# SUPREME COURT
# OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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NUCLEAR REGULATORY COMMISSION,     )

ET AL.,     )

         Petitioners,     )

        v.     ) No. 23-1300

TEXAS, ET AL.,     )

         Respondents.     )

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INTERIM STORAGE PARTNERS, LLC,     )

         Petitioner,     )

        v.     )  No. 23-1312

TEXAS, ET AL.,     )

         Respondents.     )

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Pages:  1 through 108

Place:  Washington, D.C.

Date:  March 5, 2025

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13   TEXAS, ET AL.,                   )

14                 Respondents.       )

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16                 Washington, D.C.

17            Wednesday, March 5, 2025

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19        The above-entitled matter came on for

20   oral argument before the Supreme Court of the

21   United States at 10:07 a.m.

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25

1    APPEARANCES:

2    MALCOLM L. STEWART, Deputy Solicitor General,

3        Department of Justice, Washington, D.C.; on behalf

4        of the Petitioners in Case 23-1300.

5    BRAD FAGG, ESQUIRE, Washington, D.C.; on behalf of the

6        Petitioner in Case 23-1312.

7    DAVID C. FREDERICK, ESQUIRE, Washington, D.C.; on

8        behalf of Respondent Fasken Land and Minerals,

9        Ltd.

10   AARON L. NIELSON, Solicitor General, Austin, Texas; on

11       behalf of Respondents Texas, et al.

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1                    C O N T E N T S

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1                    P R O C E E D I N G S

2                              (10:07 a.m.)

3           CHIEF JUSTICE ROBERTS:  We will hear

4    argument this morning in Case 23-1300, Nuclear

5    Regulatory Commission versus Texas, and the

6    consolidated case.

7              Mr. Stewart.

8           ORAL ARGUMENT OF MALCOLM L. STEWART

9      ON BEHALF OF THE PETITIONERS IN CASE 23-1300

10          MR. STEWART:  Thank you, Mr. Chief

11   Justice, and may it please the Court:

12             First, the petitions for review should

13   be dismissed because neither Texas nor Fasken

14   was a party to the NRC licensing proceedings.

15   Texas did not try to intervene in the agency

16   adjudication.  Fasken moved to intervene, but

17   its request was denied, and the D.C. Circuit

18   affirmed the denial.  And there is no sound

19   basis for the Fifth Circuit's ultra vires

20   exception to the Hobbs Act's "party aggrieved"

21   requirement.

22             If the Court reaches the merits, it

23   should reverse the court of appeals' judgment.

24   The Atomic Energy Act prohibits the unlicensed

25   possession of spent nuclear fuel's constituent

1      parts while authorizing the Commission to

2      license private interim storage of those

3      substances.  The Nuclear Waste Policy Act left

4      that scheme intact.  And, since 1980, the NRC's

5      regulations have provided for both onsite and

6      offsite storage.  That system allows a

7      substantial role for private market responses to

8      the country's nuclear waste storage issues,

9      subject to Commission oversight to ensure that

10      storage is safe and consistent with statutory

11      requirements.

12                  I welcome the Court's questions.

13                  JUSTICE THOMAS:  Mr. Stewart, what

14      does it take to be a party in these proceedings?

15                  MR. STEWART:  In an adjudication, you

16      would need to intervene, and the Commission's

17      rules set out the process for intervention.

18                  JUSTICE THOMAS:  So when can a

19      party -- when can an interested person

20      intervene?

21                  MR. STEWART:  The -- the Commission's

22      rules set out two requirements.  One is that --

23      basically, a standing requirement, and that is,

24      essentially, that you be an interested person,

25      that your interests be affected by the outcome.

1    And, second, the Commission's rules require

2    what's called an admissible contention.

3        And the rules were changed in 1990.

4    The changes were upheld by the D.C. Circuit.

5    And, basically, the problem the Commission had

6    confronted was that it would get requests to

7    intervene accompanied by very vague assertions.

8        JUSTICE THOMAS:  But -- so, aside from

9    the substance, when can you intervene?  When can

10   an interested person intervene?

11       MR. STEWART:  Essentially, the

12   Commission will issue notice that a licensing

13   proceeding is -- is under way or will soon be

14   under way, and then it will give a certain

15   amount of time for part --

16       JUSTICE THOMAS:  How much?  How much

17   time?

18       MR. STEWART:  I think it was 60 or 90

19   days to give notice of your intent to intervene.

20   And then there were written submissions.  The

21   Atomic Safety and Licensing Board passed in the

22   first instance on various requests to intervene.

23   And then there was an appeal available to the

24   full Commission.  And then Fasken sought

25   judicial review of the Commission's denial of

1    its request to intervene.

2              JUSTICE KAGAN:  The regulation that

3    you cited, how is that supported by the

4    statutory language?

5              MR. STEWART:  The D.C. Circuit in the

6    case Union of Concerned Scientists that I

7    referred to a moment ago, I think it's in 920

8    F.2d, said that this was an aspect of agencies'

9    traditional broad authority to regulate their

10   own procedures.  And as -- as I --

11             JUSTICE KAGAN:  Because it goes -- it

12   seems to go beyond the statutory language

13   itself.  Is that correct?  Do you agree with

14   that?

15             MR. STEWART:  I -- I agree that the

16   statutory language in itself would not impose

17   this requirement.  And -- and the Commission's

18   prior rules had not done so.  The -- the --

19             JUSTICE GORSUCH:  And in looking at

20   the statutory language, Mr. Stewart, it says

21   that any person who requests a hearing and their

22   interests are affected shall be admitted.

23   That's a mandatory obligation as I read it.

24             MR. STEWART:  Yeah.

25             JUSTICE GORSUCH:  And Fasken, their

 1      interest is affected and they requested a

 2      hearing.  Those -- those things are undisputed,

 3      right?

 4              MR. STEWART:  Yes.

 5              JUSTICE GORSUCH:  So --

 6              MR. STEWART:  I -- I --

 7              JUSTICE GORSUCH:  -- help me with

 8      Justice Kagan's question.

 9              MR. STEWART:  -- I guess I would --

10      I -- the two things I would say were, first,

11      when Fasken appealed to the D.C. Circuit from

12      the denial of its request to intervene, it

13      didn't make the argument that the Commission's

14      rules were invalid or it had a statutory right

15      to --

16              JUSTICE GORSUCH:  Well, it said it had

17      a statutory right to intervene.  And I -- I read

18      the D.C. Circuit opinion.  It didn't address

19      that argument at all.

20              MR. STEWART:  It -- it has said that

21      it has a right to intervene, but it was

22      asserting that right under the Commission's own

23      rules.  And I guess the second thing I would say

24      is, at most, the argument you're suggesting

25      would imply that Commission -- that Fasken ought

1      to have been allowed to intervene, it ought to

2      have been made a party.

3              But the fact is it wasn't --

4              JUSTICE KAGAN:  He could have thought

5      it was futile given the D.C. Circuit precedent

6      on the question, yes?

7              MR. STEWART:  It -- well, it -- it

8      could have thought -- the -- the arguments that

9      Fasken made were actually that it was entitled

10     to intervene under the Commission's own rules.

11     It was not arguing that the rules imposed an

12     invalid extra-statutory requirement.  So it had

13     no reason to think that --

14             JUSTICE GORSUCH:  Well --

15             MR. STEWART:  -- that that was

16     invalid, but --

17             JUSTICE GORSUCH:  -- actually, I --

18     I -- I've got it before me, and it says that

19     they're entitled -- that they act -- NRC abused

20     its discretion and acted arbitrarily and

21     capriciously in an excess of statutory

22     jurisdiction by not admitting them.  It -- and

23     it goes on to talk about the policies and

24     regulations, but it cites the statute in its

25     petition for review.  And, again, the D.C.

1      Circuit didn't address it.

2              MR. STEWART:  I guess the other thing

3      I would say is they could have sought en banc

4      review.  They could have sought certiorari

5      review.  And what they are in essence doing --

6              JUSTICE GORSUCH:  Is your argument

7      essentially one from issue preclusion then?  Is

8      that -- is that the nature of your argument,

9      that -- that that was litigated in another forum

10     and, therefore, that they're bound by it?

11             MR. STEWART:  I think yes in the sense

12     that --

13             JUSTICE GORSUCH:  Okay.  If it is

14     issue preclusion then, you didn't argue issue

15     preclusion below.

16             MR. STEWART:  Well, what -- what we

17     have argued --

18             JUSTICE GORSUCH:  And you haven't

19     argued it here.

20             MR. STEWART:  Well, what -- we have

21     not put the issue preclusion label on it.  We

22     did say in our reply brief they can't

23     collaterally attack the D.C. Circuit's decision

24     upholding the denial of intervention.  But we --

25             JUSTICE GORSUCH:  Isn't it your burden

1        to show that issue preclusion applies?

2                MR. STEWART:  Well, we -- I mean, I

3        think it would be our -- our burden --

4                JUSTICE GORSUCH:  Isn't that normally

5        the case, that -- that the party seeking issue

6        preclusion has to bear the burden of proving it?

7                MR. STEWART:  I think what -- what

8        they have -- our focus has always been on the

9        fact that they did not, in fact, become parties.

10       And Fasken has never contested that.

11               JUSTICE GORSUCH:  Yeah.  But can you

12       ask -- answer my question, though, that a

13       party -- a party seeking issue preclusion bears

14       the burden of proving it?

15               MR. STEWART:  Yes, typically so.

16               JUSTICE JACKSON:  Mr. Stewart, can you

17       explain this issue preclusion?  What is your

18       understanding of Justice Gorsuch's question?

19       Because I -- I'm not sure I -- I see it as issue

20       preclusion, so help me to figure that out.

21               MR. STEWART:  Well, I think the

22       question -- if the question is -- first, our

23       position would be the question should be, did

24       Fasken, in fact, intervene in the proceedings

25       and become a party?  And it didn't.  But, even

1     if the question is should Fasken have been

2     allowed to intervene, did Fasken -- was Fasken

3     improperly denied a right to intervene that it

4     had under the statute, the D.C. Circuit resolved

5     that issue against it, and it didn't seek direct

6     review of that determination either before the

7     en banc D.C. Circuit or before this Court.

8                JUSTICE JACKSON:  And I guess, for us

9     to consider that to be issue preclusion that has

10    some bearing on this proceeding, we would be

11    suggesting that a party could make some sort of

12    a collateral challenge to their party status

13    through this route?

14                In other words, you're -- you're --

15    you're saying, procedurally, the D.C. Circuit

16    made a ruling about whether or not Fasken was

17    entitled to intervene.  They did not -- they,

18    Fasken, did not seek rehearing en banc, did not

19    seek cert, but I suppose, to the extent now that

20    we are considering their party status, I guess,

21    there's a suggestion that maybe they should be

22    able to raise that issue in this proceeding?

23                MR. STEWART:  Yes, and I -- I think

24    that's not the way it would work in -- in

25    district court litigation.  For instance, if a

1      party moved to intervene in a district court

2      proceeding and was denied intervention, if it

3      wanted to become a party, it would need to

4      appeal from the denial of intervention.

5                And if it appealed from the denial of

6      intervention and lost again in the court of

7      appeals, it couldn't simply take an appeal from

8      the district court's ultimate merits ruling and

9      ask the court on that appeal to hold that the

10     prior decision denying it leave to intervene had

11     -- had been erroneous.

12                JUSTICE JACKSON:  Thank you.

13                CHIEF JUSTICE ROBERTS:  Counsel, we

14     don't normally require parties to seek en banc

15     review or seek cert before -- and -- and forfeit

16     rights at the expense of not doing so.  I would

17     hate to say the rule is you've got to seek cert

18     every time you want this type of thing to be

19     applied.

20                MR. STEWART:  Well, I think what

21     they -- what Fasken is essentially attempting to

22     do here at least in part is to ask the Court in

23     this proceeding to rule on the question of

24     whether it had a statutory right to intervene

25     and whether it was wrongly denied a review.

    1          And if Fasken thinks that's the sort

    2    of issue that warrants the -- this Court's

    3    attention, then it should have sought --

    4          CHIEF JUSTICE ROBERTS:  Well, I

    5    mean --

    6          MR. STEWART:  -- this Court's review

    7    directly.

    8          CHIEF JUSTICE ROBERTS:  Well, I mean,

    9    maybe it doesn't think it warrants this Court's

   10    attention because there's no split or the usual

   11    criteria that we have for cert, but I -- I don't

   12    think it's part of an exhaustion requirement

   13    that you've got to seek en banc review and

   14    certiorari.  That's pretty -- I mean -- I mean,

   15    I think that's unusual.  Those remedies are

   16    strictly limited and may not at all be

   17    applicable to what is nonetheless a perfectly

   18    valid legal claim.

   19          MR. STEWART:  Well, I think, in -- in

   20    general, if -- if you have a court of appeals

   21    decision that come outs -- comes out against you

   22    and you want the court in some future proceeding

   23    to kind of behave on the assumption that that

   24    decision was wrong, you really need to seek

   25    whatever form of review is available at that

 1      time rather than ask the court in the subsequent

 2      proceeding to -- to hold that the former court

 3      got it wrong.

 4                JUSTICE SOTOMAYOR:  What happens in a

 5      normal --

 6                JUSTICE ALITO:  Why should --

 7                JUSTICE SOTOMAYOR:  I'm sorry.

 8                JUSTICE ALITO:  Go ahead.

 9                JUSTICE SOTOMAYOR:  What happens in a

10      normal litigation?  Let's assume it's not an

11      agency.  There's a motion to intervene by a

12      party.  Are they required to appeal?

