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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Beyond Nuclear, Inc. ("Petitioner") respectfully submits the following reply in support of its petition for certiorari of *Beyond Nuclear, Inc. v. U.S. Nuclear Regul. Comm'n,* 113 F.4th 956 (D.C. Cir. 2024) (Pet. App. 1a-22a).

The government filed no responsive brief. The opposition brief submitted by Holtec International ("Holtec") makes no argument, nor cites a single case, regarding the two fundamental and constitutionally rooted issues raised by Petitioner:

First, by allowing the Nuclear Regulatory Commission ("NRC") to approve a concededly unlawful license application based on a hypothetical future law, the D.C. Circuit's decision flies in the face of the Administrative Procedure Act's ("APA's") prohibition against agency action "not in accordance with law," 5 U.S.C. § 706(2)(A), and violates this Court's unequivocal rule that "pleas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'" *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.,* 603 U.S. 799, 823 (2024) (quoting *Niz-Chavez v. Garland,* 593 U.S. 155, 169 (2021) and *Pereira v. Sessions,* 585 U.S. 198, 217 (2018)). Pet. 18-19.

Second, by affirming the NRC's refusal to allow Petitioner to challenge the lawfulness of the license either currently or in the future after the law may change, the D.C. Circuit transgressed the APA's "basic presumption of judicial review." *Abbott Lab'ys v. Gardner,* 387 U.S. 136, 140 (1967). Pet. 21-23.

Neither the government nor Holtec has attempted to explain why the APA's prohibition against agency action contrary to law can be ignored, or why the D.C. Circuit was justified in departing from our "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996). To the contrary, Holtec can't help making significant concessions in support of Petitioner, *i.e.,* that the license issued to it by the NRC is inconsistent with current law and that the NRC had no way of affording Petitioner a hearing on the "hypothetical" terms of future storage contracts between Holtec and the federal government. Holtec Opp. 7.[1]

Nevertheless, Holtec seeks to bar the courthouse door by arguing variously that the D.C. Circuit decision was too "narrow" to be "worthy of certiorari" (Holtec Opp. 1), that Petitioner's case is both moot (*id.* 5) and at the same time unripe (*id.* 7), and that Petitioner's claims were not "perfected" (*id.* 6). These feints are based on mischaracterizations and obfuscations of the proceedings below. Petitioner is properly before this Court, and the issues raised in its petition have significant implications

1. Holtec tries to turn the table on Petitioner, arguing that Petitioner's claims about possible future changes to the Nuclear Policy Act are unripe because they are "hypothetical," "illusory," and "theorized." Holtec Opp. 6-7. But Holtec puts the cart before the horse: Petitioner seeks this Court's review for the very reason that the NRC unlawfully approved Holtec's license application *despite* its inclusion of a "hypothetical," "illusory," and "theorized" license condition. Pet. 19. *See also In re Private Fuel Storage, L.L.C.*, 52 N.R.C. 23, 34 (2000) (holding that license conditions must be "precisely drawn so that the verification of compliance becomes a largely ministerial rather than an adjudicatory act").

for the "place of administrative agencies in a regime of separate and divided powers." *Bowen v. Michigan Acad. of Fam. Physicians,* 476 U.S. 667, 670–671 (1986). Because the D.C. Circuit unlawfully assisted the NRC to demolish two essential and constitutionally rooted APA guardrails against agency overreach—the prohibition in 5 U.S.C. § 706(2)(A) of action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law," and the "basic presumption of judicial review" established in *Abbott Lab'ys*, 387 U.S. at 140—this Court should grant certiorari.

ARGUMENT

I. Holtec makes Petitioner's case for granting certiorari.

Holtec candidly makes two concessions that support the granting of certiorari. First, Holtec concedes that the NRC issued it a license that violates the applicable law of today, *i.e.,* the Nuclear Waste Policy Act: "Consistent with the D.C. Circuit's decision, there is no genuine dispute to be found here today. The parties all agree that, with limited exceptions, it is illegal for [the U.S. Department of Energy ("DOE")] to own and store fuel with Holtec." Holtec Opp. 7. Second, Holtec concedes that "the NRC could not hold an evidentiary hearing today [based] on tomorrow's hypothetical congressional action or the hypothetical DOE contracts arising from that action." *Id.*

With these concessions, Holtec makes Petitioner's case: by acknowledging that the NRC denied Petitioner's hearing request *because* there is no dispute that the license violates the law of today, and by conceding the

impossibility of holding a hearing regarding the license's compliance with the unknown laws of tomorrow, Holtec effectively confirms that the NRC deprived Petitioner of its legally required opportunity to be heard on the question of whether the agency approved Holtec's license application in violation of the Nuclear Waste Policy Act.

Unspoken by Holtec, and yet implicitly arising from its concessions, is the fact that "today," *i.e.,* shortly after the NRC issued a hearing notice pursuant to 42 U.S.C. § 2239(a)(1), was the *only* time that Petitioner would get any opportunity to be heard on the lawfulness of Holtec's hypothetical license application. Indeed, as noted by Holtec, the Atomic Safety and Licensing Board found that any further hearing, after such time as Congress might change the law, would be a "useless act." Holtec Opp. 3 (quoting Pet. App. 161a). Further, under the Hobbs Act, 28 U.S.C. § 2344, the period within 60 days after the NRC's decision denying Petitioner's hearing request was the *only* time Petitioner would get a chance to appeal the NRC's decision to the courts above. If and when the hypothetical terms of Holtec's license condition are made real by congressional action, Petitioner will have no further opportunity for a hearing before the NRC or a judicial appeal because Holtec will already hold an approved license. Pet. 4.[2]

2. Holtec contends that the D.C. Circuit decision's effect of precluding Petitioner from obtaining judicial review of Holtec's license condition either now or in the future is not properly before this Court because the decision "never opines on that issue." Holtec Opp. 6. But the decision explicitly affirms the NRC's denial of Petitioner's hearing request on the ground that Petitioner failed to raise "a genuine dispute of law or fact" regarding Holtec's concededly unlawful license condition. 113 F.4th at 964 (Pet. App. 9a).

