Nos. 23-1300, 23-1312

In the Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

INTERIM STORAGE PARTNERS, LLC, PETITIONER

v.

STATE OF TEXAS, ET AL.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER INTERIM STORAGE PARTNERS, LLC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—continued

Page

TABLE OF AUTHORITIES—continued

Page

TABLE OF AUTHORITIES—continued

Page

STATUTES

TABLE OF AUTHORITIES—continued

Page

REGULATIONS

TABLE OF AUTHORITIES—continued

Page

OTHER AUTHORITIES

INTRODUCTION

The Fifth Circuit committed multiple consequential errors in this case. With respect to each and every one of them, the Fifth Circuit stands alone.

As a threshold matter, the Fifth Circuit should never have entertained the petitions of Texas and Fasken at all. Respondents primarily seek to defend the exercise of jurisdiction by reference to the Fifth Circuit's *dicta* that jurisdiction could be supported under the Hobbs Act. Not so, for multiple reasons. Perhaps most fundamentally, the actual Hobbs Act says "party aggrieved." 28 U.S.C. 2344. Not, as respondents would have it, "participant" aggrieved. Texas Br. 12 (arguing for "reading the word 'party' to mean 'participant'"); Fasken Br. 38 (arguing that the "statutory requirement" is "participation"). Even by 1983, application of the statutory "party aggrieved" requirement enjoyed "presumptive validity conferred by a decade of acceptance in this and other circuits," *Simmons* v. *ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983) (Scalia, J.), and that settled validity had only increased over the ensuing two-plus decades of uniform applications by the courts of appeals. Until the Fifth Circuit's contrary, and incorrect, *dicta* in this case.

In the Hobbs Act, Texas and Fasken had available to them a full, fair, and well-established pathway to full judicial review for all of the claims they attempted to assert at the Fifth Circuit, but they intentionally eschewed that route, apparently for strategic reasons. That fact distinguishes these circumstances from every one of the purported "*ultra vires*" authorities upon which respondents rely. That fact also reveals the Fifth Circuit's exercise of so-called "*ultra vires*"

jurisdiction in this case for what it was: judicial overreach based upon a long-dormant outlier doctrine, originally based upon dubious *dicta*, arbitrary and unworkable in practice, and persuasively rejected by every other circuit court that has ever looked at it. The Fifth Circuit's exercise of so-called "*ultra vires*" jurisdiction should be reversed.

On the issue of whether the NRC had authority to do what it did here, respondents' construction of the Atomic Energy Act cannot be reconciled with this Court's decision in *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Respondents' arguments also violate multiple elemental principles of statutory interpretation, lead to obviously incorrect results, and are at odds with multiple well-reasoned authorities outside of the Fifth Circuit.

Respondents' invocation of the Nuclear Waste Policy Act ("NWPA") fares no better. They still have not identified any statutory text to support the Fifth Circuit's holding that the NWPA "doesn't permit" the licensing of temporary possession of spent nuclear fuel by a private party at an away-from-reactor site. ISP App. 30a. Respondents fundamentally misconstrue the text, structure, and purposes of the NWPA, and, again, fail to justify the departure that they urge from well-reasoned and uniform contrary precedent outside of the Fifth Circuit.

For all of these reasons, the judgment of the Fifth Circuit should be reversed, and the Fifth Circuit should be directed to dismiss or deny the petitions.

ARGUMENT

I. Neither Texas Nor Fasken Was a "Party Aggrieved" Under the Hobbs Act

The language used by Congress in the Hobbs Act controls: it says "*party* aggrieved." 28 U.S.C. 2344 (emphasis supplied). Not "participant" aggrieved, *contra* Texas Br. 12, Fasken Br. 38, and not "person" aggrieved, as in the Administrative Procedure Act passed just four years prior. 5 U.S.C. 702. Congress's "apparently intentional" reference to a "party" in the Hobbs Act must be given meaning, as then-Judge Scalia noted decades ago, and effectively means what "party" means in "appeals from district court decisions." See *Simmons* v. *ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983); see also *In re Chi., Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 335 (7th Cir. 1986) (Easterbrook, J.). Respondents' contrary view lacks textual or precedential support. See Texas Br. 10; Fasken Br. 40-41.

