



1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   NUCLEAR REGULATORY COMMISSION,       )  
4   ET AL.,                                        )  
5    Petitioners,        )  
6    v.                                ) No. 23-1300  
7   TEXAS, ET AL.,                                )  
8    Respondents.        )  
9   - - - - -  
10   INTERIM STORAGE PARTNERS, LLC,        )  
11    Petitioner,         )  
12    v.                                ) No. 23-1312  
13   TEXAS, ET AL.,                                )  
14    Respondents.        )

15   - - - - -  
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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1 APPEARANCES:  
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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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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-1300, Nuclear Regulatory Commission versus Texas, and the consolidated case.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART  
ON BEHALF OF THE PETITIONERS IN CASE 23-1300

MR. STEWART: Thank you, Mr. Chief Justice, and may it please the Court:

First, the petitions for review should be dismissed because neither Texas nor Fasken was a party to the NRC licensing proceedings. Texas did not try to intervene in the agency adjudication. Fasken moved to intervene, but its request was denied, and the D.C. Circuit affirmed the denial. And there is no sound basis for the Fifth Circuit's ultra vires exception to the Hobbs Act's "party aggrieved" requirement.

If the Court reaches the merits, it should reverse the court of appeals' judgment. The Atomic Energy Act prohibits the unlicensed 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.

5 And, since 1980, the NRC's regulations  
6 have provided for both onsite and offsite  
7 storage. That system allows a substantial role  
8 for private market responses to the country's  
9 nuclear waste storage issues, subject to  
10 Commission oversight to ensure that storage is  
11 safe and consistent with statutory 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 in -- 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: Does it go -- it seems  
12 to go beyond the statutory language itself. Is  
13 that correct? Do you agree with that?

14 MR. STEWART: I -- I agree that the  
15 statutory language in itself would not impose  
16 this requirement. And -- and the Commission's  
17 prior rules had not done so. The -- the --

18 JUSTICE GORSUCH: And in looking at  
19 the statutory language, Mr. Stewart, it says  
20 that any person who requests a hearing and their  
21 interests are affected shall be admitted.  
22 That's a mandatory obligation as I read it.

23 MR. STEWART: Yeah.

24 JUSTICE GORSUCH: And Fasken, their  
25 interest is affected and they requested a

1 hearing. Those -- those things are undisputed,  
2 right?

3 MR. STEWART: Yes.

4 JUSTICE GORSUCH: So --

5 MR. STEWART: I -- I --

6 JUSTICE GORSUCH: -- help me with  
7 Justice Kagan's question.

8 MR. STEWART: -- I guess I would --  
9 I -- the two things I would say were, first,  
10 when Fasken appealed to the D.C. Circuit from  
11 the denial of its request to intervene, it  
12 didn't make the argument that the Commission's  
13 rules were invalid or it had a statutory right  
14 to --

15 JUSTICE GORSUCH: Well, it said it had  
16 a statutory right to intervene. And I -- I read  
17 the D.C. Circuit opinion. It didn't address  
18 that argument at all.

19 MR. STEWART: It -- it has said that  
20 it has a right to intervene, but it was  
21 asserting that right under the Commission's own  
22 rules. And I guess the second thing I would say  
23 is, at most, the argument you're suggesting  
24 would imply that Commission -- that Fasken ought  
25 to have been allowed to intervene, it ought to

1 have been made a party.

2 But the fact is it wasn't --

3 JUSTICE KAGAN: He could have thought  
4 it was futile given the D.C. Circuit precedent  
5 on the question, yes?

6 MR. STEWART: It -- well, it -- it  
7 could have thought -- the -- the arguments that  
8 Fasken made were actually that it was entitled  
9 to intervene under the Commission's own rules.  
10 It was not arguing that the rules imposed an  
11 invalid extra-statutory requirement. So it had  
12 no reason to think that --

13 JUSTICE GORSUCH: Well --

14 MR. STEWART: -- that that was  
15 invalid, but your --

16 JUSTICE GORSUCH: -- actually, I --  
17 I -- I've got it before me, and it says that  
18 they're entitled -- that they act -- NRC abused  
19 its discretion and acted arbitrarily and  
20 capriciously in an excess of statutory  
21 jurisdiction by not admitting them. It -- and  
22 it goes on to talk about the policies and  
23 regulations, but it cites the statute in its  
24 petition for review. And, again, the D.C.  
25 Circuit didn't address it.

1           MR. STEWART: I guess the other thing  
2 I would say is they could have sought en banc  
3 review. They could have sought certiorari  
4 review. And what they are in essence doing --

5           JUSTICE GORSUCH: Is your argument  
6 essentially one from issue preclusion then? Is  
7 that -- is that the nature of your argument,  
8 that -- that that was litigated in another forum  
9 and, therefore, that they're bound by it?

10          MR. STEWART: I think yes in the sense  
11 that --

12          JUSTICE GORSUCH: Okay. If it is  
13 issue preclusion then, you didn't argue issue  
14 preclusion below.

15          MR. STEWART: Well, what -- what we  
16 have argued --

17          JUSTICE GORSUCH: And you haven't  
18 argued it here.

19          MR. STEWART: Well, what -- we have  
20 not put the issue preclusion label on it. We  
21 did say in our reply brief they can't  
22 collaterally attack the D.C. Circuit's decision  
23 upholding the denial of intervention. But we --

24          JUSTICE GORSUCH: Isn't it your burden  
25 to show that issue preclusion applies?

1 MR. STEWART: Well, we -- I mean, I  
2 think it would be our -- our burden --

3 JUSTICE GORSUCH: Isn't that normally  
4 the case, that -- that the party seeking issue  
5 preclusion has to bear the burden of proving it?

6 MR. STEWART: I -- I think what --  
7 what they have -- our focus has always been on  
8 the fact that they did not, in fact, become  
9 parties. And Fasken has never contested that.

10 JUSTICE GORSUCH: Yeah. But can you  
11 ask -- answer my question, though, that a  
12 party -- a party seeking issue preclusion bears  
13 the burden of proving it?

14 MR. STEWART: Yes, typically so.

15 JUSTICE JACKSON: Mr. Stewart, can you  
16 explain this issue preclusion? What is your  
17 understanding of Justice Gorsuch's question?  
18 Because I -- I'm not sure I -- I see it as issue  
19 preclusion, so help me to figure that out.

20 MR. STEWART: Well, I think the  
21 question -- if the question is -- first, our  
22 position would be the question should be, did  
23 Fasken, in fact, intervene in the proceedings  
24 and become a party? And it didn't. But, even  
25 if the question is should Fasken have been

1 allowed to intervene, did Fasken -- was Fasken  
2 improperly denied a right to intervene that it  
3 had under the statute, the D.C. Circuit resolved  
4 that issue against it, and it didn't seek direct  
5 review of that determination either before the  
6 en banc D.C. Circuit or before this Court.

7 JUSTICE JACKSON: And I guess, for us  
8 to consider that to be issue preclusion that has  
9 some bearing on this proceeding, we would be  
10 suggesting that a party could make some sort of  
11 a collateral challenge to their party status  
12 through this route?

13 In other words, you're -- you're --  
14 you're saying, procedurally, the D.C. Circuit  
15 made a ruling about whether or not Fasken was  
16 entitled to intervene. They did not -- they,  
17 Fasken, did not seek rehearing en banc, did not  
18 seek cert. But I suppose, to the extent now  
19 that we are considering their party status, I  
20 guess there's a suggestion that maybe they  
21 should be able to raise that issue in this  
22 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  
11 had -- 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  
12 don't think it's part of an exhaustion  
13 requirement that you've got to seek en banc  
14 review and certiorari. That's pretty -- I  
15 mean -- I mean, I think that's unusual. Those  
16 remedies are strictly limited and may not at all  
17 be 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.

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

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. Fasken or Texas could have filed a  
12 petition for rulemaking, and it could have asked  
13 under the Commission's rules that the licensing  
14 proceeding be set -- be held in abeyance.

15           And that's not just a theoretical  
16 option if the papers are -- on the merits are  
17 full of references to the D.C. Circuit's  
18 decision in Bullcreek, which about 20 years ago  
19 upheld the Commission's statutory authority to  
20 license offsite storage of spent nuclear fuel.

21           And that was the procedural route that  
22 the State of Utah took to get to the -- the D.C.  
23 Circuit. It filed a petition for rulemaking  
24 asking that the Commission rules that authorize  
25 offsite storage be modified because they were

1 inconsistent with the statute. The Commission  
2 denied that petition. And Utah filed a petition  
3 for review of that denial in the D.C. Circuit.

4 And they didn't get the merits outcome  
5 they want -- wanted, but they got plenary  
6 judicial review of the merits question: Did the  
7 Commission have the statutory authority that it  
8 claimed? And I --

9 JUSTICE GORSUCH: Mr. Stewart, on the  
10 merits, I do have a question for you.

11 So Yucca Mountain was supposed to be  
12 the permanent solution. Congress so ordained --  
13 I think it said it had to be done by 1998. No  
14 president has complied with that in all the  
15 years since. We've spent something like \$15  
16 billion on it. It's a hole in the ground. And  
17 you parties seem to think the Yucca Mountain  
18 project is dead.

