Nos. 23-1300 & 23-1312

IN THE
Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,

AND

INTERIM STORAGE PARTNERS, LLC,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT FASKEN LAND AND MINERALS, LTD.

ALLAN KANNER
ANNEMIEKE M. TENNIS
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
(504) 524-5777

MONICA RENEE PERALES
FASKEN LAND AND MINERALS, LTD.
6101 Holiday Hill Road
Midland, TX 79707
(432) 687-1777

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
MATTHEW J. WILKINS
RYAN M. FOLIO
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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QUESTIONS PRESENTED

The Nuclear Regulatory Commission licensed Interim Storage Partners, a private company, to consolidate and store spent nuclear fuel in an above-ground facility located within the Permian Basin, the highest-producing oil field in the United States. The proposed site borders two watersheds that cover nearly all of Texas and New Mexico and faces risks of natural disasters (tornadoes, flooding, and earthquakes) and security threats, including terrorism.

The storage facility would have been the first of its kind. Every other licensed, privately owned storage facility for spent nuclear fuel is at or near the site of a civilian nuclear reactor. But the Permian Basin site is more than 300 miles from the nearest nuclear reactor and more than 2,000 miles from others. Therefore, thousands of tons of spent nuclear fuel that currently is securely stored would be transported by rail and barge across the country to reach the facility.

Numerous parties – including respondent Fasken Land and Minerals, Ltd. – brought these concerns and others to the Commission. But the Commission rejected every motion to intervene and disputed the merits of participants' arguments. The Commission then claimed that only Commission-approved intervenors can be parties aggrieved under the Hobbs Act, so no court could review its license grant. The Fifth Circuit rejected the Commission's attempt to evade judicial review of its license grant. The questions presented are:

1. Whether the Commission has authority to issue the license under the Atomic Energy Act of 1954 or the Nuclear Waste Policy Act of 1982.

2. Whether, if the Commission lacks statutory authority to issue the license, it nonetheless can insulate its license grant from judicial review by denying the applications of indisputably interested persons seeking to oppose that license before the agency.

RULE 29.6 STATEMENT

Respondent Fasken Land and Minerals, Ltd. is a non-governmental corporate party with no parent corporations. Fasken Land and Minerals, Ltd. is a limited partnership organization existing under the laws of Texas. No publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Petitioner Nuclear Regulatory Commission ("Commission") approved a license for petitioner Interim Storage Partners, LLC ("ISP") to store thousands of tons of spent nuclear fuel on private property in the largest, most productive oil basin in the nation – far from the nearest nuclear reactor, but near population and natural-resource zones. That decision lacks support in statutory law, which provides for such storage on federally owned lands or at reactor sites. To insulate its egregiously unsupported decisions from appellate review, the Commission denied intervention status to *every party* that sought to challenge that license. It then fought appellate review by invoking the Hobbs Act to deny judicial recourse to parties it had rejected as intervenors in the administrative process.

The Fifth Circuit recognized the Commission's self-protective disregard of limits on its authority for what it was – actions outside the carefully calibrated statutory framework Congress enacted. That judgment does not warrant review. On the merits, the Commission flouted the statutory requirements for interim offsite private storage for what would be the first storage facility of this type. On appealability, the Fifth Circuit correctly opined that the Commission could not shield itself from appellate review by excluding obviously aggrieved parties from administrative proceedings. Cases petitioners cite are readily distinguishable. The petitions do not raise issues compelling this Court's review.

STATEMENT

A. Statutory And Regulatory Background

1. The Atomic Energy Act

Congress passed the Atomic Energy Act of 1954 ("AEA") "to encourage widespread participation in the development and utilization of atomic energy." 42 U.S.C. § 2013(a), (d). Congress empowered the Atomic Energy Commission "to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983).

Nuclear materials come in three types: source material, byproduct material, and special nuclear material. *See* 42 U.S.C. § 2014(e), (z), (aa). Source material means uranium and other radioactive elements and ores. *See id.* § 2014(z). Special nuclear material could be used to make a nuclear weapon. *See id.* § 2014(aa). Byproduct material is radioactive through exposure to source or special nuclear material. *See id.* § 2014(e).

The AEA creates a separate licensing regime for each type of nuclear material. *See id.* §§ 2073 (special nuclear material), 2093 (source material), 2111 (byproduct material). In each, Congress carefully constrained the activities for which the Commission may grant licenses, listing purposes a licensed use must fulfill. Licenses for source material or special nuclear material must serve one of the following purposes:

(1) conducting research and development into useful applications of nuclear materials,

(2) use in medical therapies,

(3) use in enrichment facilities and nuclear reactors, or

(4) "other uses."

Id. §§ 2073(a)(1)-(4), 2093(a)(1)-(4). Licenses for by-product material must serve one of these purposes:

(1) "research or development purposes,"

(2) "medical therapy,"

(3) "industrial uses,"

(4) "agricultural uses," or

(5) "other useful applications."

Id. § 2111(a).

This case involves spent nuclear fuel. The AEA "does not refer explicitly to spent nuclear fuel." *Illinois v. General Elec. Co.*, 683 F.2d 206, 214 (7th Cir. 1982). But source, byproduct, and special nuclear material are constituent parts of spent nuclear fuel. *See In re Private Fuel Storage, L.L.C.*, 56 N.R.C. 390, 396 (Dec. 18, 2002). The Commission maintains (at 20) that licenses involving spent nuclear fuel are lawful if they satisfy all three licensing regimes.

2. The Nuclear Waste Policy Act

Nuclear reactors create spent nuclear fuel, which "poses a dangerous, long-term health and environmental risk" and "remain[s] dangerous for time spans seemingly beyond human comprehension." *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012).

When Congress enacted the AEA, government and industry officials believed "that the spent fuel would be reprocessed to make new fuel." *Illinois*, 683 F.2d at 208; *see also Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 246 (4th Cir. 1987) ("Government and industry accepted reprocessing as the only practical method of disposing spent fuel"). In reprocessing, the uranium and plutonium in spent nuclear fuel are separated from the remaining waste products and converted again into usable nuclear fuel.

See Int'l Atomic Energy Agency, *Getting to the Core of the Nuclear Fuel Cycle* (Jan. 1, 2012), https://www.iaea.org/sites/default/files/18/10/nuclearfuelcycle.pdf.

In the 1970s, however, the nuclear fuel "reprocessing industry collapsed," and with it the nation's plan for spent nuclear fuel. *Idaho v. U.S. Dep't of Energy*, 945 F.2d 295, 298 (9th Cir. 1991). In response, Congress enacted the Nuclear Waste Policy Act of 1982 ("NWPA"), which directs where to store spent nuclear fuel (1) permanently and (2) temporarily until a permanent repository exists.