Without exception and for decades now, case after case has held that, when Congress vested courts of appeals with jurisdiction to entertain challenges to certain agency actions in the Hobbs Act, challengers who failed to "properly intervene[] in the underlying NRC proceeding * * * are not 'part[ies] aggrieved,'" and therefore may not seek judicial review under the Hobbs Act. *Ohio Nuclear Free Network* v. *NRC*, 53 F.4th 236, 239 (D.C. Cir. 2022); see also *Gage* v. *Atomic Energy Comm'n*, 479 F.2d 1214, 1217-1218 (D.C. Cir. 1973); *Packard Elevator* v. *ICC*, 808 F.2d 654, 656 (8th Cir. 1986); *State ex rel. Balderas* v. *NRC*, 59 F.4th

1112, 1116-1119 (10th Cir. 2023).[1] In most of those cases, the petitioners argued that they had sufficiently participated to make them "parties" (by, for example, submitting letters to NRC staff, *Ohio Nuclear Free Network*, 53 F.4th at 239)—just as Texas and Fasken argue here. To no avail. And those cases were exactly right. Unlike the Fifth Circuit's *dicta* in this case, the uniform contrary authority correctly applies the clear statutory language of the Hobbs Act.[2]

This consistently applied interpretation is not at all undercut by the unremarkable observation that what is required to become a "party" can vary depending on whether the agency proceeding is a rulemaking or an adjudication. *Water Transp. Ass'n* v. *ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987). That is merely applying the words of the statute to the facts of the particular agency action at issue. Respondents, on the other hand, want to upend settled law with a categorical judge-made rule that ignores factual variations

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[1] The single passing reference by this Court to "an aggrieved party" in connection with a discussion of the Administrative Procedure Act in *Darby* v. *Cisneros*, 509 U.S. 137, 146 (1993), upon which Texas heavily relies (Texas Br. 10, 18), but which Fasken does not cite, does not suggest the contrary. *Darby* had nothing to do with Hobbs Act jurisdiction, but, instead, involved what the parties to that case agreed to be a "judicially created doctrine of exhaustion." 509 U.S. at 138.

[2] The judicial intervention provision in the Hobbs Act at 28 U.S.C. 2348 further supports this conclusion, as ISP and the NRC explained, ISP Br. 25-26, NRC Br. 19-20, and as the Eleventh Circuit held in *Alabama Power Co.* v. *FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002). That provision draws a clear distinction between a "party" to an agency proceeding (who may intervene in a court proceeding as of right) and others whose interests are affected (who may only intervene with leave). That underscores the significance of the use of "party" aggrieved in Section 2344.

and applies an undefined lowest common denominator in all circumstances, Texas Br. 12, Fasken Br. 41, but there is no justification for such a departure. Indeed, Texas imagines hypothetical difficulties and confusion if the Hobbs Act "party aggrieved" requirement was to be applied differently for a rulemaking and an adjudication. Texas Br. 15-16. The legal principles as described by Texas, however, have in fact been the settled law in this country for many decades, and nothing like the dire consequences portrayed by Texas have come to pass.

What respondents (and several of the *amici*) really seem to be complaining about is that they do not like the NRC's longstanding adjudicatory and intervention rules, and they even go so far as to contend that those rules "preclude appellate review." Fasken Br. 41, 38-39; Texas Br. 12-13, 18-19. Not so, at all.

First, and to be crystal clear: the straightforward application of the NRC's adjudicatory hearing rules and the Hobbs Act does not somehow "close the courthouse door" to anyone. The Hobbs Act indisputably allows judicial review, for "parties aggrieved." Texas could have attempted to become a "party," as the regulations expressly provide, and as many other states have routinely done in the past. See 10 C.F.R. 2.309(h); *e.g.*, *N.J. Dep't of Env't Prot.* v. *NRC*, 561 F.3d 132, 135 (3d Cir. 2009) (New Jersey). But Texas chose not to. Fasken did try to become a party for other, separate, claims, *and actually had its day in court on those assertions*, but lost. *Don't Waste Mich.* v. *NRC*, No. 21-1048, 2023 WL 395030, at *3 (D.C. Cir. Jan. 25, 2023).

