Nos. 23-1300 and 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 THE FEDERAL PETITIONERS

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Under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, only a "party aggrieved" by an agency's "final order" may petition for review in a court of appeals. 28 U.S.C. 2344; see Gov't Br. 16-20; pp. 5-11, *infra*. The Fifth Circuit's judge-made ultra vires exception to that requirement contravenes the Hobbs Act's text and background administrative-law principles. Respondents argue that they were in fact "part[ies] aggrieved" and thus entitled to seek review under the Hobbs Act's terms. 28 U.S.C. 2344. But because none of the respondents intervened

in the agency licensing adjudication, no respondent can properly claim "party" status here.

Respondents' defenses of the Fifth Circuit's merits holding fare no better. The Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, generally bars possession of spent nuclear fuel, except as permitted by Nuclear Regulatory Commission (Commission) licenses. That Act authorizes the Commission to license private storage of spent fuel both at and away from the sites of nuclear reactors. The Nuclear Waste Policy Act of 1982 (Policy Act), 42 U.S.C. 10101 *et seq.*, did not restrict or displace that licensing authority, but instead confirmed the legality of the Commission's approach.

Respondents' contrary merits arguments misapprehend both statutes by underreading the Atomic Energy Act and overreading the Policy Act. Further, respondents' arguments risk dire practical consequences. Taken to its logical conclusion, respondents' position threatens to deprive the Commission of authority to license the private storage of spent nuclear fuel in *any* location. That would grind the operations of nuclear reactors to a halt. Reactor operations automatically generate spent fuel; those operations cannot proceed if there is nowhere to store that spent fuel.

### A. Respondents Did Not Satisfy The Hobbs Act's Requirements For Seeking Judicial Review

The Fifth Circuit declined to decide whether respondents were "part[ies] aggrieved" under 28 U.S.C. 2344, see Gov't Br. 26-27; contra Fasken Br. 13-14, 43, instead allowing respondents' claims to proceed based on a judge-made ultra vires exception to the party-aggrieved limitation. Respondents defend the Fifth Circuit's atextual ultra vires exception and also argue

that they were parties to the Commission licensing adjudication. Both rationales lack merit.

***1. The Fifth Circuit's ultra vires exception is baseless***

The Fifth Circuit's ultra vires exception disregards the Hobbs Act's plain text, is untethered to the norms that govern litigation in court, and would require courts to draw highly malleable distinctions. Gov't Br. 20-23.

a. Respondents describe ultra vires review as a "preexisting mode[] of review" that the Hobbs Act "do[es] not bar." Fasken Br. 44; see *id.* at 43-48; Texas Br. 21-24. But, when examining statutory schemes that authorize "review in a court of appeals following the agency's own review process," this Court has often held specialized review mechanisms to be exclusive, "divest[ing] district courts of their ordinary jurisdiction over the covered cases." *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 185 (2023). The Court has applied that principle to the Hobbs Act, holding that litigants cannot evade the Act's limits on court of appeals review by asking a district court to enjoin purportedly ultra vires agency action. *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 468-469 (1984).

To be sure, "a statutory review scheme of that kind does not necessarily extend to every claim concerning agency action." *Axon*, 598 U.S. at 185; see *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). Here, however, the factors that *Axon* identified as relevant support the exclusivity of Hobbs Act review. Treating the Hobbs Act scheme as exclusive would not foreclose effective judicial review, *Axon*, 598 U.S. at 191; respondents challenge a specific Commission decision (the grant of a license to Interim Storage Partners (ISP)) rather than the constitutionality of the agency's structure or decision-making process, *id.* at 192-193; and the

question presented here (whether the Commission has statutory authority to license offsite storage of spent fuel) is squarely within the agency's expertise, *id.* at 194. See Gov't Br. 25. Indeed, respondents' merits briefs do not cite either *Axon* or *Thunder Basin*.

