No. 23-1312

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

REPLY BRIEF FOR PETITIONER INTERIM STORAGE PARTNERS, LLC

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REPLY BRIEF FOR PETITIONER INTERIM STORAGE PARTNERS, LLC

Interim Storage Partners, LLC ("ISP") respectfully submits the following reply in support of certiorari. The petition should be granted for the reasons set forth in the petition, and below.

First, the circuit splits here are plain, contrary to the protestations of the respondents. Respondents cannot credibly dispute that the Fifth Circuit decision in this case presents deliberate splits with the Second, Seventh, Tenth, and Eleventh Circuits with regard to the "*ultra vires*" exception to the Hobbs Act pursuant to which the Fifth Circuit heard the case at all, and with the D.C. and Tenth Circuits with regard to the NRC's authority under the Atomic Energy Act and Nuclear Waste Policy Act to issue the license for temporary possession of spent nuclear fuel at issue. Indeed, the Fifth Circuit admitted as much, and the D.C. Circuit recently reaffirmed its views regarding the AEA.

Second, on the merits, respondents are not able to persuasively defend the aberrant Fifth Circuit decision here. With regard to the AEA, both respondents present tortured atextual constructs to try to justify the result, with the State Respondents relying upon purported "common sense" (State Op. 30) and the Fasken Respondents positing a new unstated "productive use" limitation on portions of the statute (Fasken Op. 14), and both sets of respondents insisting that "at-reactor" storage of spent nuclear fuel is perfectly fine under the AEA, but "away-from-reactor" storage is not, when the actual statute itself says nothing of the sort.

With regard to the NWPA, the Fifth Circuit held that the NWPA "doesn't permit" privately-owned,

away from reactor storage (ISP App. 30a), but the Fasken Respondents acknowledge that "the NWPA contains no provisions specifically addressing privately owned, away-from-reactor storage." Fasken Op. 5. It is hard to conjure a more definitive admission that the court's ruling was in error.

Third, neither respondent seriously disputes the importance of this case, and the consequent need for a correct result. To the contrary, respondents emphasize, for example, the "tremendous economic significance" of the case. Fasken Opp. 15. Neither respondent persuasively addresses, much less rebuts, the industry's conclusion that the decision here "will have far-reaching and destabilizing consequences for the nuclear industry," if allowed to stand. Amicus Nuclear Energy Institute Br. 3-4.

For all of these reasons, the petition for a writ of certiorari should be granted.

A. The Fifth Circuit In This Case Clearly and Admittedly Split with Multiple Other Circuits on Multiple Substantial Issues

1. The Fasken respondents urge that the Fifth Circuit's deliberate departure from the D.C. Circuit in *Bullcreek* and the from the Tenth Circuit in *Skull Valley* is an "illusory" circuit split regarding the AEA. Fasken Op. 11. That is not what the Fifth Circuit said—it fully considered those decisions, but declined to follow them because it found them "unpersuasive" and "unhelpful." ISP App. 24a, 26a. When one circuit court disagrees with the rationale, approach, or reasoning of another circuit court, and therefore decides to reach a contrary result on the same issue, that is a circuit split, plain and simple. There can be no doubt

that the D.C. and Tenth Circuits have, necessarily and on multiple occasions, held that the AEA authorizes the NRC to issue a license to a private party to possess spent nuclear fuel at an away-from-reactor site. *Bullcreek* v. *NRC*, 359 F.3d 536, 538-539 (D.C. Cir. 2004); *Don't Waste Mich.* v. *NRC*, No. 21-1048, 2023 WL 395030, at *1 (D.C. Cir. Jan. 25, 2023) (per curiam); *Skull Valley Band of Goshute Indians* v. *Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004); *State ex rel. Balderas* v. *NRC*, 59 F.4th 1112, 1122 (10th Cir. 2023). Indeed, just recently, the D.C. Circuit reaffirmed its rulings in unmistakable terms, stating unequivocally that the AEA authorized the NRC to "license the storage of spent nuclear fuel at onsite and away-from-reactor storage facilities," and that in administrative proceedings the NRC had "easily rejected" the contrary argument, upon the authority of *Bullcreek*. *Beyond Nuclear, Inc.* v. *NRC*, No. 20-1187, 2024 WL 3942343, at *3, *4 (D.C. Cir. Aug. 27, 2024) (Rao, J.). In this case, the Fifth Circuit declined to follow the D.C. and Tenth Circuits, and instead held the opposite of what those circuits did. That is a "real" and actual circuit split.