Congress mandated that the Department of Energy ("DOE") select a site for and construct a permanent, government-owned repository for the country's spent nuclear fuel. *See* 42 U.S.C. § 10134(b), (d). DOE eventually selected Yucca Mountain as that site. *See id.* § 10172.

Congress determined that "the primary responsibility for providing interim storage of spent nuclear fuel" lay with "the persons owning and operating civilian nuclear power reactors." *Id.* § 10151(a)(1). Therefore, spent nuclear fuel must be stored "*at the site* of each civilian nuclear power reactor" where possible. *Id.* § 10151(b)(1) (emphasis added). Otherwise, spent nuclear fuel must be stored in "*federally owned and operated*" storage facilities with no more than "1,900 metric tons of capacity." *Id.* § 10151(b)(2) (emphasis added).

The NWPA also protects States in which DOE wants to store spent nuclear fuel because it empowers them to veto storage sites with capacities of 300 or more metric tons by submitting "a notice of disapproval to the Congress." *Id.* § 10155(d)(6)(B). Any site subject to a notice of disapproval "shall be disapproved

unless . . . Congress passes a resolution approving such proposed provision of storage capacity" over the State's veto. *Id.* § 10155(d)(6)(D).

The NWPA contains no provisions specifically addressing privately owned, away-from-reactor storage. Congress is considering a bill that would amend the NWPA to allow for large "Federal consolidated storage facilities . . . to provide interim storage as needed for spent nuclear fuel." S. 4927, 118th Cong. § 312(b) (2024).

B. Factual And Procedural Background

This case involves a Commission-issued license for privately owned, away-from-reactor interim storage.

In April 2016, ISP's predecessor applied for a license from the Commission to build and operate an above-ground storage facility for up to 5,000 tons (or more) of spent nuclear fuel in Andrews County, Texas.[1] All spent nuclear fuel stored at the site would need to be shipped hundreds, if not thousands, of miles from current storage sites.

The proposed site poses numerous proximity risks. Mere miles separate it from dozens of active oil and gas wells, agricultural lands, and thousands of people living in Andrews, Texas, and Eunice, New Mexico. Because only one highway and rail line serve the site, anyone using them could come close to spent nuclear fuel traveling to or from the site. Finally, the site sits atop an aquifer and near the borders of two watersheds that serve Texas and New Mexico.

The site faces numerous natural safety risks, including frequent earthquakes, sinkholes, extreme heat,

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[1] Waste Control Specialists, LLC, Consolidated Interim Spent Fuel Storage Facility License Application (Apr. 28, 2016), https://www.nrc.gov/docs/ML1613/ML16132A533.pdf.

dust storms, hailstorms, and tornadoes. Any of those events could damage the storage facility (or the vehicles transporting spent nuclear fuel to or from it) and cause radiation to contaminate the environment.

In 2018, after ISP submitted a revised application, the Commission invited interested persons to seek leave to intervene in a hearing on the application. *See* Notice, *Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility*, 83 Fed. Reg. 44,070, 44,071 (Aug. 29, 2018).

Fasken timely sought to intervene. Fasken is one of the largest private landowners in the United States, with hundreds of thousands of acres of land in the Permian Basin. That includes land just miles from the site, which the Commission recognizes faces risks of radiation leaks.[2] On its land, Fasken raises tens of thousands of cattle, operates nearly two thousand active oil and gas wells, and has various residential and commercial real estate developments. Its employees travel daily throughout that land to work cattle and service those wells. And it does business using the same roads and railroad line that the licensed storage facility would have used.

The Commission denied Fasken's motion to intervene. The AEA states that the Commission "*shall admit* any [interested] person as a party" to a licensing proceeding. 42 U.S.C. § 2239(a)(1)(A) (emphasis added). But the Commission's intervention rules require an interested party not only to show standing, but also to proffer a "contention" that the Commission concludes on the merits is admissible. 10 C.F.R. § 2.309(d), (f). The Commission agreed that Fasken

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[2] The Commission has recognized Fasken's proximity to potential radiation leaks. *See In re Interim Storage Partners LLC*, 90 N.R.C. 31, 51-52 (Aug. 23, 2019).

had standing. *See Interim Storage Partners*, 90 N.R.C. at 52. It denied Fasken leave to intervene because it decided, on the merits, that none of Fasken's six contentions "raise[d] a genuine dispute on a material issue." *Id.* at 53, 109-18.

The Commission also rejected every other motion to intervene, reasoning they lacked merit.[3] With no parties permitted to intervene, the Commission terminated the hearing in December 2019. *See In re Interim Storage Partners LLC*, 90 N.R.C. 358, 358 (Dec. 13, 2019).

In July 2020, the Commission rejected a second Fasken intervention effort, this one based on new information in the Commission's draft environmental impact statement. The Texas Commission on Environmental Quality and Texas Governor Greg Abbott also submitted comments on the draft. *See In re Interim Storage Partners LLC*, 2021 WL 8087739, at *5-6 (N.R.C. Jan. 29, 2021).

Fasken and others then timely petitioned the D.C. Circuit for review of the intervention denials,[4] and that court affirmed in January 2023. It held that the Commission "acted reasonably" in concluding that the would-be intervenors failed to proffer admissible contentions. *Don't Waste Michigan v. U.S. NRC,* 2023 WL 395030, at *2 (D.C. Cir. Jan. 25, 2023) (per curiam).

Meanwhile, on September 13, 2021, the Commission issued the license.

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[3] The Commission initially admitted one Sierra Club contention, but subsequently rejected its intervention motion. *See Interim Storage Partners*, 90 N.R.C. at 80; *In re Interim Storage Partners LLC*, 90 N.R.C. 181, 182 (Nov. 18, 2019); *In re Interim Storage Partners LLC*, 92 N.R.C. 491, 492 (Dec. 17, 2020).

[4] *See* Nos. 21-1048, 21-1055, 21-1056, 21-1179 (D.C. Cir.).

Over the next two months, various challenges to the license grant were filed in three courts of appeals – the Fifth, Tenth, and D.C. Circuits. After Texas and Fasken filed in the Fifth Circuit, three other private parties petitioned in the D.C. Circuit,[5] and New Mexico petitioned in the Tenth Circuit.[6] These petitions all challenged the same order granting the license, but the Commission filed the administrative record in each circuit and did not seek to transfer the later-filed petitions to the Fifth Circuit. *But see* 28 U.S.C. § 2112.

