No. ____

IN THE

Supreme Court of the United States

INTERIM STORAGE PARTNERS, LLC,

Petitioner,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND MINERALS, LIMITED; PERMIAN BASIS LAND AND ROYALTY OWNERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Nuclear Regulatory Commission's exercise of authority to issue a license to a private party to temporarily possess spent nuclear fuel at a location away from an operating nuclear power reactor was lawful under the applicable statutes (as the D.C. and Tenth Circuits have held) or not (as the Fifth Circuit, deliberately splitting from those other circuits, held in this case).

2. Whether, notwithstanding an allegation of "*ultra vires*" agency action, a person must take steps to become a "party" to an agency proceeding under the Hobbs Act, 28 U.S.C. 2344, in order to then subsequently challenge the agency action resulting from that proceeding in court (as the Second, Seventh, Tenth, and Eleventh Circuits have held), or whether an allegation of "*ultra vires*" agency action can override statutory limitations on jurisdiction (as the Fifth Circuit, deliberately splitting from those other circuits, held in this case).

PARTIES TO THE PROCEEDINGS

In addition to the parties listed on the cover, the U.S. Nuclear Regulatory Commission and the United States were parties in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Interim Storage Partners, LLC is a limited liability company organized and existing under the laws of the State of Delaware with principal offices in Andrews, Texas. The sole purpose of Interim Storage Partners, LLC is to license, design, construct and operate the Consolidated Interim Storage Facility at the Waste Control Specialists site in Andrews County, Texas. Interim Storage Partners, LLC is jointly owned by Orano CIS, LLC (51%) and Waste Control Specialists, LLC (49%). No other publicly held company has 10 percent or more equity interest in Interim Storage Partners, LLC.

Orano CIS, LLC is owned 100% by Orano USA, LLC. Orano CIS, LLC and Orano USA, LLC are both limited liability companies formed in the State of Delaware. Orano USA, LLC is 100% owned by Orano SA, a French entity. Orano SA is ultimately majority (90%) owned and controlled by the French State, through two French government entities. Two Japanese entities (Mitsubishi and Japan Nuclear Fuel) each own a 5% (non-voting) interest in Orano SA.

Waste Control Specialists, LLC is wholly-owned by Fermi Holdings, Inc., an investment affiliate of J.F. Lehman & Co. The full ownership chain includes several other privately held J.F. Lehman & Co. investment affiliates, with no individual shareholders owning more than 25% of any of the entities.

RELATED PROCEEDINGS

The same license that is at issue in this case has been the subject of proceedings and final decisions rejecting challenges to the license in two other circuit courts:

- *Don't Waste Mich.* v. *NRC*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023) (per curiam).

- *State ex rel. Balderas* v. *NRC*, 59 F.4th 1112 (10th Cir. 2023).

The same type of NRC-issued license for a similar proposed project by another party has also been the subject of proceedings in the Fifth and D.C. Circuits:

- *Fasken Land & Minerals, Ltd.* v. *NRC*, No. 23-60377 (5th Cir., March 27, 2024).

- *Beyond Nuclear, Inc.* v. *NRC*, No. 20-1187 (D.C. Cir.) (oral argument held March 5, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Interim Storage Partners, LLC ("ISP") respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

INTRODUCTION

On a critical issue for the domestic nuclear power industry that lies at the heart of the Nuclear Regulatory Commission's statutory mission, the Fifth Circuit abruptly departed from nearly a half century of settled law, and in so doing deliberately split with the D.C. and Tenth Circuits. The court also deliberately split with the Second, Seventh, Tenth, and Eleventh Circuits by even hearing the case, which it reached only pursuant to the Fifth Circuit's judge-made so-called "*ultra vires* exception" to the exclusive jurisdictional provisions of the Hobbs Act. It is important that those departures be corrected in this case.

The established law in this country has long been that the NRC has authority to license a private party to temporarily possess spent nuclear fuel at locations other than operating power plants under the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. ch. 14, 2011 *et seq.*). Formal promulgated regulations to that effect have been on the books since 1980. Licensing Requirements for the Storage of Spent Nuclear Fuel in an Independent Spent Fuel Storage Installation: Final Rule, 45 Fed. Reg. 74,693 (Nov. 12, 1980). The D.C. and Tenth Circuits have expressly so found. *Bullcreek* v. *NRC*, 359 F.3d 536, 543 (D.C. Cir. 2004); *Skull Valley Band of Goshute Indians* v. *Neilsen*, 376 F.3d 1223, 1232 (10th Cir. 2004). Nevertheless, in

this case the Fifth Circuit held the contrary. It ignored the regulations completely, and it recited that it was declining to follow the prior holdings of the D.C. and Tenth Circuits because it found those decisions "unpersuasive" and "unhelpful," due to purportedly insufficient "textual analysis" of the Atomic Energy Act. App. 24a-26a.