2. With regard to the NWPA, neither respondent even tries to argue that the Fifth Circuit's holding that the statute "doesn't permit" away-from-reactor storage of spent nuclear fuel by private parties is anything but a clear split with the D.C. and Tenth Circuits' holdings to the contrary regarding the NWPA. See *Balderas*, 59 F.4th at 1115; *Bullcreek*, 359 F.3d at 538-539; *Skull Valley,* 376 F.3d at 1232.

3. With regard to the "*ultra vires*" exception pursuant to which the Fifth Circuit exercised jurisdiction,

the respondents argue that they should be given one free pass, or that it is a no-never-mind, but do not dispute that the decision in this case departs from the considered judgments of the Tenth, Eleventh, Second, and Seventh Circuits. *Balderas*, 59 F.4th at 1123-1124; *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 Transp. 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).

4. With regard to the Fifth Circuit's Hobbs Act *dicta*, it also cannot be disputed that consideration of that *dicta*, as respondents urge, would merely lead to another pernicious split with the D.C. and Tenth Circuits. The Fifth Circuit itself so recognized. ISP App. 18a. And, again, the D.C. Circuit has recently reaffirmed its views regarding Hobbs Act requirements. *Beyond Nuclear, Inc.*, 2024 WL 3942343, at *2.

5. Both sets of respondents repeatedly cite *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024). *E.g.*, State Op. 12, 18, 20; Fasken Op. 15, 27. That reliance is misplaced. Most importantly for these purposes, <u>*not a single one*</u> of the above-cited other-circuit cases from which the Fifth Circuit departed—on the AEA, the NWPA, the "ultra vires" exception, or the Hobbs Act—turned upon or applied *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Respondents' invocation of *Loper Bright* is a red herring in this case, and does not cast

doubt upon the propriety of certiorari to resolve the multiple actual circuit splits presented.

B. Respondents' Merits-Based Arguments Miss the Mark

1. The State Respondents' authority arguments are not well founded, nor grounded in any supporting statutory text. They urge that the AEA provisions addressing the three constituent elements of spent nuclear fuel (*i.e.*, 42 U.S.C. 2073(a)(4), 2093(a)(4), and 2111(a)) are inapplicable because they do not use the defined term "spent nuclear fuel," that the "facilities license provisions don't supply that authority" to possess spent nuclear fuel, and that a "materials license" also does not allow for a party to possess spent nuclear fuel. State Op. 22, 28, 29. *In other words, that no one could ever lawfully possess spent nuclear fuel, anywhere.* Perhaps recognizing that that cannot be right, the State Respondents then invoke what they contend to be "common sense" to allow a nuclear power plant operator to be able to withdraw fuel from a nuclear reactor following irradiation and hang onto it. *Id.* at 30 (citing the definition of spent nuclear fuel at 42 U.S.C. 10101(23)). But, say the State Respondents, that nuclear power plant operator is then required to keep the spent nuclear fuel on its site. Well, where is all of that in the statute? It is, of course, not there—there is no prohibition in the AEA on "away-from-reactor" storage of spent nuclear fuel, and it is error for the respondents to read such a prohibition into it.

2. The Fasken Respondents are similarly unable to present a cogent or supportable interpretation of the AEA to support their argued prohibitions. They hew a bit closer to what the Fifth Circuit actually did, but

still introduce unsupported and atextual restrictions in order to try to reach their desired result. That is, the Fasken Respondents say that the purposes of the licenses that may be issued for possession of "special nuclear material," "byproduct material," and "source material" are limited to the type of specific enumerated uses in 42 U.S.C. 2073(a)(1)-(3) and 2093(a)(1)-(3) (although they differ with the Fifth Circuit regarding what that purported commonality is). The discretionary grants of authority to the NRC in sections 2073(a)(4) and 2093(a)(4) are not, according to the Fasken Respondents, informed by the broadly stated congressional purposes and goals of the AEA itself, but, rather, constrained by *ejusdem generis* and the purported requirement that only "active, productive uses" of spent nuclear fuel are allowed to be licensed. Fasken Op. 14. Although the temporary storage of spent nuclear fuel that ISP proposes would facilitate the continued operation of nuclear power plants, that (according to the Fasken Respondents) is not an "active, productive use," as they define the mandatory condition that they made up.

