Nos. 23-1300, 23-1312

IN THE

Supreme Court of the United States

NUCLEAR REGULATORY COMMISSION, *et al.*,

Petitioners,

v.

TEXAS, *et al.*,

Respondents.

INTERIM STORAGE PARTNERS, LLC,

Petitioner,

v.

TEXAS, *et al.*,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* BEYOND NUCLEAR, INC. IN SUPPORT OF RESPONDENTS

MINDY GOLDSTEIN
TURNER ENVIRONMENTAL LAW CLINIC
EMORY UNIVERSITY SCHOOL OF LAW
1301 Clifton Road
Atlanta, GA 30322

DIANE CURRAN
Counsel of Record
HARMON, CURRAN, SPIELBERG & EISENBERG, L.L.P.
1725 DeSales Street N.W., Suite 500
Washington, D.C. 20036
(240) 393-9285
dcurran@harmoncurran.com

Counsel for Amicus Curiae

January 22, 2025

130909

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Statutes, Rules and Regulations

Cited Authorities

Page

Page

Other Authorities

Page

INTEREST OF *AMICUS CURIAE*

Beyond Nuclear, Inc. ("Beyond Nuclear") is a nonprofit, nonpartisan membership organization that advocates for permanent disposal of "spent" (*i.e.*, used) nuclear reactor fuel and other highly radioactive nuclear waste in a deep underground repository.[1] It has members who live and work in close proximity to the Interim Storage Partners ("ISP") facility at issue in this proceeding, which would store up to 40,000 metric tons of spent fuel from U.S. commercial reactors above ground. *Interim Storage Partners, L.L.C.*, 92 N.R.C. 463, 466 (2019) ("*Interim Storage Partners*") (review denied, *Don't Waste Michigan, et al. v. NRC*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023)) ("*Don't Waste Michigan*"). Beyond Nuclear and its members are concerned about potential injuries to their health and environment due to both routine and accidental releases of radioactivity from the spent fuel during transportation to and/or storage at the facility. *See Texas v. Nuclear Regulatory Comm'n*, 78 F.4th 827, 832 (5th Cir. 2023) (observing that spent fuel is "intensively radioactive and must be carefully stored") (internal quotations and citations omitted).

While Beyond Nuclear did not take part in the Fifth Circuit judicial proceeding on review, it participated in the ISP-related administrative proceeding before the U.S. Nuclear Regulatory Commission ("NRC") by first moving to dismiss the proceeding and then by requesting

1. No counsel for any party authored this brief in whole or in part, and no entity or person aside from amicus and its counsel made any monetary contribution toward the preparation or submission of this brief.

an adjudicatory hearing on ISP's license application. *See Interim Storage Partners*, 92 N.R.C. at 467-469.[2] Beyond Nuclear raised a single claim to the Commission: that issuance of the license would violate the Nuclear Waste Policy Act ("NWPA") by unlawfully permitting ISP to contract with the federal government for the private storage of federally-owned spent reactor fuel.[3]

All parties, NRC's Atomic Safety and Licensing Board, and the NRC Commissioners agreed that the NWPA prohibited private storage of federally-owned spent fuel. *Interim Storage Partners*, 92 N.R.C. at 467. Yet, the Commission refused to vacate the ISP license or sever the unlawful provision, reasoning that it could lawfully condition the license on the anticipation or "hope[ ]" that the NWPA would be amended in the future. *Interim Storage Partners*, 92 N.R.C. at 468.[4]

---

2. In a separate NRC proceeding, Beyond Nuclear challenged NRC's proposal to issue a nearly identical spent fuel storage license for a facility owned by Holtec International ("Holtec"). *See Holtec International*, 91 N.R.C. 167, 173-76 (2020) ("*Holtec*") (review denied, *Beyond Nuclear, Inc. v. Nuclear Regulatory Comm'n*, 113 F.4th 956, 964 (D.C. Cir. 2024) ("*Beyond Nuclear*")).

3. In the Holtec administrative proceeding, Beyond Nuclear raised the same single claim. *Holtec*, 91 N.R.C. at 176

4. *See also Holtec*, 91 N.R.C. at 176.

In *Don't Waste Michigan*, the D.C. Circuit Court of Appeals denied Beyond Nuclear's petition for review of *Interim Storage Partners* on procedural grounds, and thus did not reach the merits. 2023 WL 395030. In *Beyond Nuclear*, however, the court reached the merits of NRC's *Holtec* decision. The court agreed with the Commission that while the Act prohibits private storage of federally-owned spent fuel, NRC could lawfully include a "forward-looking" license condition that anticipated future changes to the NWPA. 113 F.4th at 964. Beyond Nuclear's petition

The conceded inconsistency of ISP's license with the NWPA's prohibition against private storage of federally-owned spent fuel was not expressly addressed by the Fifth Circuit.[5] By addressing it now, this Court can ensure that NRC follows Congress's plain language as it is written today, and that Beyond Nuclear and other members of the public will have an opportunity for a hearing in the future, if and when that language is amended.

