review to a broader class of persons participating in the administrative process, those provisions were not understood to displace equitable rights of review, but to supplement them. Here, the Commission's license deprives Texas of a right conferred by statute—the State's right under the Nuclear Waste Policy Act to veto interim-storage facilities. Texas Br. 31. Accordingly, the Fifth Circuit properly applied the ultra vires doctrine.

Second, Texas and Fasken are both parties aggrieved under Section 4 of the Hobbs Act. Relying upon a D.C. Circuit decision, the Commission reads "party aggrieved" to mean a party to the agency

proceeding. That is wrong. The Hobbs Act's text, context, and history demonstrates that the best reading of the term "party" in Section 4 is an entity that files a petition for review in court. Section 3 of the Act, for example, unambiguously uses "party" to mean petitioner, and contextual clues and background principles point in the same direction. Congress did not hide an exhaustion requirement in the words "party aggrieved."

Regardless, Fasken is a party because the term "party," as defined by the APA, is broad enough to include, at a minimum, an entity that sought to and is "entitled as of right" to intervene, even though the Commission wrongfully denied intervention. *See* 5 U.S.C. § 551(3).

Third, even if "party aggrieved" required exhaustion, the requirement is not jurisdictional. It creates at most a condition to a right of review that equity excuses when, as here, an agency wrongfully refuses intervenor status to an entity legally entitled to intervene. Fasken's multiple attempts to intervene should make Fasken a "party aggrieved" in equity if not in law.

ARGUMENT

I. Texas Has a Right to Challenge Ultra Vires Agency Action

The State of Texas explains that the Nuclear Regulatory Commission exceeded its authority by granting a license to store nuclear waste away from a nuclear reactor in private facilities. The Fifth Circuit held that Texas had a right to bring this "ultra vires" challenge even though Texas did not formally intervene in the licensing proceeding. *See Texas v. NRC*, 78 F.4th 827, 834–40 (5th Cir. 2023).

The Commission disparages this decision as resting upon a "judge-made" exception that is contrary to "plain text." U.S. Br. 20. Specifically, the Commission focuses on one sentence in Section 4 of the Hobbs Act. That sentence provides:

> Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

28 U.S.C. § 2344.

According to the Commission, the use of the word "party" implies that *only* a person that intervened in a licensing proceeding before the agency may seek review under the Hobbs Act—at least when the agency holds a hearing on the record. *Cf.* 5 U.S.C. § 554. Because Texas did not formally intervene in the licensing proceeding, the Commission argues, Texas wasn't a "party" to the proceeding and cannot invoke judicial review under the Hobbs Act. U.S. Br. 16–20. Nor can anybody else, and the Act's jurisdiction is "exclusive." 28 U.S.C. § 2342.

The Commission further argues that "[n]o one has offered a principled defense of the [ultra vires] exception, which originated in dicta in a footnote in a 1982 Fifth Circuit decision and lacks any grounding in this Court's precedents." U.S. Br. 14; *see also id.* at 20–26; *see Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982). The upshot would be that the license may "enter a promised land free from legal challenge." *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 821 (6th Cir. 2015) (Sutton, J.).

The Commission is wrong. As explained below, the ultra vires doctrine is deeply rooted in the law of equity and the text and history of the APA, which formed the backdrop of the Hobbs Act's review scheme. Under the APA, persons "suffering legal wrong because of agency action" are "entitled to judicial review thereof," even if they are not otherwise "adversely affected or aggrieved by agency action within the meaning of a relevant statute"—here, the Hobbs Act and the Atomic Energy Act. 5 U.S.C. § 702. This right codifies a long tradition of "nonstatutory review" allowing relief in equity for official acts in excess of legal authority.

Persons suffering a legal wrong don't depend upon a right of review created by statute. Their rights flow from the law of equity now codified in the APA. As this Court put it in a case involving an ICC order reviewed under the Urgent Deficiencies Act of 1913, the immediate predecessor of the Hobbs Act:

> The contention is that the commission has exceeded its statutory powers; and that, hence, the order is void. In such a case 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.*

Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562–63 (1919) (Brandeis, J.) (citing cases) (emphasis added); *see also Edward Hines Yellow Pine Trs. v. United States*, 263 U.S. 143, 147–48 (1923) ("The mere fact that plaintiffs were not parties to the proceedings in which the order was entered does not constitute a bar to this suit. For it is brought to set aside an order alleged to be in excess of the Commission's power."). There is no evidence that by using the words "party aggrieved," the Hobbs Act meant to impliedly depart from this precedent and abrogate longstanding rights of review in equity codified in the APA's hard-fought text.