But, it was the Fifth Circuit's aberrant departure in this case that does violence to the statute itself—the actual text of the Atomic Energy Act comfortably provides for the long-exercised authority of the NRC to do just what it did here.

Spent nuclear fuel is composed of "special nuclear material," "source material," and "byproduct material." The Atomic Energy Act charged the Commission with developing rules and regulations for the possession and use of such materials in furtherance of the Act's goals, which broadly included the "development, use, and control of atomic energy" to "improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise." See 42 U.S.C. § 2011(a), (b); see also 2013(d) ("to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the public health and safety of the public."). Separate sections regarding each of the components of spent nuclear fuel authorized possession licenses for various disparate purposes, including research-type activities, medical therapy, use in production facilities (*e.g.,* certain isotope production plants), use in utilization facilities (*e.g.,* nuclear power plants), but also—importantly and

separately—for broader purposes in support of the domestic power industry. 42 U.S.C. 2073(a)(4), 2093(a)(4), and 2111(a). The Fifth Circuit, however, held that the permissible uses for away-from-reactor possession licenses were limited to just research-type activities. App. 22a-23a. In so doing, the Fifth Circuit misread the statute, rendering critically important passages as meaningless surplusage, in violation of elemental principles of textual interpretation. And, in so doing, the Fifth Circuit gutted a long-standing, core function of the Act.

The Fifth Circuit then deepened its split with the D.C. and Tenth Circuits by also holding that the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. 10101 *et seq.*) "doesn't permit" the licensing of temporary away-from-reactor storage of spent nuclear fuel. App. 30a. The D.C. Circuit, after a thorough review of the text of the Nuclear Waste Policy Act, as well as its history, purposes, and context, held exactly the opposite, *Bullcreek*, 359 F.3d at 543, as did the Tenth Circuit. *Skull Valley*, 376 F.3d at 1232. By its plain terms, the Nuclear Waste Policy Act created a comprehensive scheme for ownership and *permanent disposal* of spent nuclear fuel by the *Department of Energy*. It did not disturb—in fact, had nothing to do with—the *Nuclear Regulatory Commission's* licensing of *temporary possession* of spent nuclear fuel by a *private party,* until the Department of Energy complies with its permanent disposal obligations.

Moreover, the Fifth Circuit should never have even addressed the agency authority issues, because it had no jurisdiction to do so. As detailed in the dis-

sent to rehearing *en banc* (which rehearing was denied by a vote of 9-7), the Fifth Circuit exercised jurisdiction pursuant to an outlier of a position that finds no support in any other circuit, and admittedly and expressly conflicts with the Second, Seventh, Tenth, and Eleventh Circuits. App. 19a n.3; 51a-52a (Higginson, J., dissenting). That is, the Fifth Circuit applied a judicially-created so-called "*ultra vires*" exception to the jurisdictional requirements of the Hobbs Act, allowing persons who had intentionally eschewed mandatory participation at the agency level to nevertheless swoop in after the fact to challenge the resulting agency action in court. That non-statutory exercise of jurisdiction was contrary to the holdings in *Balderas* v. *NRC*, 59 F.4th 1112, 1123-1124 (10th Cir. 2023); *Nat'l Ass'n of State Util. Consumer Advocs.* v. *FCC*, 457 F.3d 1238, 1249 (11th Cir. 2006), modified on other grounds on denial of reh'g, 468 F.3d 1272 (11th Cir. 2006) (per curiam); *Erie-Niagara Rail Steering Comm.* v. *Surface Trans. Bd.*, 167 F.3d 111, 112-113 (2d Cir. 1999) (per curiam); *In re: Chi., Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-335 (7th Cir. 1986). Those circuits got it right, and the Fifth Circuit here did not: courts have "no authority to create equitable exceptions to jurisdictional requirements" established by Congress. *Bowles* v. *Russell*, 551 U.S. 205, 214 (2007).

It is not hyperbole to observe that the departures by the Fifth Circuit in this case have the potential to upend the domestic nuclear power industry. Indeed, the decision has already resulted in naked circuit-shopping—a similar proposed project, *not even located in the Fifth Circuit*, was nevertheless challenged by a petitioner *in the Fifth Circuit*, which summarily

vacated that license upon the authority of the decision in this case. *Fasken Land & Minerals, Ltd.* v. *NRC*, No. 23-60377 (5th Cir., Mar. 27, 2024). Most of an oft-used part of the Code of Federal Regulations promulgated pursuant to robust notice-and-comment procedures more than forty years ago would no longer be valid, under the Fifth Circuit's holding. 10 C.F.R. Part 72. Substantial, long-term investments by private industry have suddenly, and unexpectedly, been rendered essentially worthless, which will have dire future consequences for an industry that depends upon stability. Indeed, there are at least a dozen existing away-from-reactor sites currently licensed by the NRC for the storage of spent nuclear fuel, the legal status of which might be questioned pursuant to the ruling by the Fifth Circuit. See *U.S. Independent Spent Fuel* Storage Installations (ISFSI), NRC (June 2023), https://www.nrc.gov/docs/ML2316/ML23165A245.pdf (Current U.S. Independent Spent Fuel Storage Installation (ISFSI) Map as of June 12, 2023 (nrc.gov)).