Although Texas's Fifth Circuit petition was the first filed, that court was the last to rule. The D.C. Circuit and the Tenth Circuit refused to reach the merits because they concluded that they lacked jurisdiction under the Hobbs Act. They interpreted its judicial-review provision – which allows a "party aggrieved by [a] final [agency] order" to appeal, 28 U.S.C. § 2344 – to mean that only Commission-approved intervenors could appeal. *See Don't Waste Michigan,* 2023 WL 395030, at *3; *New Mexico ex rel. Balderas v. U.S. NRC*, 59 F.4th 1112, 1115 (10th Cir. 2023).

The Fifth Circuit vacated the license. NRC App. 2a. The panel held that the AEA does not authorize the Commission "to issue licenses for private parties to store spent nuclear fuel away-from-the-reactor." *Id.*

The panel found jurisdiction to consider both Fasken's and Texas's challenges to the license grant: under "the fairest reading of the Hobbs Act," Fasken and Texas are "part[ies] aggrieved" because they participated in the agency proceedings. *Id.* at 17a-18a. But the panel ultimately determined that the Commission acted *ultra vires* – that is, without authority

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[5] *See* Nos. 21-1227, 21-1230, 21-1231 (D.C. Cir.).

[6] *See* No. 21-9593 (10th Cir.).

and in violation of express limitations on its authority. *Id.* at 18a-20a.

On the merits, the panel reasoned that, although the AEA "confers on the Commission the authority to issue licenses for the possession of . . . constituent materials of spent nuclear fuel," "none" of the allowed purposes "encompass[es] storage or disposal of . . . spent nuclear fuel." *Id.* at 21a-22a. The panel rejected the Commission's reliance on earlier D.C. and Tenth Circuit cases, explaining that both courts merely assumed (without deciding) that the AEA authorized the Commission to issue that license.

Next, the panel held that the NWPA did not authorize such licenses. *Id.* at 29a. That Act "create[d] a comprehensive statutory scheme for addressing spent nuclear fuel" that "limits temporary storage to private at-the-reactor storage or at federal sites." *Id.* It "doesn't permit" "the Commission to license a private, away-from-reactor storage facility for spent nuclear fuel." *Id.*

The Fifth Circuit denied rehearing en banc. *Id.* at 31a. Judge Jones's concurrence – joined by Judges Smith, Elrod, Ho, Engelhardt, and Wilson – grounded the panel's exercise of jurisdiction on "two bases of authority": "these petitioners are parties aggrieved, and the NRC has acted *ultra vires*." *Id.* at 33a.

Judge Jones noted that, because "Fasken's multiple attempts formally to intervene were repeatedly rebuffed by the agency," accepting the Commission's arguments would allow it to "control[] the courthouse door." *Id.* at 33a-34a. Such a holding not only would violate the strong presumption that agency actions are subject to judicial review, but "also seems particularly unlikely in a legal world where deference to agency interpretations of law, e.g., in *Auer*[*v. Robbins*,

519 U.S. 452 (1997),] and *Chevron*[*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)], is under increasing scrutiny." *Id.* at 34a-35a.

Judge Jones also clarified that Fifth Circuit decisions recognizing the *ultra vires* rule postdate the Hobbs Act and that this Court and other courts of appeals recognize a similar rule in various contexts. *Id.* at 41a-42a. She rebutted the criticism that *ultra vires* means merely that the agency "got it wrong." *Id.* at 43a. Instead, "the term literally refers to being 'outside' the agency's power, *i.e.*, in defiance of the limits placed by Congress in the agency's governing statute or the Constitution." *Id.*

Judge Higginson dissented (joined by Judges Graves, Douglas, and Ramirez), disputing Judge Jones's arguments regarding jurisdiction. *Id.* at 45a-52a. No judge on the Fifth Circuit questioned the panel's conclusion that the AEA and the NWPA did not authorize the Commission to grant the license.

REASONS FOR DENYING THE PETITIONS

I. THE FIFTH CIRCUIT IS THE ONLY COURT OF APPEALS TO HAVE RULED ON THE COMMISSION'S AUTHORITY TO LICENSE PRIVATELY OWNED, AWAY-FROM-REACTOR STORAGE FACILITIES, AND IT CORRECTLY CONCLUDED THAT THE COMMISSION LACKS AUTHORITY

A. No Circuit Split Exists On The Commission Authority Issue

The Fifth Circuit held that the AEA does not authorize the Commission to license privately owned storage facilities for spent nuclear fuel located away from a nuclear reactor. NRC App. 21a-25a. No other court has analyzed whether the AEA grants the Commission that authority, much less identified a statutory

purpose from each of the three licensing regimes that such facilities fulfill.

Petitioners' proposed circuit split is illusory. They and *amicus* claim that three cases have held that the AEA authorizes the Commission to grant the license here:

- *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004);
- *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004);
- *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982).

But each assumed (without deciding and without analyzing the AEA's text) that the Commission had such authority because no party argued otherwise.

In *Bullcreek*, challengers (including Utah) argued that the NWPA "repealed or superseded the authority of the [NRC] under the [AEA] to license the storage of private spent nuclear fuel at privately owned away-from-reactor storage facilities." 359 F.3d at 537. The challengers thus *assumed* the AEA granted that authority, but argued that the NWPA took it away. In rejecting that argument, the D.C. Circuit likewise assumed that the AEA authorized the license. *Id.* at 542.

Skull Valley involved the same license as *Bullcreek*. There, Utah again argued "that federal law does not allow away-from-the-reactor storage of [spent nuclear fuel] in privately owned facilities." 376 F.3d at 1231. The Tenth Circuit believed that *Bullcreek* (which had assumed AEA authority) resolved that issue and refused to revisit it. *Id.* at 1231-32.

In *Illinois*, a nuclear waste storage facility challenged state laws regulating transporting spent nuclear fuel into (and disposing and storing it in) Illinois. 683

F.2d at 208. The facility had a license to store spent nuclear fuel, but Illinois law purported to prevent out-of-state fuel from being stored there. *Id.* The Seventh Circuit struck down the state laws as discriminating against interstate commerce under the Commerce Clause. *Id.* at 213-14.

ISP (and no one else) erroneously argues (at 16) that the Seventh Circuit also held that the AEA authorized the Commission to license private, away-from-reactor storage facilities. The sentence on which ISP relies – the court's statement that Illinois "could not" challenge the Commission's authority under the AEA to license the storage facility, 683 F.2d at 214-15 – was pure dicta. The court itself called that sentence "superfluous," added only "to assist the Supreme Court [if] it decide[d] to review" the Commerce Clause ruling (it did not). *Id.* at 214. Notably, no party had "question[ed] the Commission's authority." *Id.* at 214-15. And it is unreasoned: the court analyzed not one word of the AEA's text.

This case marks the first time a litigant has challenged the Commission's AEA authority to license private, offsite storage facilities for spent nuclear fuel.