13                MR. STEWART:  Yes.  If they -- if they

14      want to become parties, they -- if they are

15      denied intervention, then -- and they want to

16      have the rights and obligations that go with

17      party status in the underlying litigation, they

18      would need to appeal from the denial of

19      intervention.

20                And if they lost there, they couldn't

21      take an appeal from the merits judgment in the

22      case and essentially ask for a second bite at

23      the apple, ask the court of appeals in the

24      merits appeal to revisit the question of whether

25      intervention should be granted.

1           JUSTICE SOTOMAYOR:  We would never --

2           JUSTICE ALITO:  Why should --

3           JUSTICE SOTOMAYOR:  -- have any ending

4    to litigation if parties who want to intervene

5    could come in at any point in time, even after

6    judgment, raising new issues, when they weren't

7    parties below?

8           MR. STEWART:  Yes.

9           JUSTICE ALITO:  Why shouldn't Fasken

10   have been allowed to intervene?  If this had

11   been a civil proceeding, he certainly would have

12   met the requirements for intervention, would

13   he -- would it not?

14           MR. STEWART:  Yes.

15           JUSTICE ALITO:  If this was a -- if

16   this --

17           MR. STEWART:  Yes.

18           JUSTICE ALITO:  He meets -- he would

19   meet Rule 24, right?

20           MR. STEWART:  Yes.  He --

21           JUSTICE ALITO:  So why -- why was he

22   kept out of this?

23           MR. STEWART:  Basically, because

24   the -- the Commission or the -- yeah, the --

25   first, the Atomic Safety and Licensing Board and

1    then the Commission found that he had -- found

2    that Fasken had failed to raise a genuine issue

3    of law or fact.

4              And it's important to realize that the

5    issues that Fasken was trying to raise as an

6    intervenor were very different from the one that

7    is at issue now.

8              Fasken was not arguing at that stage

9    that the NRC lacked statutory authority to

10   license offsite storage.  It was making much

11   more fact-specific environmental objection --

12   asserting much more fact-specific environmental

13   objections to the project.

14             JUSTICE SOTOMAYOR:  Did the State

15   raise the issue it's raising today in any of the

16   proceedings below?

17             MR. STEWART:  Not -- not in the agency

18   proceedings.  It raised the -- the statutory

19   argument in the court of appeals but not the

20   end --

21             JUSTICE SOTOMAYOR:  Not before the

22   agency?

23             MR. STEWART:  And the -- the -- the

24   State didn't even attempt to intervene in the

25   agency licensing proceeding.

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1              JUSTICE SOTOMAYOR:  And they have an
2    absolute right to intervene?
3              MR. STEWART:  They don't have an
4    absolute right to intervene.  They -- they
5    have -- there are more, I would say, forgiving
6    or more hospitable standing requirements for the
7    State, but the State still has to identify an
8    admissible contention under the NRC's
9    intervention rules.
10             JUSTICE JACKSON:  Would you say that
11   one of the purposes of the party requirement in
12   the Hobbs Act is to ensure that issues are
13   raised before the agency?
14             MR. STEWART:  It would say that as a
15   purpose.  I would also have to concede that the
16   purpose is achieved imperfectly because the
17   Hobbs Act doesn't have what is sometimes
18   referred to as an issue-exhaustion requirement.
19   That is, the Hobbs Act requires that you be a
20   party, but at least under the terms of the
21   statute, there is no requirement that, as a
22   party, you raise the same issue that you want to
23   raise in court.
24             JUSTICE GORSUCH:  Mr. -- Mr. Stewart,
25   I understand your argument to be that the "party
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1      aggrieved" language in the Hobbs Act is narrower

2      than the "person adversely affected" language in

3      the APA, is that right?

4           MR. STEWART:  Yes.

5           JUSTICE GORSUCH:  Would anything

6      prohibit Fasken or Texas from bringing an APA

7      challenge in district court under -- as -- as

8      persons aggrieved?

9           MR. STEWART:  I -- I think the

10     exclusive review scheme of the Hobbs Act

11     would -- would do that, unless the Court

12     concluded for some reason that the Hobbs Act

13     review scheme was inadequate and that the

14     exclusivity of the -- the court of appeals

15     review scheme should be accepted for that --

16     made an exception to for that reason.

17          JUSTICE GORSUCH:  Okay.  The -- the

18     ultra vires argument perhaps could be brought

19     there, you think?

20          MR. STEWART:  I -- I don't think ultra

21     vires really maps on to what the Court has

22     looked to at least recently because the ultra

23     vires exception turns on kind of how -- how bad

24     is the agency error alleged to be or did it

25     represent a -- an exercise of authority that the

1    agency doesn't have.

2              Whether that is so or not doesn't

3    really speak to the question whether the Hobbs

4    Act review mechanism would be adequate to

5    address the sort of error.

6              If I may, I'd like to address the

7    merits.

8              JUSTICE KAGAN:  If I could ask you one

9    more, Mr. Stewart?

10             MR. STEWART:  Sure.

11             JUSTICE KAGAN:  I mean, I take your

12   point that the issue before us is not whether

13   there was proper intervention here, whether the

14   intervention should have been given.

15             But still, isn't it a little bit odd

16   to say that the agency whose -- whose action is

17   being challenged in court has so much control by

18   virtue of its regulatory -- its -- its -- its

19   regulations on intervention to dictate who gets

20   to challenge the action?

21             MR. STEWART:  Well, I think the

22   agencies will always have some control.  So, for

23   instance, if you need -- if you have to comply

24   with agency rules in notice-and-comment

25   proceedings in order to file suit in court, the

1      agency may say:  Submit comments within 90 days

2      and submit them to the following e-mail address.

3      And if you try to submit comments, but they're

4      untimely or they go to someone else, that may

5      affect the court's review authority.

6                  The other thing I would say in this

7      particular setting is there was an alternative

8      route available that didn't -- for judicial

9      review of the current statutory claim that

10     didn't require intervention in the licensing

11     proceedings.

12                 Fasken or Texas could have filed a

13     petition for rulemaking, and it could have asked

14     under the Commission's rules that the licensing

15     proceeding be set -- be held in abeyance.

16                 And that's not just a theoretical

17     option if the papers are -- on the merits are

18     full of references to the D.C. Circuit's

19     decision in Bullcreek, which about 20 years ago

20     upheld the Commission's statutory authority to

21     license offsite storage of spent nuclear fuel.

22                 And that was the procedural route that

23     the State of Utah took to get to the -- the D.C.

24     Circuit.  It filed a petition for rulemaking

25     asking that the Commission rules that authorize

1    offsite storage be modified because they were

2    inconsistent with the statute.  The Commission

3    denied that petition.  And Utah filed a petition

4    for review of that denial in the D.C. Circuit.

5         And they didn't get the merits outcome

6    they want -- wanted, but they got plenary

7    judicial review of the merits question:  Did the

8    Commission have the statutory authority that it

9    claimed?  And I --

10        JUSTICE GORSUCH:  Mr. Stewart, on the

11   merits, I do have a question for you.

12        So Yucca Mountain was supposed to be

13   the permanent solution.  Congress so ordained --

14   I think it said it had to be done by 1998.  No

15   president has complied with that in all the

16   years since.  We've spent something like $15

17   billion on it.  It's a hole in the ground.  And

18   you parties seem to think the Yucca Mountain

19   project is dead.

20        And if that's true and there's no

21   different permanent repository, how is this

22   interim storage that the government is

23   authorizing here in any meaningful sense and

24   especially when I think ISP is given a 40-year

25   license?  That doesn't sound very interim to me.

1           MR. STEWART:  Well --

2           JUSTICE GORSUCH:  And it's renewable

3    too apparently.

4           MR. STEWART:  It -- it is renewable.

5    If -- if they applied for a renewal of the

6    license, there would be a new Commission

7    adjudication.  And to the extent that --

8           JUSTICE GORSUCH:  Forty years from

9    now.

10          MR. STEWART:  Forty years from now.

11   And to the extent there were changed

12   circumstances that cast doubt on the -- the

13   propriety of this arrangement, the Commission

14   would be able to -- to speak to that.

15          I -- I don't mean to seem glib, but

16   the -- the repository is intended to keep

17   nuclear waste stored safely for a temp --

18          JUSTICE GORSUCH:  Yeah.  On -- on a --

19   on a concrete platform in the Permian Basin,

20   where we get our oil and gas from.  So,

21   hopefully, we won't have radiated oil and gas.

22          MR. STEWART:  And, of course, that was

23   an objection that the -- the State and Fasken

24   made.  But that -- that's not the question that

25   is before the Court today.

1          The -- the other -- the other point I

2     would make about kind of who bears

3     responsibility for the delay and what we should

4     do about it is that the -- the people who

5     absolutely don't bear responsibility for the

6     delay are people like ISP, people -- private

7     enterprises who are trying to come up with

8     interim solutions to the -- the nuclear waste

9     storage dilemma.

10          And it's -- it's not that the

11     Commission decided itself that this facility

12     would be located in west Texas.  ISP came up

13     with a proposal.  It filed a license

14     application.  And even if the -- the license is

15     upheld, ISP will actually be able to store spent

16     nuclear fuel only if it can work out contracts

17     with the people who control the waste now and

18     they work out a -- what is for both parties an

19     economically beneficial arrangement.

20          And so the Commission's role is to

21     decide whether this is safe and consistent with

22     the statute, but the Respondents' position would

23     place roadblocks in the way of people like ISP

24     and people like those who currently control the

25     nuclear waste trying to devise market-oriented

1    solutions to the problem.

2              CHIEF JUSTICE ROBERTS:  Thank you,

3    counsel.

4              Justice Thomas?

5              JUSTICE THOMAS:  Mr. Stewart, I do

6    think it's somewhat strange that the NRC gets to

7    choose who -- which parties are able to

8    challenge it later on.

9              But that aside, what's your argument

10   that the Nuclear Regulatory Commission has the

11   authority to establish -- to store nuclear waste

12   off the -- offsite by a private party?

13             MR. STEWART:  Well, there are -- there

14   are three -- there are really, in a sense, six

15   stat -- five pertinent statutory provisions

16   here.  The -- the relevant constituent parts of

17   spent nuclear fuel are source material, special

18   nuclear material, and by-product material, and

19   for each of those constituents, there is a

20   statutory provision that says the unlicensed

21   receipt, use, or possession of this substance is

22   illegal.

23             But then there's -- for each of those,

24   there's a cognate provision that says:  But the

25   Commission can issue a license for private

1      storage.  And -- if certain criteria are

2      satisfied.  And if the Commission issues a

3      license for private storage of each of the three

4      constituent parts, it can do it in the same

5      license, and that adds up to a license to

6      possess spent nuclear fuel.  But --

7                  JUSTICE THOMAS:  Does it say

8      permanent, offsite by a private person --

9                  MR. STEWART:  This is not permanent --

10                 JUSTICE THOMAS:  -- who is not a --

11     who's not a nuclear power plant, for example,

12     but simply storage?

13                 MR. STEWART:  It is -- it is not

14     permanent.  It is still interim, but, yes, it

15     is -- there are really three categories.  There

16     is at the site of an operating nuclear reactor,

17     and then at the other extreme is a facility

18     like -- like ISP's, which would be at a location

19     where no nuclear reactor has ever operated.

20                 And then there are also -- we -- we've

21     counted eight facilities where the Commission

22     has licensed storage of spent nuclear fuel at

23     locations where a nuclear reactor once operated

24     but where the reactor has been decommissioned.

25     And, in three of those instances, the NRC

1    renewed the facility -- I'm sorry, the materials

2    license after the facilities license for the

3    reactor itself had expired.

4              And so, for relevant purposes, they

5    seem to us similarly situated to the ISP

6    facility.  They are now stand-alone storage

7    facilities even though they are at locations

8    where reactors once operated.

9              JUSTICE THOMAS:  Well, I mean, that's

10   in part because the facilities closed down and

11   you -- the material is left where the facility

12   used to be.  But is there any comparator for a

13   large amount -- I forget how many metric tons

14   we're talking about here -- is transported to a

15   separate private facility for virtually

16   permanent storage?

17             MR. STEWART:  Well, I guess the -- the

18   GE Morris facility has been in -- is a

19   standalone facility that's has been in operation

20   since, you know, I think around 1980 or before.

21   So I -- I don't think the volumes are the same

22   as the ones that ISP contemplates.

23             But the -- the two things I would say

24   are, first, the -- the volume of waste is not

25   going to -- in the United States, is not going

1      to change depending on whether licenses like

2      these are granted.  Granting license to possess

3      the spent nuclear fuel in a storage facility is

4      not going to increase the volume of nuclear

5      waste.  It's just going to change where in the

6      country it would be stored.

7             And with respect to permanence versus

8      temporary status, the -- there's no reason to

9      think that if the Court rules against us and the

10     waste has to stay at the site of the

11     decommissioned reactors, it will stay there for

12     any shorter period of time.  It's still going to

13     stay somewhere until a permanent repository is

14     opened up.

15            And the third thing -- and this goes

16     to the point I was making before about

17     market-based solutions and ISP's motivation --

18     part -- part of the suboptimal character of

19     continued storage at the decommissioned sites is

20     that you have a bunch of places around the

21     country that now serve no other purpose but to

22     store spent nuclear fuel when once they were

23     operating reactors.  And, clearly, ISP and some

24     of its potential contracting parties think that

25     it would be better to centralize the fuel at one

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1      location so that the other locations could be

2      returned to what's been referred to as

3      greenfield status.