Second, respondents never challenged the legality of the NRC intervention regulations below. They

certainly could have attempted to do so—such challenges have been made in the past. *E.g.*, *Blue Ridge Env't Def. League* v. *NRC*, 716 F.3d 183, 196 (D.C. Cir. 2013). But the validity of those regulations is not presented in this case. This Court should not cast aside the Hobbs Act merely because respondents, now, complain that complying with the NRC's hearing regulations would have been too onerous or "futile" had they tried to invoke them. Texas Br. 20. *E.g., F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 175 (2004) ("The Court of Appeals, however, did not address this argument * * *, and, for that reason, neither shall we.").[3]

Finally with respect to the Hobbs Act, Fasken argues that, because it "requested a hearing" with respect to certain of its claims, it is a "party aggrieved" for all purposes under the Hobbs Act, including for its Fifth Circuit petition. Fasken Br. 37, 42. That is not correct. In the NRC adjudicatory proceedings, Fasken attempted to assert a contention regarding treatment of emergency response costs in the NEPA documentation, and to reopen the evidentiary record based upon alleged NEPA deficiencies regarding transportation routes. The NRC denied party status, Fasken

[3] This case does not involve anything like the circumstances in *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1 (2019), the concurring opinion to which Fasken (but not Texas) invokes many times. Fasken Br. 38, 42, 44. There, the question was whether a defendant in an enforcement action was somehow precluded from arguing that the agency's interpretation was wrong, because of the potential existence of prior Hobbs Act review. *PDR Network*, 588 U.S. at 27 (Kavanaugh, J., concurring in the judgment). *PDR Network* was all about "enforcement actions," and had nothing to do with the "party aggrieved" requirement of the Hobbs Act.

appealed to the D.C. Circuit, and the D.C. Circuit affirmed. *Don't Waste Mich.*, 2023 WL 395030, at *3. Fasken did not seek review of that D.C. Circuit decision by this Court.

Yet Fasken now argues that its prior lack of success at the NRC opened up a second avenue to proceed with its current claims before the Fifth Circuit as a "party aggrieved" under the Hobbs Act. Fasken Br. 37. Fasken argued the opposite below, contending that its claims at the Fifth Circuit were "different" and *not* the subject of its attempted intervention at the NRC.[4] Putting aside Fasken's flip-flopping, however, Fasken's argument fails because an appeal from a denial of intervention would allow the putative intervenor to challenge only that denial and to seek reopening of the proceeding—it does not provide *carte blanche* to challenge, for any reason whatsoever, the underlying merits determination of the adjudication, to which the intervenor was never a "party." *E.g.*, *Alaska* v. *FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992) ("Having failed to achieve the status of a party to the litigation, the putative intervenor could not later seek review of the final judgment on the merits."); *S. C. Loveland Co.* v. *United States*, 534 F.2d 958, 963-964 (D.C. Cir. 1976) (requiring re-opening); *Nat'l Parks Conservation Ass'n* v. *FERC*, 6 F.4th 1044, 1049 & n.4 (9th Cir. 2021) (exercising jurisdiction over petition brought by non-party petitioner because petitioner is "considered a party for the limited purpose of reviewing the agency's basis for denying party status" (citation omitted)). In short, Fasken's actions at the NRC (which it appealed

[4] 21-60743 Fasken C.A. Resp. in Opp. to Mot. to Dismiss or Transfer the Pet. for Rev. at 4.

to the D.C. Circuit) cannot support its petition at the Fifth Circuit.

II. The Fifth Circuit's Exercise of Jurisdiction Pursuant to Its "Ultra Vires" Exception to the Hobbs Act Was Error.

To repeat: neither respondent suffered from a "lack of access to courts," Texas Br. 17, nor did the agency do anything to "shield its order from judicial review." Fasken Br. 16. Texas could have attempted to intervene as a party and thereby secure meaningful judicial review, but it chose not to. Fasken did receive full judicial review by the D.C. Circuit of the claims that it attempted to pursue in a proper manner, and it certainly could have done so with the other claims that it tried to press at the Fifth Circuit. There is no reason in the world that Texas and Fasken could not have availed themselves of the well-known, long-established route to meaningful judicial review provided by the Hobbs Act. But they didn't.