The Fifth Circuit footnote the Commission calls "dicta" not grounded in precedent cited precedent, including *Skinner*. *See Am. Trucking Ass'ns*, 673 F.2d at 85 n.4. The ultra vires doctrine is thus grounded in precedent. The Commission brushes these precedents off as "decided *before* Congress brought judicial review of ICC orders within the Hobbs Act's ambit." U.S. Br. 23. As discussed below, however, this Court recognized shortly after the Hobbs Act was enacted that the APA's general right of review for a person suffering legal wrong applies to cases brought under the Hobbs Act. The right of review for a party aggrieved recognized by the Hobbs Act is thus not exclusive, but complementary.

A. The "Ultra Vires" Doctrine Is Supported by Text, History, and Precedent

In a 1944 dissenting opinion, Justice Frankfurter argued that "[t]here is no such thing as a common law

of judicial review in the federal courts." *Stark v. Wickard*, 321 U.S. 288, 312 (1944) (Frankfurter, J., dissenting). He claimed that the right to review an agency action must be found in "the text and texture of a particular law." *Id.* That is the view urged by the Commission.

Unfortunately for the Commission, Justice Frankfurter's dissenting view was "neither wholly supported by the case law at that time nor has he been sustained by subsequent legislative or judicial developments." Note, *Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 912 (1957). It was not the law then, and it is not the law now. To understand why, it is important to start from the very beginning.

1. Statutory Rights of Review Expanded on Pre-existing Nonstatutory Rights

Before the APA, administrative lawyers classified challenges to agency action into two broad forms of review. First, "nonstatutory review." Off. of the Att'y Gen., *Final Report of the Attorney General's Committee on Administrative Procedure* 80–81 (1941) ("1941 AG Report"); Walter Gellhorn & Clark Byse, *Administrative Law* 218, 223–24 (1960). Second, "statutory review." 1941 AG Report 82–83; Gellhorn & Byse, *supra*, at 218–23; *see also* 5 U.S.C. § 703 ("The form of proceeding for judicial review is the special statutory review proceeding ….).

Understanding the Hobbs Act's right of review for a "party aggrieved" requires understanding these two forms of review, and how they interact with each other.

"Nonstatutory" review. Suits against government officials have never been wholly a matter of congressional grace. Well before the APA, plaintiffs brought suits for damages against agency officials, for ejectment, or for some other remedy at common law or equity. 1941 AG Report 80–81; *see, e.g.*, *United States v. Lee*, 106 U.S. 196 (1882); *Little v. Barreme*, 6 U.S. 170 (1804). In these cases, officers could always justify their conduct "by referring to the law under which" the officer "is acting." 1941 AG Report 81. This raised "precisely the issue whether the law does indeed authorize [the officer's] conduct under the circumstances —the typical issue for judicial determination." *Id.*

By the 1940s, "the equity injunction ha[d] become … the common remedy," along with new actions for declaratory judgments. *Id.* These remedies in equity occupied "a wide field in Federal administrative law." *Id.* Persons could seek review in equity or declaratory relief "for the review of major and long-established activities of Government for which no remedy was provided by statute" as well as "where the remedy provided by statute is not an adequate substitute or does not include the particular situation involved." *Id.* at 81–82 & nn.16–17 (citing cases); *cf.* 5 U.S.C. §§ 703–04.

Not everyone adversely affected by agencies had a right to sue in equity, however. Harm alone would not sustain a bill in equity or a right to declaratory relief. *See Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137–38 (1939). "In equity as at law … courts recognized only limited rights of action." Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 Va. L. Rev. 703, 713 (2019). Relief was generally available only to prevent a threatened invasion

of "a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tenn. Elec. Power Co.*, 306 U.S. at 137; *see also* 1941 AG Report 84. As one casebook put it, "[t]he most important basis of nonstatutory review is the proposition that if an official invades a person's 'legal' rights—or in other words, commits a 'legal wrong'—the ordinary courts of the lands should be open to his plea for suitable relief, just as they would be if controversy arose between two private persons." Gellhorn & Byse, *supra*, at 224.

There were three categories of legal wrongs secured through non-statutory forms of review in equity.

First, persons could seek an anti-suit injunction to restrain an officer's wrongful enforcement of an allegedly unlawful regulation or order. *See, e.g.*, *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177, 183–84 (1938); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 621 (1912). This remedy, however, could be sought only by "the direct targets of regulation." Nelson, *supra*, at 715.

Second, persons could seek equitable relief "to prevent tortious invasions" of their legal rights by government officials, such as a wrongful interference with land, other property interests, contracts, or business. *Id.* One example of this type of suit is *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), where this Court allowed a business to challenge the Postmaster General's unlawful decision to stop delivering mail to the business—including "checks, drafts, money orders, and money itself"—based upon the Postmaster's unilateral determination

that the business was fraudulent. *Id.* at 98–99, 108–110.