4              CHIEF JUSTICE ROBERTS:  Thank you.

5              MR. STEWART:  They can be put to

6      alternative uses.

7              CHIEF JUSTICE ROBERTS:  Thank you.

8              Justice Alito?

9              JUSTICE ALITO:  Is there more --

10     excuse me.  Is there more security around

11     facilities that are owned by the federal

12     government than around these private facilities?

13             MR. STEWART:  I -- I don't know the

14     answer to that.  I mean, certainly, the

15     Commission, in determining whether the -- the

16     licensee has met the requirements, wants to

17     be -- wants to verify that there will be what

18     the Commission views as adequate security

19     arrangements.

20             JUSTICE ALITO:  Suppose this is

21     allowed and 40 years go by, and then there's an

22     application to renew the license.  Would it be

23     permanent at that time, or what if it's renewed

24     and it's another 40 years?

25             MR. STEWART:  It would still not --
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1         JUSTICE ALITO:  It will never become

2    permanent?

3         MR. STEWART:  It would still not be

4    permanent.  And, again, you would have the same

5    dilemma if the waste is left at the

6    decommissioned nuclear reactor sites.  That is,

7    at some point, the storage -- the -- the

8    materials license will expire.  The Commission

9    will have to decide whether a new license should

10   be issued.  We're going to confront that --

11   until a repository is made available, we're

12   going to confront that dilemma at some locations

13   within the country.  It's just a question of

14   where those locations will be.

15        And the other point I would make about

16   security at federal versus private, the -- the

17   decommissioned reactor sites I'm referring to

18   are also private sites.  They -- they would be

19   governed by the same arrangements that would

20   govern ISP.

21        JUSTICE ALITO:  Which statutory

22   provision -- I know you cite a number of them.

23   Which one do you think provides the strongest

24   support for your argument?

25        MR. STEWART:  Well, I think -- I would

1    say two things.  The first -- first, I would

2    point the Court to the licensing procedure --

3    provisions in the Atomic Energy Act, which are

4    42 U.S.C. 2073(a), which deals with special

5    nuclear material; 2093, which deals with source

6    material; and 2111, which deals with by-product

7    material.  And the Commission, from 1980, has

8    regarded those -- has had published regulations

9    that treat those as authority to license private

10   storage of spent nuclear fuel.

11          The other thing I would point the

12   Court to in the Policy Act is that the Policy

13   Act was enacted in 1982, two years after the

14   Commission's rules had been promulgated.

15   Congress clearly expressed its approval of

16   private storage, focusing on onsite storage, but

17   it didn't create new licensing mechanisms for

18   that to occur.  And --

19          JUSTICE ALITO:  And -- thank you, Mr.

20   Stewart.  One other -- one final question.

21   2073(a) refers to special nuclear material, not

22   to spent nuclear waste, and special nuclear

23   material has a -- a specific narrow definition.

24          MR. STEWART:  Yes, and there is also a

25   provision -- I think it's 2201(h) -- that says

1      various authorizations can be combined in a

2      single license.  And the -- the -- the three

3      constituent parts of spent nuclear fuel that

4      require a license are special nuclear material,

5      source material, and by-product material.  And

6      so the Commission has always believed that a

7      license that covers each of those will be

8      sufficient to cover spent nuclear fuel because

9      there's nothing else that needs to be licensed.

10             And then the other point I would make

11     is, if that were not true, the Commission would

12     be equally unable to license onsite storage

13     because these are the same provisions it relies

14     on to license storage at the site of a nuclear

15     reactor.

16             CHIEF JUSTICE ROBERTS:  Justice

17     Sotomayor?

18             JUSTICE SOTOMAYOR:  Counsel, these --

19     the onsite storage requires security to watch

20     this product -- inert product and make sure that

21     nobody breaks in.  So what we're talking about

22     is that there is a danger to the community by

23     these inactive facilities holding on to the

24     spent nuclear waste because the degree of

25     storage -- the -- the cost associated with the

1    storage in terms of security is greater, isn't

2    it?

3            MR. STEWART:  Yes.  And that was one

4    of the justifications that ISP gave, that it

5    was -- it was more economical to have security

6    for one centralized facility than to have

7    separate security for different facilities

8    around the country.

9            JUSTICE SOTOMAYOR:  2201 basically

10    authorizes the agency "to establish by rule,

11    regulation, or order such standards and

12    instructions to govern the possession and use of

13    special nuclear material, including all the

14    by-product materials, as the Commission may deem

15    necessary or desirable to promote the common

16    defense and security or to protect health or to

17    minimize danger to life or property."

18            MR. STEWART:  Yeah.  And so the

19    Commission did --

20            JUSTICE SOTOMAYOR:  I look at that as

21    the direct authorization to set forth the terms

22    of possession and license, correct?

23            MR. STEWART:  Yes.  And I -- I think

24    the Commission was on solid ground when it

25    promulgated the rules in 1980, but when Congress

1    stepped in two years later and enacted some new

2    provisions but without disturbing the

3    preexisting licensing scheme, that was an

4    effective ratification.

5              JUSTICE SOTOMAYOR:  You know, I --

6    I -- I'm finding it curious that in a country

7    that's celebrating its 250th year that some of

8    my colleagues think that 40 years can't be

9    temporary.  I hope that we make it another 250,

10   but if it takes 40 or 80 years for a solution to

11   come, it would still be temporary, correct?

12             MR. STEWART:  Yes.  And as I say,

13   the -- it -- it -- whether you want to think of

14   it as temporary or permanent or quasi-permanent,

15   it's going to be the same length of time

16   regardless of whether the waste is at an ISP

17   facility or at the site of a decommissioned

18   reactor.

19             JUSTICE SOTOMAYOR:  And in a time in

20   which the danger to the community continues to

21   exist?

22             MR. STEWART:  Yes.

23             JUSTICE SOTOMAYOR:  If we keep going

24   on something that can't -- that -- if we keep

25   permitting storage in facilities that have had

1    to shut down.

2              MR. STEWART:  Yes.  I mean, I -- the

3    Commission believes that its criteria can make

4    storage at these facilities safe, but at the

5    same time, the -- the perception that the risk

6    is not zero is what has led people to -- to want

7    a permanent repository.

8              JUSTICE SOTOMAYOR:  Thank you.

9              CHIEF JUSTICE ROBERTS:  Justice Kagan?

10             Justice Gorsuch?

11             JUSTICE GORSUCH:  I guess I'm

12   struggling with that.  I -- I -- I understand

13   your argument before Congress acted the NWPA.

14   But, afterwards, it specifically said that it

15   declined to authorize any storage facility

16   located away from a site of any civilian nuclear

17   reactor and not owned by the federal government.

18             That was its judgment about the

19   security that would be required for this

20   material.

21             MR. STEWART:  Well, what it said was

22   that nothing in the Policy Act itself

23   authorized, encouraged, or required store --

24   storage.

25             JUSTICE GORSUCH:  Yeah, exactly,

1      because -- because it thought that these were

2      the places that were going to be safest.  That

3      was Congress's judgment, whatever ours might be.

4      And I would have thought that the more specific

5      and more recent-in-time statute would --

6      would -- would govern over the general.  Isn't

7      that our usual interpretive understanding?

8              MR. STEWART:  I mean, certainly, if

9      the Policy Act had said offsite storage is

10     prohibited or the Commission may not license

11     offsite storage, that would trump the

12     preexisting author -- authorization in the

13     Atomic Energy Act.

14              But Congress was very careful not to

15     write the statute that way.  It basically said:

16     With respect to offsite storage, we will leave

17     the law as it found it.  It said nothing in the

18     Policy Act itself --

19              JUSTICE GORSUCH:  So that's -- so your

20     argument does hinge on the idea that Congress

21     has later enacted a more specific statute didn't

22     trump the preexisting statute?

23              MR. STEWART:  It -- it didn't trump it

24     because there was no inconsistency, because

25     saying --

1                JUSTICE GORSUCH:  And if we disagree

2    with that, then --

3                MR. STEWART:  If -- if you read

4    Section 11 --

5                JUSTICE GORSUCH:  10155 --

6                MR. STEWART:  -- 10155(h) --

7                JUSTICE GORSUCH:  Yeah.

8                MR. STEWART:  -- if you read it to --

9    to -- to be a prohibition on offsite storage of

10   spent nuclear fuel, then, yes, that would trump

11   the Atomic Energy Act's authorization.

12               But, as I say, Congress was aware that

13   the Commission had asserted this authority in

14   regulations two years earlier, and it wrote

15   the -- the language very carefully.

16               JUSTICE GORSUCH:  Yeah.  And it --

17   it -- its judgment about safety, not ours,

18   controls?

19               MR. STEWART:  Yes.

20               JUSTICE KAVANAUGH:  But Congress

21   didn't explicitly endorse the existing rules,

22   correct, as relevant here?

23               MR. STEWART:  It -- it didn't

24   endorse -- it didn't endorse the practice of

25   licensing offsite storage.  It clearly endorsed

 1        the idea that onsite storage was not only

 2        permissible but was to be encouraged.

 3                And so there are findings to the

 4        effect that the owners and operators of nuclear

 5        power plants shall be encouraged to use their

 6        existing storage capacity and expand their

 7        storage capacity.  Federal officials are

 8        supposed to encourage that as well.

 9                But what -- not only did Congress not

10        bar offsite storage, it also didn't enact any

11        new licensing provisions or, for that matter,

12        any new prohibitions on unlicensed possession.

13                And so Congress clearly contemplated

14        that licensing would continue to be done under

15        the preexisting Atomic Energy Act provisions,

16        and those provisions don't distinguish between

17        onsite and offsite storage.

18                JUSTICE KAVANAUGH:  But it still seems

19        a little odd, to pick up on Justice Gorsuch's

20        questions, that Congress would write that

21        provision in 10155(h) in that way without

22        something clearer, because anyone reading that

23        would think, okay, well, onsite storage or

24        federal offsite are the two options that

25        Congress is clearly contemplating in that 1982

1    act.

2              MR. STEWART:  You know, the D.C.

3    Circuit in Bullcreek did discuss the legislative

4    history of this provision.  And part of the

5    history was prior versions of the bill would

6    have encouraged offsite storage.  And Congress

7    wanted to make clear that it wasn't doing that.

8              But I think, even without looking to

9    the history and just looking to the text, it's

10   not conceivable that Congress would have chosen

11   this language if its intent was to prohibit the

12   Commission from doing something that it knew the

13   Commission had just asserted the authority to

14   do.

15             It could have said:  Nothing in this

16   title, i.e., Title 42, which encompasses both

17   the Atomic Energy Act and the Policy Act, shall

18   be construed to authorize, require, or

19   encourage.

20             Instead, it limited that language to

21   the Policy Act itself.  The -- the clear intent,

22   we think, was to leave the Commission's pre --

23   with its preexisting authority over offsite

24   storage but not to expand it or affirmatively

25   encourage it.

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 1              JUSTICE KAVANAUGH:  One -- and one
 2    more.  The -- the -- the other side responds
 3    that the Atomic Energy Act itself does not
 4    expressly authorize private offsite storage.
 5              I just want to get your succinct
 6    answer to that argument.
 7              MR. STEWART:  It doesn't -- it doesn't
 8    speak in so many words of offsite or onsite, but
 9    it would be -- it would be equally apt to say
10    that the Atomic Energy Act doesn't expressly
11    authorize onsite storage.  That is, it says:
12    People can be authorized to receive and possess
13    the following substances for the following
14    purposes, which include a residual.  But it
15    doesn't talk about -- in one way or another
16    about the location where that may occur.
17              JUSTICE KAVANAUGH:  Thank you.
18              CHIEF JUSTICE ROBERTS:  Justice
19    Barrett?
20              Justice Jackson?
21              JUSTICE JACKSON:  I don't hear you
22    disputing that Congress in the Policy Act was
23    expressing its perhaps preference for onsite
24    storage.  But I guess the question is:  How is
25    that objective best accomplished?
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1                And it seems to me that Congress, in

2      this statute, was doing so by incentivizing

3      onsite storage, which appears to be a different

4      thing than prohibiting offsite storage.

5                MR. STEWART:  Yes, I think that's

6      right.  And -- and one of the ways it

7      incentivized onsite storage was the -- the

8      federal storage program ultimately never got off

9      the ground, but during the period when it was

10     potentially in effect, one requirement that you

11     needed to satisfy in order to have access to

12     federal storage was show that onsite storage was

13     not available.  And there was no similar

14     requirement with respect to -- to offsite

15     storage.  So you could say in that respect

16     Congress put a thumb on the scale in the

17     direction of onsite storage.

18               JUSTICE JACKSON:  Encouraging people

19     to do onsite.

20               MR. STEWART:  Yes.

21               JUSTICE JACKSON:  And -- and I know

22     sometimes the Court is interested in clear

23     statements.  So, to the extent that the agency

24     had previously exerted its licensing authority

25     in this way, would one have expected Congress to

 1      have made clearly a prohibition statement if it

 2      was attempting to preclude offsite storage?

 3                 MR. STEWART:  Yes.

 4                 JUSTICE JACKSON:  Thank you.

 5                 CHIEF JUSTICE ROBERTS:  Thank you,

 6      counsel.

 7                 Mr. Fagg.

 8                 ORAL ARGUMENT OF BRAD FAGG

 9          ON BEHALF OF THE PETITIONER IN CASE 23-1312

10                 MR. FAGG:  Thank you, Mr. Chief

11      Justice, and may it please the Court:

12                 With respect to the Hobbs Act, if you

13      seek intervention under the agency's rules and

14      that's denied, that's a final order you get to

15      appeal.  So I guess I would resist the notion a

16      little bit that there's no judicial review of

17      that.

