

No. 23-1341

In the Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION,
ET AL., PETITIONERS

v.

FASKEN LAND AND MINERALS, LTD., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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Fasken agrees with the government (Br. in Opp. 1, 10-11) that, if the Court grants the petition for a writ of certiorari in *Nuclear Regulatory Commission v. Texas*, No. 23-1300 (filed June 12, 2024), the Court should hold this petition pending its decision in *Texas*. Three points warrant brief discussion.

First, Fasken asserts (Br. in Opp. 10) that the Court should ultimately deny the government’s petition in this case “for the same reasons explained in [Fasken’s brief in] opposition” in *Texas*. But the Fifth Circuit in *Texas* revitalized a circuit conflict on whether the party-aggrieved requirement in the Hobbs Act, 28 U.S.C. 2341 *et seq.*, is subject to a judge-made ultra vires exception, and the court created a circuit conflict on whether the Nuclear Regulatory Commission (Commission) is authorized to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites

where the spent fuel was generated. See Pet. at 27-31, *Texas, supra* (No. 23-1300); Reply Br. at 2-4, *Texas, supra* (No. 23-1300). The Fifth Circuit in *Texas* erroneously resolved both of those issues, and its flawed decision is likely to have significant consequences. See Pet. at 11-27, 29-31, *Texas, supra* (No. 23-1300); Reply Br. at 2-12, *Texas, supra* (No. 23-1300). Review in *Texas* is clearly warranted.

Second, the Fifth Circuit's decision in this case confirms the need for this Court's review in *Texas*. The panel in this case relied on both the justiciability and merits holdings in *Texas* to (1) review claims brought by a nonparty challenging a different licensing proceeding, and (2) vacate a license that authorized a different licensee (Holtec) to store spent nuclear fuel away from the site of a nuclear reactor. The decision below therefore illustrates the recurring nature of the questions presented in *Texas*.

Third, the D.C. Circuit's decision in Fasken's appeal from the Commission's denial of its intervention attempt confirms the need for this Court's review of the Fifth Circuit's ultra vires exception to the Hobbs Act's party-aggrieved requirement. Several groups, including Fasken, sought to intervene as parties in the Commission's adjudication of Holtec's license. See Pet. 6. Fasken and the other putative intervenors petitioned in the D.C. Circuit for review of the Commission's orders denying their requests to intervene. *Ibid.*; see Br. in Opp. 7. After Fasken filed its briefs in opposition (in *Texas* and in this case) in this Court, the D.C. Circuit issued its ruling on the intervention question, holding that the Commission had "complied with statutory and regulatory requirements when rejecting the requests to

intervene.” *Beyond Nuclear, Inc. v. U.S. Nuclear Regulatory Comm’n*, No. 20-1187, 2024 WL 3942343, at *1 (Aug. 27, 2024).

The decision in *Beyond Nuclear* reinforces the need for this Court’s review of the Fifth Circuit’s ultra vires exception. If the D.C. Circuit had held that Fasken should have been granted leave to intervene in the Commission proceedings regarding Holtec’s license, Fasken would have qualified as a “party” within the meaning of 28 U.S.C. 2344 with respect to that licensing adjudication. By instead upholding the Commission’s denial of intervention, the D.C. Circuit in *Beyond Nuclear* confirmed that the Fifth Circuit’s reliance on the ultra vires exception was necessary for that court to review Fasken’s challenge to the legality of the license in this case.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending this Court’s disposition of *Nuclear Regulatory Commission v. Texas*, No. 23-1300 (filed June 12, 2024), and then disposed of as appropriate.

Respectfully submitted.

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