19 And if that's true and there's no  
20 different permanent repository, how is this  
21 interim storage that the government is  
22 authorizing here in any meaningful sense and  
23 especially when I think ISP's given a 40-year  
24 license? That doesn't sound very interim to me.

25 MR. STEWART: Well --

1 JUSTICE GORSUCH: And it's renewable  
2 too apparently.

3 MR. STEWART: It -- it is renewable.  
4 If -- if they applied for a renewal of the  
5 license, there would be a new Commission  
6 adjudication. And to the extent that --

7 JUSTICE GORSUCH: Forty years from  
8 now.

9 MR. STEWART: Forty years from now.  
10 And to the extent there were changed  
11 circumstances that cast doubt on the -- the  
12 propriety of this arrangement, the Commission  
13 would be able to -- to speak to that.

14 I -- I don't mean to seem glib, but  
15 the -- the repository is intended to keep  
16 nuclear waste stored safely for a temp --

17 JUSTICE GORSUCH: Yeah. On -- on a --  
18 on a concrete platform in the Permian Basin,  
19 where we get our oil and gas from. So,  
20 hopefully, we won't have radiated oil and gas.

21 MR. STEWART: And, of course, that was  
22 an objection that the -- the State and Fasken  
23 made. But that -- that's not the question that  
24 is before the Court today.

25 The -- the other -- the other point I

1 would make about kind of who bears  
2 responsibility for the delay and what we should  
3 do about it is that the -- the people who  
4 absolutely don't bear responsibility for the  
5 delay are people like ISP, people -- private  
6 enterprises who are trying to come up with  
7 interim solutions to the -- the nuclear waste  
8 storage dilemma.

9           And it's -- it's not that the  
10 Commission decided itself that this facility  
11 would be located in west Texas. ISP came up  
12 with a proposal. It filed a license  
13 application. And even if the -- the license is  
14 upheld, ISP will actually be able to store spent  
15 nuclear fuel only if it can work out contracts  
16 with the people who control the waste now and  
17 they work out a -- what is for both parties an  
18 economically beneficial arrangement.

19           And so the Commission's role is to  
20 decide whether this is safe and consistent with  
21 the statute. But the Respondents' position  
22 would place roadblocks in the way of people like  
23 ISP and people like those who currently control  
24 the nuclear waste trying to devise  
25 market-oriented solutions to the problem.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas?

4 JUSTICE THOMAS: Mr. Stewart, I do  
5 think it's somewhat strange that the NRC gets to  
6 choose who -- which parties are able to  
7 challenge it later on.

8 But -- but that aside, what's your  
9 argument that the Nuclear Regulatory Commission  
10 has the authority to establish -- to store  
11 nuclear waste off the -- offsite by a private  
12 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.

7 JUSTICE THOMAS: Does it say permanent  
8 offsite by a private person --

9 MR. STEWART: This is not permanent --

10 JUSTICE THOMAS: -- who is not a --  
11 who -- who's not a nuclear power plant, for  
12 example, 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 -- the -- I'm sorry, the  
2 materials license after the facilities license  
3 for the 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 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

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 --

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 so --

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 22-0 -- 01(h) -- that

1 says 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 store -- 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  
11 to 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.

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?

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

3           If you look at the legislative  
4 history, it also sheds light on the fact that in  
5 the sausage-making of -- of that bill, there was  
6 a lot of back-and-forth about whether the  
7 industry would have to exercise and exhaust  
8 offsite storage before they could access this  
9 1900 MTUs of federal storage. The industry  
10 didn't want that. Some legislators did want  
11 that. Some drafts required them to do that.

12           But that context is how these  
13 references to a preference for onsite storage,  
14 which are only in subpart (b), came to be and I  
15 would respectfully suggest further confirm that  
16 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 offsite storage at a private  
23 facility?

24           MR. FAGG: It's under the Atomic  
25 Energy Act. It's 2201(b). It's 2073, 2070 --

1 93 --

2 JUSTICE THOMAS: And so what would  
3 your argument be with those recitations?

4 MR. FAGG: They authorize the NRC to  
5 license the possession and storage of the  
6 constituent elements of spent nuclear fuel  
7 without any locational restriction. You're  
8 reading -- if you say "onsite," you're reading a  
9 term into the Atomic Energy Act that is not  
10 there.

11 JUSTICE THOMAS: So there's no --  
12 there's no language that you could use to say  
13 that spent fuel shall be or is permitted to be  
14 stored offsite? You're stitching together, it's  
15 seeming, just constituent parts, not just spent  
16 fuel. And I'm just looking at, asking, whether  
17 or not there's anything you can rely on that  
18 speaks to spent fuel in the aggregate being able  
19 to be stored offsite at a private 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 possess in any particular place.

21           MR. FAGG: I think that's true. And I  
22 think it's also important to -- to keep in mind  
23 there was always going to be spent nuclear fuel,  
24 okay? Whether reprocessing played out the way  
25 people thought it was going to back in the '50s,

1 '60s, '70s, whether Yucca had gotten -- gotten  
2 up and running just like it was supposed to, you  
3 were always going to have spent nuclear fuel  
4 discharged from a reactor, stored for some  
5 period of time -- even if you're going to  
6 reprocess it, you got to ship it off to a  
7 reprocessing site.

8           And -- and -- and it still doesn't get  
9 rid of all of it. There's still something.  
10 It -- it -- it's not a hundred percent. Even  
11 with reprocessing, there's still residual spent  
12 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 not -- 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 difference between your argument  
23 and 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 -- 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 onsite versus offsite  
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 onsite or offsite.

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 offsite 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 addressing  
22          the -- the real role of that language.

23          You -- it wouldn't make sense if it  
24          was not already allowed to say nothing in this  
25          statute shall authorize or encourage, right? I

1 mean, because, if it's -- if it's not allowed,  
2 it's not allowed. And that's the position of  
3 Respondents in this case.

4 And -- and so I think read in context,  
5 read -- read correctly within the Nuclear Waste  
6 Policy Act and referring to the known,  
7 documented history of the Atomic Energy Act,  
8 those provisions, again, support the --

9 JUSTICE SOTOMAYOR: What's the source  
10 I should go to to get the history you referred  
11 to earlier about the various drafts that were  
12 being fought about in subpart (b)?

13 MR. FAGG: We -- we cite a couple of  
14 them in our reply brief. And, apologies, I  
15 don't have them handy here right now. But I --  
16 I would refer to our reply brief, and I would in  
17 particular refer to the agency's decision below,  
18 which we cite, again, in our reply brief, that  
19 goes through exhaustively that legislative  
20 history. We cite it in a footnote in our reply  
21 brief and -- and -- and refer to the specific  
22 footnotes within that agency decision that refer  
23 back to the various debates. There were draft  
24 bills. There was a lot. It was a lot.

25 JUSTICE SOTOMAYOR: All right. Thank

1 you.

2 JUSTICE GORSUCH: Mr. Fagg, what do  
3 you say to your friends on the other side's  
4 argument that spent nuclear fuel is not simply  
5 the combination of source, special nuclear, and  
6 by-product materials under the AEA, but it  
7 requires other things? Like it must have been  
8 withdrawn from the nuclear reactor, it must have  
9 undergone -- not have undergone reprocessing?  
10 And that's reflected both in the statute -- in  
11 the -- in the NWPA and also in the NRC's own  
12 regulations.

13 MR. FAGG: I -- I think I would -- I  
14 would say factually it's just not the case that  
15 when you pull one of these spent nuclear fuel  
16 assemblies, which are, you know, 15-foot metal  
17 with all the uranium rods inside, that there's  
18 anything at all in there other than special  
19 nuclear material, source material, or by-product  
20 material. There's metal sheaths and -- and  
21 things that hold this all together. They've  
22 become irradiated through the exposure and  
23 the -- and the process. And -- and that falls  
24 squarely within --

25 JUSTICE GORSUCH: Well, I -- I --

1                   MR. FAGG: -- the definition of  
2 by-product.

3                   JUSTICE GORSUCH: -- I appreciate  
4 that. But spent nuclear fuel is defined in the  
5 later statute as being withdrawn from a reactor,  
6 which doesn't necessarily pertain to the three  
7 constituent parts, and it must not have  
8 undergone reprocessing.

9                   Those are two conditions at least that  
10 seem to me to differentiate the two. And I'm --  
11 I'm struggling for an answer.

12                  MR. FAGG: May I respond?

13                  CHIEF JUSTICE ROBERTS: Certainly.

14                  MR. FAGG: The -- the -- the -- the  
15 answer to that I guess I would say is, well,  
16 which way does that cut? So, when Congress  
17 added the definition of "spent nuclear fuel" in  
18 1988 incorporating the five-year-old definition  
19 from the Nuclear Waste Policy Act --

20                  JUSTICE GORSUCH: Right.

21                  MR. FAGG: -- again, decades and  
22 decades and decades of practice have been  
23 treating the three constituent elements as spent  
24 nuclear fuel for purposes of prohibiting  
25 possession and -- and -- and licensing.

1           So I -- I think, again, just factually  
2 and looking at the statutory definitions of the  
3 three elements, a spent nuclear fuel assembly is  
4 those three and nothing else.

5           JUSTICE GORSUCH: Thank you.

6           CHIEF JUSTICE ROBERTS: Justice  
7 Thomas?

8           Justice Alito?

9           JUSTICE ALITO: If Congress wanted to  
10 authorize temporary offsite storage of spent  
11 nuclear waste, why did it use the term "special  
12 nuclear material?"