OPINIONS AND ORDERS BELOW

The panel opinion (App., *infra* 1a-31a), is reported at 78 F.4th 827 (5th Cir. 2023). The order of the court of appeals denying rehearing *en banc* (App., *infra* 32a-53a), is reported at 95 F.4th 935 (5th Cir. 2024).

STATEMENT OF JURISDICTION

The court of appeals asserted jurisdiction pursuant to an "*ultra vires* exception" to the Hobbs Act, 28 U.S.C. 2344, which is disputed and which is a subject of this petition. The court of appeals filed its order denying rehearing *en banc* on March 14, 2024. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. ch. 14, 2011 *et seq*.), the Hobbs Act (codified at 28 U.S.C. 2342, 2344), and the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. 10101 *et seq*.) are set forth at App. 109a-200a.

STATEMENT

I. Statutory and Regulatory Background.

1. Congress passed the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. ch. 14, 2011 *et seq*.) ("AEA"), less than ten years after Hiroshima, to further peaceful uses of atomic energy. The purposes of the AEA included "development, use, and control of atomic energy * * * so as to make the maximum contribution to the general welfare," 42 U.S.C. 2011(a), and to "improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise." 42 U.S.C. 2011(b). Congress found that the development, utilization, and control of atomic energy was "vital to the common defense and security," that "the processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest," and that the "processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to

protect the health and safety of the public." 42 U.S.C. 2012(a), (c), and (d). A central purpose of the AEA was to maximize development and utilization of atomic energy. 42 U.S.C. 2013(d).

2. The AEA created a brand-new agency, the Atomic Energy Commission, which was broadly tasked 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).

3. Spent nuclear fuel is composed of "special nuclear material," "source material," and "byproduct material." App. 22a. Section 2201(b) of Title 42 charged the Commission with developing rules and regulations for the possession and use of such materials as deemed "necessary or desirable" by the Commission for the common defense, to protect health, or to minimize danger to life or property. "Domestic distribution" of each of the constituent elements of spent nuclear fuel was also addressed in separate sections of the statute, which authorized the Commission to issue licenses to private parties to possess such materials for various purposes. 42 U.S.C. 2073, 2092, 2093, 2111.

4. The different enumerated purposes for licensing of special nuclear material and source material included certain research and development activities, medical therapy, and use in production (*e.g.,* certain isotope production) and utilization (*e.g.,* nuclear power plant) facilities. And, separately and importantly,

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)) and "for any other use approved by the Commission as an aid to science or industry." *Id.* 2093(a)(4). The identified purposes for licensing of byproduct materials included research and medical uses, as well as "industrial uses" and "such other useful applications as may be developed." *Id.* 2111(a).

5. The AEA was amended in 1974 to create the Nuclear Regulatory Commission ("NRC"), an independent regulatory commission which assumed the broad authority under the AEA to regulate the civilian possession and use of radioactive materials. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233. That amendment also created a completely separate agency, the Department of Energy ("DOE"), which assumed developmental functions from the Atomic Energy Commission.

6. In 1978, pursuant to the above-noted provisions of the AEA, the NRC issued a proposed rule for notice and public comment, which explicitly provided for the possession of spent nuclear fuel "at installations built specifically for this [storage] that are not coupled to either a nuclear power plant or a fuel reprocessing plant." Storage of Spent Nuclear Fuel in an Independent Spent Fuel Storage Installation (ISFSI): Proposed Rule, 43 Fed. Reg. 46,309 (Oct. 6, 1978). After extensive public comments (none of which challenged the authority of the agency to promulgate such a rule), a final rule to that effect was promulgated in 1980. Final Rule, 45 Fed. Reg. 74,693. Those regulations, therefore, have been on

the books at 10 C.F.R. Part 72 for more than forty years.

7. In the many decades since, the NRC has been open, public, and transparent about its exercise of the authority to license interim away-from-reactor storage of spent nuclear fuel. *E.g.,* General Electric Co.; Renewal of Materials License for the Storage of Spent Fuel, 47 Fed. Reg. 20,231 (May 11, 1982) (renewal of materials license SNM-2500 for away-from-reactor spent fuel storage facility in Morris, Illinois); Public Service Co. of Colorado; Issuance of Materials License SNM-2504, Ft. St. Vrain Independent Spent Fuel Storage; Installation at the Ft. St. Vrain Nuclear Generating Station, 56 Fed. Reg. 57,539 (Nov. 12, 1991) (materials license issued under 10 C.F.R. Part 72 at site of decommissioning reactor); Private Fuel Storage, Limited Liability Company; Notice of Issuance of Materials License SNM-2513 for the Private Fuel Storage Facility, 71 Fed. Reg. 10,068 (Feb. 28, 2006) (materials license for away-from-reactor spent fuel storage facility in Tooele County, Utah). See also *Bullcreek*, 359 F.3d at 543 (noting the existence of three "private away-from-reactor storage facilities" at the time of the passage of the Nuclear Waste Policy Act in 1983); 45 Fed. Reg. at 74,693, 74,698.