SUMMARY OF ARGUMENT

This Court has accepted for review the following question posed by NRC, which arises from a conflict between the Fifth Circuit's decision in *Texas* and previous decisions by the D.C. Circuit and Tenth Circuit:

> Whether the Atomic Energy Act of 1954, 42 U.S.C. 2011 et seq., and the Nuclear Waste

for rehearing en banc or panel rehearing of *Beyond Nuclear* has been held in abeyance pending the outcome of this proceeding. Order (Docket No. 21-1187, Nov. 4, 2024).

5. In their merits briefs to this Court, Fasken Land and Minerals, Ltd. ("Fasken") and the State of Texas contend that the NWPA limits away-from-reactor spent fuel storage to federally-owned facilities; therefore, the NWPA precludes NRC from applying the Atomic Energy Act to license any away-from reactor spent fuel storage, regardless of who owns the waste. Brief for Respondent Fasken Land and Minerals, Ltd. at 17-37 (Jan. 15, 2025); Brief for State Respondent at 24-47 (Jan. 15, 2025). NRC and ISP argue the opposite. Brief for the Federal Petitioners at 30-49 (Dec. 2, 2024) ("Federal Petitioners' Brief "); Brief of Petitioner Interim Storage Partners, LLC at 29-42 (Dec. 2, 2024) ("ISP Brief "). This amicus brief, in contrast, focuses on the NWPA's narrower prohibition against private storage of *federally-owned* spent fuel without implicating the Atomic Energy Act.

> Policy Act of 1982, 42 U.S.C. 10101 et seq., permit the Nuclear Regulatory Commission to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated. [6]

As stated by NRC, this question ("Question 2") is not only broad but momentous. It gets to "the heart of the Commission's expertise and congressionally assigned role" and its resolution is "likely to have wide-ranging effects." Petition for a Writ of Certiorari at 27-28 (Docket No. 23-1300, June 12, 2024). According to ISP, "[t]he repercussions of the Fifth Circuit's errors are destabilizing, and potentially devastating, to a critical industry at a critical time." ISP Brief at 4. Similarly, the nuclear industry trade association has warned that if the Fifth Circuit's decision is "allowed to stand," it "will have far-reaching and destabilizing consequences for the nuclear industry." Brief of *Amicus Curiae* Nuclear Energy Institute, Inc. in Support of Petitions for Certiorari (Docket Nos. 23-1300, 23-1312, 23-1341, and 23-1352, July 12, 2024).

There is no need for the Court to entertain this doomsday scenario. *Bostock v. Clayton County*, 590 U.S.

---

6. This amicus brief does not address the other question accepted by the Court ("Question 1"):

> Whether the Hobbs Act, 28 U.S.C. 2341 et seq., which authorizes a "party aggrieved" by an agency's "final order" to petition for review in a court of appeals, 28 U.S.C. 2344, allows nonparties to obtain review of claims asserting that an agency order exceeds the agency's statutory authority.

644, 681 (2020); *see also Office of Personnel Management v. Richmond*, 496 U.S. 414, 423-424 (1990) (reasoning that the Court should look for the narrowest basis for disposition and proceed to consider a broader one only if necessary to resolve the case at hand). The Court can uphold the Fifth Circuit's decision by resolving a question that is both narrower and undisputed, although equally important:

> Whether the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 et seq., permits the Nuclear Regulatory Commission to license *private* entities to temporarily store *federally-owned* spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated.

All parties agree that the plain terms of the NWPA prohibit NRC from authorizing such storage. *See Interim Storage Partners*, 92 N.R.C. at 467; Brief for Federal Respondents at 54 (Fifth Circuit Docket No. 21-60743, Apr. 18, 2022) ("NRC Fifth Circuit Brief"); *Holtec*, 91 N.R.C. at 176. The only dispute is over whether the license condition authorizing ISP to store federally-owned waste can be ignored until the NWPA is amended. The Administrative Procedure Act, however, allows no exception to the well-established doctrine that agencies must act in accordance with applicable laws of today. *See* 5 U.S.C. §§ 706(2)(A), (C), (D).