13          MR. FAGG: Well, special nuclear  
14 material is one of the three elements --

15          JUSTICE ALITO: Yeah, I understand  
16 that, but why choose just that? Why not refer  
17 to the whole thing?

18          MR. FAGG: Well, in 1954, there wasn't  
19 yet a nuclear power plant, okay? When the  
20 Atomic Energy Act was passed, the first online  
21 commercial plant wasn't going to come on until  
22 about 1958 or so. So I -- I think that the  
23 logical and -- and -- and probable reason why  
24 Congress did this is -- is to reduce it to  
25 the -- the most pernicious, if you will,

1 elements of it, okay? So, if you -- if you  
2 can't do it with special nuclear material, you  
3 can't do it with spent nuclear fuel.

4 And so rather than -- you know,  
5 there's all kinds of additional things that may  
6 or may not have these elements in them, but --  
7 but a -- an efficient and effective way to  
8 safeguard the public health and safety, to  
9 promote, you know, all the things that the  
10 Atomic Energy Act was -- was to promote, was to  
11 do it the way it did it, which is reduce it to  
12 the minimal elements, if you will, and -- and --  
13 and -- and invest the agency with the authority  
14 under the provisions we've talked about to  
15 regulate those.

16 JUSTICE ALITO: Do you -- would you  
17 agree that the State of Texas and those with an  
18 interest in the Permian Basin have a  
19 reasonable -- that it's reasonable for them to  
20 be concerned about the storage in this location?

21 MR. FAGG: I have no reason to -- to  
22 doubt that they care. I -- I -- I question why  
23 they didn't intervene, like lots of states do  
24 and like the regulations specifically allow.

25 I do -- I do -- I would also observe,

1 and it's in the record, Texas originally  
2 supported this project and then reversed itself  
3 and opposed it. But I -- I don't doubt their --

4 JUSTICE ALITO: Well, why was this  
5 location chosen?

6 MR. FAGG: It -- you know, there --  
7 there's -- there's reams of environmental  
8 aspects of this. One of the things is looking  
9 at, you know, the potential alternatives.

10 And -- and, you know, no -- nobody  
11 close to a location chosen, including the  
12 nuclear plants in Oregon and -- and -- and New  
13 England, want it there or like it there. But,  
14 you know, it was a place that was deemed  
15 ultimately, after a lot of study, to have been  
16 somewhere where it could be safe, safely stored.

17 JUSTICE ALITO: Do you have a  
18 prediction about when there may -- there might  
19 be a permanent storage facility?

20 MR. FAGG: I -- I -- I've been in --  
21 in this stew for a lot of years, and there's a  
22 lot of -- there are a lot of talks. There's a  
23 lot of energy. But I think I'd be -- as I sit  
24 here today, I think, you know, I -- I'd be  
25 kidding myself and every -- and the Court if I

1 said I -- I have a date.

2 But, you know, it -- it's still the  
3 law of the land as -- as we sit here today.

4 JUSTICE ALITO: Well, if it is decided  
5 that the material can be stored offsite  
6 temporarily, and "temporary" means more than 40  
7 years, maybe more than 80 years, maybe it means  
8 250 years, may it -- may it mean -- maybe it  
9 means 500 years, what -- where is the incentive  
10 to go forward to do what Congress wanted to have  
11 done, which is to establish a permanent  
12 facility?

13 MR. FAGG: Well, the -- the incentive  
14 is what it is, whether the fuel is at the  
15 facility my client wants to build it or is  
16 scattered across 40, you know, sites all across  
17 the country.

18 So, you know, the incent -- the  
19 incentives -- and, again, this is an industry  
20 that is harmed by DOE's failure. Trying to  
21 mitigate it through my client's actions and to  
22 sort of punish the industry doubly for DOE's  
23 failure and then not allow them to save tens of  
24 millions in dollars to mitigate I would suggest  
25 is -- is -- is not -- not furthering the

1 incentives that we want in terms of a -- of a --  
2 a critical part of -- a fifth of our nation's  
3 power.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Sotomayor?

6 Justice Kagan?

7 Justice Gorsuch?

8 Justice Kavanaugh?

9 Justice Barrett?

10 Justice Jackson?

11 JUSTICE JACKSON: Can I just ask you  
12 to speak quickly about the party issue? Does it  
13 matter whether the intervention motion was  
14 wrongly denied at this stage, at this point?

15 MR. FAGG: In -- in this case, I would  
16 say no because that was all litigated at the  
17 D.C. Circuit level. It wasn't timely challenged  
18 in the Fifth Circuit level.

19 Again, I resist the notion that  
20 there's no judicial review. If you're denied --  
21 and -- and to echo something Mr. -- government  
22 counsel said, the -- the -- there's all kinds of  
23 ways you could say these rules are too  
24 restrictive, these rules are -- are -- are --  
25 are too much. You -- you can challenge them in

1 a proceeding, you can get a waiver to challenge  
2 them in a proceeding, or you can do, as in the  
3 Bullcreek proceedings and as Mr. Stewart pointed  
4 out, a petition for rulemaking.

5 So that's kind of a long-winded way of  
6 saying it's not before this Court in this case  
7 about whether Fasken's attempt to become a party  
8 was rightly or wrongly decided. The D.C.  
9 Circuit said it was rightly decided, and here we  
10 are.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Frederick.

15 ORAL ARGUMENT OF DAVID C. FREDERICK  
16 ON BEHALF OF RESPONDENT FASKEN LAND  
17 AND MINERALS, LTD.

18 MR. FREDERICK: Thank you, Mr. Chief  
19 Justice, and may it please the Court:

20 The 1982 Nuclear Waste Policy Act  
21 created a comprehensive program that addressed  
22 where and how to store spent nuclear fuel. That  
23 program does not include private offsite  
24 storage, which Congress specifically ruled out  
25 in Section 10155(h).

1           As the later-enacted, more specific  
2 act, the Policy Act controls, and the NRC cannot  
3 administratively override it.

4           The Atomic Energy Act itself  
5 authorizes only onsite storage, not offsite  
6 storage. Sections 2133 and 2134 allow the  
7 Commission to impose conditions, including  
8 safety requirements, on utilization and  
9 production facilities' licenses. Reactors are  
10 utilization facilities. So licenses cover  
11 onsite storage of spent fuel.

12           Because that material is so hot, it  
13 takes years to cool, and it can only be done  
14 safely onsite by removing the reactor core and  
15 moving it immediately into water. And that's  
16 why more than about 50 percent of all spent  
17 nuclear fuel is in cooling pools around the  
18 country.

19           Section 2136, which is not cited in  
20 the briefs, says the NRC "may define the various  
21 activities at each such facility." And we think  
22 that clearly means regulating the safety  
23 characteristics of dealing with spent nuclear  
24 fuel when it comes immediately out of the  
25 reactor core.

1           The Commission's efforts to derive  
2           authority from the AEA's material license  
3           provisions don't work because storage is not  
4           use. As the 1982 Policy Act defines it, storage  
5           is "retention for subsequent use, processing, or  
6           disposal."

7           I welcome the Court's questions.

8           JUSTICE THOMAS: Why are you a party  
9           now?

10          MR. FREDERICK: We're a party now  
11          because, under the plain language of the Atomic  
12          Energy Act 2339(a)(1)(A), we are affected by the  
13          proceeding, we shall be admitted as a party, and  
14          we requested a hearing. Those are all  
15          indisputed facts.

16          JUSTICE THOMAS: So what do we do with  
17          the D.C. Circuit opinion?

18          MR. FREDERICK: I think what you say  
19          is that there were two purposes that Fasken  
20          wanted to advance as a party. One was to be  
21          able to intervene for the purposes of putting in  
22          expert testimony and other facts. We were  
23          denied that, Justice Thomas, and we're not  
24          appealing that now.

25          But the second purpose, which is

1 satisfied by the plain language of the Atomic  
2 Energy Act, is to be able to challenge that the  
3 NRC approved this license without statutory  
4 authority.

5 And the NRC's intervention rules,  
6 which are set forth at 2.309 and 2.335, make it  
7 very clear that the NRC itself is going to serve  
8 as a gatekeeper and does not allow parties to  
9 come in and challenge their statutory authority  
10 in the licensing proceeding itself.

11 JUSTICE JACKSON: But why isn't this a  
12 collateral attack on the intervention decision?  
13 I guess I don't understand.

14 MR. FREDERICK: Because, as I said,  
15 Justice Jackson, the intervention which we  
16 sought was to be able to put in expert testimony  
17 and to participate in an -- what was effectively  
18 a proceeding to gather evidence.

19 Here, we're bringing a pure legal  
20 facial challenge, and we --

21 JUSTICE SOTOMAYOR: Mr. Frederick, it  
22 makes no sense to me. What you're saying is,  
23 instead of bringing that argument to the agency  
24 first, you get, at any point in time that you  
25 want to, the right to intervene and argue that

1 they don't have the power.

2 Don't you think the normal course  
3 of -- of agency proceeding -- and we've already  
4 said that even though agencies sometimes can't  
5 decide constitutional questions, there's no  
6 question that the agency could have listened to  
7 the argument that it statutorily wasn't in power  
8 to do so.