Petitioners' assertions that 12 such facilities exist are incorrect. ISP Pet. 5, 24-25; NRC Pet. 4. Three of the 12 are owned and operated by DOE, not private parties. One (the facility in *Bullcreek* and *Skull Valley*) was never built. Another (the facility at issue in *Illinois*) is a mere half-mile from a civilian nuclear reactor – so close that the Commission considered them together when assessing their radiological effects.[7]

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[7] *See In re General Elec. Co. (GE Morris Operation Spent Fuel Storage Facility)*, 15 N.R.C. 530, 1982 WL 43396, at *3 (Mar. 2, 1982).

And the remaining seven are on the sites of (decommissioned) civilian nuclear reactors.

The Fifth Circuit is thus the first court to consider whether the AEA in fact authorizes the Commission to license such facilities. That holding conflicts with no other court judgment.

B. The Fifth Circuit's Decision Is Correct

The Fifth Circuit correctly concluded that the Commission lacks authority to license private, offsite storage facilities for spent nuclear fuel. The AEA's plain text and history support that judgment. Even if they contained an arguable basis for such authority (they do not), that basis would lack the clarity the major-questions doctrine requires. And the Commission's claimed authority ignores Congress's explicit intent for limited interim storage for spent nuclear fuel in the NWPA.

1. The Atomic Energy Act provides no authority for the license

First, the Commission lacks authority to license private, offsite storage facilities under the AEA's text and history. The Commission contends (at 3, 20) that licenses involving spent nuclear fuel must satisfy each of the separate licensing regimes for source, special, and byproduct nuclear material. And this license satisfies none of them because it fulfills none of the purposes that the regimes require proposed uses of nuclear materials to fulfill.

The license fulfills *none* of the enumerated statutory purposes of the nuclear material licensing regimes. For both special and source nuclear material, those purposes are (1) conducting "research and development" into useful applications of nuclear materials, (2) for use in "medical therapy," and (3) for use in enrichment facilities and nuclear reactors. 42 U.S.C.

§§ 2073(a)(1)-(3), 2093(a)(1)-(3). For byproduct nuclear material, those purposes are (1) "research or development purposes," (2) "medical therapy," (3) "industrial uses," and (4) "agricultural uses." *Id.* § 2111(a). Petitioners have no argument that the ISP facility fulfills those enumerated purposes. Spent nuclear fuel stored there would not be used in "research and development," in "medical therapy," in enrichment facilities or nuclear reactors, or for "industrial uses" or "agricultural uses." The point of storage is to keep spent nuclear fuel from any use at all.

While each licensing regime also includes a catch-all "other" purpose after the enumerated purposes, *id.* §§ 2073(a)(4), 2093(a)(4), 2111(a), these "other" clauses must be interpreted to authorize licenses only for purposes "similar in nature to those [purposes] enumerated by the preceding specific words." *Yates v. United States*, 574 U.S. 528, 545 (2015) (plurality); *see also id.* ("*ejusdem generis*[] counsels: Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding words.") (cleaned up). Here, "other uses" and "other useful applications" mean uses similar to research and development, medical therapy, agricultural applications, and use in enrichment facilities and nuclear reactors. The common thread linking those enumerated uses is putting the nuclear material to an active, productive use. Storage, however, is not a productive use or application of spent nuclear fuel; it is prolonged non-use and non-application. The AEA thus unambiguously provides no authority for the Commission's license grant here.

Second, even if the AEA's uses of "other" were ambiguous (they are not), the Commission's interpretation receives no deference. "Courts must exercise

their independent judgment in deciding whether an agency has acted within its statutory authority" rather than defer to an agency's interpretation of its own authority. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

Third, the Commission's claim of authority also fails under the major-questions doctrine. An agency must have express statutory authority before it may decide questions of "economic and political significance." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). "[A]mbiguous statutory text" that provides "a merely plausible textual basis for [an] agency action" is not enough to sustain agency claims to authority over major questions. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

Where to store the nation's spent nuclear fuel is a major question, one imbued with tremendous economic significance. Petitioners and *amicus* concede the license implicates more than $600 million of value to the nuclear industry. ISP Pet. 25; NEI Amicus Br. 14-15. The license also enables investment of billions of dollars to construct the facility; procure and enhance barges and rail lines to carry casks of spent nuclear fuel that "can weigh up to 150 tons"[8]; transport thousands of tons of spent nuclear fuel across the country; and secure and insure the storage facility. It also implicates the potentially disastrous economic consequences of a radiation leak to the oil and gas operations in the Permian Basin, which *daily* produces millions of barrels of oil and billions of cubic feet of

[8] Michele Sampson, *Dry Cask Storage – The Basics*, U.S. NRC Blog (Mar. 12, 2015), https://public-blog.nrc-gateway.gov/2015/03/12/dry-cask-storage-the-basics/.

natural gas[9] and is therefore vital to the nation's energy security.[10]

Where to store the nation's spent nuclear fuel also is a question of enduring political significance. More than 40 years ago, Congress acknowledged that this question "ha[d] become [a] major subject[] of public concern." 42 U.S.C. § 10131(a)(7). Decades of political intrigue and litigation scuttled the Yucca Mountain project. The license here drew public comments from States, counties, and cities; Native American tribes; environmental groups; industry groups; transportation groups; chambers of commerce; and thousands of individuals. Given that nuclear fuel "poses a dangerous, long-term health and environmental risk," the question will remain politically salient for decades to come. *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012).

The Commission lacks a clear textual basis for its claim of authority to answer this major question. This Court has identified several factors to consider when determining whether a statutory text is sufficiently clear, and the text of the AEA fails them all.

First, the Commission "'discover[ed] in a long-extant statute an unheralded power'" to license private, offsite storage facilities. *West Virginia*, 597 U.S. at

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[9] *See* U.S. Energy Info. Admin., *Permian Region: Drilling Productivity Report* (May 2024), https://www.eia.gov/petroleum/drilling/pdf/permian.pdf.

[10] *See* Railroad Comm'n of Texas, *Permian Basin* ("[T]he Permian Basin . . . also helps provide energy security for the country. The greater Permian Basin accounts for nearly 40 percent of all oil production in the United States and nearly 15 percent of its natural gas production . . . ."), https://rrc.texas.gov/oil-and-gas/major-oil-and-gas-formations/permian-basin/ (last accessed Aug. 18, 2024).