The Fasken Respondents' constructs fail on many levels. For example, rather than giving effect to Congress' command that the NRC may issue licenses for special nuclear material "for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter," 42 U.S.C. 2073(a)(4) (emphasis supplied) (and where Congress has expressly spelled out the "purposes of this chapter," see ISP Pet. 6-7), the Fasken Respondents would instead re-write the statute to say it provides licensing authority "for such other uses as the Commission determines to be productive." That, however, is not what Congress said,

and that would read critically important provisions completely out of the AEA.

Ejusdem generis is also not a lifeline for the Fasken Respondents—application of that doctrine, as this Court held recently, requires a "long and detailed list of specific directions," with a common "link," *Harrington* v. *Purdue Pharma L. P.*, 144 S. Ct. 2071, 2082 (2024), neither of which are present in 42 U.S.C. 2073(a), 2093(a), nor 2111(a). Indeed—and tellingly—the Fasken Respondents actually reject the alleged commonality proffered by the Fifth Circuit, "namely for certain types of research and development" (ISP App. 22a), in favor of their newly-minted, alternative "active, productive use" construct. That divergence itself reveals the inapplicability *ejusdem generis* here, and requires rejection of the argument.

3. The State Respondents contend that "Congress denied the Commission's former chairman's request for the very authority the Commission now claims." State Op. (I), 3, 25. That is quite incorrect, and based upon misleading partial quotes from testimony included with NUREG-0527.[1] That document and the associated testimony were all about the Commission's then-authority to license a *DOE-owned facility*. Indeed, the very title of the document was "Report to Congress on Extending the Nuclear Regulatory Commission's Licensing or Regulatory Authority to

[1] Regulation of Federal Radioactive Waste Activities; Report to Congress on Extending the Nuclear Regulatory Commission's Licensing or Regulatory Authority to Federal Radioactive Waste Storage and Disposal Activities, NRC (Sept. 1979), https://www.nrc.gov/docs/ML19249E780.pdf. The State respondents did not invoke NUREG-0527 until their final reply brief before the panel—*i.e.*, ISP and the NRC were not able to respond in writing.

Federal Radioactive Waste Storage and Disposal Activities." (Emphasis supplied). The very same sentence from which the State Respondents derive their partial quote goes on to make clear that "waste facility licensing is currently implemented via licensing the possession of materials." The testimony further observes that "the Commission's authority to regulate waste under the Act is derived from its authority over licensing byproduct materials" (*id.* at G-9), and that the NRC did have existing authority over "the commercial storage of spent fuel which is licensed by the Commission." *Id.* at G-16. In sections regarding "Options for Extending NRC Authority" (*id.* at Section 4), there is not one word that suggests a lack of NRC authority over commercial away-from-reactor storage of spent nuclear fuel. It is telling that such a demonstrably erroneous assertion is such a centerpiece of the State Respondents' opposition.

4. The Fasken Respondents rely heavily on *West Virginia* v. *Environmental Protection Agency*, 597 U.S. 697 (2022). Fasken Op. 15-18. But, as ISP, the NRC, and amicus have explained, the circumstance of this case are the complete *opposite* of what this Court held in *West Virginia* to warrant application of heightened scrutiny of agency action. Here, there was nothing "unprecedented" in connection with the decades-old transparent exercise of the NRC's licensing authority. *West Virginia*, 597 U.S. at 711. 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. See ISP Pet. 19; NRC Pet. 26-27; Amicus Nuclear Energy Institute Br. 20-22.