That fact renders all of the purported "*ultra vires*" authorities upon which respondents now rely (Fasken Br. 43-46, Texas Br. 21-23) inapplicable to this case. Indeed, Texas admits as much, characterizing the cases it cites as being where "[n]o statute provided a cause of action." Texas Br. 22. In those cases, courts were addressing congressional or agency action that was argued to *completely* preclude any meaningful judicial review *at all*. *E.g., Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958); see also, *e.g.*, *Abbott Lab'ys* v. *Gardner*, 387 U.S. 136, 139 (1967) (decision below held that "review of these regulations was unauthorized"); *DeVillier* v. *Texas*, 601 U.S. 285, 293 (2024) (reversing non-statutory exercise of jurisdiction where the

plaintiff had an available statutory "cause of action" for compensation that it did not exercise); *Knick* v. *Township of Scott*, 588 U.S. 180, 201 (2019) (non-statutory equitable relief unavailable because of availability of an alternative statutory "adequate provision" for obtaining relief, i.e., the Tucker Act); *Edward Hines Yellow Pine Trs.* v. *United States*, 263 U.S. 143 (1923) (pre-Hobbs Act case against ICC); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919) (same); *Fed. Express Corp.* v. *U.S. Dep't of Commerce*, 39 F.4th 756, 763-764 (D.C. Cir. 2022) (applying *Kyne et al.* where the parties agreed that "no alternative procedure for review of FedEx's claim exists," per 50 U.S.C. 4821(a)).

That is—emphatically—not this case, as even Judge Jones essentially conceded in the opinion supporting denial of *en banc* review. ISP App. 43a n.6 (citing *Bd. of Governors of Fed. Rsrv. Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991)). This case, instead, involved the Fifth Circuit asserting judge-made authority as an atextual supplement to what Congress carefully prescribed in the Hobbs Act. No case by this Court, or outside of the Fifth Circuit, supports that. This Court's decision in *MCorp* makes that clear, by declining to apply *Kyne* and *Abbott Laboratories* because of an adequate alternative opportunity for judicial review. 502 U.S. at 43-44.

To make matters worse, the Fifth Circuit's parallel review scheme for purportedly "*ultra vires*" action is arbitrary and unworkable. In this very case, the Fifth Circuit deemed some of respondents' Administrative Procedure Act claims to be "*ultra vires*," but others were not. ISP App. 20a-21a; ISP Br. 22-23; NRC Br.

22-23. One of the most persuasive critiques of the Fifth Circuit's "*ultra vires*" doctrine is that any clever litigant can frame almost any argument of agency error as the agency exceeding its lawful authority—it is, as Judge Easterbrook observed for the Seventh Circuit, merely a "synonym for 'wrong.'" *Chi., Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d at 335. Respondents have no substantive response, but instead just complain that such a critique is "hyperbole." Fasken Br. 47; Texas Br. 23. It's not—it is spot on.

Finally with regard to the Fifth Circuit's *ultra vires* doctrine, respondents give short shrift to the dubious origins of that doctrine even in the Fifth Circuit itself, as well as to the compelling weight of uniform contrary authority. See ISP Br. 20-22; NRC Br. 23-25. Those factors and authorities further confirm that the Fifth Circuit's stated basis for hearing the petitions of Texas and Fasken was error.

III. The Atomic Energy Act Authorizes the NRC to License the Temporary Storage of Spent Nuclear Fuel Away from a Reactor Site

A. The Atomic Energy Act's provisions regarding the constituent radioactive elements of spent nuclear fuel authorize the NRC to regulate spent nuclear fuel.

In its decision, the Fifth Circuit accepted the oft-recited (and accurate) proposition that "[s]pecial nuclear material, source material, and byproduct material are constituent materials of spent nuclear fuel," and then proceeded to base its statutory analysis upon AEA provisions addressing those constituent materials. ISP App. 22a (citing *Bullcreek* v. *NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004)). Respondents, however,

have decided to take a different tack: their AEA arguments now are largely based on the fact that the term "spent nuclear fuel" was not separately defined in the original AEA, but was instead added in 1988 as part of an unrelated overhaul of the Price Anderson Act. Fasken Br. 24 ("Indeed, Congress did not amend the AEA to add 'spent nuclear fuel' as a defined term until 1988." (citing Price Anderson Amendments Act § 4(b), 102 Stat. 1069)); Texas Br. 25-26.[5]