In any event, respondents did not invoke a district court's general federal-question jurisdiction under 28 U.S.C. 1331, but instead filed petitions for review in the Fifth Circuit. See Gov't Br. 24-26. There is no basis for viewing that approach as a "preexisting mode[] of review," Fasken Br. 44, that operates independently of the Hobbs Act. Congress has given courts of appeals more limited jurisdiction than district courts, and the applicable statute here limits court of appeals review to "part[ies] aggrieved." 28 U.S.C. 2344.

b. Respondents rely in part (Fasken Br. 45; Texas Br. 22) on this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). But *Kyne* is a narrow decision that does not apply where those with "statutory rights"—here, parties to Commission proceedings—have a right to review under the Hobbs Act, including of claims that agency action exceeds statutory authority. *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991); see Gov't Br. 24-25. And even where *Kyne* applies, that decision contemplates *district-court* review. See 358 U.S. at 186-187; Gov't Br. 24; Fasken Br. 45 (describing *Kyne* as holding that "federal district courts have jurisdiction" under specified circumstances).

Contrary to Fasken's suggestion, the government's position does not imply that "no court ha[s] the power to review" the Commission's orders. Br. 46 (emphasis omitted). Any "party" to a Commission licensing proceeding who is "aggrieved" by the Commission's final decision may seek review in a court of appeals. 28 U.S.C.

2344. Here, however, Texas never requested admission as a party. See Gov't Br. 9, 27. And while Fasken sought to intervene in the agency adjudication, the Commission denied that request, and the D.C. Circuit's affirmance of that denial prevented Fasken from qualifying as a "party aggrieved" by the Commission's ultimate licensing decision. See *id.* at 10, 27.

***2. Respondents are not "parties aggrieved" under the Hobbs Act***

Respondents primarily argue that they are in fact "parties aggrieved" under the Hobbs Act. Those arguments lack merit and are inconsistent with the conclusions of every court of appeals that has actually addressed that question. See Gov't Br. 16-20, 26-30.

a. The Commission's adjudication of an application for a nuclear materials license is similar to district-court litigation between two parties. The purpose of the agency proceeding is not to prescribe rules that will apply to regulated entities generally, but to determine whether a particular entity should be allowed to engage in specified conduct that the Atomic Energy Act would otherwise prohibit.

Because intervention is the usual means by which a non-party to an adjudication becomes a party, no respondent here was a "party" under any traditional understanding of that term. Gov't Br. 16-20, 27. Respondents primarily argue (Fasken Br. 39-41; Texas Br. 9-12, 15-16) that their participation in the licensing proceedings was sufficient to make them "parties aggrieved" under the Hobbs Act. That argument suffers from numerous flaws.

First, respondents argue that the dictionary definitions on which the government relies (Gov't Br. 17)—which define "party" according to its "precise meaning

in legal parlance" as "he or they by or against whom a suit is brought," *Black's Law Dictionary* 1278 (4th ed. 1951) (capitalization omitted)—are inapplicable here because "a licensing proceeding affects a wide range of interested parties." Fasken Br. 40; see Texas Br. 9-10. But judicial rulings likewise may affect the interests of persons other than the original parties to a suit. The rules that govern intervention in court (see, *e.g.*, Fed. R. Civ. P. 24) recognize that fact, while providing mechanisms through which interested non-parties may seek party status. Intervention serves the same purpose and has the same legal effect in Commission licensing adjudications.

Second, this Court's decisions underscore that "party" as used with reference to adjudication is a term of art that generally requires participation *as a litigant* in a proceeding. Gov't Br. 17-18. Contrary to Texas's contention (Br. 10, 17-18), this Court's passing use of the term "aggrieved party," *Darby* v. *Cisneros*, 509 U.S. 137, 146 (1993), as a shorthand description of the persons who may seek judicial review under 5 U.S.C. 702 does not suggest that the Court views the terms "person" and "party" as interchangeable. Texas's reliance (Br. 18) on *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 882-883 (1990), is also misplaced: That decision addressed what it means for a "person" to be "adversely affected or aggrieved by agency action," 5 U.S.C. 702, under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* And while respondents invoke this Court's recent decision in *Truck Insurance Exchange* v. *Kaiser Gypsum Co.*, 602 U.S. 268 (2024), they ignore that decision's reference to "one or the other of the two sides in an action or affair" as one definition of "party," *id.* at 278 (brackets and citation omitted)—a definition that

has particular salience in the adjudication context. Compare Fasken Br. 39 and Texas Br. 17 with Gov't Br. 18.