By addressing this straightforward administrative law question instead of attempting to resolve the scope of the NRC's statutory authority to license all away-from-reactor spent fuel storage, this Court would satisfy its own requirement to exercise judicial restraint. *Bostock*,

590 U.S. at 681; *Office of Personnel Management*, 496 U.S. at 423-424. Further, it would avoid wading into an unnecessary conflict among the circuits that exists only by virtue of the Fifth Circuit's unnecessarily broad justification for its holding.

ARGUMENT

I. THE SUPREME COURT SHOULD REVERSE AND VACATE NRC'S ISP LICENSING DECISION FOR FAILING TO COMPLY WITH THE PLAIN AND UNDISPUTED REQUIREMENTS OF THE NUCLEAR WASTE POLICY ACT.

The NWPA unambiguously prohibits an activity authorized by ISP's license: private storage of *federally-owned* spent fuel. This Court should reverse and vacate NRC's licensing decision on the sole ground that it violates the NWPA's plain terms.[7]

---

7. This question was thoroughly briefed below by Fasken, NRC, and ISP. *See* Initial Brief of Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners at 20-26 (Fifth Circuit Docket No. 21-60743, Feb. 7, 2022) ("Fasken Fifth Circuit Brief ")); Reply Brief of Fasken et al. at 14-15 (Fifth Cir. Docket No. 21-60743, May 16, 2022); NRC Fifth Circuit Brief at 53-57; Brief of Intervenor Interim Storage Partners, LLC at 52-54 (Fifth Cir. Docket No. 21-60743, Apr. 25, 2022). Thus, by addressing this narrow question in lieu of the broader Question 2, the Court would not risk "the perils of deciding a question neither presented nor briefed." *Dobbs v. Jackson Women's Health Association*, 597 U.S. 215, 349 (2022) (Roberts, J. concurring).

A. ISP's License Includes a Concededly Unlawful License Condition.

ISP's license confers on it the lawful right to contract with the U.S. Department of Energy ("DOE") for storage of federally-owned spent fuel. Paragraph 19 of the license provides that:

> Prior to commencement of operations, the Licensee shall have an executed contract with the [DOE] or other SNF [spent nuclear fuel] Title Holder(s) stipulating that the DOE or other SNF Title Holder(s) is/are responsible for funding operations required for storing the material . . .

Fed. Pet. App. 58a-59a. In approving this license condition, NRC recognized its inconsistency with the NWPA, which "does not authorize DOE to take title to [spent fuel] at this time." *Interim Storage Partners*, 92 N.R.C. at 467*; see also id.* at 468 (recognizing that ISP's right to "bid[ ] for a DOE contract" is inconsistent with the NWPA).

Nevertheless, NRC decided it could lawfully include the condition based on ISP's "hope[]" that one day Congress would change the law to allow it to contract with DOE for storage of federally-owned spent fuel. *Interim Storage Partners*, 92 N.R.C. at 468. Once the law changed, NRC reasoned, ISP would have an "advantage" of being able to bid for a DOE contract "without having to first amend its license." *Id.* As discussed below, however, the lawfulness of agency decisions must be judged against the law of today, and not against a speculative law of the future or the relative convenience of the regulated entity. *Corner*

Post, Inc. v. Board of Governors of the Federal Reserve System, 603 U.S. 799, 823 (2024) (internal quotations omitted) ("[P]leas of administrative inconvenience [for agencies or regulated entities] . . . never justify departing from the statute's clear text").[8]

B. By Licensing ISP to Contract with DOE for Private Storage of Federally-Owned Spent Fuel, NRC Violated the Plain Language and Statutory Scheme of the Nuclear Waste Policy Act.

The plain language and statutory scheme of the NWPA establish unequivocally that NRC had no authority to confer on ISP the right to contract with DOE for private storage of federally-owned spent fuel. *Bailey v. United States*, 516 U.S. 137, 146-47 (1995) (additional citations omitted) ("The meaning of statutory language, plain or not, depends on context."). In enacting the NWPA, Congress' overarching purpose was to ensure the completion of a permanent federal repository for spent fuel and thereby provide "a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository." 42 U.S.C. § 10131(b)(1); *see also* Subtitle A, 42 U.S.C. §§ 10121-45 (setting standards and criteria for a geologic repository). Congress expressly required DOE to build and operate the required federal repository, licensed by NRC. 42 U.S.C. §§ 10134(b), (d). Congress also forbade

8. Nor does it matter how much money ISP spent to obtain its unlawful license. *See* ISP Brief at 3 ("ISP spent years, and millions of dollars, to secure its NRC license."). The Administrative Procedure Act does not set a monetary threshold for disregarding the law.

transfer to DOE of commercial spent fuel ownership until *after* the repository was licensed and operating. 42 U.S.C. § 10222(a)(5)(A) (requiring that contracts for disposal of spent fuel in a repository must provide that "following commencement of operation of a repository, the Secretary shall take title to the . . . spent fuel").