8. Two years after Part 72 of Title 10 of the C.F.R. was promulgated by the NRC, Congress passed the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. 10101 *et seq.*) ("NWPA"). Congress was fully aware of the NRC's Part 72 away-from-reactor spent nuclear fuel storage regulations, and that the NRC had asserted authority under the AEA to license such

possession of spent nuclear fuel, at the time of the consideration of the NWPA. *E.g.,* S. Rep. No. 97-282, at 44 (1981). Although the AEA is mentioned several times in the text of the NWPA (*e.g.,* 42 U.S.C. 10141(b), 10155(a)(1)(A)(i)), there is no reference to, much less a revocation of, the NRC's Part 72 authority under the AEA to license away-from-reactor storage of spent nuclear fuel.

9. The NWPA created a comprehensive scheme for the ownership and permanent disposal of spent nuclear fuel by DOE, not private parties. It created acceptance and disposal duties regarding spent nuclear fuel on the part of DOE, not the NRC. See *Don't Waste Mich.*, 2023 WL 395030 at *1 ("Storage and disposal, however, are different concepts."). And, as everyone understands, DOE is in breach of its acceptance and disposal obligations under the NWPA. *E.g., Ind. Mich. Power Co.* v. *United States*, 422 F.3d 1369, 1372 (Fed. Cir. 2005) ("partial breach"). Private parties are therefore being forced to store spent nuclear fuel for longer than just about anyone would have liked. *E.g., Texas* v. *NRC*, 891 F.3d 553, 555 (5th Cir. 2018).

10. The Atomic Energy Act allows any person whose interest may be affected by the issuance of a license to request a hearing before the NRC. 42 U.S.C. 2239(a)(1)(A). Jurisdiction for courts to review challenges to such licenses is granted by a portion of the Hobbs Act, 28 U.S.C. 2344, which is exclusive and which limits judicial review to a "party aggrieved" by the agency proceeding—that is, a person who has become a "party" to the agency proceeding. (If a person is denied "party" status by the agency, then that de-

termination itself is appealable pursuant to 42 U.S.C. 2239(b)(1).) But, to be able to pursue judicial review under the statute, a person has to either be a "party" to the agency proceeding, or at least attempted to become a "party" to those proceedings. This jurisdictional provision of the Hobbs Act applies not just to the NRC, but also to the Federal Communications Commission, Department of Agriculture, Department of Transportation, Federal Maritime Commission, and Surface Transportation Board. 28 U.S.C. 2342(1)-(7).

II. Facts and Procedural History.

1. In April 2016, one of ISP's joint venture members submitted an application (subsequently assumed and pursued by ISP) to the NRC for a license to temporarily store spent nuclear fuel from civilian nuclear power facilities at a consolidated interim storage facility, to be constructed adjacent to, but separate from, an existing low-level radiological waste facility in Andrews County, Texas. In August 2018 the NRC provided notice of its consideration of the license application in the Federal Register pursuant to its regulations, along with instructions regarding how interested parties and entities could petition for a hearing and intervene in the NRC proceedings.

2. A number of parties made various filings with the NRC between September and November 2018. Texas elected not to participate in the NRC adjudicatory proceedings pursuant to the NRC's rules, but submitted comment letters to the NRC regarding a draft Environmental Impact Statement and, on the eve of the issuance of the license, objected upon the basis of a just-passed Texas law prohibiting the stor-

age of spent nuclear fuel in the state. The State of New Mexico, like Texas, also did not participate in the NRC adjudicatory process, but filed a challenge to the license in the Tenth Circuit, which that court dismissed on jurisdictional grounds due to New Mexico's failure to participate as required at the agency level. *Balderas*, 59 F.4th 1112. Various of the groups that had sought to participate in the NRC adjudicatory process filed petitions in the D.C. Circuit, which ultimately dismissed or denied all of those petitions on the merits. *Don't Waste Mich.*, 2023 WL 395030.

3. Texas, along with two other related private parties ("Fasken"), filed petitions directly in the Fifth Circuit, challenging the NRC's issuance of the license on multiple grounds. The Fifth Circuit panel rejected the NRC's standing and jurisdictional challenges to the Texas and Fasken petitions, declining to follow contrary precedent in the D.C. and at least one other circuit. App. 10a-21a; see *Ohio Nuclear-Free Network* v. *NRC*, 53 F.4th 236, 239 (D.C. Cir. 2022); *Balderas*, 59 F.4th at 1117.