Third, Texas contends (Br. 10, 15-16, 18-19) that, because some courts of appeals have held that submitting a comment in an informal rulemaking suffices to confer party status under the Hobbs Act, Texas's comments on the draft Environmental Impact Statement (EIS) concerning ISP's license application likewise sufficed here. But the courts of appeals have recognized that, under the Hobbs Act, "[t]he degree of participation necessary to achieve party status varies" depending on the nature of the agency proceeding. *Water Transp. Ass'n* v. *ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987); see Gov't Br. 28. Because the Hobbs Act applies to a wide range of agency actions, it is unsurprising that what triggers "party" status in one context may be inadequate in another.

Finally, Texas asserts (Br. 15-16) that defining "party aggrieved" to mean "participant" will avoid confusion regarding who is a party to a particular agency proceeding. But Texas identifies no instance of such confusion, even though numerous courts of appeals have adopted the government's interpretation of "party aggrieved." Gov't Pet. 28-29. Texas also claims that "[r]eading the word 'party' to mean 'participant'" would "'ensure that the agency had the opportunity to consider the issue[s]'" that will be subject to appellate review. Br. 12 (citation omitted). But respondents do not limit their participation-based conception of "party" status to circumstances where a participant apprises the agency of the specific arguments it intends to assert in court.

Indeed, in this case, neither Fasken's intervention motions nor Texas's comments questioned the Commission's statutory authority to license temporary offsite storage of spent nuclear fuel. See *In re Interim Storage Partners LLC*, 93 N.R.C. 244, 247-251 (2021); *In re Interim Storage Partners LLC*, 92 N.R.C. 463, 469-478 (2020); J.A. 115-122, 201-208, 215-220. Texas nevertheless argues that its comments on a draft EIS—which were entirely unrelated to the Commission's statutory authority to license offsite storage—permitted the State to contest that statutory authority in the Fifth Circuit. That argument is inconsistent both with Section 2344's text and with the practical objective of "ensur[ing] that the agency had the opportunity to consider the issue that petitioners are concerned with." Texas Br. 12 (citation omitted).

b. Respondents' arguments attacking the Commission's intervention requirements fare no better. Fasken asserts (Br. 38, 41-42) that the Commission's intervention rules unlawfully restrict access to judicial review. But respondents offer no basis for disputing that properly tailored intervention rules would be an appropriate means of determining party status in an adjudication.

The Commission's intervention rules themselves are subject to judicial review, yet Fasken has never challenged them. Gov't Br. 30. The D.C. Circuit considered and rejected Fasken's argument that it *should have been* admitted as a party, see *id.* at 10, 27, and Fasken cannot collaterally attack that holding in its current challenge to ISP's license. And because Fasken sought to intervene to raise arguments different from its cur-

rent statutory challenge, the D.C. Circuit had no occasion to consider the application of the intervention rules to Fasken's challenge.

Texas does not challenge the Commission's intervention rules, but contends (Br. 14, 20) that compliance with those rules is unnecessary to obtain party status. But the Hobbs Act requires persons that would appeal an adverse Commission licensing decision to first become "parties" to the agency proceedings. Under the plain meaning of the term, Texas did not become a party by submitting comments on the draft EIS, just as a nonparty to litigation would not become a party by filing comments on a case docket. See Gov't Br. 27-28.[1]

c. Respondents' reliance on other Hobbs Act and Atomic Energy Act provisions is likewise misplaced. Texas argues (Br. 10-11, 13, 18) that a person can become a party under the Hobbs Act without formally seeking party status. But the Atomic Energy Act clearly prescribes the mechanism for a person to become a party to a Commission licensing proceeding: "[U]pon the request of any person whose interest may be affected by the proceeding," "the Commission shall grant a hearing" "and shall admit any such person as a party to such proceeding." 42 U.S.C. 2239(a)(1)(A). And, contrary to Texas's suggestion (Br. 13), there is nothing anomalous

[1] Texas asserts (Br. 19) that, under the government's approach, an agency could limit a person's ability to seek judicial review by imposing onerous formatting requirements on documents. That is not so; such a requirement could be challenged as arbitrary and capricious or an abuse of discretion. And because respondents have not challenged the Commission's intervention rules, this case does not implicate any question concerning the prerequisites an agency may impose for obtaining party status.

about the prospect that agency-specific statutes may establish prerequisites for obtaining Hobbs Act "party" status in particular agency proceedings.