Third, a statute could create a "privilege" for an individual or a class, which could then be protected through a suit in equity. Nelson, *supra*, at 716. This Court's decision in *Leedom v. Kyne*, cited by the Fifth Circuit, falls into this category, as it concerned a statutory "right" enjoyed by a group of employees in derogation of the common law. 358 U.S. 184, 188–89 (1958).

Although quite broad, nonstatutory forms of review left many economic harms unprotected by the courts. For example, businesses would often seek to prevent illegal agency actions that permitted competition against them. "The common law," however, "does not recognize an interest in freedom from honest competition." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 153 (1951) (Frankfurter, J., concurring). Harms arising from honest competition were thus routinely dismissed by this Court as "*damnum absque injuria*"—harm without a cognizable injury. *Tenn. Elec. Power Co.*, 306 U.S. at 137–38; *see also Ala. Power Co. v. Ickes*, 302 U.S. 464, 478–79 (1938).

Statutory Review. Congress sometimes enacts a specific scheme of statutory review and did so many times before the APA. 1941 AG Report 82–83; Gellhorn & Byse, *supra*, at 218–23. These schemes often channel jurisdiction over challenges to agency action to a specific court. By 1941, "[r]eview in the Circuit Courts of Appeals [was] the method provided by statute for orders of a number of agencies." 1941 AG Report 83 (citing statutes).

These schemes often provided an expansive right of review for those "aggrieved." Section 402(b) of the Communications Act of 1934 is one example. Pub. L. No. 73-416, § 402(b), 48 Stat. 1064, 1093 (1934) (codified as amended at 47 U.S.C. § 402(b)). Section 402(b) provided a direct appeal to the D.C. Circuit by either the applicant for the permit or license, or "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application." *Id.*

This gave a right of review, or what courts then sometimes called "prudential standing," to a broader class of persons. Businesses that would be hurt by competition from the license applicant, for example, could challenge a Federal Communications Commission ("FCC") license as inconsistent with the public interest. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473–74 (1940). Such provisions thus would "create rights of action that the unwritten law would not have recognized." Nelson, *supra*, at 725; *FEC v. Akins*, 524 U.S. 11, 19 (1998) ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested.").

2. Conditions on New Statutory Rights of Review Did Not Limit Nonstatutory Rights

Statutory rights of action for aggrieved parties sometimes had limits. One limit required showing that the aggrieved person invoking statutory rights participated in the underlying agency proceeding. 1941 AG Report 85. For example, the Bituminous Coal Conservation Act of 1937 allowed "[a]ny person

aggrieved by an order issued by the [agency] *in a proceeding to which such person is a party*" to bring an action in circuit court. Pub. L. No. 75-48, § 6(b), 50 Stat. 72, 85 (emphasis added).

In these cases, participating in the agency proceeding could confer a right to sue on a person who otherwise could not have sought equitable relief. In the foundational *Chicago Junction Case*, this Court held that "plaintiffs may challenge [an] order" of the ICC, even if they have no otherwise protected legal interest in equity, "because they are parties to it." 264 U.S. 258, 267 (1924). Participating could thus confer novel rights to review.

These participation requirements, however, did not displace the pre-existing rights of persons suffering a legal wrong already protected by equity. 1941 AG Report 85. Courts applied these participation requirements only to limit suits brought by persons "not entitled, without the statutory provision, to initiate litigation in a court." *Am. Power & Light Co. v. SEC*, 325 U.S. 385, 391 (1945). As this Court noted, "[i]n awarding a review of an administrative proceeding Congress has power to formulate the conditions under which resort to the courts may be had." *Id.* at 389. Courts, however, did not understand rights protected by equity as a matter of a congressional award or grace, but as part of the general law of judicial review. *Cf. United States v. Texas*, 507 U.S. 529, 534 (1993) ("Statutes … are to be read with a presumption favoring the retention of long-established and familiar principles[.]").