Respondents' arguments run headlong into *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). That case was all about "spent fuel," *id.* at 194, and, more particularly, the metes and bounds of how much Congress had occupied the field regarding the storage of spent fuel in the AEA, for preemption purposes. The Court based its decision on its analysis of the then-current version of the AEA, including the provisions regarding the constituent elements of spent fuel. *Id.* at 207. The Court also highlighted that "the NRC has promulgated detailed regulations governing storage and disposal away from the reactor." *Pac. Gas*, 461 U.S. at 217

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[5] Fasken makes much of the fact that a subsequent regulatory definition of "spent nuclear fuel" includes "other radioactive materials associated with fuel assemblies." Fasken Br. 26-27 (emphasis omitted) (citing Final Rule, Licensing Requirements for the Storage of Spent Fuel in an Independent Fuel Spent Storage Installation, 45 Fed. Reg. 74,693, 74,700-01 (Nov. 12, 1980); 10 C.F.R. 72.3). That reference merely recognizes the existence of control rod elements and the like—the packaging that holds a nuclear fuel assembly together—which become irradiated with use. See*, e.g.*, 10 C.F.R. 961.11, Appendix E, Section B.2. Moreover, materials "made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material" are, in fact, "byproduct material." 42 U.S.C. 2014(e)(1).

(citing 10 C.F.R. Part 72). The addition of a separate definition of "spent nuclear fuel," on which respondents now place such heavy reliance, had not yet occurred—that was still some five years into the future. And the recently enacted Nuclear Waste Policy Act did not affect the preemption analysis. *Pac. Gas*, 461 U.S. at 219.

While the Court ultimately held that the challenged state statute addressed economic matters reserved to the states and was therefore not preempted, the Court's reasoning offered definitive guidance on the scope of the AEA. The Court made clear that Congress had "occupied the entire field of nuclear safety concerns," and the NRC, given the already-existing statutory and regulatory landscape under the AEA, had exercised its authority "to authorize the storage of spent fuel." 461 U.S. at 212, 218. Indeed, a key premise of the Court's holding was that although the federal government was responsible to develop and license technology for "nuclear waste disposal," the state statute had not attempted "to enter this field * * * occupied by the federal government." *Id.* at 219. The main arguments propounded by respondents regarding the AEA in this case, therefore, cannot be reconciled with this Court's decision in *Pacific Gas*.[6]

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[6] Texas posits an analogy about erroneously concluding that the Federal Aviation Administration can regulate water, because it can regulate hydrogen-fueled planes with oxygen equipment. Texas Br. 38. That misses the mark. The more apt analogy would be one section of a statute criminalizing the possession of heroin, and another the possession of cocaine. No one could seriously argue that merely mixing the two drugs together takes one completely outside of the law. Yet, that is the essential position of respondents here.

B. Respondents are unable to proffer any plausible interpretation of statutory text to support what they say the law is.

Respondents' definitional arguments reveal another fundamental flaw in their efforts to defend the result of the Fifth Circuit: there is no sensible interpretation of the statutes that leads to what respondents contend the law to be. Texas asserts that the NRC "cannot license possession of *spent nuclear fuel* at all." Texas Br. 40. Similarly, Fasken asserts that "[n]o AEA provision grants NRC express authority to issue a license for storing spent fuel." Fasken Br. 24. But, at the same time, Texas admits that "no one disputes that storage facilities onsite are permissible; they must be." Texas Br. 36. Well, what statutory provision provides that "permission"? Respondents do not say.

The necessary flipside of respondents' arguments also reveals their error. If, as respondents contend, the provisions of the AEA addressing the constituent components do not authorize the NRC to issue a license for the possession and storage of "spent nuclear fuel," then the AEA also cannot *prohibit* the possession and storage of "spent nuclear fuel"—you cannot have one without the other.[7] We would be in a state of nature: the unavoidable implication of respondents' arguments is that ISP did not even need a license from the NRC, and could have just constructed the facility on its own. It is hard to imagine a scenario more inimical to what Congress expressly identified as the core

[7] The prohibitions upon possession without a license are at 42 U.S.C. 2077(a) (special nuclear material), 2092 (source material) and 2111(a) (byproduct material).

purposes of the AEA. *E.g.*, 42 U.S.C. 2011(a), (b); 2012(a); 2013(d). The statute should be interpreted in a manner that harmonizes those provisions, not creates such elemental conflicts. *E.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* ("*Reading Law*") 181-182 (2012).