18                 You do have to appeal that within 60

19      days.  Fasken did to the D.C. Circuit, like we

20      talked about.  That played out the way it did.

21                 Fasken did not appeal to the Fifth

22      Circuit within 60 days.  It did not appeal until

23      six or seven months later.  And I think that's a

24      real problem with looking at what Fasken did at

25      the agency to try to justify the Fifth Circuit's

1    exercise of jurisdiction here.

2            With respect to merits and the Atomic

3    Energy Act, the primary argument of the

4    Respondents here is that the words "spent

5    nuclear fuel" are not separately defined.

6            If they're right, then the Atomic

7    Energy Act does not prohibit the possession of

8    spent nuclear fuel.  My client, ISP, never

9    needed a license if they're right.  They could

10   have just built this facility.

11           With all due respect, I would suggest

12   that's not a credible interpretation of the

13   Atomic Energy Act.

14           With respect to the Nuclear Waste

15   Policy Act and the references to encouraging of

16   onsite storage, I think it's important to

17   understand the context in which those statements

18   appear.

19           Those are all in subpart (b) of the

20   Policy Act.  Subpart(a), I would argue, is the

21   guts of the Act.  That's the permanent

22   repository underground for hundreds of thousands

23   of years.

24           Subpart (b) was a very limited,

25   now-expired program involving access to 1900

 1    MTUs of federal interim storage.  And the

 2    context of that makes clear it's self-contained.

 3              If you look at the legislative

 4    history, it also sheds light on the fact in the

 5    sausage making of -- of that bill, there was a

 6    lot of back-and-forth about whether the industry

 7    would have to exercise and exhaust off-site

 8    storage before they could access this 1900 MTUs

 9    of federal storage.  The industry didn't want

10    that.  Some legislators did want that.  Some

11    drafts required them to do that.

12              But that context is how these

13    references to a preference for on-site storage,

14    which are only in subpart (b), came to be.  And

15    I would respectfully suggest further confirm

16    that it's error to say that there are locational

17    restrictions.  Certainly no locational

18    restrictions appear within the Atomic Energy

19    Act.

20              JUSTICE THOMAS:  Well, could you give

21    us a -- a straightforward argument for the

22    authorization for off-site storage at a private

23    facility?

24              MR. FAGG:  It's under the Atomic

25    Energy Act.  It's 2201(b).  It is 2073, 2093 --

1           JUSTICE THOMAS:  And so what would

2    your argument be with those recitations?

3           MR. FAGG:  They authorize the NRC to

4    license the possession and storage of the

5    constituent elements, spent nuclear fuel,

6    without any locational restriction.  You're

7    reading -- if you say "on-site," you're reading

8    a term into the Atomic Energy Act that is not

9    there.

10           JUSTICE THOMAS:  So there's no --

11    there's no language that you could use to say

12    that spent fuel shall be or is permitted to be

13    stored off-site?  You're stitching together,

14    it's seeming, just constituent parts, not just

15    spent fuel.  And I'm just looking at, asking,

16    whether or not there's anything you can rely on

17    that speaks to spent fuel in the aggregate being

18    able to be stored off-site at a private

19    facility.

20           MR. FAGG:  I -- I do rely upon the

21    three constituent elements adding up to spent

22    fuel, in the same way you have to rely upon the

23    three constituent elements adding up to spent

24    fuel to prohibit the possession of it.  Because

25    if you don't buy that proposition, you can't

1    have one without the other.  You can't say the

2    Atomic Energy Act prohibits the possession of

3    these three items, but it doesn't allow the

4    licensing of these three items.

5           Either -- it's either one or the

6    other.  And if the three constituent elements

7    don't add up to spent nuclear fuel for licensing

8    purposes, they can't add up to the prohibition

9    on possession.  And I go back to what I said

10   earlier.  My client never needed a license.  We

11   should have just built this thing.  We -- why

12   are we here?

13          JUSTICE SOTOMAYOR:  What you're saying

14   I think I understand, which is if you read the

15   Act, it doesn't say you have to possess it where

16   it's created.

17          MR. FAGG:  That -- that is certainly

18   true.

19          JUSTICE SOTOMAYOR:  There's nothing

20   there that says possession in any particular

21   place.

22          MR. FAGG:  I think that's true.  And I

23   think it's also important to -- to keep in mind

24   there was always going to be spent nuclear fuel,

25   okay?  Whether reprocessing played out the way

1    people thought it was going to back in the '50s,

2    '60s, '70s, whether Yucca had gotten -- gotten

3    up and running like it was supposed to, you were

4    always going to have spent nuclear fuel

5    discharged from a reactor, stored for some

6    period of time -- even if you're going to

7    reprocess it, you got to ship it off to a

8    reprocessing site.

9            And -- and -- and it still doesn't get

10   rid of all of it.  There's still something.

11   It's not 100 percent.  Even with reprocessing,

12   there's still residual spent nuclear fuel left.

13           So the notion that the Atomic Energy

14   Act wasn't intended by Congress to cover all of

15   those different parts of what might happen or

16   not happen to spent nuclear fuel, again, I would

17   suggest is -- is -- is not a credible

18   interpretation of the Atomic Energy Act.

19           With respect to -- sticking --

20   sticking with the merits --

21           JUSTICE JACKSON:  Can I just ask you,

22   is there any different between your argument and

23   the government's in this case?

24           MR. FAGG:  Substantively, I'm -- I'm

25   not aware of a difference.  I think we

1      articulate things a little bit differently, but

2      no.

3                JUSTICE JACKSON:  Thank you.

4                MR. FAGG:  With respect to the Nuclear

5      Waste Policy Act, I -- I want to emphasize,

6      because I think it's a really important fact,

7      that the -- the 10 C.F.R. Part 72 regulations

8      that were formally, after notice-and-comment

9      rulemaking, acted on and on the books at the

10     time of the Nuclear Waste Policy Act, and, you

11     know, this wasn't a sort of secret,

12     in-the-pocket exercise of authority.

13               Massive notice and comment over

14     multiple years, a big, thick chunk of the

15     Federal Register with all the comments,

16     including debates about on-site versus off-site

17     storage.  Is it a good idea, a bad idea?  Not a

18     whisper of the notion that the Atomic Energy Act

19     didn't cover storage of -- of spent nuclear fuel

20     on-site or off-site.

21               And all of that was enacted in 1980.

22     All of that was demonstrably known by Congress

23     when it undertook the comprehensive Nuclear

24     Waste Policy Act legislation ultimately at the

25     end of -- of 1982 and '83.

  1                    And so to just underscore the fact

  2      that in discerning Congress's intent here with

  3      these two statutes, I would say that the -- the

  4      chronology and the facts confirm that the

  5      Nuclear Waste Policy Act, considered with the

  6      Atomic Energy Act, underscores and supports our

  7      position.

  8                    JUSTICE KAVANAUGH:  Meaning, given

  9      what was known -- this is what you're saying, I

 10      think -- Congress would have explicitly

 11      prohibited private off-site had it -- had it

 12      wanted to do so?  Is that what you're saying?

 13                    MR. FAGG:  Yes.  Yes.  And, again, if

 14      you go back to what I referred to earlier, the

 15      limited sort of provisions within subpart (b),

 16      the access to the federal interim storage

 17      program, and 10155(h) that we've talked about,

 18      "nothing in this chapter shall authorize or

 19      encourage," I -- I would suggest and, again,

 20      commend the Bullcreek decision, both at the

 21      agency level and the D.C. Circuit, for

 22      addressing the -- the real role of that

 23      language.

 24                    You -- it wouldn't make sense, if it

 25      was not already allowed, to say nothing in this

1    statute shall authorize or encourage.  Right?  I

2    mean, because if it -- if it's not allowed, it's

3    not allowed.  And that's the position of

4    Respondents in this case.

5              And -- and so I think read in context,

6    read -- read correctly within the Nuclear Waste

7    Policy Act and referring to the known,

8    documented history of the Atomic Energy Act,

9    those provisions, again, support -- support --

10             JUSTICE SOTOMAYOR:  What's the source

11   I should go to to get the history you referred

12   to earlier about the various drafts that were

13   being fought on -- about in subpart (b)?

14             MR. FAGG:  We -- we cite a couple of

15   them in our reply brief.  And, apologies, I

16   don't have them handy here right now.  But I --

17   I would refer to our reply brief, and I would

18   particularly refer to the agency's decision

19   below, which we cite, again, in our reply brief,

20   that goes through exhaustively that legislative

21   history.  We cite it in a footnote in our reply

22   brief and -- and -- and refer to the specific

23   footnotes within that agency decision that refer

24   -- refer back to the various debates.  There

25   were draft bills.  There was a lot.  It was a

1      lot.

2                  JUSTICE SOTOMAYOR:  All right.  Thank

3      you.

4                  JUSTICE GORSUCH:  Mr. Fagg, what do

5      you say to your friends on the other side's

6      argument that spent nuclear fuel is not simply

7      the combination of source, special nuclear, and

8      by-product materials under the AEA, but it

9      requires other things, like it must have been

10     withdrawn from the nuclear reactor, it must have

11     undergone -- not have undergone reprocessing?

12     And that's reflected both in the statute -- in

13     the -- in the NWPA and also in the NRC's own

14     regulations.

15                 MR. FAGG:  I -- I think I would -- I

16     would say factually it's just not the case that

17     when you pull one of these spent nuclear fuel

18     assemblies, which are, you know, 15-foot metal

19     with all the uranium rods inside, that there's

20     anything at all in there other than special

21     nuclear material, source material, or by-product

22     material.  There's metal sheaths and -- and

23     things that hold this all together.  They've

24     become irradiated through the exposure and the

25     -- and the process.  And -- and that falls

1          squarely within --

2                    JUSTICE GORSUCH:  I -- I --

3                    MR. FAGG:  -- the definition of

4          by-product.

5                    JUSTICE GORSUCH:  I appreciate that.

6          But spent nuclear fuel is defined in the later

7          statute as being withdrawn from a reactor, which

8          doesn't necessarily pertain to the three

9          constituent parts.  And it must not have

10         undergone reprocessing.

11                   Those are two conditions, at least,

12         that seem to me to differentiate the two.  And

13         I'm -- I'm struggling for an answer.

14                   MR. FAGG:  May I respond?

15                   CHIEF JUSTICE ROBERTS:  Certainly.

16                   MR. FAGG:  The -- the -- the answer to

17         that, I guess I would say is, well, which way

18         does that cut?  So when Congress added the

19         definition of spent nuclear fuel in 1988

20         incorporating the five-year-old definition from

21         the Nuclear Waste Policy Act --

22                   JUSTICE GORSUCH:  Right.

23                   MR. FAGG:  -- again, decades and

24         decades and decades of practice have been

25         treating the three constituent elements as spent

1    nuclear fuel for purposes of prohibiting

2    possession and -- and -- and licensing.

3              So I -- I think, again, just factually

4    and looking at the statutory definitions of the

5    three elements, a spent nuclear fuel assembly is

6    those three and nothing else.

7              JUSTICE GORSUCH:  Thank you.

8              CHIEF JUSTICE ROBERTS:  Justice

9    Thomas?

10             Justice Alito?

11             JUSTICE ALITO:  If Congress wanted to

12   authorize temporary off-site storage of spent

13   nuclear waste, why did it use the term "special

14   nuclear material"?

15             MR. FAGG:  Well, special nuclear

16   material is one of the three elements --

17             JUSTICE ALITO:  Yeah, I understand

18   that, but why choose just that?  Why not refer

19   to the whole thing?

20             MR. FAGG:  Well, in 1954, there wasn't

21   yet a nuclear power plant, okay?  When the

22   Atomic Energy Act was passed, the first online

23   commercial plant wasn't going to come on until

24   about 1958 or so.

25             So I -- I think the -- the logical and

 1      -- and probable reason why Congress did this is

 2      -- is to reduce it to the -- the most

 3      pernicious, if you will, elements of it, okay?

 4              So, if you -- if you can't do it with

 5      special nuclear material, you can't do it with

 6      spent nuclear fuel.

 7              And so rather than -- you know,

 8      there's all kinds of additional things that may

 9      or may not have these elements in them, but --

10      but a -- an efficient and effective way to

11      safeguard the public health and safety, to

12      promote, you know, all the things that the

13      Atomic Energy Act was -- was to promote, was to

14      do it the way it did it, which is reduce it to

15      the minimal elements, if you will, and -- and --

16      and -- and invest the agency with the authority

17      under the provisions we've talked about to

18      regulate those.

19              JUSTICE ALITO:  Do you -- would you

20      agree that the State of Texas and those with an

21      interest in the Permian Basin have a

22      reasonable -- that it's reasonable for them to

23      be concerned about the storage in this location?

24              MR. FAGG:  I have no reason to -- to

25      doubt that they care.  I -- I -- I question why

         1       they didn't intervene, like lots of states do

         2       and like the regulations specifically allow.

         3              I do -- I do -- I would also observe,

         4       and it's in the record, Texas originally

         5       supported this project and then reversed itself

         6       and opposed it.  But I -- I don't doubt their --

         7              JUSTICE ALITO:  Well, why was this

         8       location chosen?

         9              MR. FAGG:  It -- you know, there --

        10       there's -- there's reams of environmental

        11       aspects of this.  One of the things is looking

        12       at, you know, the potential alternatives.