9 MR. FREDERICK: Except that their  
10 rules say you can't. And so it would have been  
11 utterly futile to go to the Commission and say:  
12 You're acting ultra vires beyond your statutory  
13 authority because the regulations of the NRC  
14 say: We are not going to accept that at -- that  
15 contention.

16 JUSTICE SOTOMAYOR: And then you could  
17 have brought it to the Fifth Circuit.

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

19 JUSTICE SOTOMAYOR: Well --

20 MR. FREDERICK: We did argue --

21 JUSTICE SOTOMAYOR: -- yeah, but you  
22 didn't argue it at the time when -- you -- you  
23 didn't bring it. You didn't argue it at the  
24 time that you moved to intervene.

25 JUSTICE JACKSON: Did you --

1 MR. FREDERICK: That's incorrect.

2 That is -- I --

3 JUSTICE JACKSON: Did you -- did you  
4 say --

5 MR. FREDERICK: -- would like to set  
6 the record straight. That's not correct.

7 JUSTICE JACKSON: Go ahead. Go ahead.

8 MR. FREDERICK: Yeah. We moved to  
9 dismiss. The very first motion we filed said:  
10 This is not within your statutory authority. We  
11 moved to intervene for multiple purposes.

12 JUSTICE SOTOMAYOR: And then you  
13 didn't take it up to the Fifth Circuit.

14 MR. FREDERICK: We argued to the Fifth  
15 Circuit that the --

16 JUSTICE SOTOMAYOR: At -- at the  
17 second -- at the second --

18 MR. FREDERICK: Because that was the  
19 final order, Your Honor. We challenged the  
20 final order as being outside the scope of the  
21 authority --

22 JUSTICE SOTOMAYOR: But you didn't do  
23 it at the first motion to --

24 MR. FREDERICK: No, because the first  
25 motion only go -- went to could we intervene for

1 purposes of bringing in evidence to the  
2 Commission.

3 And -- and the point here is: Are you  
4 going to allow agencies to manipulate their  
5 rules so that they can decide who gets to  
6 challenge them?

7 JUSTICE SOTOMAYOR: I'm sorry --

8 JUSTICE JACKSON: Quite frankly, I'm  
9 worried about party manipulation.

10 I'm trying to understand what basis  
11 you now have to say that we should be revisiting  
12 the D.C. Circuit's determination that you cannot  
13 intervene.

14 MR. FREDERICK: I'm not asking you to  
15 do that.

16 JUSTICE JACKSON: Okay. So, if we  
17 believe that the law is such that you had to be  
18 a party, do you concede that you were not a  
19 party at the lower court proceeding?

20 MR. FREDERICK: No.

21 JUSTICE JACKSON: You do not concede?

22 MR. FREDERICK: We do not concede  
23 that.

24 JUSTICE JACKSON: Okay.

25 MR. FREDERICK: The Atomic --

1 JUSTICE JACKSON: And the basis for  
2 your part -- your party participation is what?

3 MR. FREDERICK: The Atomic Energy Act  
4 says that if we are affected by the proceedings  
5 and we ask for a hearing, the NRC "shall admit"  
6 us as a party.

7 JUSTICE KAGAN: Well, that -- that  
8 says, Mr. Frederick, why you have a argument  
9 that you should have been a party. And maybe  
10 you do have a good argument that you should have  
11 been a party.

12 But it -- it's not to say that you  
13 were a party. In fact, you were not a party.

14 MR. FREDERICK: No, I think that we  
15 were not a party in the sense that we were  
16 permitted to do the full evidentiary exposition  
17 that we might have liked to have done. And I'm  
18 not arguing that we should have -- that that  
19 should be revisited.

20 But we are a party under the  
21 meaning -- the plain language of the Atomic  
22 Energy Act, which says we shall be a party and  
23 we shall have an opportunity to say in a  
24 judicial review setting --

25 JUSTICE KAGAN: But then you're saying

1 that -- that -- I mean, you know, when I look at  
2 this, your only participation in the agency  
3 proceeding was to be excluded from it. But then  
4 you're saying: Well, if I was excluded wrongly,  
5 I'm a party.

6 I mean, how could that be? I mean,  
7 that's -- that's -- that's very much against the  
8 way we think of this in a judicial context,  
9 right, where we look at somebody and they've  
10 tried to intervene, and maybe they've been  
11 wronged, maybe the court was wrong to say that  
12 they can't intervene, but we don't say: Oh, the  
13 court was wrong. They really should have been  
14 there, and so we're going to give them an  
15 opportunity to come in at some later point in  
16 time and attack the judgment.

17 It just doesn't work that way.

18 MR. FREDERICK: Well, I would say this  
19 is not the normal agency proceeding. The  
20 Pacific Legal Foundation says that they have  
21 looked at the various agencies. This is the  
22 only agency that serves as a gatekeeper to its  
23 own proceedings. That's point one.

24 Point two, there are different scopes  
25 of party participation. One is that you

1 participate as a full party, bring depositions,  
2 bring other evidence.

3           That is not what we are challenging  
4 here. What we are saying is that the plain  
5 language of the Act gives us the right to say  
6 for the first time in court, because the agency  
7 won't allow us to say it in the proceedings, you  
8 don't have the statutory authority for what you  
9 did.

10           JUSTICE JACKSON: But, Mr. Frederick,  
11 if we disagree with you, if we think that as a  
12 matter of law, what counts as being a party is  
13 having the level of participation that you  
14 called Category 1, do you concede that you did  
15 not have that in this case?

16           MR. FREDERICK: Well, we were  
17 foreclosed from having it.

18           JUSTICE JACKSON: All right. So, if  
19 we think that in order to be a party for the  
20 purpose of the Hobbs Act, you have to have that  
21 status, what difference does it make what  
22 arguments you're making or whatever? You didn't  
23 have that status.

24           MR. FREDERICK: Because the Hobbs Act  
25 itself incorporates the Atomic Energy 2339

1 provision that I quoted to you about being a  
2 person affected by the license, requesting a  
3 hearing, that we shall be admitted.

4 So the Hobbs Act party --

5 JUSTICE JACKSON: Did you make that  
6 argument before the court in your  
7 intervention -- wasn't that the basis by which  
8 you went to the court and said: I need to  
9 intervene, look at the Hobbs Act provision that  
10 says these things?

11 MR. FREDERICK: No. What we did in  
12 the D.C. Circuit was we talked -- and -- and the  
13 D.C. Circuit, by the way --

14 JUSTICE JACKSON: I'm sorry, that's  
15 not the statutory basis for your claiming the  
16 right to intervene?

17 MR. FREDERICK: It is. It is.

18 JUSTICE JACKSON: It was, right? So  
19 you said to the court: Look at the Hobbs Act.  
20 Here are these criteria we need to be able to  
21 intervene. And the court disagreed.

22 MR. FREDERICK: I think you're  
23 misreading what happened in the D.C. Circuit,  
24 Your Honor, with respect. We didn't have an  
25 opportunity to challenge the final order in the

1 D.C. Circuit. That could only be done after the  
2 final order was made.

3 So what we did challenge was the  
4 limited application of the Commission's  
5 intervention rules to say they had not been  
6 applied correctly.

7 JUSTICE SOTOMAYOR: Mr. Frederick --

8 MR. FREDERICK: That's a much more  
9 limited question.

10 JUSTICE SOTOMAYOR: -- it makes little  
11 sense. The rule at issue that you wanted to  
12 intervene in was a rule that was citing a -- a  
13 storage area that you now say they didn't have  
14 the authority to do.

15 So, if you were an aggrieved person  
16 under the Act, you could have gone to the D.C.  
17 Circuit on your first round of appeal and said  
18 just that: I can intervene because I have an  
19 argument that they've exceeded their statutory  
20 authority.

21 MR. FREDERICK: And the D.C. Circuit  
22 20 years before had rejected that argument.  
23 There was no circuit split.

24 JUSTICE SOTOMAYOR: Oh, so then you  
25 could have sought cert here.

1                   MR. FREDERICK: And there was no  
2 circuit split, Your Honor.

3                   JUSTICE SOTOMAYOR: You didn't have  
4 to, but you -- but the Hobbs Act requires you to  
5 be a party aggrieved, not a person aggrieved.

6                   MR. FREDERICK: Let me just say,  
7 Justice Sotomayor, if the Court adopts that line  
8 of reasoning, the NRC is effectively immune from  
9 judicial review because they set the rules for  
10 determining what can be a "admissible  
11 contention" which has to meet -- surpass the  
12 summary judgment standard.

13                   JUSTICE KAGAN: Well, I take that  
14 point, Mr. Frederick, and it might very well be  
15 that this D.C. Circuit decision is wrong. I  
16 mean, it -- it -- it looks to me as though it  
17 goes beyond the statute. So I -- I'm pretty  
18 sympathetic to that view.

19                   And yet I'm still sort of hung up on  
20 the idea that in this proceeding, at this moment  
21 in time, that's not before us. Only whether you  
22 were a party is before us. And any way I sort  
23 of think about it, you weren't a party.

24                   MR. FREDERICK: Well, I would ask you  
25 to reread the language of 2339 of the Atomic

1 Energy Act, which says we are a party. And --  
2 and if you're going to apply normal textual  
3 canons of strict construction, you would say we  
4 are a party.