4. In order to reach the merits issues, the court, in *dicta*, expressed disagreement with those other circuits regarding interpretation of the Hobbs Act, but then, as the actual basis for asserting jurisdiction, applied a purported "*ultra vires* exception" to statutory standing requirements under the Hobbs Act. App. 19a. The Fifth Circuit acknowledged that the "*ultra vires*" position upon which it rested jurisdiction had not been adopted by any other circuit, and that it was in fact directly contrary to the law of the Second, Seventh, Tenth, and Eleventh Circuits. App. 19a n.3.

5. The Fifth Circuit panel therefore determined to reach the merits of the subset of arguments by Texas and Fasken that the court deemed to be claims by the petitioners of "*ultra vires*" agency action. App. 19a.

6. The Fifth Circuit then held that the AEA does not authorize the Commission to license a private, away-from reactor storage facility for spent nuclear fuel, dismissing contrary rulings by the D.C. Circuit (in *Bullcreek*, 359 F.3d at 538), and the Tenth Circuit (in *Skull Valley*, 376 F.3d at 1232), as "unpersuasive" and "unhelpful" based upon a lack of "textual analysis" of the AEA in those decisions. App. 21a-26a.

7. The Fifth Circuit further held that the Nuclear Waste Policy Act "doesn't permit" the activity authorized by the ISP license. App. 21a-30a.

8. The government and ISP each moved for rehearing *en banc*. By a 9-7 vote of eligible judges, the full court denied review. App. 33a. A concurrence expanded upon the panel's *dicta* regarding the Hobbs Act, and further elaborated upon the *ultra vires* doctrine upon which the panel rested jurisdiction. A dissent from rehearing explained that the court's "exercise of jurisdiction has grave consequences for regulated entities' settled expectations and careful investments in costly, time-consuming agency proceedings, inviting spoilers to sidestep the avenues for participation that Congress carefully crafted to prevent this uncertainty." App. 46a (Higginson, J., dissenting).

REASONS FOR GRANTING THE PETITION

This case presents irreconcilable, deliberate, outcome-determinative circuit splits on substantial issues of exceptional importance to the industry that generates one-fifth of all of the electricity consumed in the United States. The opinion below also threatens to upend judicial review for multiple other industries and agencies, contrary to the clear intent of Congress. The petition for certiorari should be granted.

I. The Fifth Circuit Erred by Deliberately Departing from the D.C. and Tenth Circuits with Regard to the NRC's Authority to License Temporary Away-From-Reactor Possession of Spent Nuclear Fuel.

A. The terms of the Atomic Energy Act comfortably allow the NRC to license temporary away-from-reactor possession of spent nuclear fuel.

Congress intended for the NRC to have, and to exercise, the authority to grant a license to a private party to temporarily possess spent nuclear fuel at locations other than existing power plants, such as the license granted to ISP in this case. The statutory language of the AEA clearly contemplates that authority: Section 161(b) of the AEA, 42 U.S.C. 2201(b), broadly confers upon the agency the responsibility to "establish by rule, regulation, or order" the standards to possess all of the constituent elements of spent nuclear fuel deemed "necessary or desirable" by the agency to further the purposes of the Act. Similarly, sections 2073, 2093, and 2111 of title 42 broadly allow the agency to issue licenses for the possession of each

of the constituent elements of spent nuclear fuel for "uses as the Commission determines to be appropriate to carry out the purposes of this chapter" (Section 2073(a)(4)), "any other use approved by the Commission as an aid to science or industry" (Section 2093(a)(4)), and for "industrial uses" and "such other useful applications as may be developed." (Section 2111(a).)

The context and history of the AEA, both as passed and over the decades since, further confirm this congressional intent. At the time of its passage and for the several years thereafter, atomic energy was a brand-new, world-altering technology, and development of the specific rules and standards that would apply to that nascent new industry plainly required the sort of flexibility and dedicated expertise that Congress intended to be exercised by a specialized scientific agency. When the NRC determined to formalize its procedures regarding away-from-reactor storage of spent nuclear fuel in 1978, it did so in the most public, deliberate, and transparent way possible—extensive formal notice and comment rulemaking, explicitly citing the above-noted AEA statutory provisions as its authority for doing so. The public record and comments covered almost every conceivable issue, including policy debates regarding "at-reactor versus away-from-reactor siting" of storage installations (45 Fed. Reg. at 74,693, 74,696), but there was no suggestion regarding any lack of NRC authority over the latter under the AEA. Those regulations were promulgated in 1980, and have been on the books and applied as needed, both prior to the passage of the NWPA in 1982 and for the more than four decades since.