724 (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Congress passed the AEA in 1954. Yet the Commission first claimed authority to license private, offsite storage facilities decades later in the late 1970s. *See* Final Rule, *Licensing Requirements for the Storage of Spent Fuel in an Independent Fuel Spent Storage Installation*, 45 Fed. Reg. 74,693, 74,696 (Nov. 12, 1980). Even then, "private" was understood to mean a utility that operated a nuclear reactor – not a company like ISP that exists solely to store nuclear waste. *Cf. id.* at 74,702 (describing the required "technical qualifications" of the applicant and its personnel).

Second, the Commission derived that newfound power from "the vague language of an ancillary provision of" the AEA. *West Virginia*, 597 U.S. at 724 (cleaned up). The AEA "does not refer explicitly to spent nuclear fuel" at all. *Illinois*, 683 F.2d at 214. Interim storage is not one of the enumerated approved purposes for nuclear-materials licenses. So the Commission relies on not one, but three separate "other" clauses. Such stitch work provides, at best, an ambiguous and "merely plausible" textual basis for the Commission's action. *West Virginia*, 597 U.S. at 723.

Third, the Commission "adopt[ed] a regulatory program that Congress ha[s] conspicuously . . . declined to enact itself." *Id.* at 724. Congress has passed an explicit statutory regime governing interim storage of spent nuclear fuel – the NWPA, discussed below. That regime conspicuously omits authority to store spent nuclear fuel in private, offsite facilities. The NWPA amendment that Congress currently is considering makes that omission even more conspicuous because it contemplates federal – not private – consolidated interim storage facilities.

Accordingly, the Fifth Circuit correctly concluded the AEA does not authorize the Commission's license grant.

2. The Nuclear Waste Policy Act's explicit interim storage provisions for spent nuclear fuel provide no authority for the license

The Fifth Circuit correctly determined that the NWPA does not authorize the Commission to grant the license. NRC App. 2a.

The NWPA first says that interim storage should occur, where possible, "*at the site of each civilian nuclear power reactor*." 42 U.S.C. § 10151(b)(1) (emphasis added). But the license permits the opposite – removing spent nuclear fuel from civilian nuclear reactor sites for offsite storage. And where onsite storage is not possible, offsite storage should occur in "*federally owned and operated*" storage facilities "with not more than 1,900 metric tons of capacity." *Id.* § 10151(b)(2) (emphasis added). But the license again permits the opposite – storing spent nuclear fuel at a privately owned and operated facility with a capacity of 5,000 (and possibly up to 40,000) tons.

The license also is inconsistent with the NWPA's respect for state sovereignty. That statute gives States the right to veto away-from-reactor storage sites with capacities of 300 or more metric tons. *Id.* § 10155(d)(6)(B). But the license permits a 5,000-ton storage facility over Texas's express disapproval. The NWPA's protections of and respect for state sovereignty are meaningless if the Commission can avoid them merely by claiming authority under the AEA rather than the NWPA.

Thus, the Commission derives no authority to issue the license from the NWPA.[11]

3. Petitioners' contrary arguments are unpersuasive

a. Petitioners erroneously assert that the catch-all provisions have "no work to do" if read consistently with each licensing regime's enumerated purposes. ISP Pet. 18; *accord* NRC Pet. 22-23. The Commission still may grant licenses for any "other" *productive* use or application of nuclear materials not specifically enumerated. But *storage* is not a productive use or application.

Indeed, petitioners' interpretation leaves the enumerated purposes with no work to do. If, as petitioners contend, the catch-all provisions empower the Commission to grant licenses for *any* purpose the Commission deems worthy, the enumerated purposes are superfluous.

b. ISP incorrectly asserts (at 18) the enumerated purposes in each licensing regime lack a "common attribute" to guide interpretation of the catch-all provisions. As discussed above (at 14), the common attribute is they put nuclear material to an active, productive use.

c. The Commission erroneously argues (at 22) that it must have authority to issue the license because it "promulgat[ed] regulations that established a formal process for licensing temporary storage of spent fuel, both at and away from reactors," in 1980, and allegedly "has repeatedly licensed offsite storage

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[11] Indeed, petitioners advance no argument that the NWPA authorizes the license. They instead argue that "the NWPA has nothing to do with the issues in this case." ISP Pet. 21; *accord* NRC Pet. 24-25.

facilities for spent nuclear fuel." But the Commission "possess[es] only such powers as are granted by statute." *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587, 598 (1934). Neither the AEA nor the NWPA empowers the Commission to license privately owned offsite storage facilities for spent nuclear fuel.

Claiming and (purportedly) exercising unlawful authority for many years does not change the scope of the statutory grant of power. For example, the Federal Trade Commission ("FTC") claimed for decades that it had power to receive "equitable monetary relief" under § 13(b) of its organic statute, 15 U.S.C. § 53(b). *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 70, 72-74, 81-82 (2021). It had issued regulatory guidance explicitly claiming that power and "use[d] § 13(b) to win equitable monetary relief directly in court with great frequency" since "the late 1970s." *Id.* at 73-74. Nevertheless, this Court unanimously held that § 13(b) does not authorize the FTC to receive equitable monetary relief. *Id.* at 70. If the FTC's long-standing practices could not save its claim to authority in *AMG*, then the Commission's much-thinner claim[12] here likewise fails.

d. Congress has not endorsed the Commission's assertion of authority. Petitioners suggest (NRC Pet. 25; ISP Pet. 20) that, because Congress was aware of the Commission's licensing regulations when it passed the NWPA and did not explicitly disapprove of them, Congress acquiesced to the Commission's assertion of power. But this Court long has criticized "reliance on congressional inaction" when interpreting statutes, "saying that as a general matter the argument deserves

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[12] The Commission has no long-standing practice of licensing privately owned offsite storage facilities for spent nuclear fuel. *See supra* pp. 12-13.

little weight." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (cleaned up). The Commission's lone contrary authority from this Court predates those criticisms. *See CFTC v. Schor*, 478 U.S. 833, 846 (1986) (cited at NRC Pet. 25). Congress's failure to disapprove the Commission's regulations, therefore, cannot be interpreted as endorsement.

e. ISP claims (at 24) that the Fifth Circuit's decision will cause "palpable, severe, and multi-faceted" harms to the nuclear power industry. But "[p]olicy arguments are properly addressed to Congress, not this Court," and so provide no legitimate basis for granting certiorari. *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018).

In any event, the Fifth Circuit's decision will not result in "naked circuit shopping." ISP Pet. 24. ISP notes that Fasken also challenged a New Mexico project in the Fifth Circuit. But that project (the subject of certiorari petitions in Nos. 23-1341 and 23-1352) was located near the Texas-New Mexico border. Interested parties resided on both sides of the border. That is geographical coincidence, not circuit shopping.