Respondents suggest (Fasken Br. 39; Texas Br. 11) that the Hobbs Act provision that addresses intervention in the courts of appeals, 28 U.S.C. 2348, supports their expansive reading of "party aggrieved." But Section 2348 distinguishes between "part[ies] in interest in the proceeding before the agency" and other persons "whose interests are affected by the order of the agency." *Ibid.*; see Gov't Br. 19. If an actual party to the ISP licensing adjudication had sought judicial review of the Commission's decision, respondents' "interests" in the outcome might well have been sufficient to support intervention in the judicial proceedings under Section 2348. But because respondents were non-parties to the adjudication, Section 2344 did not authorize them to pursue their own petitions for review.

d. Respondents' remaining arguments lack merit.

Various arguments advanced by Texas (Br. 12-17) reflect the assumption that the Hobbs Act's party-aggrieved requirement is jurisdictional. The government has historically argued that the party-aggrieved requirement is jurisdictional but has not had occasion to reconsider that position after this Court's decision last Term in *Harrow* v. *Department of Defense*, 601 U.S. 480 (2024). For purposes of this case, however, nothing of substance turns on whether the Act's party-aggrieved limitation is a jurisdictional requirement or a mandatory claims-processing rule. Cf. *Ross* v. *Blake*, 578 U.S. 632, 638-639 (2016) (rejecting an "'extra-textual'" exception to a statutory exhaustion requirement and emphasizing that when "Congress sets the rules," courts

have a role in creating exceptions "only if Congress wants them to") (citation omitted).

Fasken asserts (Br. 11, 37) that it is a party aggrieved under the Hobbs Act because the Commission's Atomic Safety and Licensing Board concluded that Fasken had statutory "standing" due to its "proximity to the proposed facility." *In re Interim Storage Partners LLC*, 90 N.R.C. 31, 52 (2019), aff'd, 92 N.R.C. 463 (2020). But while the agency's determination as to standing suggests that Fasken was "aggrieved" by the grant of ISP's license, it has no bearing on the distinct question whether Fasken was a "party" to the Commission proceedings. 28 U.S.C. 2344; see Gov't Br. 27.

Texas briefly invokes (Br. 12) the presumption of judicial review and argues (Br. 14-15) that the Commission has impermissibly created an exhaustion requirement. The presumption that agency action is judicially reviewable cannot override the Hobbs Act's plain text, which authorizes court of appeals review of specified agency actions, but only at the behest of "parties" to the agency proceedings. And the Commission has not created an exhaustion requirement; the party-aggrieved limitation appears in the Hobbs Act's text. See Gov't Br. 26.

### B. Congress Has Authorized The Commission To License Temporary Offsite Storage Of Spent Nuclear Fuel

The Atomic Energy Act authorized the Commission to license temporary offsite storage of spent nuclear fuel. The Policy Act did not disturb that authority, but instead manifested Congress's approval of the Commission's prior materials-licensing practices. Respondents' contrary arguments reflect serious misunderstandings of the text and context of both statutes.

### *1. The Atomic Energy Act authorizes the Commission to license temporary offsite storage of spent fuel*

Three Atomic Energy Act provisions authorize the Commission to issue licenses to possess the components of spent nuclear fuel for purposes, including interim storage, that relate to generating nuclear power. See Gov't Br. 31-42. The Act does not impose any geographic restrictions on such storage. In arguing that the Commission lacks authority to license offsite storage of spent fuel, respondents misread the statutory text and sidestep the disruptive practical implications of their arguments.

a. Respondents primarily rely (Fasken Br. 24-29; Texas Br. 25-26, 38-40) on an argument the Fifth Circuit did not accept: that because the Atomic Energy Act refers to licenses to possess source material, special nuclear material, and byproduct material, the Commission may not license the possession of spent nuclear fuel. But as explained (Gov't Br. 3, 41-42) and as the Fifth Circuit recognized (Pet. App. 21a), spent nuclear fuel consists of source, special nuclear, and byproduct material. Indeed, the applicable definitions make clear that those three materials are the relevant and regulated "constituent" components of spent fuel. See 10 C.F.R. 72.3 ("Spent fuel means fuel that has been withdrawn from a nuclear reactor following irradiation, has undergone at least one year's decay since being used as a source of energy in a power reactor, and has not been chemically separated into its constituent elements by reprocessing" and "includes the special nuclear material, byproduct material, source material, and other radioactive materials associated with fuel assemblies.") (emphasis omitted); see also 42 U.S.C. 2014(ee); 42 U.S.C. 10101(23) ("The term 'spent nuclear fuel' means

fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.").