The D.C., Tenth, and other circuits have consistently confirmed that congressional intent. In the *Bullcreek* proceedings, both at the agency level and before the court of appeals, the vigorously-contested issues were all about whether the NRC's existing authority under the AEA to license away-from-reactor storage of spent nuclear fuel had been abrogated by the NWPA. See *In the Matter of Priv. Fuel Storage, LLC*, 56 N.R.C. 390, 395-396 (Dec. 18, 2002); *Bullcreek*, 359 F.3d at 539-540; see also *Skull Valley*, 376 F.3d at 1232. If there was any legitimate doubt about the existence of the NRC's predicate authority in the first place, that most certainly would have been fully ventilated at that time and in those proceedings, rather than—necessarily—conceded. *Bullcreek*, 359 F.3d at 541; see also *Illinois* v. *Gen. Elec. Co.*, 683 F.2d 206, 214-215 (7th Cir. 1982) ("the state does not, and could not * * * question the Commission's authority to regulate the storage of spent nuclear fuel."). But, there was no legitimate doubt then, and there is no legitimate doubt now.

The Fifth Circuit's speculative, *sua sponte*, internet-based conclusions about the statute—which were not argued by any party nor ever presented to the agency—are demonstrably erroneous in several respects. For example, the Fifth Circuit focused on 42 U.S.C. 2111(b), which refers to "disposal" of certain types of "byproduct" materials. App. 23a. The license at issue here, of course, has nothing to do with "disposal," but instead involves temporary "possession" of spent nuclear fuel until it is permanently disposed of, and the relevant "byproduct" provision is therefore section 2111(a). Not section 2111(b). Moreover, the court then did its own web-based research, and drew

its own conclusions, about half-lives of certain radioactive isotopes, opining that the half-life of radium-226 is far less than that of plutonium, and, since spent nuclear fuel contains plutonium, section 2111(b) could not apply or authorize the license. But, no one ever argued that it did, and *plutonium is not even "byproduct" material.* Rather, it is "special nuclear material." 42 U.S.C. 2014(aa). The Fifth Circuit's reliance on section 2111(b) is therefore doubly misguided. The aberrant conclusions by the Fifth Circuit are a stark illustration of the dangers of courts ignoring well-settled and long-standing constructions of statutory provisions—often, as here, there is a reason such constructions are well-settled and long-standing.

Another straw man invoked by the Fifth Circuit in support of its conclusions involved consideration of "utilization facilities" and "production facilities." The former includes nuclear power plants (42 U.S.C. 2014(cc)), and the latter includes certain isotope production facilities (42 U.S.C. 2014(v)). The fact that the special nuclear and source material provisions (sections 2073 and 2093) "also" allow for so-called "facilities" licenses (App. 23a) does not undercut the separate authority for issuance of licenses for the temporary possession of spent nuclear fuel at away-from-reactor sites. Indeed, a seemingly necessary implication of the Fifth Circuit's holding would appear to be that the Atomic Energy Act does not allow for the possession or storage of spent nuclear fuel by a private party at all, even at an operating nuclear power plant or "utilization facility"—but there is certainly nothing about the text of the Act that limits or

conditions possession or storage of spent nuclear fuel to being "at-the-reactor."

And, the Fifth Circuit further, and fundamentally, erred by holding that the statute limited possession licenses to only those "certain enumerated purposes" specifically described in sections 2073(a)(1)-(2) and 2093(a)(1)-(2). App. 22a. In so doing, the court left critically important sections of the statute—i.e., the grant of authority to the NRC to issues licenses to "carry out the purposes" of the AEA (42 U.S.C. 2073(a)(4)) and "as an aid to science or industry" (42 U.S.C. 2093(a)(4)) with no work to do—*i.e.*, as meaningless. It is axiomatic that courts should not do what the Fifth Circuit did here, namely, effectively to apply *noscitur a sociis* to give a general term in a statute "essentially the same function as other words in the definition, thereby denying it independent meaning." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 702 (1995); see generally, *Bilski* v. *Kappos*, 561 U.S. 593, 596, 607-608 (2010) (applying the "canon against interpreting any statutory provision in a manner that would render another provision superfluous."), citing, *Corley* v. *United States*, 556 U.S. 303, 314 (2009). Moreover, the enumerated purposes in subsections 2073(a)(1)-(3) and 2093(a)(1)-(3) span various types of research, medical therapy, use in power plants, and use in nuclear fuel fabrication facilities—that is, they plainly shared no "common attribute" at all, such as would be necessary to trigger application of a doctrine such as *noscitur a sociis* with respect to subsections (a)(1)-(4). *E.g., Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008). It was, in short, clearly error for the Fifth

Circuit to construe the AEA in the unprecedented way that it did.

This is not a case where an agency strayed outside of its established lane—safety-based regulation of nuclear materials has always been the core and explicit function of the AEA, *e.g.,* 42 U.S.C. 2011(b), 2201(b), and the license and applicable regulations here plainly do just that. For that and other reasons, the Fifth Circuit further erred by invoking *West Virginia* v. *Environmental Protection Agency*, 597 U.S. 697 (2022), in support of its conclusions. App. 30a-31a. Indeed, in all of the ways that matter, this case presented circumstances that were the complete *opposite* of those held by this Court in *West Virginia* to warrant application of heightened scrutiny of agency action. That is, here there was nothing "unprecedented" where "things changed" in connection with the decades-old transparent exercise of the NRC's licensing authority. *West Virginia*, 597 U.S. at 711. Here, Congress had *not* "considered and rejected" the exercise of the challenged authority, *id.* at 731, and it was emphatically *not* the circumstance that the agency had "never regulated" before in the way now being challenged. *Id.* at 729-731. The NRC should simply have been allowed to keep doing what it has been doing under the AEA for nearly half a century. The Fifth Circuit's abrupt curtailment of that authority, and the deliberate split it created with the D.C. and Tenth Circuits, should be corrected.