The Fifth Circuit's judgment likewise casts no doubt on the status of "a dozen existing sites in the country where there is no operating reactor and where spent nuclear fuel is stored." ISP Pet. 24-25. Three of the sites are federally owned and eight others are either on or adjacent to (decommissioned) civilian nuclear reactor sites. *See* 42 U.S.C. § 10151(b)(2) (referring to "federally owned and operated" storage facilities); *id.* § 10151(b)(1) (referring to storage "at the site of" nuclear reactors, with no requirement the reactor be active). And the last site – the Utah site at issue in *Bullcreek* and *Skull Valley* – while unlawfully licensed 20 years ago, still has no storage facility located there, so that example hardly supports petitioners.

ISP's license also is unnecessary to mitigate DOE's continued "breach of its acceptance and permanent disposal obligations under" the NWPA. ISP Pet. 25. Two wrongs do not make a right. The Commission's exercise of unlawful authority is not justified by DOE's failure to exercise (and Congress's inaction in funding) DOE's lawful authority. *See In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) (Commission "may not rely on political guesswork about future congressional appropriations" for Yucca Mountain "as a basis for violating existing legal mandates"). In any event, the NWPA contains Congress's explicit program for what to do with spent nuclear fuel until a permanent facility exists – store it at civilian nuclear reactor sites or in small, government-owned-and-operated facilities. The Commission and industry may not like Congress's decision, but those complaints are for Congress, not the Court. *See SAS Inst.*, 584 U.S. at 368. And, indeed, Congress is actively considering amending the NWPA. *See* S. 4927, 118th Cong. § 312 (2024).

II. THE HOBBS ACT ISSUE DOES NOT INDEPENDENTLY WARRANT REVIEW

The Hobbs Act issue does not warrant review. *First*, any circuit split lacks overarching significance because disputes about the Fifth Circuit's *ultra vires* rule are unlikely to recur. The rule is rarely invoked within the Fifth Circuit and appears never to have changed the outcome of a case (including this one). The main reason it arguably led to a circuit split as to the license at issue here is that the Commission wrongly filed the administrative record in the Tenth and D.C. Circuits – leading those courts to rule in a situation where only the Fifth Circuit had a right to do so. *See* 28 U.S.C. § 2112. Nor is review needed to

settle whether intervention in Commission licensing proceedings is required for "party aggrieved" status under the Hobbs Act. That issue is unlikely to recur because the sole ground on which the Commission denied every motion to intervene was its regulations, which contradict the AEA and cannot withstand scrutiny without the *Chevron* deference the Commission no longer receives.

Second, this case is a poor vehicle to review the *ultra vires* rule because the Fifth Circuit correctly asserted jurisdiction regardless of whether the rule is sound. Although the panel rested its holding on the *ultra vires* rule, both the panel and the en banc concurring judges explained why Fasken's and Texas's participation in the licensing proceedings suffices for "party aggrieved" status under the Hobbs Act. Accordingly, reviewing the *ultra vires* rule here would be (at best) basic error correction. If petitioners are correct that the Fifth Circuit will apply the *ultra vires* rule with increasing frequency, this Court can review it in a case in which its application changed the outcome. Finally, it was not improper for the Fifth Circuit to exercise jurisdiction under the *ultra vires* rule in this unusual case: the Commission acted not only without authority, but also in violation of express limitations on its authority, and it asserts functional immunity from judicial review for its orders.

A. Any Circuit Split Lacks Overarching Significance

1. Any difference between the Fifth Circuit's approach to Hobbs Act jurisdiction and the approaches of other circuits lacks significance. To start, "[t]he Hobbs Act jurisdictional provision is rarely debated." NRC App. 39a. The *ultra vires* rule is a subset of those debates and "is exceedingly narrow." *Merchants Fast*

Motor Lines, Inc. v. ICC, 5 F.3d 911, 922 (5th Cir. 1993). Indeed, the Fifth Circuit itself often finds the rule inapplicable. *See id.*; *see also Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005).

Petitioners do not dispute these facts. Rather, the Commission concedes (at 29) that the Fifth Circuit applied the *ultra vires* rule "for the first time since 1984." And neither the Commission nor ISP identifies any case in which the *ultra vires* rule caused the Fifth Circuit to assert jurisdiction where it otherwise was lacking. *See Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984) (noting that applying the *ultra vires* rule did not change the outcome because one petitioner "as to all claims . . . participated in the original agency proceeding"). The Commission therefore exaggerates when it asserts (at 10) that "[t]he Fifth Circuit has long been an outlier in embracing" the *ultra vires* rule. A rule that the Fifth Circuit "embrac[es]" once every 40 years with no practical effect is hardly one that warrants this Court's review.

Several of petitioners' other criticisms of the *ultra vires* rule also are speculative. The Commission (at 14, 29) and ISP (at 4) argue that the rule allows nonparties to obtain appellate review. These arguments do not apply here. Fasken *was* a party to the Commission proceeding. It certainly did not "intentionally eschew[] mandatory participation." ISP Pet. 4. As the Fifth Circuit recognized, "Fasken's multiple attempts formally to intervene were repeatedly rebuffed by the agency." NRC App. 33a (Jones, J., concurring in the denial of rehearing en banc).[13] Petitioners identify no

[13] The same analysis applies to ISP's prediction (at 4-5, 24) that the *ultra vires* rule will cause "naked circuit-shopping." The *ultra vires* rule is "exceedingly narrow." *See supra* pp. 23-24. If

case in which the *ultra vires* rule allowed a person to skip an agency proceeding and then challenge agency action in court.

The Commission's next argument (at 15) – that the *ultra vires* exception threatens to swallow the party-aggrieved rule because *ultra vires* "may be a synonym for 'wrong'" – is "hyperbol[ic]" and speculative as well. NRC App. 43a (Jones, J., concurring in the denial of rehearing en banc). As Judge Jones explained, the exception requires that the agency acted not only without authority, but also in violation of express limitations on its authority. The Commission again identifies no contrary case and does not even try to explain why – if its view is correct – in other cases the Fifth Circuit repeatedly has found the *ultra vires* principle inapplicable.

Petitioners' remaining criticisms of the *ultra vires* rule are incorrect. The Commission's argument (at 15-16) that the *ultra vires* rule "is untethered to the norms that govern litigation in court" rests on a false equivalence between "agency adjudication" and "district-court case[s]." While certainly "a nonparty to a district-court case" cannot appeal it (NRC Pet. 16), the same is not necessarily true for agency adjudication. As the Commission acknowledges (at 12), the Administrative Procedure Act expressly allows interested persons to challenge adverse agency action. That includes agency adjudication. *See Radiofone, Inc. v. FCC*, 759 F.2d 936, 938-39 (D.C. Cir. 1985) ("Standing to challenge agency adjudications is of course more expansive than standing to appeal lower court judgments, in that not only the losing party before the

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ISP's prediction comes true, this Court can review the *ultra vires* rule in an outcome-determinative case.

agency but even . . . other persons with interests adverse to the winning party[] may often sue.").