Respondents argue (Fasken Br. 27; Texas Br. 39) that, because spent nuclear fuel includes some materials in addition to source, special nuclear, and byproduct material, a license to possess those three materials cannot permit possession of spent fuel. But the point of a Commission license is to authorize conduct that the Atomic Energy Act would otherwise prohibit. See Gov't Br. 2, 31-32. Because the Act does not generally ban possession of the additional spent-fuel components, their possession does not require a Commission license. A license to possess source, special nuclear, and byproduct material is therefore sufficient to make the licensee's possession of spent fuel lawful. And the Commission can issue a single license authorizing the possession of all three regulated constituent materials. See 42 U.S.C. 2201(h).[2]

Respondents' argument—which no court has adopted—also has highly disruptive practical implications. That argument logically suggests that the Atomic Energy Act does not authorize the Commission to license

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[2] Fasken observes (Br. 27) that a later-enacted statutory provision refers separately to "spent nuclear fuel" and to each of spent fuel's three regulated constituent parts. See 42 U.S.C. 2210i(b). But that later-enacted provision requires that, when specified materials are "transferred or received in the United States by any party pursuant to an import or export license," those materials must be "accompanied by a manifest describing the type and amount of materials being transferred or received." 42 U.S.C. 2210i(a). Because spent fuel is a substance different from any one of its constituent parts, it makes sense to refer to the different substances separately for purposes of the requirement that "the type and amount of" transferred materials be accurately described. *Ibid.*

storage of spent fuel at *any* location. See Fasken Br. 24 (asserting that "[n]o [Atomic Energy Act] provision grants [the Commission] express authority to issue a license for storing spent fuel"). As explained (Gov't Br. 2-3), moreover, the Atomic Energy Act's licensing provisions create exceptions to the Act's general ban on possession of source, special nuclear, and byproduct material. If (as respondents contend) the Commission's authority to license possession of those constituent parts does not include authority to license possession of spent nuclear fuel itself, there is no evident reason to read the background *prohibitions* on *unlicensed* possession of the constituent parts as banning possession of spent fuel. Respondents disregard the practical implications of their theory.

b. Respondents argue that the Atomic Energy Act's materials-licensing provisions authorize licenses only for an "active, productive use" and that the interim storage ISP seeks to provide is not such a use. Fasken Br. 30; see *id.* at 29-32; Texas Br. 27-28. Respondents characterize the permissible uses enumerated in the Act's licensing provisions as active and productive. But each of the relevant statutory provisions contains a catchall that is not limited in that manner. Those provisions authorize the Commission to grant licenses for the possession or transfer of (1) special nuclear material "for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter," 42 U.S.C. 2073(a)(4); (2) source material "for any other use approved by the Commission as an aid to science or industry," 42 U.S.C. 2093(a)(4); and (3) byproduct material for "other useful applications as may be developed," 42 U.S.C. 2111(a).

Storage of spent nuclear fuel is "appropriate to carry out the purposes of" the Act (which include licensing nuclear power plants), 42 U.S.C. 2073(a)(4), and is "an aid" to "science or industry," 42 U.S.C. 2093(a)(4), because it is a practical necessity in order for nuclear power plants to operate. And contrary to Fasken's suggestion (Br. 30), storage is a "useful application[]" of spent fuel, 42 U.S.C. 2111(a), because storage is essential to the production of nuclear power. Limiting the Commission's licensing authority to "active, productive use[s]," Fasken Br. 30, would also call into question the Commission's longstanding authority to license the storage of other nuclear materials—such as mill tailings, which are a type of byproduct material. See 42 U.S.C. 2014(e)(2); 10 C.F.R. Pt. 40, App. A.