        13              And -- and, you know, no -- nobody

        14       close to a location chosen, including the

        15       nuclear plants in Oregon and -- and -- and New

        16       England, want it there or like it there.  But,

        17       you know, it was a place that was deemed

        18       ultimately, after a lot of study, to have been

        19       somewhere where it could be safe, safely stored.

        20              JUSTICE ALITO:  Do you have a

        21       prediction about when there may -- there might

        22       be a permanent storage facility?

        23              MR. FAGG:  I -- I -- I've been in --

        24       in this stew for a lot of years, and there's a

        25       lot of -- there are a lot of talks.  There's a

1    lot of energy.  But I think I'd be -- as I sit

2    here today, I think, you know, I -- I'd be

3    kidding myself and every -- and the Court if I

4    said I -- I have a date.

5              But, you know, it -- it's still the

6    law of the land as -- as we sit here today.

7              JUSTICE ALITO:  Well, if it is decided

8    that the material can be stored offsite

9    temporarily, and "temporary" means more than 40

10   years, maybe more than 80 years, maybe it means

11   250 years, may it -- may it mean -- maybe it

12   means 500 years, what -- where is the incentive

13   to go forward to do what Congress wanted to have

14   done, which is to establish a permanent

15   facility?

16             MR. FAGG:  Well, the -- the incentive

17   is what it is, whether the fuel is at the

18   facility my client wants to build it or is

19   scattered across 40, you know, sites all across

20   the country.

21             So, you know, the incent -- the

22   incentives -- and, again, this is an industry

23   that is harmed by DOE's failure.  Trying to

24   mitigate it through my client's actions and to

25   sort of punish the industry doubly for DOE's

1    failure and then not allow them to save tens of

2    millions of dollars to mitigate I would suggest

3    is -- is -- is not -- not furthering the

4    incentives that we want in terms of a -- of a --

5    a critical part of -- a fifth of our nation's

6    power.

7              CHIEF JUSTICE ROBERTS:  Justice

8    Sotomayor?

9              Justice Kagan?

10             Justice Gorsuch?

11             Justice Kavanaugh?

12             Justice Barrett?

13             Justice Jackson?

14             JUSTICE JACKSON:  Can I just ask you

15   to speak quickly about the party issue?  Does it

16   matter whether the intervention motion was

17   wrongly denied at this stage, at this point?

18             MR. FAGG:  In -- in this case, I would

19   say no because that was all litigated at the

20   D.C. Circuit level.  It wasn't timely challenged

21   in the Fifth Circuit level.

22             Again, I resist the notion that

23   there's no judicial review.  If you're denied --

24   and -- and to echo something Mr. -- government

25   counsel said, the -- the -- there's all kinds of

         1      ways you could say these rules are too

         2      restrictive, these rules are -- are -- are --

         3      are too much.  You -- you can challenge them in

         4      a proceeding, you can get a waiver to challenge

         5      them in a proceeding, or you can do, as in the

         6      Bullcreek proceedings and as Mr. Stewart pointed

         7      out, a petition for rulemaking.

         8              So that's kind of a long-winded way of

         9      saying it's not before this Court in this case

        10      about whether Fasken's attempt to become a party

        11      was rightly or wrongly decided.  The D.C.

        12      Circuit said it was rightly decided, and here we

        13      are.

        14              JUSTICE JACKSON:  Thank you.

        15              CHIEF JUSTICE ROBERTS:  Thank you,

        16      counsel.

        17              Mr. Frederick.

        18              ORAL ARGUMENT OF DAVID C. FREDERICK

        19              ON BEHALF OF RESPONDENT FASKEN LAND

        20                  AND MINERALS, LTD.

        21              MR. FREDERICK:  Thank you, Mr. Chief

        22      Justice, and may it please the Court:

        23              The 1982 Nuclear Waste Policy Act

        24      created a comprehensive program that addressed

        25      where and how to store spent nuclear fuel.  That

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 1    program does not include private offsite
 2    storage, which Congress specifically ruled out
 3    in Section 10155(h).
 4              As the later-enacted, more specific
 5    act, the Policy Act controls, and the NRC cannot
 6    administratively override it.
 7              The Atomic Energy Act itself
 8    authorizes only onsite storage, not offsite
 9    storage.  Sections 2133 and 2134 allow the
10    Commission to impose conditions, including
11    safety requirements, on utilization and
12    production facilities' licenses.  Reactors are
13    utilization facilities.  So licenses cover
14    onsite storage of spent fuel.
15              Because that material is so hot, it
16    takes years to cool, and it can only be done
17    safely onsite by removing the reactor core and
18    moving it immediately into water.  And that's
19    why more than about 50 percent of all spent
20    nuclear fuel is in cooling pools around the
21    country.
22              Section 2136, which is not cited in
23    the briefs, says the NRC "may define the various
24    activities at each such facility."  And we think
25    that clearly means regulating the safety
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1    characteristics of dealing with spent nuclear

2    fuel when it comes immediately out of the

3    reactor core.

4            The Commission's efforts to derive

5    authority from the AEA's material license

6    provisions don't work because storage is not

7    use.  As the 1982 Policy Act defines it, storage

8    is "retention for subsequent use, processing, or

9    disposal."

10           I welcome the Court's questions.

11           JUSTICE THOMAS:  Why are you a party

12   now?

13           MR. FREDERICK:  We're a party now

14   because, under the plain language of the Atomic

15   Energy Act 2339(a)(1)(A), we are affected by the

16   proceeding, we shall be admitted as a party, and

17   we requested a hearing.  Those are all

18   indisputed facts.

19           JUSTICE THOMAS:  So what do we do with

20   the D.C. Circuit opinion?

21           MR. FREDERICK:  I think what you say

22   is that there were two purposes that Fasken

23   wanted to advance as a party.  One was to be

24   able to intervene for the purposes of putting in

25   expert testimony and other facts.  We were

1    denied that, Justice Thomas, and we're not

2    appealing that now.

3              But the second purpose, which is

4    satisfied by the plain language of the Atomic

5    Energy Act, is to be able to challenge that the

6    NRC approved this license without statutory

7    authority.

8              And the NRC's intervention rules,

9    which are set forth at 2.309 and 2.335, make it

10   very clear that the NRC itself is going to serve

11   as a gatekeeper and does not allow parties to

12   come in and challenge their statutory authority

13   in the licensing proceeding itself.

14             JUSTICE JACKSON:  But why isn't this a

15   collateral attack on the intervention decision?

16   I guess I don't understand.

17             MR. FREDERICK:  Because, as I said,

18   Justice Jackson, the intervention which we

19   sought was to be able to put in expert testimony

20   and to participate in an -- what was effectively

21   a proceeding to gather evidence.

22             Here, we're bringing a pure legal

23   facial challenge, and we --

24             JUSTICE SOTOMAYOR:  Mr. Frederick, it

25   makes no sense to me.  What you're saying is,

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1      instead of bringing that argument to the agency

2      first, you get, at any point in time that you

3      want to, the right to intervene and argue that

4      they don't have the power.

5              Don't you think the normal course

6      of -- of agency proceeding -- and we've already

7      said that even though agencies sometimes can't

8      decide constitutional questions, there's no

9      question that the agency could have listened to

10     the argument that it statutorily wasn't in power

11     to do so.

12             MR. FREDERICK:  Except that their

13     rules say you can't.  And so it would have been

14     utterly futile to go to the Commission and say:

15     You're acting ultra vires beyond your statutory

16     authority because the regulations of the NRC

17     say:  We are not going to accept that at -- that

18     contention.

19             JUSTICE SOTOMAYOR:  And then you could

20     have brought it to the Fifth Circuit.

21             MR. FREDERICK:  That's what we did.

22             JUSTICE SOTOMAYOR:  Well --

23             MR. FREDERICK:  We did argue --

24             JUSTICE SOTOMAYOR:  -- yeah, but you

25     didn't argue it at the time when -- you -- you
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1    didn't bring it.  You didn't argue it at the

2    time that you moved to intervene.

3                JUSTICE JACKSON:  Did you --

4                MR. FREDERICK:  That's incorrect.

5    That is --

6                JUSTICE JACKSON:  Did you -- did you

7    say --

8                MR. FREDERICK:  I would like to set

9    the record straight.  That's not correct.

10               JUSTICE JACKSON:  Go ahead.  Go ahead.

11               MR. FREDERICK:  Yeah.  We moved to

12   dismiss.  The very first motion we filed said:

13   This is not within your statutory authority.  We

14   moved to intervene for multiple purposes.

15               JUSTICE SOTOMAYOR:  And then you

16   didn't take it up to the Fifth Circuit.

17               MR. FREDERICK:  We argued to the Fifth

18   Circuit that the --

19               JUSTICE SOTOMAYOR:  At the second --

20   at the second --

21               MR. FREDERICK:  Because that was the

22   final order, Your Honor.  We challenged the

23   final order as being outside the scope of the

24   authority --

25               JUSTICE SOTOMAYOR:  But you didn't do

1      it at the first motion to --

2              MR. FREDERICK:  No, because the first

3      motion only go -- went to could we intervene for

4      purposes of bringing in evidence to the

5      Commission.

6              And -- and the point here is:  Are you

7      going to allow agencies to manipulate their

8      rules so that they can decide who gets to

9      challenge them?

10             JUSTICE SOTOMAYOR:  I'm sorry --

11             JUSTICE JACKSON:  Quite frankly, I'm

12     worried about party manipulation.

13             I'm trying to understand what basis

14     you now have to say that we should be revisiting

15     the D.C. Circuit's determination that you cannot

16     intervene.

17             MR. FREDERICK:  I'm not asking you to

18     do that.

19             JUSTICE JACKSON:  Okay.  So, if we

20     believe that the law is such that you had to be

21     a party, do you concede that you were not a

22     party at the lower court proceeding?

23             MR. FREDERICK:  No.

24             JUSTICE JACKSON:  You do not concede?

25             MR. FREDERICK:  We do not concede

1    that.

2              JUSTICE JACKSON:  Okay.

3              MR. FREDERICK:  The Atomic --

4              JUSTICE JACKSON:  And the basis for

5    your part -- your party participation is what?

6              MR. FREDERICK:  The Atomic Energy Act

7    says that if we are affected by the proceedings

8    and we ask for a hearing, the NRC "shall admit"

9    us as a party.

10             JUSTICE KAGAN:  Well, that -- that

11   says, Mr. Frederick, why you have a argument

12   that you should have been a party.  And maybe

13   you do have a good argument that you should have

14   been a party.

15             But it -- it's not to say that you

16   were a party.  In fact, you were not a party.

17             MR. FREDERICK:  No, I think that we

18   were not a party in the sense that we were

19   permitted to do the full evidentiary exposition

20   that we might have liked to have done.  And I'm

21   not arguing that we should have -- that that

22   should be revisited.

23             But we are a party under the

24   meaning -- the plain language of the Atomic

25   Energy Act, which says we shall be a party and

1      we shall have an opportunity to say in a

2      judicial review setting --

3              JUSTICE KAGAN:  But then you're saying

4      that -- that -- I mean, you know, when I look at

5      this, your only participation in the agency

6      proceeding was to be excluded from it.  But then

7      you're saying:  Well, if I was excluded wrongly,

8      I'm a party.

9              I mean, how could that be?  I mean,

10     that's -- that's -- that's very much against the

11     way we think of this in a judicial context,

12     right, where we look at somebody and they've

13     tried to intervene, and maybe they've been

14     wronged, maybe the court was wrong to say that

15     they can't intervene, but we don't say:  Oh, the

16     court was wrong.  They really should have been

17     there, and so we're going to give them an

18     opportunity to come in at some later point in

19     time and attack the judgment.

20              It just doesn't work that way.

21              MR. FREDERICK:  Well, I would say this

22     is not the normal agency proceeding.  The

23     Pacific Legal Foundation says that they have

24     looked at the various agencies.  This is the

25     only agency that serves as a gatekeeper to its

1      own proceedings.  That's point one.

2                Point two, there are different scopes

3      of party participation.  One is that you

4      participate as a full party, bring depositions,

5      bring other evidence.  That is not what we are

6      challenging here.

7                What we are saying is that the plain

8      language of the Act gives us the right to say

9      for the first time in court, because the agency

10     won't allow us to say it in the proceedings, you

11     don't have the statutory authority for what you

12     did.

13               JUSTICE JACKSON:  But, Mr. Frederick,

14     if we disagree with you, if we think that as a

15     matter of law, what counts as being a party is

16     having the level of participation that you

17     called Category 1, do you concede that you did

18     not have that in this case?

19               MR. FREDERICK:  Well, we were

20     foreclosed from having it.

21               JUSTICE JACKSON:  All right.  So, if

22     we think that in order to be a party for the

23     purpose of the Hobbs Act, you have to have that

24     status, what difference does it make what

25     arguments you're making or whatever?  You didn't

1    have that status.

2            MR. FREDERICK:  Because the Hobbs Act

3    itself incorporates the Atomic Energy 2339

4    provision that I quoted to you about being a

5    person affected by the license, requesting a

6    hearing, that we shall be admitted.

7            So the Hobbs Act party --

8            JUSTICE JACKSON:  Did you make that

9    argument before the court in your

10   intervention -- wasn't that the basis by which

11   you went to the court and said:  I need to

12   intervene, look at the Hobbs Act provision that

13   says these things?

14           MR. FREDERICK:  No.  What we did in

15   the D.C. Circuit was we talked -- and -- and the

16   D.C. Circuit, by the way --

17           JUSTICE JACKSON:  I'm sorry, that's

18   not the statutory basis for your claiming the

19   right to intervene?