5 JUSTICE KAGAN: I think that language  
6 says you should have been included as a party.  
7 I think that language gives you a good reason  
8 for saying that -- that the regulation is  
9 invalid and a good reason for saying that the  
10 D.C. Circuit is wrong. But I don't think that  
11 language gives you a good reason for sort of  
12 just, you know, making X not X, that you weren't  
13 there.

14 MR. FREDERICK: Your Honor, I don't  
15 think that the Fifth Circuit's ruling that we  
16 were a party that should be allowed to challenge  
17 the statutory authority of the agency would deny  
18 us party status now.

19 And I -- I do want to emphasize the  
20 time point. As Justice Alito pointed out, this  
21 license can have this storage for up to 80  
22 years. And under the reasoning of that line, no  
23 one would ever be able to say, well, you know  
24 that -- that nuclear stuff in the west Texas  
25 area was done illegally because no one had the

1 appropriate party status because the  
2 intervention rules of the NRC said you don't get  
3 to intervene.

4 That would be a very crazy way to  
5 think about limitations on agency authority that  
6 exceed what the statute allows. And I think  
7 that if you consider the other side's argument,  
8 onsite storage has to be done for safety  
9 reasons. The -- the nuclear material that is  
10 burned, it is very, very hot. It has to stay  
11 onsite.

12 And that's why the facilities license  
13 provisions are the easiest way to understand the  
14 practical reality that, for 70 years, this  
15 material has stayed onsite. When Congress  
16 considered in the Policy Act what to do with it,  
17 it said either --

18 JUSTICE JACKSON: Mr. Frederick, what  
19 do we do about the fact --

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

21 JUSTICE JACKSON: What do -- what do  
22 we -- you've said over and over that it's hot  
23 and it's hard and all of that. But I would  
24 assume that in 70 years, technology changes,  
25 that, you know, things happen and people figure

1 out ways to store and move. What -- what --  
2 what do we do with that?

3 MR. FREDERICK: Well, the technology  
4 hasn't speeded up the cooling process of  
5 material that is radioactive.

6 JUSTICE JACKSON: No, I understand,  
7 but we have -- we have ISP here saying that they  
8 can receive this material.

9 MR. FREDERICK: This -- this material,  
10 Justice Jackson, is so hot when it comes out of  
11 the core, no human being can get anywhere close  
12 to it, which is why it -- the design of the  
13 facility that is done by the Commission is to  
14 have the spent rods taken down into pools of  
15 water.

16 JUSTICE JACKSON: No, I understand. I  
17 guess I just don't -- I -- I'm not fully  
18 understanding why it matters that the material  
19 is so hot and that it's difficult to do in a  
20 situation like this in which the Commission has  
21 apparently licensed -- that's what you're  
22 challenging -- this transfer. So someone thinks  
23 it can be done because they've given a license  
24 to do it.

25 MR. FREDERICK: And it hadn't been

1 done before this situation. No facility's ever  
2 been constructed. The Morris facility that Mr.  
3 Stewart adverts to --

4 JUSTICE JACKSON: But why doesn't that  
5 fit into the statutory authorization for the  
6 Commission to make the determination about  
7 whether or not this can be done consistent with  
8 safety, et cetera, et cetera?

9 MR. FREDERICK: Because the Policy Act  
10 says in five provisions the NRC shall maximize  
11 onsite storage. It shall increase technology  
12 for onsite storage. It shall, if it has to go  
13 offsite, go to a federal facility.

14 JUSTICE JACKSON: And does it say it  
15 cannot --

16 MR. FREDERICK: Yes. 101 --

17 JUSTICE JACKSON: -- authorize -- it  
18 cannot authorize offsite storage?

19 MR. FREDERICK: 10155(h) says it shall  
20 not do private offsite storage.

21 JUSTICE JACKSON: 101 --

22 MR. FREDERICK: 55 --

23 JUSTICE JACKSON: -- 55 --

24 MR. FREDERICK: -- (h).

25 JUSTICE JACKSON: -- (h).

1 JUSTICE KAVANAUGH: What --

2 MR. FREDERICK: Yes. And -- and I  
3 think, Justice Jackson, what -- what's very  
4 clear from these provisions is that the NRC is  
5 seeking to use a rulemaking to override a  
6 statute.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Justice Thomas, anything further?  
10 Justice Alito?

11 JUSTICE SOTOMAYOR: Perhaps, in reply,  
12 I'll get an answer to this or you can.

13 I had understood that the pooling --  
14 the cooling pools, that many of them are  
15 offsite?

16 MR. FREDERICK: No, that's not  
17 correct.

18 JUSTICE SOTOMAYOR: All right. Then I  
19 misunderstood.

20 MR. FREDERICK: And -- and -- and I --  
21 and I can point you to the Blue --

22 JUSTICE SOTOMAYOR: I thought Mr. Fagg  
23 had said that, but --

24 MR. FREDERICK: Right. There was a  
25 Blue Ribbon Commission report that the

1 President's Blue Ribbon Commission put together  
2 that goes through all of this material. It goes  
3 through the nuclear process, the history at the  
4 storage site. It was published, I think, in  
5 2012 or 2013. It answers many of the questions  
6 about the practicalities of the nuclear process.

7 JUSTICE SOTOMAYOR: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?  
9 Justice Gorsuch?

10 JUSTICE GORSUCH: A couple quick  
11 questions, Mr. Frederick.

12 First, with respect to your ultra  
13 vires argument, it sure sounds to me a lot like  
14 an APA challenge beyond statutory authority that  
15 would normally be brought in district court in  
16 the first instance. Help me with that.

17 MR. FREDERICK: Well, what I would say  
18 is that we have not found a case on all fours  
19 with the one that we have where the ultra vires  
20 argument was brought directly to the court of  
21 appeals.

22 But what I would say is that the  
23 jurisdiction, the exclusive jurisdiction  
24 provision of the Hobbs Act, 2342(4) --

25 JUSTICE GORSUCH: I understand. If

1 you get in the Hobbs Act, you're in the Hobbs  
2 Act. But assume we're not in the Hobbs Act.

3 MR. FREDERICK: Right. But what I'm  
4 saying is that 2342 says all final orders, the  
5 exclusive jurisdiction --

6 JUSTICE GORSUCH: I see.

7 MR. FREDERICK: -- shall be in the  
8 courts of appeals. And so our reading of that  
9 is that that answers the question of where you  
10 can bring the argument. It doesn't say --

11 JUSTICE GORSUCH: Got you.

12 MR. FREDERICK: -- how or what the  
13 argument is.

14 JUSTICE GORSUCH: I follow you.

15 And then, with respect to the struggle  
16 over the D.C. Circuit order, I didn't see  
17 anything in the opinion addressing the statutory  
18 question, so -- and I didn't see anybody below  
19 arguing that that -- that -- normally, for issue  
20 preclusion to have an effect, you have to have a  
21 ruling on -- on the question at hand.

22 MR. FREDERICK: Correct.

23 JUSTICE GORSUCH: And somebody has the  
24 burden to show that it applies. And I didn't  
25 see either ruling on this question in the D.C.

1 Circuit.

2 MR. FREDERICK: That's correct. And  
3 that's --

4 JUSTICE GORSUCH: And I didn't see the  
5 government suggest or ISP suggesting that you  
6 were precluded as a matter of collateral  
7 estoppel.

8 MR. FREDERICK: That's correct.  
9 They've not made that oral waiver argument. And  
10 that's why it's important to understand the  
11 difference between an intervenor party and just  
12 a party to be able to say under the plain  
13 language of the Act you violated the Act.  
14 You've gone beyond the Act in approving this  
15 license.

16 JUSTICE GORSUCH: All right. Thank  
17 you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: One of the  
21 arguments on the other side is the Commission's  
22 interpreted the statutory scheme the same way  
23 for, you know, five decades and that that  
24 consistent, longstanding interpretation has  
25 itself significant weight as we interpret the

1 statute.

2 You want to respond that?

3 MR. FREDERICK: Yes. Thank you for  
4 asking that question, Justice Kavanaugh.

5 If you look at the Federal Register  
6 for the 1980 rules, there are two paragraphs on  
7 the question of does the agency have the  
8 authority to do offsite storage. One paragraph  
9 says many commenters think it's a bad idea to do  
10 it anywhere but onsite. The second paragraph  
11 says some commentators think that it's okay to  
12 do it offsite.

13 So we think it should be -- we should  
14 have the authority to choose. They don't cite  
15 any provisions of the Atomic Energy Act. They  
16 don't ground that policy in any particular  
17 statutory language.

18 It was the Commission's decision to do  
19 this simply on the basis of what they thought  
20 was a good idea. And then two years later, when  
21 Congress comprehensively addressed the subject  
22 in the Policy Act, the agency should have gone  
23 back and redone its rules. It didn't do that.

24 And that's why Mr. Stewart has to make  
25 a rather convoluted statutory argument deriving

1 from these provisions in the Atomic Energy Act  
2 that don't speak to the question.

3 JUSTICE KAVANAUGH: Well, is it really  
4 that convoluted? It's basically that the Act  
5 was understood to authorize this, that the  
6 Commission recognized that authority, that  
7 Congress in 1982 had a chance to, was well aware  
8 of this issue and did not expressly preclude  
9 this, and then that's been the way it's been  
10 for, you know, 50 years.

