No. 25-540

IN THE
Supreme Court of the United States

BEYOND NUCLEAR, INC., PETITIONER

v.

NUCLEAR REGULATORY COMMISSION, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF OF AMICI CURIAE NEW MEXICO, MICHIGAN, AND UTAH IN SUPPORT OF BEYOND NUCLEAR'S PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF AMICI CURIAE[1]

New Mexico, Michigan, and Utah ("Amici States") have a keen interest in the outcome of this case because Holtec International's license to store spent nuclear fuel on an interim basis—approved by the Nuclear Regulatory Commission (NRC) in 2023, despite the inclusion of an unlawful provision—is now, based on Holtec's public announcements, a license in search of a home.[2]

Beyond Nuclear's petition for certiorari correctly focuses on how the D.C. Circuit's decision deprives it of judicial review both now and in the future. Here, Amici States expand on the consequences of that decision. If this Court denies certiorari in this case, a future host state will have no opportunity to contest the unlawful license condition Beyond Nuclear challenges here, nor will it be able to challenge other aspects of the license that likely would not exist but for that unlawful condition. Importantly, this decision deprives New Mexico—or a different prospective host state—of bargaining chips it would otherwise have held in negotiating where, and how, the nation's spent nuclear fuel is stored.

SUMMARY OF ARGUMENT

The unlawful provision at issue here would allow Holtec to receive spent nuclear fuel for which the Department of Energy (DOE) holds title, even though

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[1] Pursuant to U.S. Sup. Ct. R. 37(2), New Mexico gave notice of this amicus brief to counsel of record for the parties on November 23, 2025.

[2] *See* Pet.2 n.3.

the DOE cannot lawfully take title to that waste under the current provisions of the Nuclear Waste Policy Act of 1982 (NWPA). The record below demonstrates that Holtec hopes that Congress will amend the NWPA in the future to allow the DOE to take title to, and transport, spent nuclear fuel to an interim storage facility like Holtec's.

The D.C. Circuit's decision sets a dangerous precedent by allowing the NRC and other agencies to sanction conduct contrary to existing federal law and by rationalizing that decision in an arbitrary and capricious manner. This decision has real consequences for states. Congress specifically prohibited the DOE from taking title to spent nuclear fuel unless and until a permanent geologic repository is built, to incentivize the construction of such a permanent geologic repository.

If the currently slim prospects of a permanent repository are reduced to zero (because the incentive to build one no longer exists), the facility described in this license will be even more likely to become a *de facto* permanent storage facility for the nation's spent nuclear fuel. This is problematic because the Holtec license is *not* a license for a permanent storage facility and is not suited to that purpose. Left undisturbed, the existence of Holtec's conditional license—ready to deploy as soon as Congress amends the NWPA—will short-circuit what should be a national dialogue (and negotiation) about where and how to store the nation's spent nuclear fuel.

Amici States therefore urge this Court to grant certiorari.

ARGUMENT

Chief Justice John Marshall famously wrote that "[i]t is emphatically the province and duty of the judicial department to say what the law *is*," not what the law might someday *become*. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Yet, despite the "basic" nature of this "judicial task," *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 410 (2024), the D.C. Circuit erroneously affirmed the NRC's decision to allow a license to be issued based on an applicant's speculation about the law of tomorrow, rather than the law—and legal realities—of today.

Beyond Nuclear argues correctly that the D.C. Circuit unlawfully deprived it of its right to judicial review, both now and in the future. The D.C. Circuit's decision, if allowed to stand, also cuts off a future host state's right to challenge many aspects of the license that are now a *fait accompli*.

Further, the decision robs a future host state of bargaining chips it might have held in petitioning Congress for changes to the NWPA. If Holtec did not have this conditional license already in its back pocket, a host state would be in a stronger position to ask Congress to balance any proposed loosening of restrictions on the DOE's ability to take title to spent nuclear fuel with provisions for interim storage facilities that would protect substantial state interests.

This Court should grant certiorari and reverse the D.C. Circuit because: (i) the decision sets a dangerous precedent by allowing the NRC to circumvent the NWPA and the Administrative Procedure Act (APA); (ii) this facility will become a *de facto* permanent storage facility but is not suited to that purpose; and (iii) the license deprives a host state of significant leverage it may have had before Congress.