As for ISP, its reliance (at 4, 22) on *Bowles v. Russell*, 551 U.S. 205 (2007), is misplaced. *Bowles* held courts may not create equitable exceptions to jurisdictional requirements. *See id.* at 214. The Fifth Circuit did not "create" the *ultra vires* rule as an "equitable exception" to the Hobbs Act. Support for the *ultra vires* rule preexisted the Hobbs Act; the question here (if any) is whether Congress intended for the Hobbs Act to negate the *ultra vires* rule. *See* NRC App. 42a (Jones, J., concurring in the denial of rehearing en banc). Neither petitioner addresses that question. And the *ultra vires* rule is not "equitable" in the sense of relaxing a legal rule to advance fairness. It is a legal rule the Fifth Circuit has recognized for decades. Accordingly, the "exceedingly narrow" *ultra vires* rule does not warrant this Court's review. *Merchants*, 5 F.3d at 922.

2. Review is not warranted to ensure the uniformity of federal law, either. The Tenth and D.C. Circuits' refusals to exercise jurisdiction over challenges to the license never should have been issued. Under 28 U.S.C. § 2112, those later-filed appeals should have been transferred to the Fifth Circuit, where the first-filed appeal (Texas's) was lodged.

Here, the Commission issued the license on September 13, 2021. By September 23, only one petition for review of the license grant – Texas's in the Fifth Circuit – had been filed. *See Texas v. NRC*, No. 21-60743, Dkt. 1 (5th Cir. Sept. 23, 2021). Under § 2112(a)(1), only the Fifth Circuit should have heard these appeals. But neither the Commission nor the D.C. and Tenth Circuits acted to consolidate the cases or transfer the petitions to the Fifth Circuit, despite the mandatory "shall transfer" language in § 2112(a)(5).

The Commission touts the Tenth Circuit's decision (at 28) on the same Commission action. But the Commission should not be able to use its own failure to follow § 2112 to create a split among circuits; the statute's entire point is to prevent multiple courts from reviewing the same agency order.[14]

3. Nor is review needed to settle whether intervention in Commission licensing proceedings is required for "party aggrieved" status under the Hobbs Act. Even if the Commission were correct that only Commission-approved intervenors can challenge its license grants, that question would not be of lasting importance because Commission intervention regulations cannot withstand scrutiny absent *Chevron* deference. *Loper Bright* portends a successful challenge to those regulations. And without those regulations, the issue that three circuits confronted here – whether a Commission-disapproved intervenor nonetheless attains party status under the Hobbs Act – will either cease to arise or arise much less frequently.

Read together, the AEA and the Hobbs Act clearly contemplate a legal framework in which the Commission *must* allow interested persons to become "part[ies]," who then have an indisputable right to seek appellate review. The AEA states that the Commission "*shall admit* any [interested] person as a party" to a licensing proceeding. 42 U.S.C. § 2239(a)(1)(A) (emphasis added). The word "shall" "normally creates an obligation impervious to [agency] discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). The Hobbs

[14] It also is untrue that the Tenth Circuit addressed "the *same*" reviewability question because New Mexico (unlike Fasken) did not attempt to intervene in the licensing proceedings.

Act, in turn, allows any "party aggrieved" to petition for review. 28 U.S.C. § 2344.

The Commission's regulations contradict the AEA's clear statutory commands because they allow the Commission to deny "party" status even to interested persons unless a myriad of agency-imposed, non-statutory conditions are met. The regulations required *Chevron* deference to withstand challenge. *See Union of Concerned Scientists v. U.S. NRC*, 920 F.2d 50, 54 (D.C. Cir. 1990) ("We are, of course, obliged to defer to the operating procedures employed by an agency . . . .").

Under the best reading of the statute, those regulations are unlawful. The Commission may find the substance of an intervenor's arguments unavailing, but the Commission must defend that position along with the license granted over those arguments. It cannot use its views of the merits to deny an interested person's intervention motion. The question whether a Commission-disapproved intervenor is nonetheless a "party" for Hobbs Act purposes is unlikely to recur and does not warrant review.

4. Finally, review is unwarranted because the *ultra vires* rule did not make a difference here. Judge Jones explained that the panel's exercise of jurisdiction rested on "two bases of authority": "these petitioners are parties aggrieved, and the NRC has acted *ultra vires*." NRC App. 33a (Jones, J., concurring in the denial of rehearing en banc). The *ultra vires* ground was not required. And, as explained below, the court and Judge Jones correctly concluded that participation sufficed for Fasken to attain "party" status. The Commission's blessing is not a precondition to appellate jurisdiction.

B. The Fifth Circuit's Decision Is Correct

In any event, the Fifth Circuit correctly reasoned that, because Fasken participated in the licensing proceeding, it was a "party" for Hobbs Act purposes. "[T]he plain text of the Hobbs Act requires only that a petitioner have participated—in some way—in the agency proceedings, which . . . Fasken did by seeking intervention and filing contentions." NRC App. 17a; *see also* NRC Pet. 12-13 (equating "party" status with participation); *cf. Truck Ins. Exch. v. Kaiser Gypsum Co.*, 144 S. Ct. 1414, 1424 (2024) ("[t]he plain meaning" of the phrase "party in interest" is "entities that are potentially concerned with or affected by a proceeding").

Petitioners do not seriously argue otherwise. ISP concedes (at 11) that, "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*" (emphases added). Because Fasken attempted to become a party to the Commission proceedings, the Fifth Circuit had jurisdiction to entertain Fasken's petition even on ISP's view. The Commission likewise concedes (at 12) that "[t]he courts of appeals (including the Fifth Circuit) have accordingly concluded that . . . actual[] participat[ion] in the agency proceeding" is sufficient for party status.[15] Because Fasken participated, the Fifth Circuit properly exercised jurisdiction.

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[15] The government's reliance (at 13) on 28 U.S.C. § 2348 is misplaced. That section supports Fasken because it was a "party in interest in the proceeding before the agency" and could therefore petition for review of the Commission's order "as of right." 28 U.S.C. § 2348. Section 2348 further provides that other entities "whose interests are affected by the order of the agency[] may intervene" in court proceedings. *Id.* That rule applies if an entity

Although the Commission is correct (at 14) that the D.C. Circuit sometimes has applied a more demanding rule, it has not always done so. As the Fifth Circuit explained, D.C. Circuit authorities equally support a conclusion that Fasken was a "party aggrieved." NRC App. 35a-40a (Jones, J., concurring in the denial of rehearing en banc). Both circuits recognize that "party" status must be interpreted flexibly considering the nature of the administrative proceeding.