20           MR. FREDERICK:  It is.  It is.

21           JUSTICE JACKSON:  It was, right?  So

22   you said to the court:  Look at the Hobbs Act.

23   Here are these criteria we need to be able to

24   intervene.  And the court disagreed.

25           MR. FREDERICK:  I think you're

1     misreading what happened in the D.C. Circuit,

2     Your Honor, with respect.  We didn't have an

3     opportunity to challenge the final order in the

4     D.C. Circuit.  That could only be done after the

5     final order was made.

6          So what we did challenge was the

7     limited application of the Commission's

8     intervention rules to say they had not been

9     applied correctly.

10          JUSTICE SOTOMAYOR:  Mr. Frederick --

11          MR. FREDERICK:  That's a much more

12     limited question.

13          JUSTICE SOTOMAYOR:  -- it makes little

14     sense.  The rule at issue that you wanted to

15     intervene in was a rule that was citing a -- a

16     storage area that you now say they didn't have

17     the authority to do.

18          So, if you were an aggrieved person

19     under the Act, you could have gone to the D.C.

20     Circuit on your first round of appeal and said

21     just that.  I can intervene because I have an

22     argument that they've exceeded their statutory

23     authority.

24          MR. FREDERICK:  And the D.C. Circuit

25     20 years before had rejected that argument.

1      There was no circuit split.

2            JUSTICE SOTOMAYOR:  So then you could

3      have sought cert here.

4            MR. FREDERICK:  And there was no

5      circuit split, Your Honor.

6            JUSTICE SOTOMAYOR:  You didn't have

7      to, but you -- but the Hobbs Act requires you to

8      be a party aggrieved, not a person aggrieved.

9            MR. FREDERICK:  Let me just say,

10     Justice Sotomayor, if the Court adopts that line

11     of reasoning, the NRC is effectively immune from

12     judicial review because they set the rules for

13     determining what can be a "admissible

14     contention" which has to meet -- surpass the

15     summary judgment standard.

16           JUSTICE KAGAN:  Well, I take that

17     point, Mr. Frederick, and it might very well be

18     that this D.C. Circuit decision is wrong.  I

19     mean, it -- it -- it looks to me as though it

20     goes beyond the statute.  So I -- I'm pretty

21     sympathetic to that view.

22           And yet I'm still sort of hung up on

23     the idea that in this proceeding, at this moment

24     in time, that's not before us.  Only whether you

25     were a party is before us.  And any way I sort

1      of think about it, you weren't a party.

2              MR. FREDERICK:  Well, I would ask you

3      to reread the language of 2339 of the Atomic

4      Energy Act, which says we are a party.  And --

5      and if you're going to apply normal textual

6      canons of strict construction, you would say we

7      are a party.

8              JUSTICE KAGAN:  I think that language

9      says you should have been included as a party.

10     I think that language gives you a good reason

11     for saying that -- that the regulation is

12     invalid and a good reason for saying that the

13     D.C. Circuit is wrong.  But I don't think that

14     language gives you a good reason for sort of

15     just, you know, making X not X, that you weren't

16     there.

17             MR. FREDERICK:  Your Honor, I don't

18     think that the Fifth Circuit's ruling that we

19     were a party that should be allowed to challenge

20     the statutory authority of the agency would deny

21     us party status now.

22             And I -- I do want to emphasize the

23     time point.  As Justice Alito pointed out, this

24     license can have this storage for up to 80

25     years.  And under the reasoning of that line, no

1      one would ever be able to say, well, you know

2      that -- that nuclear stuff in the west Texas

3      area was done illegally because no one had the

4      appropriate party status because the

5      intervention rules of the NRC said you don't get

6      to intervene.

7              That would be a very crazy way to

8      think about limitations on agency authority that

9      exceed what the statute allows.  And I think

10     that if you consider the other side's argument,

11     onsite storage has to be done for safety

12     reasons.  The -- the nuclear material that is

13     burned, it is very, very hot.  It has to stay

14     onsite.

15              And that's why the facilities license

16     provisions are the easiest way to understand the

17     practical reality that, for 70 years, this

18     material has stayed onsite.  When Congress

19     considered in the Policy Act what to do with it,

20     it said, you know --

21              JUSTICE JACKSON:  Mr. Frederick, what

22     do we do about the fact --

23              MR. FREDERICK:  -- keep it onsite --

24              JUSTICE JACKSON:  What do -- what do

25     we -- you've said over and over that it's hot

1    and it's hard and all of that.  But I would

2    assume that in 70 years, technology changes,

3    that, you know, things happen and people figure

4    out ways to store and move.  What -- what --

5    what do we do with that?

6              MR. FREDERICK:  Well, the technology

7    hasn't speeded up the cooling process of

8    material that is radioactive.

9              JUSTICE JACKSON:  No, I understand,

10    but we have -- we have ISP here saying that they

11    can receive this material.

12              MR. FREDERICK:  This -- this material,

13    Justice Jackson, is so hot when it comes out of

14    the core, no human being can get anywhere close

15    to it, which is why it -- the design of the

16    facility that is done by the Commission is to

17    have the spent rods taken down into pools of

18    water.

19              JUSTICE JACKSON:  No, I understand.  I

20    guess I just don't -- I -- I'm not fully

21    understanding why it matters that the material

22    is so hot and that it's difficult to do in a

23    situation like this in which the Commission has

24    apparently licensed -- that's what you're

25    challenging -- this transfer.  So someone thinks

1    it can be done because they've given a license

2    to do it.

3          MR. FREDERICK:  And it hadn't been

4    done before this situation.  No facility's ever

5    been constructed.  The Morris facility that Mr.

6    Stewart adverts to --

7          JUSTICE JACKSON:  But why doesn't that

8    fit into the statutory authorization for the

9    Commission to make the determination about

10   whether or not this can be done consistent with

11   safety, et cetera, et cetera?

12         MR. FREDERICK:  Because the Policy Act

13   says in five provisions the NRC shall maximize

14   onsite storage.  It shall increase technology

15   for onsite storage.  It shall, if it has to go

16   offsite, go to a federal facility.

17         JUSTICE JACKSON:  And does it say it

18   cannot --

19         MR. FREDERICK:  Yes.  101 --

20         JUSTICE JACKSON:  -- authorize -- it

21   cannot authorize offsite storage?

22         MR. FREDERICK:  10155(h) says it shall

23   not do private offsite storage.

24         JUSTICE JACKSON:  101 --

25         MR. FREDERICK:  55 --

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1                JUSTICE JACKSON:  -- 55 --

2                MR. FREDERICK:  -- (h).

3                JUSTICE JACKSON:  -- (h).

4                JUSTICE KAVANAUGH:  What --

5                MR. FREDERICK:  Yes.  And -- and I

6    think, Justice Jackson, what -- what's very

7    clear from these provisions is that the NRC is

8    seeking to use a rulemaking to override a

9    statute.

10               CHIEF JUSTICE ROBERTS:  Thank you,

11   counsel.

12               Justice Thomas, anything further?

13               Justice Alito?

14               JUSTICE SOTOMAYOR:  Perhaps, in reply,

15   I'll get an answer to this or you can.

16               I had understood that the pooling --

17   the cooling pools, that many of them are

18   offsite?

19               MR. FREDERICK:  No, that's not

20   correct.

21               JUSTICE SOTOMAYOR:  All right.  Then I

22   misunderstood.

23               MR. FREDERICK:  And -- and -- and I --

24   and I can point you to the Blue --

25               JUSTICE SOTOMAYOR:  I thought Mr. Fagg
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1      had said that, but --

2              MR. FREDERICK:  Right.  There was a

3      Blue Ribbon Commission report that the

4      President's Blue Ribbon Commission put together

5      that goes through all of this material.  It goes

6      through the nuclear process, the history at the

7      storage site.  It was published, I think, in

8      2012 or 2013.  It answers many of the questions

9      about the practicalities of the nuclear process.

10             JUSTICE SOTOMAYOR:  Thank you.

11             CHIEF JUSTICE ROBERTS:  Justice Kagan?

12             Justice Gorsuch?

13             JUSTICE GORSUCH:  A couple quick

14     questions, Mr. Frederick.

15             First, with respect to your ultra

16     vires argument, it sure sounds to me a lot like

17     an APA challenge beyond statutory authority that

18     would normally be brought in district court in

19     the first instance.  Help me with that.

20             MR. FREDERICK:  Well, what I would say

21     is that we have not found a case on all fours

22     with the one that we have where the ultra vires

23     argument was brought directly to the court of

24     appeals.

25             What I would say is that the

        1       jurisdiction, the exclusive jurisdiction

        2       provision of the Hobbs Act, 2342(4) --

        3               JUSTICE GORSUCH:  I understand.  If

        4       you get in the Hobbs Act, you're in the Hobbs

        5       Act.  But assume we're not in the Hobbs Act.

        6               MR. FREDERICK:  Right.  But what I'm

        7       saying is that 2342 says all final orders, the

        8       exclusive jurisdiction --

        9               JUSTICE GORSUCH:  I see.

       10               MR. FREDERICK:  -- shall be in the

       11       courts of appeals.  And so our reading of that

       12       is that that answers the question of where you

       13       can bring the argument.  It doesn't say --

       14               JUSTICE GORSUCH:  Got you.

       15               MR. FREDERICK:  -- how or what the

       16       argument is.

       17               JUSTICE GORSUCH:  I follow you.

       18               And then, with respect to the struggle

       19       over the D.C. Circuit order, I didn't see

       20       anything in the opinion addressing the statutory

       21       question, so -- and I didn't see anybody below

       22       arguing that that -- that -- normally, for issue

       23       preclusion to have an effect, you have to have a

       24       ruling on -- on the question at hand.

       25               MR. FREDERICK:  Correct.

1          JUSTICE GORSUCH:  And somebody has the

2    burden to show that it applies.  And I didn't

3    see either ruling on this question in the D.C.

4    Circuit.

5          MR. FREDERICK:  That's correct.  And

6    that's --

7          JUSTICE GORSUCH:  And I didn't see the

8    government suggest or ISP suggesting that you

9    were precluded as a matter of collateral

10   estoppel.

11         MR. FREDERICK:  That's correct.

12   They've not made that oral waiver argument.  And

13   that's why it's important to understand the

14   difference between an intervenor party and just

15   a party to be able to say under the plain

16   language of the Act you violated the Act.

17   You've gone beyond the Act in approving this

18   license.

19         JUSTICE GORSUCH:  All right.  Thank

20   you.

21         CHIEF JUSTICE ROBERTS:  Justice

22   Kavanaugh?

23         JUSTICE KAVANAUGH:  One of the

24   arguments on the other side is the Commission's

25   interpreted the statutory scheme the same way

1      for, you know, five decades and that that

2      consistent, longstanding interpretation has

3      itself significant weight as we interpret the

4      statute.

5              Do you want to respond that?

6              MR. FREDERICK:  Yes.  Thank you for

7      asking that question, Justice Kavanaugh.

8              If you look at the Federal Register

9      for the 1980 rules, there are two paragraphs on

10     the question of does the agency have the

11     authority to do offsite storage.  One paragraph

12     says many commenters think it's a bad idea to do

13     it anywhere but onsite.  The second paragraph

14     says some commentators think that it's okay to

15     do it offsite.

16             So we think it should be -- we should

17     have the authority to choose.  They don't cite

18     any provisions of the Atomic Energy Act.  They

19     don't ground that policy in any particular

20     statutory language.

21             It was the Commission's decision to do

22     this simply on the basis of what they thought

23     was a good idea.  And then two years later, when

24     Congress comprehensively addressed the subject

25     in the Policy Act, the agency should have gone

1    back and redone its rules.  It didn't do that.

2         And that's why Mr. Stewart has to make

3    a rather convoluted statutory argument deriving

4    from these provisions in the Atomic Energy Act

5    that don't speak to the question.

6         JUSTICE KAVANAUGH:  Well, is it really

7    that convoluted?  It's basically that the Act

8    was understood to authorize this, that the

9    Commission recognized that authority, that

10   Congress in 1982 had a chance to, was well aware

11   of this issue and did not expressly preclude

12   this, and then that's been the way it's been

13   for, you know, 50 years.

14        MR. FREDERICK:  Well, it is not how it

15   has been.  The only example they have is a

16   former reprocessing facility.  That is a

17   production facility as defined in the Atomic

18   Energy Act.  That's the Morris plant.

19        When reprocessing failed, they had to

20   do something with the spent nuclear fuel that

21   had been sent to the Morris plant.  And so what

22   they did was kind of a jerry-rigged approach and

23   said:  It's here, we don't want to move it,

24   let's just keep it here, and we'll store it

25   onsite.

        1                And that has become the exemplar of

        2      their longstanding interpretation for offsite

        3      storage.  It -- it is really a stretch and makes

        4      no relation to the statutory test at all.

        5                JUSTICE KAVANAUGH:  One of the reasons

        6      longstanding interpretations matter, of course,

        7      is that private parties rely on those, and the

        8      amicus brief, for example, of the Nuclear Energy

        9      Institute makes -- makes clear that a lot of

       10      investment has happened based on what appeared

       11      to be a settled understanding of the authority.

       12                Do you want to respond to that?

       13                MR. FREDERICK:  Yeah.  There --

       14      there's been no actual construction of an

       15      offsite facility ever.  There have only been

       16      three approvals.  One, the Bullcreek example was

       17      never built.  So that license was approved, no

       18      facility.  The only two other ones are before

       19      this Court.  It's Holtec in New Mexico, ISP in

       20      Texas.

       21                JUSTICE KAVANAUGH:  And then last

       22      question.  Petitioners' counsel said, if your

       23      statutory argument is correct, they never needed

       24      a license to begin with.