11 MR. FREDERICK: Well, it is not how it  
12 has been. The only example they have is a  
13 former reprocessing facility. That is a  
14 production facility as defined in the Atomic  
15 Energy Act. That's the Morris plant.

16 When reprocessing failed, they had to  
17 do something with the spent nuclear fuel that  
18 had been sent to the Morris plant, and so what  
19 they did was kind of a jerry-rigged approach and  
20 said: It's here, we don't want to move it,  
21 let's just keep it here, and we'll store it  
22 onsite.

23 And that has become the exemplar of  
24 their longstanding interpretation for offsite  
25 storage. It -- it is really a stretch and makes

1 no relation to the statutory test at all.

2 JUSTICE KAVANAUGH: One of the reasons  
3 longstanding interpretations matter, of course,  
4 is that private parties rely on those, and the  
5 amicus brief, for example, of the Nuclear Energy  
6 Institute makes -- makes clear that a lot of  
7 investment has happened based on what appeared  
8 to be a settled understanding of the authority.

9 Do you want to respond to that?

10 MR. FREDERICK: Yeah. There --  
11 there's been no actual construction of an  
12 offsite facility ever. There have only been  
13 three approvals. One, the Bullcreek example,  
14 was never built. So that license was approved,  
15 no facility. The only two other ones are before  
16 this Court. It's Holtec in New Mexico, ISP in  
17 Texas.

18 JUSTICE KAVANAUGH: And then last  
19 question. Petitioners' counsel said, if your  
20 statutory argument is correct, they never needed  
21 a license to begin with.

22 You want to respond to that?

23 MR. FREDERICK: Yeah. What I started  
24 with on the material -- on the facilities  
25 license is that in order to ensure the safe

1 operation of the facility under 2133, 2134, and  
2 2136, the Commission has always asserted the  
3 authority to make sure safe operations occur  
4 onsite, but that's part of the facilities  
5 license, which means you don't move it off the  
6 facility, which is the whole argument that  
7 they're trying to make here by saying it's  
8 lawful to take what is a materials license  
9 and -- and contort what authority that they were  
10 really asserting under the facilities license  
11 provision.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett?

15 Justice Jackson?

16 JUSTICE JACKSON: Do you concede that  
17 the "party aggrieved" language is  
18 jurisdictional?

19 MR. FREDERICK: I think that if it's  
20 jurisdictional, it can't be waived. And so --

21 JUSTICE JACKSON: No, I understand.  
22 I'm just asking you, is it a jurisdictional  
23 provision?

24 MR. FREDERICK: I'm not sure. I think  
25 courts of appeals have treated the 60-day

1 provision as jurisdictional for appeal. I'm not  
2 sure that they've treated who constitutes a  
3 party as being jurisdictional, but what I would  
4 say to that, Justice Jackson, is that in all of  
5 those Hobbs Act conditions, you should look at  
6 the organic statute for the Commission first  
7 because the FCC has two different appellate  
8 mechanisms. One is a Hobbs Act provision and  
9 the other is not a Hobbs Act provision.

10 JUSTICE JACKSON: All right. Well,  
11 I -- I'm just trying to understand the argument  
12 that I think you're now making, which is that  
13 there's a difference between being an intervenor  
14 party for the purpose of any party aggrieved and  
15 being a party who wants to make the particular  
16 claim of ultra vires.

17 MR. FREDERICK: Well --

18 JUSTICE JACKSON: You say you're the  
19 latter, but you admit you're not the former.

20 MR. FREDERICK: Well, what I'm -- I  
21 think we were the former. I think the  
22 language --

23 JUSTICE JACKSON: Well, you didn't --  
24 you didn't get intervenor -- intervenor status.

25 MR. FREDERICK: I'm not challenging

1 that, Justice Jackson, but I'm not saying we're  
2 not aggrieved. We clearly are aggrieved. And  
3 we are aggrieved under any --

4 JUSTICE JACKSON: I didn't ask you  
5 whether you were aggrieved. I'm trying to  
6 figure out whether you're a party.

7 MR. FREDERICK: Yes.

8 JUSTICE JACKSON: And -- and -- and --  
9 and the distinction that you've now made is the  
10 difference between parties who were intervenors  
11 and parties who would like to claim ultra vires.  
12 I don't see any statutory basis for that  
13 distinction, but I'm just trying to even  
14 understand where it comes from.

15 MR. FREDERICK: What I'm saying,  
16 Justice Jackson, is there are two routes for us  
17 to assert our party status, okay? One is under  
18 the Atomic Energy Act, which we clearly satisfy.  
19 The other is under the Commission's rules for  
20 intervention, which the Commission ruled against  
21 us on.

22 I acknowledge we lost the second one  
23 and it's not before this Court. But that  
24 doesn't mean we don't satisfy the statutory  
25 requirements that would be --

1 JUSTICE JACKSON: Thank you. I  
2 understand your argument.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Nielson.

6 ORAL ARGUMENT OF AARON LLOYD NIELSON  
7 ON BEHALF OF RESPONDENTS TEXAS, ET AL.

8 MR. NIELSON: Mr. Chief Justice, and  
9 may it please the Court:

10 I hope to make several additional  
11 points, but I want to start with three quick  
12 ones.

13 First, Justice Kavanaugh was right in  
14 PDR Network that the Hobbs Act covers a wide  
15 variety of orders. Under Clark -- Clark  
16 v. Martinez, where one provision has multiple  
17 applications, the Court applies a lowest common  
18 denominator interpretation to all of them. Even  
19 in the D.C. Circuit, if you file comments,  
20 that's enough to challenge a rule and a  
21 declaratory ruling in adjudication.

22 Second, Congress added to the A -- to  
23 the AEA the NWPA's definition of "spent nuclear  
24 fuel." The Court needs to interpret today's AEA  
25 and address Petitioners' obvious superfluity.

1                   And, finally, you know, if anyone  
2                   thinks this is temporary, I have a bridge to  
3                   sell you.

4                   There's no way that we're going to  
5                   move 140,000 tons of nuclear waste in 60 years.  
6                   What the Commission has just done is put a  
7                   permanent terrorist bulls-eye on the most  
8                   productive oil field in America.

9                   I welcome the Court's questions.

10                  JUSTICE THOMAS: You did not  
11                  intervene, so why are you a party now?

12                  MR. NIELSON: Correct, Your Honor.  
13                  So, I mean, listen, effectively, we did  
14                  intervene, but I would say this goes back to  
15                  understanding of the Hobbs Act.

16                  The Hobbs Act does not just apply to  
17                  this agency. It applies to a whole bunch of  
18                  agencies and a whole bunch of different types of  
19                  orders. So, if you file a comment in an FCC  
20                  rulemaking, you're good. Or, even at the D.C.  
21                  Circuit, if you file a declaratory ruling, which  
22                  is a form of adjudication, you discussed this in  
23                  McKesson, that's also -- it's enough to file a  
24                  comment.

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

1 think it's important to understand kind of what  
2 happened.

3 JUSTICE KAGAN: But, General --

4 MR. NIELSON: Yes.

5 JUSTICE KAGAN: -- I mean, this was an  
6 adjudicatory proceeding. So the way people  
7 understand who parties are in an adjudicative  
8 proceeding, it's -- it's not enough to send in a  
9 letter.

10 MR. NIELSON: Well, a couple  
11 responses. One, so is a declaratory ruling.  
12 And in the D.C. Circuit, declaratory rulings,  
13 it's enough to send a comment. So their  
14 distinction doesn't work on its own terms. And  
15 I would point the Court there to Petition  
16 Appendix 18a. That is where the Fifth Circuit  
17 discusses the D.C. Circuit precedent on that  
18 point.

19 But, second, this is a very strange  
20 type of adjudication. By statute, Congress has  
21 said that if they're going to do this type of  
22 license, they need to open up to NEPA, which is  
23 a -- a notice-and-comment process, in the middle  
24 of the adjudication. This is not a normal  
25 adjudication.

1 JUSTICE KAGAN: Do you think it's  
2 enough for anybody to send in a letter, or does  
3 it have to be the governor of a state?

4 MR. NIELSON: I think it certainly  
5 helps that it was a governor of a state.

6 JUSTICE KAGAN: Well, I don't see  
7 really how it does help under the statute. I  
8 mean, it's nice that he was the governor of the  
9 state, but I don't see how you can make a legal  
10 argument on that basis. If somebody is a party  
11 by virtue of sending in a letter under this  
12 statutory scheme, anybody is a party by virtue  
13 of sending in a letter.

14 MR. NIELSON: So, again, we think that  
15 if you file a comment -- and it wasn't just a  
16 letter; it's comments -- as part of the  
17 notice-and-comment process, but if they solicit  
18 you, which is what happened here -- I'd point  
19 the Court to the record on this one. This was  
20 JA 292. They asked us, they solicited our  
21 comments, and then we responded to that.

22 Even under their -- their best case,  
23 this Water Transport case from the D.C. Circuit  
24 that they rely on, if the agency solicits your  
25 participation and you respond to that, that

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

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

3 So this isn't an ordinary enforcement  
4 action or something like that. Even then, I  
5 don't think their argument holds up, but --

6 JUSTICE KAGAN: I mean, the question,  
7 General, is what does "party" mean? And it  
8 seems to me "party" means somebody who has  
9 participated in an agency proceeding with the  
10 degree of formality required for that  
11 proceeding.