B. The Nuclear Waste Policy Act does not prohibit the NRC from licensing temporary away-from-reactor possession of spent nuclear fuel.

The Fifth Circuit doubled down on its deliberate split with the D.C. and Tenth Circuits by holding that that the NWPA "doesn't permit" the license issued by the NRC here. App. 30a. The D.C. and Tenth Circuits have explicitly held the exact opposite, namely, that the NWPA did nothing to undercut "the NRC's authority under the AEA to license and regulate private use of private away-from-reactor spent fuel storage facilities." *Bullcreek*, 359 F.3d at 542; see also *Skull Valley*, 376 F.3d at 1232.

In holding that the NWPA doesn't prohibit the NRC from licensing temporary away-from-reactor storage of spent nuclear fuel, the D.C. Circuit exhaustively reviewed the "language," "structure," and "legislative history" of the NWPA, including the fact that the existing regulations at 10 C.F.R. Part 72 that explicitly provided for away-from-reactor storage of spent nuclear fuel by private parties were already on the books, and demonstrably known to Congress, when the NWPA was passed in 1982. *Bullcreek*, 359 F.3d at 541-542. The Fifth Circuit in this case, by contrast, completely ignored the regulations and salient legislative history. And, the Fifth Circuit misconstrued the structure and text, for example by erroneously invoking portions of the NWPA that describe at-reactor storage at Subtitle B-Interim Storage Program, 42 U.S.C. 10151-10157, as purported limitations on the NRC (App. 28a-29a), without appreciating that the actual role of those provisions was mere-

ly to delineate "preconditions on private generators for obtaining federal interim storage." *Bullcreek*, 359 F.3d at 542.

Indeed, although the Fifth Circuit purported to cite "textual analysis" as its guiding principle, the court did not cite any textual provision of the NWPA that comes remotely close to saying that the NWPA "doesn't permit" the NRC to issue licenses for temporary possession of spent nuclear fuel at away-from-reactor sites. App. 25a, 30a. There is no such provision.

The NWPA created acceptance and disposal obligations on the part of *DOE*, not the *NRC*. The NWPA was all about permanent *disposal* of spent nuclear fuel by DOE, not *temporary possession* of spent nuclear fuel by private parties. *E.g., Don't Waste Mich.*, 2023 WL 395030, at *1 ("Storage and disposal, however, are different concepts."); *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."). As the other circuits have held, at the end of the day the NWPA has nothing to do with the issues in this case. The Fifth Circuit erred in splitting with those circuits and concluding otherwise.

II. The Fifth Circuit Erred When It Deliberately Split with the Second, Seventh, Tenth, and Eleventh Circuits by Exercising Jurisdiction Pursuant to the Fifth Circuit's Judicially-Created "*Ultra Vires* Exception" to Hobbs Act Jurisdictional Requirements.

As detailed in the dissent to *en banc* review, the Fifth Circuit relied upon an atextual, judge-made, so-called "*ultra vires*" exception to the exclusive jurisdictional requirements carefully established by Congress in the Hobbs Act. App. 50a (Higginson, J., dissenting). As such, it deliberately split with at least four other circuits. And, it violated the oft-recognized principle that courts "ha[ve] no authority to create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214.

The Fifth Circuit's position is based upon *dicta* in a footnote in a Fifth Circuit case from 1982, which itself relied exclusively on Interstate Commerce Commission cases from 1968 or earlier, well before Interstate Commerce Commission cases were even brought within the ambit of Hobbs Act review in 1975. *Am. Trucking Ass'ns, Inc.* v. *ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam); see An Act to Improve Judicial Machinery by Amending Title 28, United States Code, with Respect to Judicial Review of Decisions of the Interstate Commerce Commission, and for other purposes, Pub. L. No. 93-584, §§ 3, 4, 88 Stat. 1917 (1975). By nevertheless applying and adhering to that position in this case with respect to the NRC and to the Hobbs Act generally, the Fifth Circuit failed to acknowledge "the intervening change in

governing procedure," and also failed to show why such a position should "remain valid today." *Erie-Niagara Rail Steering Comm.*, 167 F.3d at 112.