Here again, respondents' arguments logically imply that, although the Atomic Energy Act created a comprehensive scheme for the regulation of nuclear material and authorized the licensing of nuclear power plants, the Act did not provide for storage of spent nuclear fuel *anywhere*. Texas asserts (Br. 46) that the Atomic Energy Act "permits onsite storage of spent fuel because some amount of storage is inherent in the license of use." But Texas identifies no statutory basis for licensing interim storage if, as it elsewhere argues (Br. 26-28), the provisions governing special nuclear, source, and byproduct material do not confer such licensing authority.

Fasken, by contrast, acknowledges the broad implication of its argument, asserting (Br. 29) that the government has failed to "show that *storage* (in any location) satisfies" the requirements of the three Atomic Energy Act licensing provisions discussed above. Fasken claims (Br. 34) that the purported absence of

any Atomic Energy Act provision authorizing materials licenses for interim storage of spent fuel is unproblematic because the Policy Act now confers such authority. As we explain below, that argument reflects a misunderstanding of the relationship between the two statutes. The Policy Act confirmed Congress's understanding that the Commission had *preexisting* authority to license private onsite storage, but it did not *confer* any such authority. Indeed, the approach to private interim storage that Congress took in the Policy Act—expressing the intent that such storage would continue, without enacting any new authorization for the issuance of materials licenses to effectuate that intent—makes sense only if Congress understood the Atomic Energy Act to confer the necessary licensing authority. See pp. 19-21, *infra.*

c. The Commission's longstanding view, reflected in published agency regulations that were promulgated in 1980 and have remained in effect since that time, is that the Atomic Energy Act authorizes the agency to license both onsite and offsite storage of spent nuclear fuel. Gov't Br. 38-39. Contrary to Fasken's suggestion (Br. 4, 35), the Commission has historically grounded that authority in the provisions of the Act discussed above. See 45 Fed. Reg. 74,693, 74,699 (Nov. 12, 1980); Gov't Br. 4.

Respondents suggest (Fasken Br. 35-36; Texas Br. 46-47) that the Commission's longstanding view of its licensing authority is due little weight because the Commission has infrequently licensed temporary offsite storage. But the Commission has exercised such authority both to license possession of spent nuclear fuel at facilities where no nuclear reactor has ever existed,

and to renew licenses for storage at the sites of decommissioned reactors that no longer have facilities licenses. See Gov't Br. 5-6. The relative infrequency with which the Commission has licensed offsite storage does not suggest that the agency has doubted the legality of that practice, or that the Commission's assertion of such authority has previously gone unnoticed.[3]

***2. The Policy Act did not disturb the Commission's authority under the Atomic Energy Act to license temporary offsite storage of spent fuel***

Congress was aware in 1982 that the Commission had interpreted the Atomic Energy Act to authorize licenses for offsite storage, and that the agency had adopted regulations to that effect. The Policy Act did not withdraw or displace that authority, nor did it amend or otherwise restrict the application of the three Atomic Energy Act provisions—Sections 2073(a), 2093(a), and 2111(a)—that authorize the Commission to license offsite storage of spent fuel. See Gov't Br. 4-5, 42-45. Respondents' contrary arguments misunderstand the relationship between the two statutes.

a. Relying principally on 42 U.S.C. 10151-10155, Fasken depicts (Br. 17-21) the Policy Act as a comprehensive, standalone licensing regime. Based on those provisions' repeated references to (1) storage of spent

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[3] To the extent respondents assert (Fasken Br. 8-11; Texas Br. 1, 5) that it would be unsafe to store spent nuclear fuel at ISP's facility or to transport it to the facility, such claims are outside the scope of the question presented and lack a sound factual basis. When adjudicating ISP's request for a materials license, the Commission considered whether ISP's facility could safely store spent fuel and concluded that it could, and the agency thoroughly evaluated any threats to health and safety that transportation of fuel to the facility was likely to pose. See J.A. 80, 87, 93, 276, 286, 290; Gov't Br. 10.

nuclear fuel at the site of a nuclear reactor and (2) offsite storage in a federally owned facility, Fasken infers that those are the *only* permissible options for temporary storage of spent fuel. That inference is unsound.