I. THE D.C. CIRCUIT'S DECISION ALLOWS THE NRC TO CIRCUMVENT THE NWPA AND THE APA.

The D.C. Circuit's affirmance of the NRC sets a dangerous precedent, is contrary to this Court's precedents, and should be reversed. It signals to license applicants who wish the law to be something other than it is to apply for a license anyway, no matter that their intended activity is currently unlawful. A license applicant should not be encouraged to import activism that properly belongs in the legislative arena into judicial or quasi-judicial proceedings, lest we end up in an administrative game of "Calvinball," in which the only "fixed rules" are ones that favor the agency, and license applicants "always win[]."*Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2675 (2025) (Jackson, J., concurring in part and dissenting in part).

The D.C. Circuit's decision should be reversed because (i) the licensing decision was contrary to law, and (ii) the NRC's explanation for its decision ran counter to the evidence before it.

A. The NRC's Licensing Decision Was Contrary to Law.

Baked into *Loper Bright* and this Court's longstanding administrative law jurisprudence is the obvious principle that federal statutes delineate and constrain an agency's rulemaking and adjudicatory authority, not the other way round. *See, e.g.*, *Loper Bright*, 603 U.S. at 413 ("[W]hen a particular statute delegates authority to an agency . . . courts must respect the delegation, while *ensuring that the agency acts within it*." (emphasis added)); *City of Arlington v. F.C.C.*, 569 U.S. 290, 297 (2013) ("[T]he question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."). True, the NRC's licensing authority comes from the Atomic Energy Act of 1954 (AEA), not the NWPA. *NRC v. Texas*, 605 U.S. 665, 683 (2025); *see Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (explaining that the NRC now exercises the former Atomic Energy Commission's authority to "license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials").

But the NRC may not read into the AEA the authority to ignore or circumvent a key part of the NWPA: "[E]nabling legislation is generally not an open book to which the agency may add pages and change the plot line." *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 723 (2022) (cleaned up). Otherwise stated, an agency may not "make a 'radical or fundamental change' to a statutory scheme." *Id.* (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994)). By issuing a license that

explicitly allows future conduct that is currently proscribed by statute, an agency is making a *de facto*—if not a *de jure*—fundamental change to a statutory scheme.

The D.C. Circuit observed below that the license merely sought "the conditional storage of DOE-titled fuel if such storage became lawful," and was "consistent with relevant legal requirements." Pet.App.8a. It reasoned that "the NRC's regulations explicitly permit licenses to include forward-looking terms, such as approval of an action upon the satisfaction of some condition." Pet.App.9a (citing *Oglala Sioux Tribe v. NRC*, 45 F.4th 291, 304 (D.C. Cir. 2022)). But *Oglala Sioux* does not stand for the proposition that the D.C. Circuit implies. In that case, a tribe challenged an Environmental Impact Statement's (EIS) failure to analyze the potential environmental impact of the applicant's "failing to secure a disposal contract before beginning operations." *Oglala Sioux*, 45 F.4th at 304. The D.C. Circuit dismissed such concerns as "purely hypothetical because the conditions placed on [the applicant's] license prohibit initiating operations without first securing a disposal contract." *Id.*

Any comparison between the license condition in *Oglala Sioux* and the license condition here is unavailing: there, the license was conditioned on the applicant entering into a *currently legal* contract in the future; here, the license is conditioned on the law changing so that a *currently illegal* contract will become lawful. *See id.* As Beyond Nuclear notes in its petition, forward-looking conditions in licenses are

customarily forward-looking as to a licensee's *conduct*, not as to *the law*. Pet.3 n.4. To argue otherwise would render meaningless the APA's requirement that agency action must be "in accordance with law." 5 U.S.C. § 706(2)(A); *see* Pet.18–23.

The NRC's disregard of federal statute stands in stark contrast to the solicitude and zeal with which it applied *its own* substantive and procedural rules and regulations to swat away all contentions and thus quash any prospects for judicial review of important aspects of this license.[3] *See NRC v. Texas*, 605 U.S. at 679–80 ("[A] person who has not successfully intervened before the Commission may not, as a nonparty, bring a Hobbs Act suit contesting the merits of orders issued in the underlying Commission proceeding.").

This Court's administrative jurisprudence and the APA would be rendered toothless if courts can allow agencies to license conduct that is indisputably contrary to a federal statute on the gamble that it will become legal in the future.

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[3] *Compare, e.g.*, Pet.App.173a–174a (holding that NRC regulations barred petitioner's contention that EIS should consider environmental impacts beyond the initial 40-year license term); Pet.App.46a–47a (holding that NRC generic rulemaking does not require provision of a dry transfer system for the initial 40-year license); Pet.App.93a, 282a (holding that disclosure of transportation routes was not required per "past NRC practice" and was outside the scope of the proceeding), *with* Pet.App.161a (countering contention that the APA "requires federal agencies to follow the law" with the rationale that the law does not "require the NRC to perform a useless act"); Pet.App.27a–33a (affirming Board's analysis).