The Fifth Circuit's view was that Texas had made three merits arguments, and Fasken had made four—with both sets of petitioners including Administrative Procedure Act and other claims. Of those, and pursuant to its "*ultra vires*" ruling, the Fifth Circuit had to pick which of the arguments qualified as an assertion that the agency exceeded its authority. The court selected Texas's statutory authority claim (but not its Administrative Procedure Act claim) and one of Fasken's two Administrative Procedure Act claims (i.e., one invoking the Nuclear Waste Policy Act). App. 20a-21a. The arbitrary and unworkable nature of that type of approach is plain: any crafty litigant can frame an argument of agency error as the agency exceeding its lawful authority. That is, as the Seventh Circuit has observed, merely "a synonym for 'wrong.'" *In re Chi.*, 799 F.2d at 335. As stated by the dissent to the rehearing *en banc*, the "risk for judicial aggrandizement when courts can pick and choose when to abide by Congress' limits" is obvious. App. 52a (Higginson, J., dissenting).

There is no support from any other circuit for the Fifth Circuit's so-called *ultra vires* exception to Hobbs Act jurisdictional limits, and the Fifth Circuit's ruling expressly and admittedly conflicts with the Second, Seventh, Tenth, and Eleventh Circuits. *Erie-Niagara Rail Steering Comm.*, 167 F.3d at 112-113; *In re Chi.*, 799 F.2d at 334-335; *Balderas*, 59 F.4th at 1123-1124; *Nat'l Ass'n of State Util. Consumer Advocs.*, 457 F.3d at 1249. App. 42a n.5. Those other circuits got it

right—the Fifth Circuit in this case got it wrong. Certiorari is warranted to resolve that conflict, and to correct the Fifth Circuit's error.

III. The Fifth Circuit's Deliberate Departure from Other Circuits Poses Substantial Potential Harm to a Critically Important Industry

The nuclear power industry currently supplies about one-fifth of the nation's electricity, and does so without carbon or greenhouse gas emissions. It is, unquestionably, an industry that is vital to the entire nation's welfare and well-being. The disruptive harms that the Fifth Circuit's departures from settled law pose to this critical industry are palpable, severe, and multi-faceted.

Uniformity of the law, and the stability of expectations associated with such uniformity, are especially important to an investment-intensive sector of the economy such as nuclear power. The Fifth Circuit has shattered that uniformity with its decision in this case, and that has already resulted in naked circuit shopping. Another similar project, to be located in the Tenth Circuit, was nevertheless challenged (by two of the same petitioners as in this case) in the Fifth Circuit, which summarily vacated that license upon the authority of the decision in this case. *Fasken Land & Minerals, Ltd.* v. *NRC*, No. 23-60377 (5th Cir., Mar. 27, 2024).

The potential practical and legal implications of the Fifth Circuit's decision, which the court did not address or grapple with, are disturbing in the extreme. There are at least a dozen existing sites in the country where there is no operating reactor and

where spent nuclear fuel is stored. See *U.S. Independent Spent Fuel Storage Installations (ISFSI)*, NRC (June 2023), https://www.nrc.gov/docs/ML2316/ML23165A245.pdf (Current U.S. Independent Spent Fuel Storage Installation (ISFSI) Map as of June 12, 2023 (nrc.gov)). Those are, functionally, temporary away-from-reactor storage sites just like the planned one that the Fifth Circuit held in this case to be illegal. And, the bulk of an entire decades-old part of the Code of Federal Regulations, 10 C.F.R. Part 72, upon which the industry relies, is incompatible with the views expressed by the Fifth Circuit in this case.

The DOE remains in breach of its acceptance and permanent disposal obligations under the NWPA and implementing standard contracts. *E.g., Ind. Mich. Power Co.*, 422 F.3d at 1372. That imposes great stress upon the industry, and results in extraordinary costs. Government estimates of the costs for the temporary storage of spent nuclear fuel until DOE performs its permanent disposal obligations range into the billions of dollars. *See, e.g., Commercial Spent Nuclear Fuel: Congressional Action Needed to Break Impasse and Develop a Permanent Disposal Solution*, GAO (Sept. 23, 2021), https://www.gao.gov/products/gao-21-603. The record in this case includes information to the effect that, based on various assumptions, the efficiencies of this proposed project alone could result in savings of at least $636 million. C.A. App. 714 (C.I. 125: Final Environmental Impact Statement (July 31, 2021) – Appendices, at 8-11).

With the stroke of a pen, however, the Fifth Circuit has eliminated the possibility of those efficiencies and potential savings. It has also placed the domestic

nuclear power industry in the worst of all possible worlds—that is, incurring massive expense and inconvenience as a result of DOE's failures and, now, handcuffed in its own efforts to sensibly mitigate that harm and reduce costs.

The departures from existing law by the Fifth Circuit are destabilizing, harmful in their own right, and unwarranted. As the dissent to *en banc* review correctly observed, the Fifth Circuit's view would "invite spoilers to sidestep the avenues for participation that Congress carefully created to prevent this uncertainty." App. 46a. Respectfully, the errors of the Fifth Circuit should be corrected by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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