Section 10151 sets forth Congress's "[f]indings and purposes" in enacting the Policy Act. 42 U.S.C. 10151. That provision neither conferred new powers on the Commission nor restricted the authority the agency previously possessed. Section 10152 directs various federal officials to "encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor," while identifying various factors those officials should consider. 42 U.S.C. 10152. That provision likewise neither expanded nor contracted the Commission's preexisting powers. Section 10153 directed the Commission to "establish procedures for the licensing of any technology approved by the Commission under section 10198(a) of this title for use at the site of any civilian nuclear power reactor." 42 U.S.C. 10153 (footnote omitted). Section 10153 did not grant any new materials-licensing authority, but rather instructed the Commission to use its preexisting Atomic Energy Act authority to establish procedures enabling power plant owners to more efficiently obtain permission for spent-fuel storage.[4]

Section 10154 imposes certain procedural requirements for Commission hearings on specified types of onsite-storage license applications. By making those

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[4] In 1990, in accordance with that directive, the Commission authorized issuance of general licenses, see 42 U.S.C. 2077, 2092, 2111, to store spent fuel using Commission-approved storage systems. See 55 Fed. Reg. 29,181 (July 18, 1990) (adding 10 C.F.R. Pt. 72, Subpts. K and L).

requirements applicable to "Commission hearing[s] under section 189 of the Atomic Energy Act of 1954 (42 U.S.C. 2239)," Congress made clear its understanding that the Atomic Energy Act would continue to govern the issuance of storage licenses. 42 U.S.C. 10154(a). And Section 10155 applies specifically to spent-fuel storage capacity provided by the Department of Energy (DOE). 42 U.S.C. 10155(a)(1).

Respondents cite (Fasken Br. 6; Texas Br. 30) Section 10155(h)'s statement that, "[n]otwithstanding any other provision of law, nothing in" the Policy Act "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 nuclear power reactor and not owned by the Federal Government on January 7, 1983." 42 U.S.C. 10155(h). But that provision simply made clear that the Policy Act did not independently encourage or require private offsite storage. It did not purport to limit the Commission's preexisting licensing authority under the Atomic Energy Act.

b. Far from establishing a comprehensive, standalone regulatory or permitting regime, the Policy Act depends fundamentally on the continued application of preexisting law. The Policy Act contains no provision that either (1) prohibits the unlicensed possession of spent nuclear fuel or any of its components, or (2) authorizes the Commission to issue materials licenses for those substances. Those subjects continue to be governed by the Atomic Energy Act, which does not limit the permissible locations for storage of spent fuel.[5] The

[5] Indeed, contrary to Fasken's assertion (Br. 23), the Atomic Energy Act's licensing requirements apply even to the Commission's

Policy Act provisions on which respondents rely thus build upon, rather than displace, the Atomic Energy Act's regulatory and licensing scheme. And while various Policy Act provisions refer favorably to the development and use of onsite storage capacity, nothing in that Act restricts the Commission's preexisting authority to license offsite storage as well.

Fasken asserts that allowing the Commission to license private offsite storage would contravene the Policy Act by "discourag[ing] creating new onsite storage capacity." Br. 20 (emphasis omitted). That argument is both legally and factually unsound. The Policy Act does not require that onsite storage must be pursued at all costs. Rather, it states that owners and operators of nuclear power reactors should "maximiz[e], *to the extent practical*, the effective use of existing storage facilities at the site of each civilian nuclear power reactor" and should "add[] new onsite storage capacity in a timely manner *where practical*." 42 U.S.C. 10151(a)(1) (emphases added). The Commission's licensing of private offsite storage where onsite storage is impractical is consistent with those provisions. And as a factual matter, although the Commission has asserted the authority to license private offsite storage since the early 1970s, most spent fuel is stored at the sites of nuclear

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licensing of a permanent repository. The relevant Policy Act provision (which Fasken quotes only in part, see *ibid.*) requires the Commission to "consider an application for a construction authorization for all or part of a repository *in accordance with the laws applicable to such applications*"—*i.e.*, the Atomic Energy Act's licensing provisions. 42 U.S.C. 10134(d) (emphasis added); see 42 U.S.C. 10141(b)(1)(A)(i) (providing that "licenses to receive and possess spent nuclear fuel" in the federal repository will be governed by rules promulgated "under the Atomic Energy Act").

reactors, see Gov't Br. 6, and the Commission considered alternative storage options before issuing ISP's license, J.A. 293-294.

c. The Policy Act findings described above, 42 U.S.C. 10151(a)(1), unambiguously expressed Congress's awareness of existing private storage facilities and its expectation that such storage would continue. Yet Congress did not include in the Policy Act any new authorization for Commission materials licensing of private interim storage, as Congress presumably would have done if it had viewed the Atomic Energy Act's licensing provisions as inadequate.