B. The NRC's Explanation for its Decision Ran Counter to Evidence Before the Agency.

Both the NRC and D.C. Circuit relied on the amended license application provision—adding that Holtec would also contract with private companies, not just the DOE—to save the otherwise unlawful license. *See* Pet.App.8a ("Because the amended application sought a license for the lawful storage of privately owned spent fuel . . . the Commission concluded that Beyond Nuclear had failed to raise a genuine dispute of law or fact."); Pet.App.32a–33a ("The NWPA does not prohibit a nuclear power plant licensee from transferring spent nuclear fuel to another private entity. We therefore affirm the Board's decision to reject this contention.").

In the proceedings below, another petitioner contended that this revision to the Holtec license application was "a materially false statement" that should prevent approval of the license. Pet.App.11a; *see* Pet.App.230a–37a. The petitioner offered up one of Holtec's public statements that the facility will depend on Congress amending the NWPA as evidence that Holtec had "no intention of contracting with nuclear plant owners." Pet.App.234a (citing Holtec International, *Reprising 2018* (Jan. 2, 2019),

https://holtecinternational.com/holtec-reprising-2018/).[4]

Though Beyond Nuclear does not challenge this part of the D.C. Circuit's opinion in its petition for certiorari, this part of the record provides important context for *why* the inclusion of the unlawful license condition is consequential to Amici States—it strongly suggests that the addition of a provision allowing for contracts with private parties was purely pretextual, and that the only way that this facility will be built is if the NWPA is amended to allow the DOE to take title to spent nuclear fuel from nuclear power plant owners.

The Board clearly understood that Holtec did not intend to contract with private parties directly and so, instead, brushed away the significance of any potential false statement. *Cf.* Pet.App.159a ("Whether Holtec will find that alternative commercially viable is not an issue before the Board."). In its review, the NRC also focused on materiality: "[T]he material issue in this licensing proceeding is whether Holtec has shown that it can safely operate the facility, not

[4] In the *Reprising 2018* press release, Holtec stated that the facility's "deployment will ultimately depend on the DOE and the U.S. Congress." Indeed, Holtec *still* represents that the DOE will have to ship the waste: "Holtec has already licensed transportation casks for shipping canisters from [independent spent fuel storage installations (ISFSIs)] and they can be made available *as soon as the U.S. Department of Energy is ready to ship fuel to a repository*." Holtec International, *Spent Fuel Management: FAQs*, https://holtecinternational.com/communications-and-outreach/spent-fuel-management/ (last visited Dec. 3, 2025) (emphasis added).

its future political activity or business intentions." Pet.App.64a; *see* Pet.App.12a ("Holtec accurately represented that it would contract with DOE, if such contracting became lawful, and Holtec acknowledged that the facility's success might depend on government action.").

But the D.C. Circuit should not have relied on the amended provision to save the license, nor should it have relied on the NRC's flawed materiality analysis because, according to 10 C.F.R. § 72.22(e), "financial qualifications" *are* material to the application—an applicant must show that it "either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary[] funds." *Id.* Significantly, the unlawful provision at issue here was proffered by Holtec to satisfy that very regulatory requirement. *See Holtec Proposed License Rev. 3* at 2, ¶ 17 (Oct. 9, 2020), ADAMS No. ML20283A793 ("In accordance with 10 CFR 72.22, the construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (USDOE and/or a nuclear plant owner) . . . has been established."); *Holtec Materials License* at 2, ¶ 15 (May 9, 2023), ADAMS No. ML23075A181 ("In accordance with 10 CFR 72.22, the construction program will be undertaken only after a definitive agreement with the prospective customer . . . has been established.").[5]

[5] Available at NRC, *Application Documents for Holtec HI-STORE Consolidated Interim Storage Facility*,

Minimizing its regulatory duty to ensure an applicant's financial qualifications, the NRC revealed that its real interest was with its own procedural efficiency and convenience: "[I]f Congress were to expand the category of lawful contracts . . . to include most contracts with DOE . . . . the NRC need not require Holtec to begin the licensing process all over again." Pet.App.152a. The D.C. Circuit justified its affirmance with the unsupported observation that "[s]uch conditions are often essential in light of the protracted timelines for securing a license and the need to anticipate changing conditions and regulatory shifts." Pet.App.9a. But, as Beyond Nuclear points out, "pleas of administrative inconvenience . . . never justify departing from the statute's clear text." Pet. at 18–19 (quoting *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 603 U.S. 799, 823 (2024) (cleaned up)).