       25                You want to respond to that?

 1                MR. FREDERICK:  Yeah.  What I started

 2      with on the material -- on the facilities

 3      license is that in order to ensure the safe

 4      operation of the facility under 2133, 2134, and

 5      2136, the Commission has always asserted the

 6      authority to make sure safe operations occur

 7      onsite, but that's part of the facilities

 8      license, which means you don't move it off the

 9      facility, which is the whole argument that

10      they're trying to make here by saying it's

11      lawful to take what is a materials license

12      and -- and contort what authority that they were

13      really asserting under the facilities license

14      provision.

15                JUSTICE KAVANAUGH:  Thank you.

16                CHIEF JUSTICE ROBERTS:  Justice

17      Barrett?

18                Justice Jackson?

19                JUSTICE JACKSON:  Do you concede that

20      the "party aggrieved" language is

21      jurisdictional?

22                MR. FREDERICK:  I think that if it's

23      jurisdictional, it can't be waived.  And so --

24                JUSTICE JACKSON:  No, I understand.

25      I'm just asking you, is it a jurisdictional

 1     provision?

 2          MR. FREDERICK:  I'm not sure.  I think

 3     courts of appeals have treated the 60-day

 4     provision as jurisdictional for appeal.  I'm not

 5     sure that they've treated who constitutes a

 6     party as being jurisdictional, but what I would

 7     say to that, Justice Jackson, is that in all of

 8     those Hobbs Act conditions, you should look at

 9     the organic statute for the Commission first

10     because the FCC has two different appellate

11     mechanisms.  One is a Hobbs Act provision and

12     the other is not a Hobbs Act provision.

13          JUSTICE JACKSON:  All right.  Well,

14     I -- I'm just trying to understand the argument

15     that I think you're now making, which is that

16     there's a difference between being an intervenor

17     party for the purpose of any party aggrieved and

18     being a party who wants to make the particular

19     claim of ultra vires.

20          MR. FREDERICK:  Well --

21          JUSTICE JACKSON:  You say you're the

22     latter, but you admit you're not the former.

23          MR. FREDERICK:  Well, what I'm -- I

24     think we were the former.  I think the

25     language --

1                    JUSTICE JACKSON:  Well, you didn't --

2      you didn't get intervenor -- intervenor status.

3                    MR. FREDERICK:  I'm not challenging

4      that, Justice Jackson, but I'm not saying we're

5      not aggrieved.  We clearly are aggrieved.  And

6      we are aggrieved under any --

7                    JUSTICE JACKSON:  I didn't ask you

8      whether you were aggrieved.  I'm trying to

9      figure out whether you're a party.

10                    MR. FREDERICK:  Yes.

11                    JUSTICE JACKSON:  And -- and -- and --

12     and the distinction that you've now made is the

13     difference between parties who were intervenors

14     and parties who would like to claim ultra vires.

15     I don't see any statutory basis for that

16     distinction, but I'm just trying to even

17     understand where it comes from.

18                    MR. FREDERICK:  What I'm saying,

19     Justice Jackson, is there are two routes for us

20     to assert our party status, okay?  One is under

21     the Atomic Energy Act, which we clearly satisfy.

22     The other is under the Commission's rules for

23     intervention, which the Commission ruled against

24     us on.

25                    I acknowledge we lost the second one

1      and it's not before this Court.  But that

2      doesn't mean we don't satisfy the statutory

3      requirements that would be --

4                JUSTICE JACKSON:  Thank you.  I

5      understand your argument.

6                CHIEF JUSTICE ROBERTS:  Thank you,

7      counsel.

8                Mr. Nielson.

9         ORAL ARGUMENT OF AARON LLOYD NIELSON

10         ON BEHALF OF RESPONDENTS TEXAS, ET AL.

11                MR. NIELSON:  Mr. Chief Justice, and

12     may it please the Court:

13                I hope to make several additional

14     points, but I want to start with three quick

15     ones.

16                First, Justice Kavanaugh was right in

17     PDR Network that the Hobbs Act covers a wide

18     variety of orders.  Under Clark -- Clark

19     v. Martinez, where one provision has multiple

20     applications, the Court applies a lowest common

21     denominator interpretation to all of them.  Even

22     in the D.C. Circuit, if you file comments,

23     that's enough to challenge a rule and a

24     declaratory ruling in adjudication.

25                Second, Congress added to the A -- to

1      the AEA the NWPA's definition of "spent nuclear

2      fuel."  The Court needs to interpret today's AEA

3      and address Petitioners' obvious superfluity.

4              And, finally, you know, if anyone

5      thinks this is temporary, I have a bridge to

6      sell you.

7              There's no way that we're going to

8      move 140,000 tons of nuclear waste in 60 years.

9      What the Commission has just done is put a

10     permanent terrorist bulls-eye on the most

11     productive oil field in America.

12             I welcome the Court's questions.

13             JUSTICE THOMAS:  You did not

14     intervene, so why are you a party now?

15             MR. NIELSON:  Correct, Your Honor.

16     So, I mean, listen, effectively, we did

17     intervene, but I would say this goes back to

18     understanding of the Hobbs Act.

19             The Hobbs Act does not just apply to

20     this agency.  It applies to a whole bunch of

21     agencies and a whole bunch of different types of

22     orders.  So, if you file a comment in an FCC

23     rulemaking, you're good.  Or, even at the D.C.

24     Circuit, if you file a declaratory ruling, which

25     is a form of adjudication, you discussed this in

1    McKesson, that's also -- it's enough to file a

2    comment.

3                So that's what Texas did here.  And I

4    think it's important to understand kind of what

5    happened.

6                JUSTICE KAGAN:  But, General --

7                MR. NIELSON:  Yes.

8                JUSTICE KAGAN:  -- I mean, this was an

9    adjudicatory proceeding.  So the way people

10   understand who parties are in an adjudicative

11   proceeding, it's -- it's not enough to send in a

12   letter.

13               MR. NIELSON:  Well, a couple

14   responses.  One, so is a declaratory ruling.

15   And in the D.C. Circuit, declaratory rulings,

16   it's enough to send a comment.  So their

17   distinction doesn't work on its own terms.  And

18   I would point the Court there to Petition

19   Appendix 18a.  That is where the Fifth Circuit

20   discusses the D.C. Circuit precedent on that

21   point.

22               But, second, this is a very strange

23   type of adjudication.  By statute, Congress has

24   said that if they're going to do this type of

25   license, they need to open up to NEPA, which is

1    a -- a notice-and-comment process, in the middle

2    of the adjudication.  This is not a normal

3    adjudication.

4         JUSTICE KAGAN:  Do you think it's

5    enough for anybody to send in a letter, or does

6    it have to be the governor of a state?

7         MR. NIELSON:  I think it certainly

8    helps that it was a governor of a state.

9         JUSTICE KAGAN:  Well, I don't see

10   really how it does help under the statute.  I

11   mean, it's nice that he was the governor of the

12   state, but I don't see how you can make a legal

13   argument on that basis.  If somebody is a party

14   by virtue of sending in a letter under this

15   statutory scheme, anybody is a party by virtue

16   of sending in a letter.

17        MR. NIELSON:  So, again, we think that

18   if you file a comment -- and it wasn't just a

19   letter; it's comments -- as part of the

20   notice-and-comment process, but if they solicit

21   you, which is what happened here -- I'd point

22   the Court to the record on this one.  This was

23   JA 292.  They asked us, they solicited our

24   comments, and then we responded to that.

25        Even under their -- their best case,

1      this Water Transport case from the D.C. Circuit

2      that they rely on, if the agency solicits your

3      participation and you respond to that, that

4      counts in the D.C. Circuit, their case.

5      That's -- and, again, that's their best case.

6              So this isn't an ordinary enforcement

7      action or something like that.  Even then, I

8      don't think their argument holds up, but --

9              JUSTICE KAGAN:  I mean, the question,

10     General, is what does "party" mean?  And it

11     seems to me "party" means somebody who has

12     participated in an agency proceeding with the

13     degree of formality required for that

14     proceeding.

15             So, if you're in a rulemaking, being a

16     party may very well mean I submitted a comment

17     in a notice-and-comment process.  But-- but

18     that's not the degree of formality that's

19     associated with a proceeding of this kind.

20             And, you know, you didn't intervene.

21     You didn't even try to intervene, unlike

22     Mr. Frederick's client.  I -- I don't see how we

23     can say that you were a party.

24             MR. NIELSON:  Well, I mean, the word

25     "party," it's the same word in the Hobbs Act

1    that applies to all of these things.  So we have

2    to say that the word "party" is a chameleon.

3              JUSTICE KAGAN:  It's not a chameleon.

4    It's like different proceedings might understand

5    who parties are differently.  I mean, that's --

6    that's -- that's not anything weird.

7              There are three separate processes,

8    and the way you participate in those three

9    separate processes are -- are different because

10   different rules apply, because the processes are

11   understood to -- parties in -- in adjudications

12   are different from parties in rulemakings.

13             MR. NIELSON:  Okay.  So I guess a

14   couple of responses.  One, I don't agree under

15   the Hobbs Act that you're going to

16   distinguish -- it's -- it's one word that has to

17   apply to both.  But say I'm wrong about that.

18             JUSTICE KAGAN:  It -- it -- it is one

19   word.

20             MR. NIELSON:  Yeah.

21             JUSTICE KAGAN:  It means have you

22   participated with the degree of formality that's

23   necessary for the kind of proceeding it is?  And

24   if you are, you're a party.  It's one

25   definition.

1          MR. NIELSON:  Okay.  So say I'm wrong

2     about it.  So I'm agreeing with you for -- for

3     purposes of this answer.  I would still say what

4     we're talking about here is a lot closer to a

5     hybrid between a rulemaking and an adjudication

6     than a pure adjudication.  This is a licensing

7     which Congress said by statute they have to take

8     our comments.  And then we filed those comments

9     in response.

10          And the argument that we are making

11     today was presented to the agency by Sierra

12     Club, and the agency said no, we're not going to

13     even consider that.  We're not going to take

14     that contention.

15          So we're in the position here where

16     they've asked for our comments, we've responded

17     to their comments the arguments we want to make,

18     they've already said they're not going to hear.

19     It seems very strange to say that the State of

20     Texas is not a party.  We're obviously

21     aggrieved.  And, by their own regulations, they

22     asked for our participation and we participated.

23          JUSTICE SOTOMAYOR:  Are you defending

24     the Fifth Circuit's ultra vires holding?  You're

25     saying, even if you weren't a party aggrieved,

1    we could hear your appeal under the theory of

2    ultra vires?  I didn't see you or Fasken

3    spending a whole lot of ink on that in your

4    briefs.

5              MR. NIELSON:  Well, I mean, I think

6    the more straightforward point is that we are a

7    party under the Hobbs Act.  Or, if not, if

8    Fasken is truly a party, and then this is all

9    academic for us.

10             JUSTICE SOTOMAYOR:  Okay.

11             MR. NIELSON:  But --

12             JUSTICE SOTOMAYOR:  So you're not.

13   Thank you.

14             MR. NIELSON:  But, no, I certainly am.

15   I certainly am, and here's why.  If I am wrong

16   about the Hobbs Act, then we really are in a

17   situation where we don't have meaningful

18   judicial review.  If they can really cut us out

19   by saying we're not going to take your

20   contentions because we think you're wrong on the

21   merits and that's somehow okay, then we are in

22   the world of ultra vires review.

23             I don't think we're there.  That's why

24   our front-line answer is just look to the Hobbs

25   Act; we're a party there.

1          JUSTICE JACKSON:  Could you have moved

2    to intervene?  Is there -- was there something

3    precluding the State of Texas from moving to

4    intervene in this case?

5          MR. NIELSON:  Well, other than, Your

6    Honor, they asked for our participation, and --

7          JUSTICE JACKSON:  No, I understand.  I

8    understand what you actually did.

9          MR. NIELSON:  Yeah.

10          JUSTICE JACKSON:  I'm just saying, you

11    say there's no meaningful judicial review.  And

12    I'm just wondering, if there is an avenue for

13    you to become a party with the requisite degree

14    of formality, say, by requesting intervention,

15    was there a reason why you couldn't have done

16    that?

17          MR. NIELSON:  Yeah.  So I would go

18    back to what Mr. Stewart said earlier, which is,

19    even for states, you have to have an admissible

20    contention.  And the argument that we were

21    making was the exact same argument Sierra Club

22    made, and they said that's not an admissible

23    contention.

24          I would point the Court to 10 C.F.R.

25    2.335, which is their procedure if they wanted

 1    to screen out these types of things, which

 2    essentially says, if you think you're operating

 3    outside of -- if we were operating outside of

 4    the law, well, then you have to file a petition

 5    for rulemaking.  That is not meaningful judicial

 6    review.  That is not how judicial review works.

 7         JUSTICE GORSUCH:  General, I take your

 8    point that if this were a rulemaking, you'd be a

 9    party.  I get that.  I also understand the

10    instinct that adjudications are sometimes

11    different, though I know this Court has held

12    that objecting shareholders in a class action

13    suit are parties for purposes of appeal even

14    though they haven't intervened.

15         Where should we look to understand

16    what the Hobbs Act meant by the term "party?"