The issue came up very early in the history of special statutory review schemes. In the Mann-Elkins Act of 1910, Congress created a Commerce Court with

"exclusive" jurisdiction over, among other things, suits "brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." Pub. L. No. 61-218, 36 Stat. 539, 539–40. Section 5 governed who could appear as party to the suit. Apart from the ICC, "any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, [could] appear as parties thereto." *Id.* § 5, 36 Stat. at 543. Shortly after, agents of a trade group brought suit to challenge an order of the Commission that would interfere with the business of its members. *F.H. Peavey & Co. v. Union Pac. R. Co.*, 176 F. 409, 416 (C.C.W.D. Mo. 1910). Proponents objected to the suit on the basis that the agents "were not parties to the proceeding before the commission upon which the order challenged is based." *Id.*

The lower court rejected this argument as not "the true rule of right or of practice." *Id.* at 417. The court refused to read Section 5 of the Mann-Elkins Act to abrogate "general rules and practice in equity," allowing "any party whose rights of property are in danger of irreparable injury from an unauthorized order of the commission [to] appeal to a federal court of equity for relief." *Id.*

This Court affirmed. *ICC v. Diffenbaugh*, 222 U.S. 42 (1911) (Holmes, J.). On the question of the plaintiffs' right to review, or what the Court loosely labeled "jurisdiction," the Court was "content to leave that matter on the statement of the court below. The 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." *Id.* at 49 (citation omitted).

Diffenbaugh soon came to be understood as allowing challenges to ultra vires ICC orders interfering with legal rights. Thus, in suits brought under the Urgent Deficiencies Act, the predecessor of the Hobbs Act, the Court recognized the ultra vires doctrine. When a plaintiff alleging a legal wrong didn't simply argue that an ICC order was unreasonable, but argued that the ICC "ha[d] exceeded its statutory powers; and that, hence, the order is void," then "courts ha[d] 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." *Skinner*, 249 U.S. at 562; *see also Edward Hines*, 263 U.S. at 147–48 (same). Nonstatutory rights of review thus were not altered by exhaustion requirements conditioning rights of review conferred through statute.

In the *Chicago Junction Case*, this Court summarized the regime applicable to review of ICC orders as follows:

> No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission, but did not do so, have been allowed to maintain such suits where the requisite interest was shown.

264 U.S. at 268.

Other agency orders later made subject to the Hobbs Act largely followed the procedures and equitable tradition applicable to judicial review of ICC

orders.[2] Most came without any statutory rights of review. Section 402(a) of the Communications Act, for example, generally made FCC orders reviewable under the Urgent Deficiencies Act. Would-be plaintiffs suing under Section 402(a) would obtain review by showing an interference with protected legal interests, such as contract rights with broadcasting stations. *See CBS v. United States*, 316 U.S. 407, 408, 415–17 (1942).

3. The APA Codified Nonstatutory Rights of Review

The 1946 APA was designed to work with statutory review schemes such as those created in the Communications Act, and "clarify, if not expand, the scope of judicial review." *See Kisor v. Wilkie*, 588 U.S. 558, 610 (2019) (Gorsuch, J., concurring in the judgment); *see* 5 U.S.C. § 703.

Section 10(a) answers who is "entitled to judicial review," the relevant question here. 5 U.S.C. § 702. The APA divides the groups into two classes, those "suffering a legal wrong," and those "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." *Id.* (emphasis added). As Caleb Nelson and many scholars of administrative law have noted, the "legal wrong" clause was enacted to codify the pre-existing law of nonstatutory review, while the second clause was meant to recognize that

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[2] *See* Shipping Act of 1916, Pub. L. No. 64-260, § 31, 39 Stat. 728, 738; Packers and Stockyards Act of 1921, Pub. L. No. 67-51, § 204(a), (e), 42 Stat. 159, 162; *see also id.* § 204(h) ("The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders …."); Perishable Agricultural Commodities Act of 1930, Pub. L. No. 71-325, §§ 10–11, 46 Stat. 531, 535.

statutory schemes could sometimes create more expansive rights to review, as with Section 402(b) of the Communications Act. Nelson, *supra*, at 727, 729–30.

4. The Hobbs Act Didn't Impliedly Repeal the APA's General Right to Review

The Hobbs Act was enacted in 1950. Pub. L. No. 81-901, 64 Stat. 1129. It was written largely to replace the three-judge procedure followed under the Urgent Deficiencies Act with direct review in circuit courts, similar to the procedure followed for review of Federal Trade Commission orders and many other agencies. H.R. Rep. No. 81-2122 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 4303, 4305–06. Section 2 made jurisdiction over challenges to specific orders exclusive to circuits courts, Section 3 provided venue, and Section 4, at issue here, governed how to petition for review of an order.

There is no evidence that the Judicial Conference or Congress meant to abrogate precedents such as *Skinner* by limiting suit to only participants in agency proceedings, even when the agency acted in excess of authority. Indeed, as explained in greater detail below, the framers of the Hobbs Act most likely used the word "party" as shorthand for the person petitioning for review in court, not a party in interest to the agency proceedings. *See infra* Part II.A. But in any event, the term "party aggrieved" is best read in context to "expand" rights of review beyond persons with recognized legal injuries, not to "constrict" pre-existing rights of review in equity. *Cf.* Antonin Scalia, *The Doctrine of Legal Standing as an Essential Element in the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 889 (1983).