In sum, the NRC "offered an explanation for its decision that r[an] counter to the evidence before the agency," as well as counter to its own duty to examine an applicant's financial qualifications. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As such, the decision was not "reasonable and reasonably explained," but

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https://www.nrc.gov/waste/spent-fuel-storage/cis/hi/hi-app-docs (last visited Dec. 3, 2025). The final license's use of the phrase "prospective customer" instead of "USDOE and/or a nuclear plant owner" does not change the fact that the license incorporates supporting documentation such as the EIS, Safety Analysis Report, and Financial Assurance that continue to reference contracts with both the DOE and nuclear plant owners.

was arbitrary and capricious. *Ohio v. Env't Prot. Agency*, 603 U.S. 279, 292 (2024) (citation omitted). The D.C. Circuit's affirmance was likewise based on flawed reasoning and was, therefore, erroneous.

If Holtec truly intends to "enter into lawful customer contracts today" with nuclear power plant owners, as it represented to the NRC and the D.C. Circuit that it would, then it may still do so after the unlawful provision has been severed. *See* Pet.App.8a.

The NRC can't have it both ways: If the truth of Holtec's stated intention to contract with private parties was *not* material to the license, then the amended provision allowing such contracts can—and should—stand alone, without the unlawful provision. But if the veracity of Holtec's stated intentions *was* material, then it was arbitrary and capricious for the NRC to rely on that clearly pretextual amendment to deny Beyond Nuclear's contention.

II. THIS FACILITY WILL BECOME A *DE FACTO* STORAGE FACILITY BUT IS NOT SUITED TO THAT PURPOSE.

Notwithstanding its designation as a "consolidated *interim* storage facility," once constructed, the Holtec facility will almost certainly become the final resting place for the nation's spent nuclear fuel. *See* NRC, *Environmental Impact Statement for the Holtec International's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Lea County, New Mexico: Final Report* ("Holtec EIS") at iii, available at https://www.nrc.gov/waste/spent-fuel-

storage/cis/holtec-international (last visited Dec. 3, 2025) (emphasis added). Holtec's plan to license the facility in successive phases reveals this intended purpose: the initial 40-year license allows it to accept 8,680 metric tons of uranium (MTUs) in its first phase. *Id.* But Holtec plans to expand and increase the amount of waste stored in 19 further phases of an additional 500 canisters per phase over the course of 20 years, to store 173,600 MTUs in total. *Id.* This planned storage capacity is far more than the *total current national inventory* of such waste, which is approximately 96,000 metric tons.[6] To this day, Holtec's website does not contradict the very real possibility that this facility will be permanent.[7]

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[6] Government Accountability Office, *Commercial Spent Nuclear Fuel* at 6, GA0-21-603 (Sept. 2021), https://www.gao.gov/products/gao-21-603 (estimating that there were approximately 86,000 metric tons of spent nuclear fuel stored on-site at the end of 2019, increasing by approximately 2,000 tons per year).

[7] In response to the frequently asked question, "Is it possible that spent fuel will always remain in [ISFSIs] and never moved offsite?" Holtec responds that "[t]he U.S. Government, through the U.S. Department of Energy, has, by law, the ultimate responsible [sic] for the transportation and final disposition of spent nuclear fuel. . . . HI-STORE [Consolidated Interim Storage Facility (CISF)] will provide a significant step on the path to the Federal Government's long standing obligation for disposition of used nuclear fuel." Holtec International, *Spent Fuel Management: FAQs*, https://holtecinternational.com/communications-and-outreach/spent-fuel-management/ (last visited Dec. 3, 2025).

A future host state will be unable to challenge aspects of the license that were enabled by the unlawful license condition. For example, once Holtec or a license transferee determines where to site the facility, and if Congress changes the law to allow Holtec or its transferee to contract with DOE for the spent nuclear fuel, the host state will have no opportunity to challenge the facility's lack of a dry transfer system to safely repackage or move the spent nuclear fuel once it is at the facility. *See* Pet.App.47a. By licensing the facility for an initial—but renewable—40-year term, the NRC ensured that no-one could challenge Holtec for failing to provide for the inevitable day when the storage canisters will fail and need to be replaced, or the waste will need be transported elsewhere. *See* Pet.App.88a–89a (explaining that dry transfer systems need only be built for long-term (60 to 100 years) or indefinite timeframes); Pet.App.47a (explaining that the Continued Storage Rule doesn't require Holtec to build a dry transfer system "initially").