Given Congress's expressed intent that private interim storage of spent nuclear fuel would continue, the Policy Act's failure to address materials licensing of such storage would have made no sense if Congress had understood the preexisting legal regime as authorizing licenses only for "active, productive use" of regulated materials, Fasken Br. 30, or as applying only to specific constituents of spent fuel rather than to spent fuel itself. See pp. 12-16, *supra*. By expressing its approval of then-existing storage practices, without enacting any new statutory basis for those practices to continue, Congress effectively ratified the Commission's assertion of authority under the Atomic Energy Act to license private interim storage of spent fuel. And while the relevant Policy Act findings specifically reference onsite storage, the Atomic Energy Act provisions that govern materials licenses impose no geographic limitations on the storage of regulated materials.

d. The Policy Act identifies a permanent federal repository for disposal of spent nuclear fuel as Congress's long-term objective, while recognizing the need for temporary storage capacity until a repository is created.

Although Texas blames (Br. 1-2, 4-5, 33) the Commission and DOE for failing to build a permanent repository at Yucca Mountain, Congress has declined for more than a decade to appropriate additional funds for that site. Gov't Br. 47-48.

In any event, issues regarding the status of a permanent repository for spent fuel *disposal* are not relevant to the question presented here, which concerns the locations where spent fuel may be *temporarily stored*. And, contrary to Texas's claim (Br. 6, 29), ISP's facility cannot become a de facto permanent repository. The Commission has not licensed ISP's facility for permanent storage; the agency has recognized that it cannot indefinitely renew licenses to store spent fuel at such temporary facilities, see Waste Confidence Directorate, Office of Nuclear Material Safety & Safeguards, U.S. Nuclear Regulatory Commission, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel—Final Report*, NUREG-2157, Vol. 1, at 4-2 (Sept. 2014); and Texas's suggestion that the facility will someday become a permanent repository is entirely speculative.[6]

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[6] Texas asserts (Br. 31) that the State was "supposed to enjoy statutory protections" under the Policy Act, and that "the Commission ignored those requirements." But the requirements that Texas invokes are triggered only when the government takes specified actions under the Policy Act, such as providing *federal* storage or disposal facilities for spent nuclear fuel. See 42 U.S.C. 10136, 10155(d), 10156(e), 10166, 10169. No statutory provision gives States veto power over the Commission's decisions regarding private temporary storage of spent fuel, either at or away from a nuclear reactor site.

### *3. The major questions doctrine is inapplicable*

Respondents' position would extend the major questions doctrine far beyond all current bounds. See Gov't Br. 48-49. Respondents claim that the major questions doctrine applies here because the Commission is exercising power it derived from three "ancillary" provisions of the Atomic Energy Act. Texas Br. 33; see Fasken Br. 33. But those materials-licensing provisions are central to the Act's system of (1) generally prohibiting the possession of spent nuclear fuel's primary constituent parts, while (2) authorizing possession to the extent permitted by Commission licenses.

Respondents argue that the major questions doctrine applies here because the Commission "discover[ed]" its authority to license private offsite storage of spent fuel "in a long-extant statute." Fasken Br. 33 (citation omitted); see Texas Br. 33. But the Commission has asserted authority to license private offsite storage since the early 1970s, and it first exercised that authority in 1982. Gov't Br. 38-39. Fasken notes (Br. 33) that the Commission did not promulgate its regulations addressing offsite storage until 1980—26 years after Congress enacted the Atomic Energy Act. Until shortly before that date, however, it was generally assumed that spent fuel would be reprocessed and that onsite storage would be sufficient. Gov't Br. 3-4. The Commission's promulgation of offsite-storage regulations in 1980 reflected a reasonable response to changed factual circumstances, not a change in the agency's view of the governing law.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Acting Solicitor General*

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