That is how this Court first read the Hobbs Act. In *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), Storer filed a comment objecting to a proposed FCC order that would limit the number of radio broadcast stations one company could own. *Id.* at 193–94. Storer filed a petition for review in the D.C. Circuit under the Hobbs Act, invoking 5 U.S.C. § 702. *Id.* at 194–95 & nn.2, 4.

On certiorari, this Court addressed *sua sponte* "[i]f respondent could … rightfully seek review from the order adopting the challenged regulations." *Id.* at 197. In answer, the Court observed that "[u]nder the above-cited Code sections, review of Commission action is granted any party aggrieved *or suffering legal wrong* by that action." *Id.* at 197 (emphasis added). A footnote clarified that the APA added "suffering legal wrong" as an alternative basis to invoke review under the Hobbs Act. *Id.* at 197 n.6. Thus, in *Storer Broadcasting*, this Court recognized that the Hobbs Act did not impliedly repeal or limit the APA's general right of review for persons suffering a legal wrong because of agency action.[3] The Court went on to hold that Storer was sufficiently injured because the order "operate[d] to control [Storer's] business affairs." *Id.* at 199.

The Court's nearly contemporaneous understanding of the Hobbs Act as supplementing the APA's general right of review should be entitled to considerable weight, far more than the decisions of lower courts decades later.

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[3] Respondents here also invoked 5 U.S.C. § 702, including in their petition for review. *See* No. 21-60743 (5th Cir.), ECF No. 34-2 at 2; ECF No. 62 at 6 n.2.

To be sure, under the Hobbs Act, the "form of proceeding" is a direct petition in circuit court. 5 U.S.C. § 703; 28 U.S.C. § 2342(4). Subject-matter jurisdiction rests upon circuit courts, and that exclusive jurisdiction may not be evaded through a suit for equitable relief in district court invoking federal-question jurisdiction, even when challenging ultra vires agency action. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984). The APA's right of review doesn't confer any subject-matter jurisdiction on the court and so cannot be used to create subject-matter jurisdiction in district courts where none exists. *Id.*

But that is not what Texas asks for here. Texas filed in the Court of Appeals for the Fifth Circuit, which has subject-matter jurisdiction over the order under Section 2 of the Hobbs Act. 28 U.S.C. § 2342(4). Once a person has filed in circuit court, however, the right of review, or cause of action, is not limited to parties in interest to the agency proceeding. As *Storer Broadcasting* indicates, petitioners who suffer a legal wrong because of agency action may seek review in a circuit court vested with jurisdiction under Section 2. That is the doctrine of *Skinner*. *ITT World* is therefore inapposite.

B. The Fifth Circuit Properly Applied the "Ultra Vires" Doctrine

With that understanding, the only question is whether the Fifth Circuit properly applied the ultra vires doctrine. It did.

The Fifth Circuit noted that Texas challenges the license as exceeding the Commission's power. *Texas v. NRC*, 78 F.4th at 839. Further, the injury alleged by Texas qualifies as a legal wrong. The Nuclear Waste

Policy Act confers upon Texas a legal right to veto interim-storage facilities. *See* 42 U.S.C. §§ 10136(b), 10155(d), 10156(e), 10166, 10169; Texas Br. 31. As in *Leedom*, cited by the Fifth Circuit, this vested Texas with a legal right the license infringes upon. 358 U.S. at 189. This qualifies as a legal wrong. *Cf. Hardin v. Ky. Utils. Co.*, 390 U.S. 1 (1968); *Safir v. Gibson*, 417 F.2d 972, 978 (2d Cir. 1969) (Friendly, J.); Nelson, *supra*, at 716–17.

Because the ultra vires doctrine is supported by text, history, and precedent, and because the Fifth Circuit correctly applied it, this Court should reach the merits and affirm.

II. Texas and Fasken Are Parties Aggrieved

Texas and Fasken are also both parties aggrieved under the Hobbs Act. As an initial matter, the term "party aggrieved" likely simply referred to the party petitioning in court. But even if that is wrong, Fasken was a party to the proceeding within the meaning of the Hobbs Act.

A. "Party" Means Petitioner

The Commission argues that the use of the word "party" to modify "aggrieved," as opposed to person, must have implicitly referred to parties in interest to agency proceedings. U.S. Br. 18. The Commission even claims that meaning is "unambiguous." U.S. Br. 26. Years after the Hobbs Act was enacted, the D.C. Circuit would assume the same, contrasting the use of the word "party" to the use of the word "person" in Section 10(a) of the APA. *Simmons v. ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983). With all due respect, *Simmons* is likely wrong.