5. The respondents' NWPA arguments can be dealt with swiftly: the Fifth Circuit held that the NWPA "doesn't permit" privately owned, away-from-reactor storage (ISP App. 30a), but even the Fasken Respondents admit that "the NWPA contains no provisions specifically addressing privately owned, away-from-reactor storage." Fasken Op. 5. To be clear: in all of the briefing in these cases to date, no respondent has ever pointed to any provision of the NWPA that bars the NRC from granting the sort of license at issue here. There is none.

6. Regarding the very ability of the Fifth Circuit to even hear the case, respondents argue that the "*ultra vires*" exception has not been widely or frequently applied, and that the Hobbs Act is not frequently the subject of litigation before this Court. State Op. 19; Fasken Op. 22. Those are facile arguments, and do not call the propriety of certiorari in this case into doubt.

The *reason* that the *ultra vires* exception has not been frequently applied or litigated is that—until the Fifth Circuit went off the rails in this case—the doctrine seemed destined to be relegated to the dustbin of history, where it belongs. But, the Fifth Circuit's express and consequential resurrection of the judge-made basis of jurisdiction changed all of that. Similarly, the *reason* that Hobbs Act jurisdictional cases have not been a significant part of this Court's historic docket is that—again, until the Fifth Circuit went off the rails in this case—the metes and bounds of the requirements were for the most part consistently understood and applied. There are hundreds of reported Hobbs Act challenges to agency action at the court of appeals level, and the scheme is the exclusive judicial

review provision for agency oversight of multiple critically important sectors of the economy, including the civilian nuclear power industry. It is absurd to suggest that the rules of the game for such consequential issues do not matter.

C. The Importance of Resolving the Multiple Circuit Splits and Correcting the Fifth Circuit's Consequential Errors in this Case Cannot Be Seriously Questioned

Finally, the severe impacts of the multiple circuit splits and the errors of the Fifth Circuit in the case are obvious and severe. Respondents essentially admit as much, but urge that, rather than this Court reversing the Fifth Circuit as it should, those harms are "policy matters" that should be taken up with Congress. Fasken Op. 21.

In their 66 pages of opposition, the respondents do not directly address the devastating impact that the uncertainty wrought by the Fifth Circuit's decision will have on the critically important, investment-intensive domestic nuclear power industry. That impact is starkly illustrated by this very case. ISP invested many years, and millions of dollars, in vigorously contested agency proceedings and a proper (albeit unavailing) Hobbs Act appeal, just in order to secure its license. All of that, however, was rendered for naught when Texas, after a change in state administrations and a reversal of position (from support to opposition), and a tactical decision to intentionally eschew the potential agency participation that was fully available to it, then swooped in and, with the help of the Fifth Circuit, had the license vacated. Such scenarios do not go unnoticed by the sort of substantial investors and

financial interests whose support is vital for a major portion of the nation's energy supply. And, that uncertainty does not attach just to this project or ones like it, but to any and all licensing decisions by the NRC regarding any type of project or nuclear undertaking. And, that does not even account for other major economic sectors subject to agency regulation with judicial review governed by the Hobbs Act, including agriculture, transportation, and communications.

The Fasken Respondents seek to downplay the potential uncertainty for existing away-from-reactor sites where spent nuclear fuel is stored by noting that many of those sites are where there used to be, but no longer is, an operating civilian nuclear power reactor. Fasken Op. 13. But, where is the "former-reactor site is permissible" exception to be found in the text of the AEA or the NWPA? There is, of course, no such thing. And, the actual demonstrable forum-shopping occasioned by the Fifth Circuit's decision in this case cannot be dismissed merely by labeling that the result of "geographical coincidence." *Id.* at 21. The challenge to a similar project in New Mexico could have been brought in either the Tenth or Fifth Circuits, but the petitioners chose the Fifth Circuit because of its aberrant rulings in this case as compared to those of the Tenth Circuit. *That is what forum-shopping is*. The circuit split that occasioned that strategy should be corrected by the Court.

In short, as the dissent to *en banc* review aptly and correctly observed, the Fifth Circuit's decision in this case is erroneous and has "grave consequences" for the civilian nuclear power and multiple other critical

industries. ISP App. 46a. A grant of a writ of certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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