C. Respondents' *ejusdem generis*-type interpretations of the AEA are erroneous.

Neither respondent tries to defend the Fifth Circuit's interpretive analysis of the AEA. The court below held that the only permissible licenses with respect to special nuclear and source material were for "certain types of research and development," ISP App. 22a, based upon 42 U.S.C. 2073(a)(1) and (2) and 2093(a)(1) and (2). The Fifth Circuit inexplicably failed to account for subsection (a)(3) of both statutory sections, and failed to give any meaning to subsection (a)(4). And with regard to byproduct material, the Fifth Circuit misconstrued an inapplicable provision (42 U.S.C. 2111(b)) based upon internet-derived conclusions involving not byproduct, but special nuclear, material. ISP App. 23a; see ISP Br. 37.

Respondents, however, do try to construct *post-hoc ejusdem generis*-type defenses of the Fifth Circuit's result, at least with respect to special nuclear and source material. Fasken Br. 29-31; Texas Br. 26-28, 40-43. Those efforts fail.

First, respondents cannot identify a supportable "common attribute" that fits their needs. That, alone, precludes the *ejusdem generis*-type arguments of respondents. *E.g., Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008); *Reading Law* 209 ("'the enumeration of the specific items is so heterogeneous as to disclose

no common genus.' With this type of wording, the canon does not apply." (quoting Lord Macmillan, *Law and Other Things* 166 (1938)). The specifically enumerated potential uses here include research and development related to atomic energy ((2073(a)(1), 2093(a)(1)), research or development related to medical therapy or medical therapy itself ((2073(a)(2), 2093(a)(2)), and for "use in a license" for certain isotope production facilities, and in nuclear power plants. 42 U.S.C. 2073(a)(3), 2093(a)(3). Respondents have come up with an argued common attribute of "productive use," which they say excludes temporary storage of the materials, even at reactor sites. Fasken Br. 30; Texas Br. 28. That, however, is a made-up restriction without any textual, historical, or other support, and is further belied by the admission that "some form of temporary, onsite storage of spent nuclear fuel inheres in the use of nuclear fuel." Texas Br. 36. If there is any "common attribute" here (and ISP does not agree that there is), the fact that the enumerated items include nuclear power plants would mean that regulation of radioactive materials that "inhere" to operation of such plants would fit comfortably within any reasonable postulated commonality.

Second, whether or not one labels Sections 2073(a)(4) and 2093(a)(4) as "catch-all" provisions, those terms indisputably have to be given *some* meaning. *Bilski* v. *Kappos*, 561 U.S. 596, 607-608 (2010); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 702 (1995). Respondents' constructs fail to do so, and the better interpretation is to conclude that the provisions encompass the licensing of temporary storage of spent nuclear fuel at away-from-reactors sites.

It is also important to give meaning to what Congress actually said about the duties of the NRC, which is that it was required to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material, as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property," 42 U.S.C. 2201(b), consistent with the "development, use, and control of atomic energy," 42 U.S.C. 2011(a),[8] and without any locational limitation. The restrictive contentions of respondents are irreconcilable with Congress's clear commands.

In short, respondents cannot defend the Fifth Circuit's construction of the AEA, nor reconcile their arguments with *Pacific Gas*, 461 U.S. at 217, nor defend the Fifth Circuit's departure from *Bullcreek*, 359 F.3d at 541, and *Skull Valley Band of Goshute Indians* v. *Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004). See also*, Beyond Nuclear, Inc.* v. *NRC*, 113 F.4th 956, 964 (D.C. Cir. 2024). Which is perhaps why they have, now, pivoted to relying primarily upon the NWPA for their merits-based arguments.

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[8] These provisions are not, as Texas claims, mere empty "policy statements" that can be ignored for these purposes. Texas Br. 37-38, 41 (citing *Sturgeon* v. *Frost*, 587 U.S. 28 (2019)). Rather, they are commands and delegations that do not conflict or override any operative language from the statute and quite intentionally leave the agency with flexibility to regulate. This Court has recognized that such provisions should be applied as written. *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 395 & n.6 (2024).

IV. The Nuclear Waste Policy Act Does Not Forbid the NRC from Licensing Private Parties' Temporary Storage of Spent Nuclear Fuel Away from a Reactor Site.