Congress did not use the word "party" to limit review across the board only to parties who participated in the underlying agency proceeding. To the contrary, the word "party" in Section 4 simply meant "petitioner."

The original venue provision of the Hobbs Act, Section 3, used "party" to refer to a person filing a petition for review:

> The venue of any proceeding under this Act shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

64 Stat. at 1130. Under Section 3, the "party," therefore, was the person "filing the petition for review," not a party to the agency proceedings.

Congress confirmed that "party" means petitioner when, in 1966, it replaced the cumbersome phrase "party or any of the parties filing the petition for review" in Section 3 with the single word "petitioner," Pub. L. No. 89-554, § 4(e), 80 Stat. 378, 622 (1966), and explained that it made this change "for clarity and conciseness," H.R. Rep. No. 89-901, at 196 (1965); S. Rep. No. 89-1380, at 215 (1966). Congress further defined the term petitioner to mean "the party or parties by whom a petition to review an order, reviewable under this chapter, is filed," again confirming that Congress used the simple word "party" aggrieved in the Hobbs Act to mean the injured petitioner seeking review in a court of law. 28 U.S.C. § 2341.

Context supports this reading. Section 8, governing intervention, uses different terminology to refer to parties participating before the agency. As under the preceding Mann-Elkins Act provision at issue in the *Chicago Junction Case*, Section 8 provides that "[t]he agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected … may appear as parties thereto of their own motion and as of right." 64 Stat. at 1131. Thus, when Congress wanted to refer to parties to the agency proceeding it used the unambiguous phrase "party or parties in interest to the proceeding before the agency." This shows that "Congress knows how to" say what it "wants to." *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987). Far from reinforcing *Simmons*, U.S. Br. 19, Section 8 cuts against it.

Another provision, Section 7, authorizes judicial review even when the agency "has held no hearing" and proceeded informally, not on the record. 64 Stat. at 1130. Not all orders subject to the Hobbs Act must be made after a formal hearing. Congress knew that. Henry P. Chandler, then-Director of the Administrative Office of the U.S. Courts and one of the Hobbs Act's principal designers, explained to Congress that the Act must apply to orders that are "legislative or administrative in nature which are made upon informal hearings in no sense adversary in character." *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearing on H.R. 1468, H.R. 1470, and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No. 4 of the H. Comm. on the Judiciary*, 80th Cong., at 81 (1947) (letter from Mr. Chandler). If only formal parties to an agency

proceeding could seek review, then this provision would be a nullity. Reading "party" to mean petitioner thus makes more sense than reading "party" to mean commenter in some cases and intervenor in others, as the Commission would have it. "[S]tatutes are not chameleons, acquiring different meanings when presented in different contexts." *Env't Comm. of Fla. Elec. Power Coordinating Grp., Inc. v. EPA*, 94 F.4th 77, 115 (D.C. Cir. 2024).

Background principles support this reading. Implying an exhaustion requirement from the use of the ambiguous word "party" is inconsistent with the APA. 5 U.S.C. § 704. The APA, "by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993). The words "party aggrieved" do not clearly mandate exhaustion of remedies, so the term "party" in Section 4 is best read to mean simply a petitioner aggrieved by the order, not a party before the agency.

Further, when Congress wanted to impose exhaustion of remedies, it did so with far greater clarity. In a 1952 amendment to the Communications Act, for example, Congress required filing a petition for reconsideration before petitioning for judicial review "where the party seeking such review … was not a party to the proceedings resulting in such decision, order, or requirement." Pub. L. No. 82-554, § 15, 66 Stat. 711, 720 (codified at 47 U.S.C. § 405). Here, Congress used "party" to mean the petitioner in court and used the unambiguous phrase "party to the [agency] proceedings" to require exhaustion. This requirement

would be surplusage if "party aggrieved" meant what the Commission says.

Finally, supposing Congress did use the word "party" as a camouflaged exhaustion requirement, it, like many other exhaustion requirements, would be subject to equitable doctrines. *See, e.g.*, Parts III, IV; *Santos-Zacaria v. Garland*, 598 U.S. 411, 416–17 (2023).

The word "party" in Section 4 meant "petitioner." A necessary premise of the Commission's argument therefore fails, and this Court must reach the merits. Texas and Fasken were petitioners, and they are no doubt aggrieved, so they are parties aggrieved.

B. A Would-Be Intervenor Is a "Party" to the Proceeding

In any event, even if "party" does mean a party to the agency proceedings, the term "party" is broad enough to embrace Fasken, given that Fasken sought to and had a clear right to intervene in the licensing proceeding.