In the meantime, Congress imposed strict and clear prohibitions and limitations on above-ground interim storage of federally-owned spent fuel in Monitored Retrievable Storage facilities (Subtitle C, 42 U.S.C. §§ 10161-69) and Interim Storage facilities (Subtitle B, 42 U.S.C. §§ 10151-57). For instance, Congress permitted only DOE—not private companies—to build and operate either type of storage facility. *See* 42 U.S.C. § 10163(b) (Monitored Retrievable Storage) and 42 U.S.C. § 10151(b)(2) (Interim Storage). Congress further required reactor licensees to cover the cost of either type of storage facility. *See* 42 U.S.C. §§ 10161(a)(4), (b)(2)(B) (Monitored Retrievable Storage) and 42 U.S.C. § 10156(a)(1) (Interim Storage). Construction of a Monitored Retrievable Storage facility also required Congressional approval (42 U.S.C. § 10161(b)) and could not commence until NRC had licensed a repository. 42 U.S.C. § 10168(d)(1).[9]

In addition, Congress limited the quantity of spent fuel that could be stored at these interim facilities. *See*, *e.g.*, 42 U.S.C. §§ 10168(d)(3), (4) (limiting Monitored Retrieval

9. The Act's only exception to the prohibition against federal ownership of spent fuel prior to the licensing of a repository was for the emergency Interim Storage program, which sunset on January 1, 1990. 42 U.S.C. § 10156(a)(1). Under this now-defunct program, reactor licensees could transfer no more than 1,900 metric tons of spent fuel to DOE, by demonstrating an urgent lack of onsite storage capacity. 42 U.S.C. §§ 10155(a), (b).

Storage capacity to 10,000 metric tons after licensing of a repository but prior to opening of the repository, and after opening to 15,000 metric tons); 42 U.S.C. § 10151(b)(2) (limiting the capacity of Interim Storage facilities to 1,900 metric tons prior to 1990).[10]

This statutory scheme was the result of careful work by Congress to ensure the federal government retained control over all activities related to federally-owned spent fuel, and that interim storage of federally-owned spent fuel would never undermine or supplant the ultimate goal of permanent spent fuel disposal in a repository. ISP's license flouts Congress's goals and violates the many storage and disposal requirements enshrined in the NWPA. It unlawfully provides for private storage of federally-owned spent fuel before a repository has been licensed; assumption by DOE of the cost of spent fuel storage; and accumulation of 40,000 metric tons of spent fuel, far in excess of the quantity contemplated by Congress for an interim storage facility and far beyond the time frame contemplated by Congress for the Interim Storage Program.[11]

---

10. Thus, ISP misconstrues the NWPA in arguing that it "was all about permanent disposal of spent nuclear fuel by DOE, not temporary possession of spent nuclear fuel by private parties." ISP Brief at 42. While permanent storage of spent fuel was indeed the NWPA's ultimate goal, Congress recognized that the goal could not be achieved without forbidding private storage of federally-owned spent fuel until a repository opened and imposing other limitations on storage. *See* Federal Petitioners' Brief at 5 (recognizing that in addition to providing for permanent storage of spent fuel, the NWPA "also directed the [DOE] to provide limited interim storage of spent fuel if certain conditions were met.").

11. *See* note 9, *supra.*

C. By Licensing ISP to Contract with DOE for Private Storage of Federally-Owned Spent Fuel in Violation of the Nuclear Waste Policy Act, NRC Violated the Administrative Procedure Act.

The inclusion in ISP's license of a condition that is facially—and concededly—inconsistent with the NWPA and its statutory scheme constitutes a violation of NRC's obligation under the Administrative Procedure Act to follow the law as written by Congress. *See* 5 U.S.C. §§ 706(2)(A), (C), (D). Because ISP's license is not "in accordance with law," is "in excess of statutory jurisdiction, authority, or limitations," and is "short of statutory right," it must be vacated. *Id.*; *see also Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 393 (2024) ("The text of the APA means what it says."). No matter how sincerely ISP "hopes" that Congress will amend the NWPA, *see* Section I.A above, "only the written word is the law." *Bostock*, 590 U.S. at 653 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest."). Similarly, no matter how "forward-looking" the NRC wishes to be in its licensing actions, *see Beyond Nuclear*, 93 F.4th at 964, the Administrative Procedure Act requires that those licensing actions must be "in accordance" with the law of today. 5 U.S.C. § 706(2)(A).[12]

12. By the same token, the "need to anticipate changing conditions and regulatory shifts," *Beyond Nuclear*, 113 F.4th at 964, does not override the clear admonition of the Administrative Procedure Act to comply with the law. *See Corner Post*, 603 U.S. at 823 ("pleas of administrative inconvenience . . . never justify departing from the statute's clear text") (internal quotations and citations omitted).