Respondents fundamentally misconstrue the NWPA. They erroneously contend that it is the NWPA, rather than the AEA, that must provide the "statutory authority to license ISP's private, offsite storage." Fasken Br. 17; Texas Br. 29-31. That is just not so. *E.g., Balderas*, 59 F.4th at 1115, 1121 (NWPA "governs the establishment of a federal repository for permanent storage [i.e., disposal], not temporary storage by private parties."). It is true enough that petitioners "do not contend the NWPA authorizes ISP's license" (Fasken Br. 20), but that is because no one ever thought that the NWPA was enacted to do so. And it wasn't, as confirmed by the text, structure, and legislative history of that law.

Regarding the text: the Fifth Circuit held that the NWPA "doesn't permit" the ISP license, ISP App. 30a, but cited no statutory provision that says that. Nor do respondents. There is none. Fasken contends that 42 U.S.C. 10155(h) "specifically forbids" private offsite storage facilities (Fasken Br. 19), but that provision does not "forbid" anything at all.[9] Rather, the provision says "nothing in this chapter"—meaning the NWPA—"shall be construed to * * * authorize" private

[9] 42 U.S.C. 10155(h): "Application * * * Notwithstanding any other provision of law, nothing in this chapter shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease or other acquisition of any storage facility located away from the site of any civilian power nuclear reactor and not owned by the Federal Government on January 7, 1983."

storage facilities. See *Bullcreek*, 359 F.3d at 542. In other words, the provision limits the scope *of the NWPA*. But the NWPA is not, and never has been, the source of the NRC's licensing authority at issue here. Respondents' position cannot be squared with the statute's words—it would make no sense for Congress to say that the law did nothing to "encourage" or "require" an activity if (as respondents argue) that activity was already altogether banned. Respondents can point to no statutory text whatsoever to support their main substantive position.

Regarding the structure: The overall purpose of the NWPA was to establish the federal government's responsibilities for the permanent disposal of spent nuclear fuel. Subpart A set forth a plan for a permanent repository. 42 U.S.C. 10131-10145. Subpart B deals with an interim storage program *by the federal government*, pending permanent disposal. 42 U.S.C. 10151-10157. That was a limited program, designed to help utilities manage spent nuclear fuel while waiting for a permanent disposal site, and—significantly—it expired by its terms *in 1990*. 42 U.S.C. 10156(a)(1). That is, there were a number of conditions and processes associated with the program, including a requirement that any utility desiring to participate execute a contract with the federal government "no later than January 1, 1990." 42 U.S.C. 10156(a)(1).

Respondents chiefly rely upon provisions within that Subpart B. Texas Br. 29-31; Fasken Br. 18 (citing 42 U.S.C. 10152, 10153, 10154). Importantly, however, all of those provisions concerned the limited federal interim storage program in Subpart B, and therefore can be properly understood only as "preconditions

on private generators for obtaining federal interim storage." *Bullcreek*, 359 F.3d at 542. It is plainly wrong for respondents to argue that those *now-expired* portions of Subpart B are, instead, the only potential source of the NRC's *current* authority to license a private party's possession of spent nuclear fuel at all, anywhere. *E.g., Idaho* v. *DOE*, 945 F.2d 295, 299 (9th Cir. 1991) ("The Act's restrictive language [in Subpart B] limits the requirements to the specific set of remedial storage agreements authorized by the Act itself.").

Regarding the legislative history: *First*, and importantly, the legislative history conclusively confirms that Congress was fully aware that the AEA had been interpreted and applied by the NRC to authorize offsite storage of spent nuclear fuel by private parties. *E.g.*, S. Rep. No. 97-282, at 44 (1981); see *Bullcreek*, 359 F.3d at 542; *In the Matter of Private Fuel Storage*, CLI-02-29, 56 N.R.C. 390, 400 (Dec. 18, 2002) ("Members of Congress clearly were well aware that 'other provisions of law' authorized private [away-from-reactor] storage facilities, as the existence, and fate, of such facilities was discussed in congressional committee debates."), & n.35, n.44, n.45 (citations omitted).[10] Congress, of course, is presumed to know the state of the law when it enacts legislation, *e.g.*, *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 117-118 (2002), and here that knowledge is unquestionable. Respondents' contention that the meaning of the AEA should be informed by the subsequent NWPA (Texas Br. 28) is fair

[10] *In the Matter of Private Fuel Storage*, 56 N.R.C. at 399-410, cites and summarizes the voluminous relevant legislative history in a far more comprehensive manner than space will allow for here.

enough as a general proposition, but that proposition cuts squarely against respondents in this case.