12 So, if you're in a rulemaking, being a  
13 party may very well mean I submitted a comment  
14 in a notice-and-comment process. But -- but  
15 that's not the degree of formality that's  
16 associated with a proceeding of this kind.

17 And, you know, you didn't intervene.  
18 You didn't even try to intervene, unlike  
19 Mr. Frederick's client. I -- I don't see how we  
20 can say that you were a party.

21 MR. NIELSON: Well, I mean, the word  
22 "party," it's the same word in the Hobbs Act  
23 that applies to all of these things. So we have  
24 to say that the word "party" is a chameleon.

25 JUSTICE KAGAN: It's not a chameleon.

1 It's like different proceedings might understand  
2 who parties are differently. I mean, that's --  
3 that's -- that's not anything weird.

4 There are three separate processes,  
5 and the way you participate in those three  
6 separate processes are -- are different because  
7 different rules apply, because the processes are  
8 understood to -- parties in -- in adjudications  
9 are different from parties in rulemakings.

10 MR. NIELSON: Okay. So I guess a  
11 couple of responses. One, I don't agree under  
12 the Hobbs Act that you're going to  
13 distinguish -- it's -- it's one word that has to  
14 apply to both. But say I'm wrong about that.

15 JUSTICE KAGAN: It -- it -- it is one  
16 word.

17 MR. NIELSON: Yeah.

18 JUSTICE KAGAN: It means have you  
19 participated with the degree of formality that's  
20 necessary for the kind of proceeding it is? And  
21 if you are, you're a party. It's one  
22 definition.

23 MR. NIELSON: Okay. So say I'm wrong  
24 about this. So I'm agreeing with you for -- for  
25 purposes of this answer. I would still say what

1 we're talking about here is a lot closer to a  
2 hybrid between a rulemaking and an adjudication  
3 than a pure adjudication. This is a licensing  
4 which Congress said by statute they have to take  
5 our comments. And then we filed those comments  
6 in response.

7           And the argument that we are making  
8 today was presented to the agency by Sierra  
9 Club, and the agency said no, we're not going to  
10 even consider that. We're not going to take  
11 that contention.

12           So we're in the position here where  
13 they've asked for our comments, we've responded  
14 to their comments. The arguments we want to  
15 make they've already said they're not going to  
16 hear. It seems very strange to say that the  
17 State of Texas is not a party. We're obviously  
18 aggrieved. And, by their own regulations, they  
19 asked for our participation and we participated.

20           JUSTICE SOTOMAYOR: Are you defending  
21 the Fifth Circuit's ultra vires holding? You're  
22 saying, even if you weren't a party aggrieved,  
23 we could hear your appeal under the theory of  
24 ultra vires? I didn't see you or Fasken  
25 spending a whole lot of ink on that in your

1       briefs.

2                   MR. NIELSON: Well, I mean, I think  
3       the more straightforward point is that we are a  
4       party under the Hobbs Act. Or, if not, if  
5       Fasken is truly a party, then this is all  
6       academic for us.

7                   JUSTICE SOTOMAYOR: Okay.

8                   MR. NIELSON: But --

9                   JUSTICE SOTOMAYOR: So you're not.  
10       Thank you.

11                   MR. NIELSON: No. But, no, I  
12       certainly am. I certainly am, and here's why.  
13       If I am wrong about the Hobbs Act, then we  
14       really are in a situation where we don't have  
15       meaningful judicial review. If they can really  
16       cut us out by saying we're not going to take  
17       your contentions because we think you're wrong  
18       on the merits and that's somehow okay, then we  
19       are in the world of ultra vires review.

20                   I don't think we're there. That's why  
21       our front-line answer is just look to the Hobbs  
22       Act and we're a party there.

23                   JUSTICE JACKSON: Could you have moved  
24       to intervene? Is there -- was there something  
25       precluding the State of Texas from moving to

1 intervene in this case?

2 MR. NIELSON: Well, other than, Your  
3 Honor, they asked for our participation, I  
4 don't --

5 JUSTICE JACKSON: No, I understand. I  
6 understand what you actually did.

7 MR. NIELSON: Yeah.

8 JUSTICE JACKSON: I'm just saying, you  
9 say there's no meaningful judicial review. And  
10 I'm just wondering, if there is an avenue for  
11 you to become a party with the requisite degree  
12 of formality, say, by requesting intervention,  
13 was there a reason why you couldn't have done  
14 that?

15 MR. NIELSON: Yeah. So I would go  
16 back to what Mr. Stewart said earlier, which is,  
17 even for states, you have to have an admissible  
18 contention. And the argument that we were  
19 making was the exact same argument Sierra Club  
20 made, and they said that's not an admissible  
21 contention.

22 I would point the Court to 10 C.F.R.  
23 2.335, which is their procedure if they wanted  
24 to screen out these types of things, which  
25 essentially says, if you think you're operating

1 outside of -- if we were operating outside of  
2 the law, well, then you have to file a petition  
3 for rulemaking. That is not meaningful judicial  
4 review.

5 JUSTICE GORSUCH: General --

6 MR. NIELSON: That is not how judicial  
7 review works.

8 JUSTICE GORSUCH: General, I take your  
9 point that if this were a rulemaking, you'd be a  
10 party. I get that. I also understand the  
11 instinct that adjudications are sometimes  
12 different, though I know this Court has held  
13 that objecting shareholders in a class action  
14 suit are parties for purposes of appeal even  
15 though they haven't intervened.

16 Where should we look to understand  
17 what the Hobbs Act meant by the term "party?"

18 MR. NIELSON: Sure. I mean, one, I  
19 would say let's look at the dictionary. Both  
20 parties point the Court to the 1951 Black's Law  
21 Dictionary. Look at the big text, not the  
22 little text underneath that they rely on. Look  
23 at the big front-line text that he uses in the  
24 1951 Black's Law Dictionary. I would say there.  
25 But I'd also say whatever you say "party" means

1 for Hobbs Act purposes, it has to be big enough  
2 to include rulemaking because it's the very same  
3 word.

4 JUSTICE GORSUCH: Yeah, we've never  
5 said that you have to intervene to be a party.  
6 And that was not the case at common law.

7 MR. NIELSON: Correct, Your Honor.  
8 And I would also -- again, this is back on the  
9 Tenth Circuit days, you wrote a decision in In  
10 re Wolseley --

11 JUSTICE GORSUCH: Oh, gosh.

12 MR. NIELSON: -- where the court --  
13 where -- I thought it was a wonderful opinion.

14 (Laughter.)

15 MR. NIELSON: And the court  
16 explained --

17 JUSTICE GORSUCH: I wish I could  
18 remember it.

19 (Laughter.)

20 MR. NIELSON: And the court explained  
21 the Clark v. Martinez point, which it says is  
22 tied to the rule of law itself. You can't have  
23 a word that means different things in different  
24 applications. If it's the same word, it means  
25 the same thing. You have to have the lowest

1 common denominator to capture them all.

2 But, if I -- if I may, I'd like to  
3 turn to the merits, though I'm happy to keep  
4 discussing jurisdiction.

5 I think that, for me, the most kind of  
6 straightforward way to understand the problem  
7 with their argument is Congress amended this  
8 statute. Congress amended this statute and took  
9 the definition of "spent nuclear fuel" from the  
10 Nuclear Waste Policy Act and placed it in the  
11 AEA.

12 So there are provisions of the AEA  
13 that make no sense at all under their  
14 interpretation. I'd point the Court to 42  
15 U.S.C. 2210(i), which lists all of these terms  
16 in the same sentence. So, if spent nuclear fuel  
17 is just the same thing as the other three  
18 constituent parts, that sentence is -- it's --  
19 is nonsense. That cannot possibly be the  
20 correct reading of the statute.

21 I would also point the Court if I may  
22 to where did Congress say they didn't want this?  
23 One is 10155(h), which we've been talking about,  
24 which is inexplicable under their theory, but  
25 also 10131(a)(3), where Congress said in its

1 findings -- paraphrasing here -- we are unhappy  
2 with what has happened before. You don't see  
3 that very often from Congress, but Congress said  
4 we are displeased with what has happened before.  
5 And then you go on to 10155(h), which says keep  
6 it onsite.

7 JUSTICE JACKSON: Mr. Nielson, if  
8 spent nuclear fuel is not the same as the three  
9 constituent parts, why did ISP need a license at  
10 all?

11 MR. NIELSON: Yeah. So I think this  
12 is where -- a couple answers. One, I agree  
13 with -- with Mr. Frederick that the answer is  
14 the licensing of the facility. You have to have  
15 a safe facility, so you have to have some way to  
16 keep the very, very, very hot nuclear waste  
17 safe.

18 But the other is -- is physics. If  
19 you have a license to take some sort of product  
20 or -- or material onto a facility and you have a  
21 license to use that facility, but you have no  
22 license to take it off the facility, you know,  
23 per Newton, it stays where it is.

24 JUSTICE JACKSON: No, I'm just asking  
25 about --

1 MR. NIELSON: And that --

2 JUSTICE JACKSON: -- I'm asking about  
3 the statutory possession requirement. I thought  
4 you had to have a license to possess this kind  
5 of material and its -- the constituent parts,  
6 and everybody has believed that that equals  
7 spent nuclear fuel.