17         MR. NIELSON:  Sure.  I mean, one, I

18    would say let's look at the dictionary.  Both

19    parties point the Court to the 1951 Black's Law

20    Dictionary.  Look at the big text, not the

21    little text underneath that they rely on.  Look

22    at the big front-line text that he uses in the

23    1951 Black's Law Dictionary.  I would say there.

24    But I'd also say whatever you say "party" means

25    for Hobbs Act purposes, it has to be big enough

 1    to include rulemaking because it's the very same

 2    word.

 3            JUSTICE GORSUCH:  Yeah, we've never

 4    said that you have to intervene to be a party.

 5    And that was not the case at common law.

 6            MR. NIELSON:  Correct, Your Honor.

 7    And I would also -- again, this is back on the

 8    Tenth Circuit days, you wrote a decision in In

 9    re Woolsey --

10            JUSTICE GORSUCH:  Oh, gosh.

11            MR. NIELSON:  -- where the court --

12    where -- I thought it was a wonderful opinion.

13            (Laughter.)

14            MR. NIELSON:  And the court

15    explained --

16            JUSTICE GORSUCH:  I wish I could

17    remember it.

18            (Laughter.)

19            MR. NIELSON:  And the court explained

20    the Clark v. Martinez point, which it says is

21    tied to the rule of law itself.  You can't have

22    a word that means different things in different

23    applications.  If it's the same word, it means

24    the same thing.  You have to have the lowest

25    common denominator to capture them all.

         1          But, if I -- if I may, I'd like to

         2   turn to the merits, though I'm happy to keep

         3   discussing jurisdiction.

         4          I think that, for me, the most kind of

         5   straightforward way to understand the problem

         6   with their argument is Congress amended this

         7   statute.  Congress amended this statute and took

         8   the definition of "spent nuclear fuel" from the

         9   Nuclear Waste Policy Act and placed it in the

        10   AEA.

        11          So there are provisions of the AEA

        12   that make no sense at all under their

        13   interpretation.  I'd point the Court to 42

        14   U.S.C. 2210(i), which lists all of these terms

        15   in the same sentence.  So, if spent nuclear fuel

        16   is just the same thing as the other three

        17   constituent parts, that sentence is -- it's --

        18   is nonsense.  That cannot possibly be the

        19   correct reading of the statute.

        20          I would also point the Court if I may

        21   to where did Congress say they didn't want this?

        22   One is 10155(h), which we've been talking about,

        23   which is inexplicable under their theory, but

        24   also 10131(a)(3), where Congress said in its

        25   findings -- paraphrasing here -- we are unhappy

1      with what has happened before.  You don't see

2      that very often from Congress, but Congress said

3      we are displeased with what has happened before.

4      And then you go on to 10155(h), which says keep

5      it onsite.

6              JUSTICE JACKSON:  Mr. Nielson, if

7      spent nuclear fuel is not the same as the three

8      constituent parts, why did ISP need a license at

9      all?

10             MR. NIELSON:  Yeah.  So I think this

11     is where -- a couple answers.  One, I agree

12     with -- with Mr. Frederick that the answer is

13     the licensing of the facility.  You have to have

14     a safe facility, so you have to have some way to

15     keep the very, very, very hot nuclear waste

16     safe.

17             But the other is -- is physics.  If

18     you have a license to take some sort of product

19     or -- or material onto a facility and you have a

20     license to use that facility, but you have no

21     license to take it off the facility, you know,

22     per Newton, it stays where it is.

23             JUSTICE JACKSON:  No, I'm just asking

24     about --

25             MR. NIELSON:  And that --

1          JUSTICE JACKSON:  -- I'm asking about

2     the statutory possession requirement.  I thought

3     you had to have a license to possess this kind

4     of material and its -- the constituent parts,

5     and everybody has believed that that equals

6     spent nuclear fuel.

7          MR. NIELSON:  Yeah.

8          JUSTICE JACKSON:  If you're saying

9     that spent nuclear fuel is something different,

10    then isn't it outside of all of this licensing?

11         MR. NIELSON:  No, Your Honor.  And I'd

12    point the Court back to Pacific Gas and also the

13    first line of ISP's brief and the first line of

14    Paul Clement's brief.

15         The -- the way you start with nuclear

16    power, going back to 1946, is right after

17    Hiroshima.  There is a federal monopoly on all

18    of this.  No private ownership of any of this

19    stuff.

20         Congress then, in 1954, opens it up

21    for the first time and says:  We're going to

22    allow some private ownership or possession of

23    these things.  And said:  These are the three

24    types of things that we are going to allow.

25    They did not allow spent nuclear fuel.

 1               So if you start with the baseline of

 2     there's a federal monopoly and no one can do any

 3     of this, and then you have three exceptions, you

 4     can't have a fourth exception.

 5               JUSTICE KAVANAUGH:  What about the

 6     idea that the 1954 Act arguably authorizes this;

 7     when you get down to 1980, the Commission says

 8     it does; 1982, Congress is very aware of this

 9     issue, and certainly aware of the Commission --

10     where the Commission is on this, and yet does

11     not preclude it, and that's remained the settled

12     understanding ever since?

13               The basic same argument I asked

14     Mr. Frederick.

15               MR. NIELSON:  Yeah.

16               JUSTICE KAVANAUGH:  But that seems

17     kind of unusual step by Congress.  They -- they

18     might not have had the votes to prohibit it in

19     1982, might be one -- one interpretation --

20     big-picture interpretation of what happened

21     there.

22               Do you just want to respond to all

23     that?

24               MR. NIELSON:  Sure.  So, one, again, I

25     would point the Court to 10155(h) and

 1    10131(a)(3).

 2              JUSTICE KAVANAUGH:  Yeah.  And if

 3    10155(h) does not prohibit.

 4              MR. NIELSON:  Okay.  But it is

 5    inexplicable under their view.

 6              But I would also point the Court to

 7    the congressional brief, where they explain the

 8    early statements of the agency after the passage

 9    of the Policy Act, which I don't think are

10    consistent with what we're hearing now.

11              There is also the time.  What strikes

12    me is:  If we've always had this power, then why

13    didn't -- why wasn't it until after the agency

14    gave up on Yucca Mountain that suddenly you

15    started getting these applications?

16              It's very bizarre, it seems to me,

17    that if there's always been this power and

18    everybody understood this power exists, it

19    wasn't until the agency said, oh, actually,

20    we're not going to do Yucca Mountain, that

21    suddenly they said, oh, let's go back to this

22    power that's already existed.

23              JUSTICE SOTOMAYOR:  Wait a minute.

24    Because it was told it had to try everything

25    else.

1          MR. NIELSON:  Well --

2          JUSTICE SOTOMAYOR:  It was told, in

3    the 1982 Act, that it wanted to encourage

4    on-site -- the federal government to take it, et

5    cetera.  So it couldn't run to do something that

6    Congress said:  Try everything else.

7          MR. NIELSON:  Yeah.  And the

8    fallback --

9          JUSTICE SOTOMAYOR:  We've run out of

10   everything else.

11         MR. NIELSON:  Well, I disagree with

12   that, Your Honor.  But the fallback that

13   Congress said was federal facilities.  Federal

14   facilities.

15         And this goes back to the point that I

16   think Justice Alito was making.  What are the

17   incentives for Congress here?

18         If New Mexico and Texas are left

19   holding the bag, every other state will be

20   happy.  They will be pleased because this waste

21   will stay in Texas forever.

22         The only way we're going to get a

23   national solution to this problem is by Congress

24   to get everybody there and figure it out.  They

25   tried to do that with Yucca Mountain, and it

1    didn't work.

2           But the answer isn't:  Well, I guess

3    we're just going to put it on Texas now.  No,

4    Congress needs to go back and fix the law.  If

5    the law is broken, it's on Congress, Congress to

6    fix it.  It's not this Court's job, and it's not

7    the agency's job.

8           CHIEF JUSTICE ROBERTS:  Thank you,

9    counsel.

10          MR. NIELSON:  My time's expired.

11          CHIEF JUSTICE ROBERTS:  Justice

12   Thomas?

13          Justice Alito?

14          Justice Sotomayor?

15          JUSTICE SOTOMAYOR:  When are we in the

16   business of giving Congress incentives?

17          MR. NIELSON:  No, Congress gave the

18   agency incentives.  Congress said:  Do this,

19   Agency.

20          JUSTICE SOTOMAYOR:  All right.  Thank

21   you, counsel.

22          CHIEF JUSTICE ROBERTS:  Justice Kagan?

23          Justice Gorsuch?

24          JUSTICE KAVANAUGH:  In your opening

25   you used the phrase "terrorist bull's-eye,"

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 1      which is obviously distinct language.

 2              We've known of that at least since

 3      September 11th, 2001.  Yet Texas supported this

 4      project, as I understand it -- correct me if I'm

 5      wrong -- for several years.  Can you -- in the

 6      mid-2010s.

 7              MR. NIELSON:  Yeah -- yeah -- yeah --

 8              JUSTICE KAVANAUGH:  Can you explain

 9      that, if it was a terrorist bull's-eye?

10              MR. NIELSON:  Yeah, I would like to

11      correct it.

12              So I would urge the Court to go back

13      and look at JA 1 through 3, the very first pages

14      of the JA.  This is Governor Perry's letter.  I

15      don't read that letter as saying, oh, yeah, this

16      is a great idea.

17              He is saying:  The federal government

18      has failed its obligations and has not done what

19      Congress said.  You're not going to have an

20      answer for this for decades.  And now Texas is

21      in the spot of what are we supposed to do?

22      They're going to build it across the border in

23      New Mexico.  Texas needs to have some sort of

24      ability to have some say in this.

25              That is how I would urge the Court.
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1 Read pages 1 through 3 of the JA. That is not a

2 ringing endorsement by Governor Perry. He was

3 just going to say this is the best of the bad

4 options.

5    Governor Abbott comes in, before this

6 license, and he says: No, essentially over my

7 dead body, are you going to do this. Citing the

8 terrorist concerns that we are identifying.

9    Also look at the brief from the

10 congressional brief, which does this as well.

11    JUSTICE KAVANAUGH: Thank you.

12    CHIEF JUSTICE ROBERTS: Justice

13 Barrett?

14    Justice Jackson?

15    Thank you, counsel.

16    Mr. Stewart.

17   REBUTTAL ARGUMENT OF MALCOLM L. STEWART

18  ON BEHALF OF THE PETITIONERS IN CASE 23-1300

19    MR. STEWART: Thank you, Mr. Chief

20 Justice. Just a few quick points.

21    First, Mr. Frederick referred to 42

22 U.S.C. 2239(a), which refers to -- deals with

23 the Commission adjudications, but that provision

24 doesn't say if a person satisfies certain

25 requirements, that person becomes a party or is

 1      a party.

 2              What it says is under certain

 3      circumstances, the Commission "shall admit any

 4      such person as a party to such proceedings.

 5      It's a directive to the Commission.

 6              And it's indisputable here that the

 7      Commission didn't admit either Texas or ISP as a

 8      party -- I -- I'm -- I'm sorry, Fasken or Texas

 9      as a party.  Fasken's argument is simply that it

10      should have been admitted.

11              Second, Mr. Frederick said that when

12      spent nuclear fuel comes out of the reactor,

13      it's too hot to handle, or too hot to move.  And

14      there is an initial period of at least five

15      years when it has to be placed in a pool, and

16      I'm told that it's rare, though not

17      unprecedented, that the -- the pool is moved.

18              But after that time, even when the

19      waste is stored at the site of a nuclear

20      reactor, it's often moved into cask storage.

21      It's in the same containers where it would be

22      stored at ISP's facility.

23              Third, Mr. Frederick referred to the

24      1980 Federal Register notice.  There was a

25      two-paragraph discussion, I think it's Heading

1      Number 18, off-site versus on-site storage.

2                But it was all about policy.  Some

3      commenters said on-site storage is better as a

4      policy matter, some commenters said off-site

5      storage is better as a policy matter.  No

6      commenter at that time questioned the

7      Commission's statutory authority to choose one

8      or the other or both, and the Commission chose

9      both.

10               The next thing I'd refer to is there

11     was a reference to the facilities license.  That

12     Justice Kavanaugh, I think you asked:  How would

13     the ISP facility be illegal if your view of the

14     materials licensing provisions is correct?  And

15     the answer was:  They would still need a

16     facilities license.

17               That's not correct.

18               The facilities licensing provisions

19     apply only to production or utilization

20     facilities.  If you operate a nuclear reactor,

21     you need both a facilities license to operate

22     the reactor and a materials license to possess

23     the -- the relevant stuff.

24               But an ISP -- ISP's proposed facility

25     is not either a production or utilization

1    facility.  All it needs is the materials

2    license.

3            And it's true that in determining

4    whether to grant the materials license the

5    Commission will examine the nature of the

6    facility, is it safe, is it secure, but that

7    doesn't convert it into a facilities license.

8            And Justice Kavanaugh, you laid out

9    the sequence of events that led to the current

10   understanding or the until-recent understanding

11   that off-site storage is permissible.  And I'd

12   add only one, and that's the D.C. Circuit's

13   decision in Bullcreek, which was a little over

14   20 years ago.

15           And that was when the question whether

16   the Policy Act had superseded the Atomic Energy

17   Act's licensing provisions and precluded

18   off-site storage.  It was teed up then.  And the

19   D.C. Circuit decided that, no, the Commission's

20   off-site licensing authority remained intact.

21   And we've been another 20 years since then.

22           Thank you.

23           CHIEF JUSTICE ROBERTS:  Thank you,

24   counsel.  The case is submitted.

25

1          (Whereupon, at 11:43 a.m., the case

2     was submitted.)

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