The term "party" to an agency proceeding is defined by the APA as follows:

> "[P]arty" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.

5 U.S.C. § 551(3). Notably, the term "party" is not limited to those "admitted," but includes anyone "properly seeking and entitled as of right to be admitted as a party."

Fasken sought to intervene in a timely manner and had a right to intervene. The Atomic Energy Act provides that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1)(A). Because Fasken's ownership of land near the proposed storage site entitled it to be admitted, the Court should treat Fasken as a "party" and reach the merits.

III. The "Party Aggrieved" Right of Review Is Not Jurisdictional

Interim Storage Partners argues that "party aggrieved" status is a "jurisdictional provision." ISP Br. 10. The D.C. Circuit has also treated Section 4 of the Hobbs Act, including party-aggrieved status, as jurisdictional. *See Ohio Nuclear-free Network v. NRC*, 53 F.4th 236, 239 (D.C. Cir. 2022); *Matson Navigation Co. v. DOT*, 77 F.4th 1151, 1157 (D.C. Cir. 2023).[4]

That's wrong. "Party aggrieved" status is not a prerequisite affecting a court's power to entertain a petition for review. If the Court disagrees with the reasoning of the Fifth Circuit, then it shouldn't order the court to dismiss for lack of jurisdiction, but remand for further proceedings while acknowledging the possibility of equitable exceptions. *See* Part IV.

Section 4 of the Hobbs Act, and specifically, the right of review for parties "aggrieved," isn't

[4] This Court has assumed, without analysis, that the 60-day filing window in Section 4 of the Hobbs Act is jurisdictional. *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 287 (1987).

jurisdictional. *See* Texas Br. 15. Rather, it provides a right of review for petitioners, or what this Court has often called "prudential standing." *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28 (2014). For that reason, Section 4 is not one of those rare procedural rules that is truly "'jurisdictional,' and therefore precludes equitable exceptions." *Harrow v. DOD*, 601 U.S. 480, 482 (2024). It goes to the right of review, not the subject-matter jurisdiction or power of the Court.

As this Court reiterated last term, "th[e] Court will treat a procedural requirement as jurisdictional only if Congress clearly states that it is." *Id.* at 484 (quotation marks omitted). Although "Congress of course need not use 'magic words,'" the Court's "demand for a clear statement erects a 'high bar.'" *Id.* That bar is met only when the "traditional tools of statutory construction … plainly show that Congress imbued [the provision] with jurisdictional consequences." *Id.* Congress's instruction must be "unmistakabl[e]." *Santos-Zacaria*, 598 U.S. at 417. If "multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear." *Id.* at 416.

The "traditional tools of statutory construction" do not "plainly show that Congress imbued" Section 4's party-aggrieved status "with jurisdictional consequences." *Harrow*, 601 U.S. at 484. To begin, Section 4 doesn't mention "jurisdiction." 28 U.S.C. § 2344. Section 2 does provide that "[j]urisdiction is invoked by filing a petition as provided by" Section 4. *Id.* § 2342. But Section 4 governs only the manner or form used to invoke jurisdiction—the petition for review—and sets forth claims-processing and service

rules that are very unlikely to be jurisdictional. *Id.* § 2344. The passing reference to a "party aggrieved" is not phrased as a requirement, nor is it phrased as a restriction on parties or claims, or a limitation on courts' power. It is an invitation to file suit with a short expiration date—i.e., a party aggrieved by an agency order "may" challenge it by filing a petition "within 60 days after" the order's entry. 28 U.S.C. § 2344.

If Congress wanted this provision to have jurisdictional consequences, then it would have been more explicit. For example, Congress could have stated expressly that courts would *only* have jurisdiction over petitions filed by parties aggrieved or that courts would *not* have jurisdiction over petitions that others filed. Congress could also have specified in Section 2 that "*only* a party aggrieved" may invoke the federal courts' "jurisdiction," rather than just stating that a petition is enough and leaving details about the petition to another provision. The bare mention of "jurisdiction" at the end of a separate section that references Section 4 is not enough to make that section jurisdictional.

A brief look at other statutes that this Court has recently held to be nonjurisdictional suggests that the "party aggrieved" provision is nonjurisdictional, too. For example, in *Fort Bend County v. Davis*, 587 U.S. 541 (2019), this Court confronted Title VII's charge-filing instructions, which share a key structural similarity with Section 4 of the Hobbs Act. Namely, they are contained in "[s]eparate provisions" from Title VII's jurisdictional provisions, *id.* at 550–51. These "provisions do not speak to a court's authority or refer in any way to the jurisdiction of the district courts.