II. AN EXERCISE OF JUDICIAL RESTRAINT IS WARRANTED.

There is no need for this Court to address the broad question of whether the Atomic Energy Act and the NWPA generally authorize private away-from-reactor interim storage of spent reactor fuel. It can uphold the Fifth Circuit's decision on the narrower and undisputed ground that ISP's license condition is inconsistent with the NWPA's prohibition against private storage of federally-owned spent fuel. *See Bostock*, 590 U.S. at 681; *Office of Personnel Management*, 496 U.S. at 423-424. Because the ISP license authorizes storage of federally-owned fuel in violation of the NWPA, basic principles of administrative law require that it must be reversed and vacated. 5 U.S.C. §§ 706(2)(A), (B), (C).[13]

By relying on the narrower Administrative Procedure Act-based grounds for invalidating the ISP license, the Court would also avoid resolving a conflict among the U.S. appellate courts that need not exist. Had the Fifth Circuit

13. Instead of vacating entire licenses, courts often sever only the unlawful provision. *See, e.g, Barr v. American Association of Political Consultants*, 591 U.S. 610, 625 (2020) (explaining the presumption of severability in the context of statutes). This is an unusual case, however. The Court need not "imaginatively reconstruct" whether NRC would have issued the ISP license without the unlawful provision if only it had known that provision was unlawful. *Id.* NRC knew full well that the provision was unlawful at the time of license issuance. It included the provision anyway, in order to give ISP a future competitive "advantage" of being able to bid for a DOE contract "without having to first amend its license." *Interim Storage Partners*, 92 N.R.C. at 468. Because NRC declined to sever the unlawful provision, the entire license should be vacated.

simply addressed private storage of federally-owned waste, no conflict would have occurred—because there is no disagreement among any circuits that the NWPA prohibits the NRC from issuing a license that permits a private company to contract with the federal government for the storage of spent fuel.[14]

By resolving the narrow issue before it, this Court could restore public trust that the NWPA "means what it says" and will be followed by federal agencies and the courts. *See Loper Bright Enterprises*, 603 U.S. at 393.[15] And it would ensure that Beyond Nuclear and other members of the public will have an opportunity for a hearing in the future, if and when the law is amended.

---

14. Notably, neither of the circuit court decisions addressing the NRC's statutory authority to license away-from-reactor spent fuel storage concerned storage of federally-owned spent fuel. Both decisions found only that the NRC could lawfully license a private company to store *privately-owned* spent fuel. *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004)); *Skull Valley Band of Goshute Indians v. Nielsen*, 376 F.3d 1223, 1232 (10th Cir. 2004) (cert. denied, 546 U.S. 1060 (2005)).

15. Under the circumstances, concern expressed by ISP about the "destabilizing effects" of the Fifth Circuit's "errors," ISP Brief at 4, is more appropriately directed at the NRC for flouting the Administrative Procedure Act and the NWPA in the *Interim Storage Partners* decision, thereby "destabilizing" public confidence in the law. *See also Niz-Chavez v. Garland*, 593 U.S. 155, 172 (explaining that "words are how the law constrains power").

CONCLUSION

Consistent with the principles of judicial restraint set forth in *Bostock* and *Office of Personnel Management*, the Court should uphold the Fifth Circuit's decision to vacate ISP's license, albeit on a narrower ground than relied on by the Fifth Circuit. The Court can leave for another day the broader statutory question of whether *any* private away-from-reactor storage facility can be licensed, regardless of who owns the fuel.

Respectfully submitted,

MINDY GOLDSTEIN
TURNER ENVIRONMENTAL LAW CLINIC
EMORY UNIVERSITY SCHOOL OF LAW
1301 Clifton Road
Atlanta, GA 30322

DIANE CURRAN
Counsel of Record
HARMON, CURRAN, SPIELBERG & EISENBERG, L.L.P.
1725 DeSales Street N.W., Suite 500
Washington, D.C. 20036
(240) 393-9285
dcurran@harmoncurran.com

Counsel for Amicus Curiae

January 22, 2025