8 MR. NIELSON: Yeah.

9 JUSTICE JACKSON: If you're saying  
10 that spent nuclear fuel is something different,  
11 then isn't it outside of all of this licensing?

12 MR. NIELSON: No, Your Honor. And I'd  
13 point the Court back to Pacific Gas and also the  
14 first line of ISP's brief and the first line of  
15 Paul Clement's brief.

16 The -- the way you start with nuclear  
17 power, going back to 1946, is right after  
18 Hiroshima. There is a federal monopoly on all  
19 of this. No private ownership of any of this  
20 stuff.

21 Congress then, in 1954, opens it up  
22 for the first time and says: We're going to  
23 allow some private ownership or possession of  
24 these things, and said: These are the three  
25 types of things that we are going to allow.

1 They did not allow spent nuclear fuel.

2 So, if you start with the baseline of  
3 there's a federal monopoly and no one can do any  
4 of this, and then you have three exceptions, you  
5 can't have a fourth exception.

6 JUSTICE KAVANAUGH: What about the  
7 idea that the 1954 Act arguably authorizes this;  
8 when you get down to 1980, the Commission says  
9 it does; 1982, Congress is very aware of this  
10 issue and certainly aware of the Commission --  
11 where the Commission is on this and yet does not  
12 preclude it, and that's remained the settled  
13 understanding ever since?

14 The basic same argument I asked  
15 Mr. Frederick.

16 MR. NIELSON: Yeah.

17 JUSTICE KAVANAUGH: But that seems  
18 kind of an unusual step by Congress. They --  
19 they might not have had the votes to prohibit it  
20 in 1982, might be one -- one interpretation,  
21 big-picture interpretation of what happened  
22 there.

23 Do you just want to respond to all  
24 that?

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

1 would point the Court to 10155(h) and  
2 10131(a)(3).

3 JUSTICE KAVANAUGH: Yeah. And if  
4 10155(h) does not prohibit.

5 MR. NIELSON: Okay. But it is  
6 inexplicable under their view.

7 But I would also point the Court to  
8 the congressional brief, where they explain the  
9 early statements of the agency after the passage  
10 of the Policy Act, which I don't think are  
11 consistent with what we're hearing now.

12 There's also the time. What strikes  
13 me is, if we've always had this power, then why  
14 didn't -- why wasn't it until after the agency  
15 gave up on Yucca Mountain that suddenly you  
16 started getting these applications?

17 It's very bizarre, it seems to me,  
18 that if there's always been this power and  
19 everybody understood this power exists, it  
20 wasn't until the agency said, oh, actually,  
21 we're not going to do Yucca Mountain, that  
22 suddenly they said, oh, let's go back to this  
23 power that's already existed.

24 JUSTICE SOTOMAYOR: Wait a minute,  
25 because it was told it had to try everything

1 else.

2 MR. NIELSON: Well --

3 JUSTICE SOTOMAYOR: It was told in the  
4 1982 Act that it wanted to encourage onsite --  
5 the federal government to take it, et cetera.  
6 So it couldn't run to do something that Congress  
7 said: Try everything else.

8 MR. NIELSON: Yeah. And the  
9 fallback --

10 JUSTICE SOTOMAYOR: And we've run out  
11 of everything else.

12 MR. NIELSON: Well, I disagree with  
13 that, Your Honor. But the fallback that  
14 Congress said was federal facilities, federal  
15 facilities.

16 And this goes back to the point that I  
17 think Justice Alito was making. What are the  
18 incentives for Congress here?

19 If New Mexico and Texas are left  
20 holding the bag, every other state will be  
21 happy. They will be pleased because this waste  
22 will stay in Texas forever.

23 The only way we're going to get a  
24 national solution to this problem is by Congress  
25 to get everybody there and figure it out. They

1       tried to do that with Yucca Mountain, and it  
2       didn't work.

3                    But the answer isn't: Well, I guess  
4       we're just going to put it on Texas now. No,  
5       Congress needs to go back and fix the law. If  
6       the law is broken, it's on Congress, Congress to  
7       fix it. It's not this Court's job, and it's not  
8       the agency's job.

9                    CHIEF JUSTICE ROBERTS: Thank you,  
10       counsel.

11                   MR. NIELSON: I see my time's expired.

12                   CHIEF JUSTICE ROBERTS: Justice  
13       Thomas?

14                   Justice Alito?

15                   Justice Sotomayor?

16                   JUSTICE SOTOMAYOR: When are we in the  
17       business of giving Congress incentives?

18                   MR. NIELSON: No, Congress gave the  
19       agency incentives. Congress said: Do this,  
20       Agency.

21                   JUSTICE SOTOMAYOR: All right. Thank  
22       you, counsel.

23                   CHIEF JUSTICE ROBERTS: Justice Kagan?  
24       Justice Gorsuch?

25                   JUSTICE KAVANAUGH: In your opening,

1 you used the phrase "terrorist bulls-eye," which  
2 is obviously distinct language.

3 We've known of that at least since  
4 September 11th, 2001. Yet Texas supported this  
5 project, as I understand it -- correct me if I'm  
6 wrong -- for several years. Can you -- in the  
7 mid-2010s.

8 MR. NIELSON: Yeah -- yeah. I --

9 JUSTICE KAVANAUGH: Can you explain  
10 that, if it was a terrorist bulls-eye?

11 MR. NIELSON: Yeah, I would like to  
12 correct it.

13 So I would urge the Court to go back  
14 and look at JA 1 through 3, the very first pages  
15 of the JA. This is Governor Perry's letter. I  
16 don't read that letter as saying, oh, yeah, this  
17 is a great idea.

18 He is saying: The federal government  
19 has failed its obligations and has not done what  
20 Congress said. You're not going to have an  
21 answer for this for decades. And now Texas is  
22 in the spot of, what are we supposed to do?  
23 They're going to build it across the border in  
24 New Mexico. Texas needs to have some sort of  
25 ability to have some say in this.

1                   That is how I would urge the Court.  
2           Read pages 1 through 3 of the JA. That is not a  
3           ringing endorsement by Governor Perry. He was  
4           just going to say this is the best of the bad  
5           options.

6                   Governor Abbott comes in before this  
7           license and he says: No, essentially, over my  
8           dead body are you going to do this, citing the  
9           terrorist concerns that we are identifying.

10                   Also, look at the brief from -- the  
11           congressional brief, which does this as well.

12                   JUSTICE KAVANAUGH: Thank you.

13                   CHIEF JUSTICE ROBERTS: Justice  
14           Barrett?

15                   Justice Jackson?

16                   Thank you, counsel.

17                   Mr. Stewart.

18                   REBUTTAL ARGUMENT OF MALCOLM L. STEWART  
19           ON BEHALF OF THE PETITIONERS IN CASE 23-1300

20                   MR. STEWART: Thank you, Mr. Chief  
21           Justice. Just a few quick points.

22                   First, Mr. Frederick referred to 42  
23           U.S.C. 2239(a), which refers -- deals with the  
24           Commission adjudications. But that provision  
25           doesn't say, if a person satisfies certain

1 requirements, that person becomes a party or is  
2 a party.

3           What it says is, under certain  
4 circumstances, the Commission "shall admit any  
5 such person as a party to such proceedings."  
6 It's a directive to the Commission.

7           And it's indisputable here that the  
8 Commission didn't admit either Texas or ISP as a  
9 party -- I -- I'm -- I'm sorry, Fasken or Texas  
10 as a party. Fasken's argument is simply that it  
11 should have been admitted.

12           Second, Mr. Frederick said that when  
13 spent nuclear fuel comes out of the reactor,  
14 it's too hot to handle or too hot to move. And  
15 there is an initial period of at least five  
16 years when it has to be placed in a pool, and  
17 I'm told that it's rare, though not  
18 unprecedented, that the -- the pool is moved.

19           But, after that time, even when the  
20 waste is stored at the site of a nuclear  
21 reactor, it's often moved into cask storage.  
22 It's in the same containers where it would be  
23 stored at ISP's facility.

24           Third, Mr. Frederick referred to the  
25 1980 Federal Register notice. There was a

1 two-paragraph discussion, I think it's Heading  
2 Number 18, offsite versus onsite storage.

3 But it was all about policy. Some  
4 commenters said onsite storage is better as a  
5 policy matter, some commenters said offsite  
6 storage is better as a policy matter. No  
7 commenter at that time questioned the  
8 Commission's statutory authority to choose one  
9 or the other or both, and the Commission chose  
10 both.

11 The next thing I'd refer to is there  
12 was a reference to the facilities license that,  
13 Justice Kavanaugh, I think you asked: How would  
14 the ISP facility be illegal if your view of the  
15 materials licensing provisions is correct? And  
16 the answer was: They would still need a  
17 facilities license.

18 That's not correct. The facilities  
19 licensing provisions apply only to production or  
20 utilization facilities. If you operate a  
21 nuclear reactor, you need both a facilities  
22 license to operate the reactor and a materials  
23 license to possess 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 offsite 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 off  
18 site storage, it was teed up then. And the D.C.  
19 Circuit decided that, no, the Commission's  
20 offsite 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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