States will also find themselves unable to challenge their future liability for emergency training and response costs along transportation routes, which the NRC has already determined will be borne by the states. *See, e.g.*, Holtec EIS at 4-82 ("States are . . . responsible for protecting public health and safety during transportation accidents involving radioactive materials."). Holtec acknowledged that, "if [spent nuclear fuel] is shipped to a [consolidated interim storage facility], some States, Tribes, or municipalities along transportation routes *may incur*

costs for emergency response training and equipment that would otherwise likely be eligible for funding under NWPA Section 180(c) provisions if the DOE shipped the [spent nuclear fuel] from existing sites to a repository." Holtec EIS at 4-82 to -83 (emphasis added). *Cf.* 42 U.S.C. § 10175(c) (providing for "technical assistance and funds to States for training for public safety officials . . . through whose jurisdiction the Secretary plans to transport spent nuclear fuel" to a permanent repository).

Should Congress fail to amend the NWPA to provide funds to states for emergency training and response when the waste is not bound for a permanent, federally operated repository, there will be no way for states to challenge this provision in Holtec's license and EIS.

In sum, these kinds of concerns would not exist—or would very likely be mitigated in the legislative process—if Holtec and the NRC had not bypassed the NWPA to license a *de facto* permanent storage facility by "gam[ing] the administrative system." Pet.5.

III. THIS LICENSE DEPRIVES A HOST STATE OF SIGNIFICANT LEVERAGE BEFORE CONGRESS.

By giving pre-approval to the private storage of DOE-titled waste in advance of Congress doing so, the NRC shielded the license not only from judicial review, but also from changes that might otherwise have been effected through the legislative process. Given the permanent—or, at minimum, indefinite—

nature of Holtec's storage facility, the diminishment of a future host state's legislative leverage has enormous consequences.

In the NWPA, Congress recognized that any state hosting a "*federally* owned and operated system for the interim storage of spent nuclear fuel," 42 U.S.C. § 10151(b)(2) (emphasis added), would incur costs and carry burdens that needed mitigating, *see, e.g.*, 42 U.S.C. § 10156(e)(1) (providing for "annual impact assistance payments to a State . . . in order to mitigate social or economic impacts occasioned by the establishment and subsequent operation of any interim storage capacity within the jurisdictional boundaries of such government"). Similarly, Congress recognized that a host state would incur costs and burdens associated with the development of a federally operated *permanent* geologic repository. *See generally* 42 U.S.C. § 10136(c). The host state for Holtec's facility will face similar costs and burdens, but because this license is not for a federal facility as contemplated in the NWPA, Congress has not attempted to mitigate them.

Had the license application been required to comply with existing law regarding DOE title from the start, a rational applicant would likely have paused its investment in a lengthy and costly license application until the law changed, cognizant that contracting with only private nuclear power plant owners was not "commercially viable." Pet.App.159a. A prospective host state could then have petitioned Congress from a position of strength to amend the

NWPA in ways that would also obviate or mitigate problematic aspects of the storage facility.

In exchange for housing the nation's spent nuclear fuel on an indefinite basis, a prospective host state could petition for the kinds of provisions that would be available were this facility federally owned and operated: For example, it could petition for greater protections for public health and safety en route to and surrounding the facility; or, at least for payments to mitigate those impacts. *Cf.* 42 U.S.C. § 10156(e)(1). A host state could petition for a similar negotiated "benefits agreement" with the DOE as it would be entitled to if it housed a federally owned permanent repository. *See* 42 U.S.C. § 10173(a).

States could also petition for the apportionment of liability between the federal government and licensee in a manner that sufficiently protects states in the event of an accident during transportation or storage, and the provision of emergency response costs and training for affected states and tribes. *See* 42 U.S.C. § 10175(c).

Of course, if Holtec were made to wait for the law to change, it is possible that the permanent geologic repository would be built after all, thus "eliminat[ing] the need for some or all of the planned stages of Holtec's proposed interim storage facility." Pet.App.236a.

The NRC thus short-circuited what should have been a negotiation about where to store the "national problem" of spent nuclear fuel, and deprived New

Mexico—or another prospective host state—of bargaining chips it might have held before Congress. *See* 42 U.S.C. § 10131(a)(2).

CONCLUSION

For the reasons set forth above, Amici States request that this Court grant Beyond Nuclear's petition for certiorari.

Respectfully submitted,

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