Second, with regard to the federal interim storage program invoked by respondents, the legislative history reveals efforts to balance competing concerns about the nature and scope of such a program. See S. Rep. No. 97-282 (1981); H.R. Rep. No. 97-491, pt. 1 (1982); 128 Cong. Rec. 28,032 (1982). Section 10155(h), on which respondents heavily rely, went through drafts and debates which confirm that its ultimate role was to ensure that DOE would not take over private facilities to fulfill its NWPA responsibilities, and that also make clear that utilities would not have to exhaust potential off-site storage options to gain access to the federal interim storage program at Subpart B (which had been a requirement in some early drafts).[11] See *Bullcreek*, 359 F.3d at 543. Significantly, however, "[n]othing in those reports and debates suggests that Congress intended to prohibit private use of private away-from-reactor facilities." *Ibid.*

Although they avoided or disavowed it below,[12] it is apparent that respondents' real argument is that

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[11] See, *e.g.*, H.R. Rep. No. 97-491, at 20 (1982), *reprinted in part in* 1982 U.S.C.C.A.N. 3792 (H.R. 3809, § 133(b)(1)(D)), reported out of the House Comm. on Interior and Insular Affairs on April 27, 1982; *Nuclear Waste Disposal Policy: Hearing Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce on H.R. 1993, H.R. 2881, H.R. 3809, and H.R. 5016*, 97th Cong. 2-3 (1982) (reference to "tentative agreement" requiring generators to exhaust private offsite storage as options in order to access federal interim storage).

[12] 21-60743 State Pets. C.A. Br. at 24 (whether NWPA impliedly repealed the NRC's AEA authority is the "wrong question").

the NWPA silently repealed existing AEA authority, by implication. Texas Br. 28, 43; Fasken Br. 21-23. Respondents have not come close to clearing that high hurdle in this case. *E.g., Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). The preexisting NRC authority under the AEA to license private parties to store spent nuclear fuel away from existing reactor sites was not merely "implied," as Fasken argues. Fasken Br. 22 (citing *United States* v. *Fausto*, 484 U.S. 439, 453 (1988)). Rather, that AEA authority was demonstrably and indisputably known to Congress when it passed the NWPA, and formally enshrined in the Code of Federal Regulations after extensive notice-and comment processes (which Texas contends "prompted alarm," Texas Br. 3). See *Bullcreek*, 359 F.3d at 542-543. And, as explained above, there is no conflict whatsoever, much less any "irreconcilable conflict" (Fasken Br. 22 (citation omitted)) between the AEA and NWPA with regard to the NRC's authority to license private parties to temporarily possess spent nuclear fuel. Respondents' case for repeal by implication falls woefully short.

Finally, both respondents invoke *West Virginia* v. *EPA*, 597 U.S. 697 (2022). Fasken Br. 32-33; Texas Br. 31, 35. As petitioners have explained, however, the "major questions" doctrine has no applicability to this case. ISP Br. 38-39; NRC Br. 38-39.[13] In regulating the possession of nuclear materials from a safety perspective, the NRC is clearly not acting "outside its

[13] Nor is Texas's effort to invoke the "no-elephants-in-mouseholes" doctrine availing, Texas Br. 32, for reasons that include the above-described fact that the NRC's preexisting implementation of the AEA does nothing to "bypass Congress's scheme" as set forth in the NWPA. *Id.* at 34.

wheelhouse." *Biden* v. *Nebraska*, 600 U.S. 477, 518 (2023) (Barrett, J., concurring). There was nothing "unprecedented" or new here, and Congress did not "consider[] and reject[]" the exercise of NRC authority at issue in this case. *West Virginia*, 597 U.S. at 711, 729-731 (citation omitted). There is no basis for invocation of the "major questions" doctrine here.

CONCLUSION

The judgment of the Fifth Circuit should be reversed, and this Court should direct the Fifth Circuit to dismiss or deny the petitions.

Respectfully submitted,

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