Instead, Title VII's charge-filing provisions speak to a party's procedural obligations." *Id.* at 551 (cleaned up). The same is true of Section 4 of the Hobbs Act. Section 2 is a jurisdictional provision, entitled "Jurisdiction of court of appeals," 28 U.S.C. § 2342, while Section 4 contains the "party aggrieved" language but entirely omits any reference to the court's "jurisdiction" and instead lays out charge-filing instructions and claim-processing rules, including deadlines, parties, and the contents of any petition for review. *Id.* § 2344.

This Court has confronted analogous provisions and held that they are nonjurisdictional. *See, e.g.*, *Santos-Zacaria*, 598 U.S. at 418 (explaining an immigration law provision "differs substantially from more clearly jurisdictional language in related statutory provisions"). The right of review in Section 4 is nonjurisdictional for the same reasons. This means a court may "excuse the party's non-compliance for equitable reasons." *Harrow*, 601 U.S. at 483–84.

IV. The Court May Award Party Status *Nunc Pro Tunc*

Fasken is already a party to the agency proceeding as a matter of law. *See* Part II. But regardless, the equitable doctrine of "*nunc pro tunc*"—i.e., now for then—would provide Fasken with an equitable remedy. "It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time." *Aetna Ins. Co. v. Boon*, 95 U.S. 117, 125 (1877). This Court, or the Fifth Circuit on remand, has equitable discretion to correct the administrative record of the Commission, currently before the court, 28 U.S.C. § 2346, and deem Fasken's intervention "as taking effect on

approximately the date it would have" but for the Commission's wrongful denial, making Fasken's petition for review timely, *see Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C. Cir. 1995) (backdating an EPA license allowing the sale of a fuel additive to redress a wrongful denial).

Failure to provide equitable relief to Fasken would be wrong. The Commission's treatment of Fasken's request to intervene was manifestly illegal, and it would be inequitable to allow the Commission to evade judicial review because it wrongfully denied intervention. Fasken is in a similar bind as the parties in *Diffenbaugh*. As the circuit court there explained:

> These parties have no remedy at law. Are they deprived of the right to equitable relief because those opposed to them did not cause them to be made parties to the proceeding …? If so, parties may easily deprive those injuriously affected by such orders of all relief by making, as in this case, those having a like interest parties to the proceeding and excluding those who are interested in opposition to their interest. In such a case none of the parties to the proceeding may successfully maintain a suit to challenge the order, because none of their interests are irreparably or at all injured, and, if those whose interests are injuriously affected may not assail it, the order is impregnable.

F.H. Peavey & Co., 176 F. at 417.

Fasken's multiple attempts to intervene in the Commission's licensing proceeding justify an equitable remedy. No one disputes that Fasken would have

been a "party aggrieved" had its motions to intervene succeeded, U.S. Br. 29–30, and the Commission rejected these motions on extralegal grounds. So, Fasken is not to blame for failing to meet the Commission's strict reading of Section 4's "party aggrieved" language.

Fasken did all it reasonably could to intervene but was thwarted at every turn. Even before it "submitted various comments," and "[b]efore the proceeding was terminated, Fasken timely filed five contentions" to intervene. *Texas v. NRC*, 78 F.4th at 834. The Atomic Safety and Licensing Board (the Commission's adjudicatory division) "denied each one" and then denied Fasken's motions to reopen the record to amend one of its previously filed contentions. *Id.* Finally, "[b]ased on the draft environmental impact statement, Fasken also filed a second motion to reopen the adjudicatory proceeding. The Board once again denied the request." *Id.*; *see also In re Interim Storage Partners LLC*, 2021 WL 8087739, at *5–6 (N.R.C. Jan. 29, 2021). Fasken was nothing if not diligent in its attempt to participate.

Moreover, the Commission erred badly in denying Fasken's requests for intervention. The Atomic Energy Act directs the Commission to permit intervention by entities like Fasken. The Commission "*shall admit* any [interested] person as a party" to an NRC licensing proceeding. 42 U.S.C. § 2239(a)(1)(A) (emphasis added). There is no question that Fasken is an "interested person" within the meaning of the statute and so should have been allowed to intervene. In fact, the Commission acknowledged that Fasken owns land in the Permian Basin just miles from the proposed storage site that faces radiation leak risks. *In re*

Interim Storage Partners LLC, 90 N.R.C. 31, 51–52 (Aug. 23, 2019).

It is a "foundational principle" that it is "inequitable that a wrongdoer should make a profit out of his own wrong." *Cf. Liu v. SEC*, 591 U.S. 71, 79–80 (2020) (cleaned up). The Commission's inequitable refusal to allow Fasken's intervention shouldn't be rewarded with a win.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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