The D.C. Circuit's contrary conclusion in *Don't Waste Michigan* lacks a supporting rationale. That court held "party" status was lacking because an interested person tried to intervene, but the Commission denied intervention. *Don't Waste Michigan v. U.S. NRC,* 2023 WL 395030, at *3 (D.C. Cir. Jan. 25, 2023) (per curiam). As applied here, that rule would mean "the NRC controls the courthouse door." NRC App. 33a-34a (Jones, J., concurring in the denial of rehearing en banc).[16] Neither case cited by the D.C. Circuit supports its holding. In *Water Transportation Association v. ICC*, the D.C. Circuit held an interested person *was* a "party." *See* 819 F.2d 1189, 1192 (D.C. Cir. 1987). And in *Ohio Nuclear-Free Network v. U.S. NRC*, the interested person did not even try to intervene. The court therefore did not need to decide whether successful intervention was required for

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has eschewed participation in the agency proceeding altogether, which is not the case here.

[16] In *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984) – which the Commission cites to undermine the *ultra vires* rule (at 14) – the agency did not argue that *no court* had the power to review its orders. Rather, this Court held that a district court lacked jurisdiction to enjoin the agency's action as *ultra vires* in part *because* appellate review was "[t]he appropriate procedure for obtaining judicial review." 466 U.S. at 468.

"party" status under the Hobbs Act. *See* 53 F.4th 236, 239 (D.C. Cir. 2022).

No other analysis supports the D.C. Circuit's ruling in *Don't Waste Michigan*, and the Commission's attempt to backfill fails. The dictionary definition cited by the Commission confirms Fasken is a "party aggrieved" because the Commission's order directly and injuriously affected its rights. *See* NRC Pet. 12 (defining "[p]arty aggrieved" as "one whose right has been directly and injuriously affected by action of court"). The Commission fails to mention that the above definition is the one the dictionary says applies "[u]nder statutes permitting any party aggrieved to appeal." *Party*, *Black's Law Dictionary* 1278 (4th ed. 1951). And although the Commission correctly observes that the dictionary defines "party" to mean "he or they by or against whom a suit is brought," it fails to mention the dictionary's cautionary note that "'[p]arty' is not restricted to strict meaning of plaintiff or defendant in a lawsuit" and instead can be "defined as one concerned in or privy to a matter." *Id.* Indeed, the United States argued just months ago that a similar phrase – "party in interest" – "is *broad* and refers to *a participant* in an action or affair that is concerned with or affected by its potential effects." U.S. Amicus Br. 13, *Truck Ins. Exch. v. Kaiser Gypsum Co.*, No. 22-1079 (U.S. Dec. 14, 2023) (emphases added). *Simmons v. ICC* does not help the Commission, either. *See* NRC Pet. 12 (citing 716 F.2d 40, 43 (D.C. Cir. 1983) (Scalia, J.)). Its statement that the Hobbs Act refers "to a party before the agency, not a party to the judicial proceeding," 716 F.2d at 43, leaves unanswered the question *who* was a party before the agency, which was the issue the Fifth Circuit considered.

Finally, the Tenth Circuit's *Balderas* case does not hold that a person successfully must intervene in a

licensing proceeding to attain party status. There, New Mexico did not try to intervene in the licensing proceeding. *See New Mexico ex rel. Balderas v. U.S. NRC*, 59 F.4th 1112, 1117-19 (10th Cir. 2023). The Tenth Circuit therefore did not need to decide whether intervention was needed for "party" status. As Judge Jones noted, "[g]iven the breadth of NRC's statutory charge to allow 'affected persons' to be made 'parties,' it seems paradoxical to resort to the Hobbs Act to disable Fasken and Texas from judicial review by agency fiat." NRC App. 35a (Jones, J., concurring in the denial of rehearing en banc).

Fasken's party status here is especially clear because the Commission reached the merits of Fasken's contentions. *Cf. Truck Ins.*, 144 S. Ct. at 1427 (rejecting doctrine that "conflates the merits of an objection with the threshold party in interest inquiry"). Assigning weight to the fact that the Commission reached the merits *when denying Fasken intervention* (as opposed to first granting intervention and then denying Fasken's contentions) elevates form over substance. *Cf. Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 739 (1985) (holding court of appeals had jurisdiction to review the Commission's order in licensing proceeding under Hobbs Act – even though the Commission refused citizen petitioner a hearing – because "Congress decided on the scope of judicial review . . . solely by reference to the subject matter of the Commission action and not by reference to the procedural particulars of the Commission action").

Independently, the Fifth Circuit did not err in hearing Fasken's argument that the NRC acted *ultra vires*. In the Fifth Circuit, "a person may appeal an agency action even if not a party to the original agency proceeding . . . if the agency's action is attacked as exceeding [its] power." *American Trucking Ass'ns,*

Inc. v. ICC, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam); *accord Wales Transp.*, 728 F.2d at 776 n.1.

That rule draws support from Supreme Court precedent. In *Leedom v. Kyne*, this Court said it will not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. 184, 190 (1958). It held federal district courts have jurisdiction if an agency acts "in excess of its delegated powers *and* contrary to a specific [statutory] prohibition." *Id.* at 188 (emphasis added).

That principle applies here. The Commission's license grant exceeded its delegated powers under the AEA and the NWPA. The Fifth Circuit's exercise of jurisdiction thus fits comfortably under *Leedom*.

This Court's decision in *Board of Governors v. MCorp Financial, Inc.* is not to the contrary. *See* 502 U.S. 32, 43-44 (1991). There, the Court declined to exercise jurisdiction under *Leedom* because (1) the relevant statute gave the party challenging agency action "a meaningful and adequate means" to do so, and (2) "Congress ha[d] spoken clearly and directly" that other means of challenging agency action were precluded. *Id.* Here, both factors counsel in favor of exercising jurisdiction. "[T]he [Commission's] interpretation of the [AEA and the Hobbs Act] would wholly deprive [Fasken] of a meaningful and adequate means of vindicating its statutory rights" because the Commission denied intervention to interested persons. *Id.* Neither the AEA nor the Hobbs Act purports to preclude other means of challenging the Commission's actions. Accordingly, the Fifth Circuit correctly exercised jurisdiction over Fasken's petition.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

ALLAN KANNER
ANNEMIEKE M. TENNIS
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
(504) 524-5777

MONICA RENEE PERALES
FASKEN LAND AND MINERALS, LTD.
6101 Holiday Hill Road
Midland, TX 79707
(432) 687-1777

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
MATTHEW J. WILKINS
RYAN M. FOLIO
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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