Holtec's brief supports Petitioner's case that the D.C. Circuit's decision is inconsistent with the APA's unequivocal prohibition against unlawful agency action and its constitutionally rooted presumption of judicial review.

II. The D.C. Circuit's decision establishes significant adverse precedents that Petitioner has properly placed before this Court and that are worthy of review.

Having failed to address the substance of Petitioner's claims, Holtec futilely seeks to discourage this Court from taking review by minimizing or obscuring the legal and practical significance of the adverse precedents set by the D.C. Circuit's decision and by suggesting chimerical procedural and jurisdictional barriers.

Holtec first tries to shrink the importance of this case by portraying a favorable ruling by this Court as a "decision to reopen a single NRC licensing proceeding, and, at most, strike three superfluous words from a license application." Holtec Opp. 1. But Holtec's attempt to diminish the import of the matters at issue here is farcical, amounting to "the regulatory equivalent of 'hid[ing] elephants in mouseholes." *See* Pet. Br. 19-20 n.12 (quoting *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001)).

The purpose and effect of that ruling was to exempt Holtec's license condition from APA compliance and shield it from challenge in any NRC licensing proceeding or related judicial appeal. Petitioner is therefore properly before this Court.

From a purely legal perspective, there can be no doubt that the D.C. Circuit's decision sets a momentous precedent damaging to the rule of law: that any federal Hobbs Act agency may issue a license or permit that violates current law but anticipates future changes to the law, based on a new carve-out to the APA for deviations deemed "essential" by the agency. 113 F.4th at 964 (Pet. App. 9a).[3] By necessity, the equally harmful corollary is that no party will have the right to challenge the unlawfulness of the license at the time of issuance because that unlawfulness is both conceded and excused; nor will any party be able to challenge the license if and when the law changes because the license already will be in effect. Pet. 17.

From a policy and practical perspective, it would be hard to overstate the significance of this "single" NRC licensing proceeding in light of Congress' seven-decade failure to resolve the issue of how and where to permanently store the nation's growing spent fuel inventory. *See* Pet. 7-10 and n. 9. By denying Petitioner's challenge to the lawfulness of Holtec's license, the NRC cleared Holtec's path to build and operate an above-ground storage facility large enough to store more than the entire U.S. inventory of highly radioactive spent

3. Indeed, NRC has already issued such anticipatory licenses twice: first to Interim Storage Partners, L.L.C. ("ISP") and then to Holtec. Similar to Holtec's license, ISP's license conditionally authorizes ISP to store federally owned spent fuel. While this Court reviewed ISP's license in *NRC v. Texas,* 605 U.S. 665 (2025), the issue of the legality of the license condition was not before the Court. *See* Pet. iv and n.2.

reactor fuel now scattered throughout the country at individual reactor sites. Pet. 13 n.10. While Holtec has dubbed the facility "interim," it could well become the final resting place for the many thousands of tons of spent fuel in the U.S. if Congress continues to be deadlocked over a permanent geologic repository. Pet. 8-10.

Further, setting aside the absurdity of Holtec's proposition that the legal significance of a license term can be gauged by counting the number of words it contains, the three words in Holtec's license application can hardly be characterized as "superfluous." Holtec Opp. 1. Assuming that Holtec is referring to the phrase "USDOE and/or" that provides for contracts between Holtec and the DOE and/or private reactor licensees,[4] the inclusion in Holtec's license of these three words is indeed crucial: they fundamentally undermine the Nuclear Waste Policy Act's prohibition against transferring ownership of spent fuel from private companies to the DOE unless and until a deep geological repository is licensed and operating. Pet. 18 and 19-20 n.12.

Holtec next tries obfuscation, with the highly misleading suggestion that the NRC mooted Petitioner's case by ultimately issuing a license to Holtec that had "no references to DOE as a customer." Holtec Opp. 5. As Holtec well knows, the NRC did not eliminate DOE as a customer by eliminating a reference to

4. In tossing off the significance of the "three superfluous words," Holtec does not say exactly what they are.

DOE in the license, because the terms of Holtec's license application were incorporated into the license itself. *See* 88 Fed. Reg. 30801, 30801 (May 12, 2023) (announcing that the NRC issued Holtec's license "as proposed in its license application, as amended."). Elsewhere in its opposition brief, Holtec acknowledges as much:

> If Congress decides to amend the [Nuclear Waste Policy Act], . . . the only difference would be that DOE could then lawfully contract with Holtec to store the same spent fuel that presently belongs to the nuclear power plant owners, *an alternative already encompassed in NRC Staff safety and environmental reviews*.

Holtec Opp. 3 (quoting Atomic Safety and Licensing Board decision, Pet. App. 161a) (internal quotations omitted) (emphasis added). Thus, Holtec refutes its own disingenuous claim.[5]

CONCLUSION

Holtec has not only failed to demonstrate that Petitioner's claims are insignificant, moot, unripe, or otherwise not properly before this Court, but it makes key concessions that support Petitioner's claims. As demonstrated by Petitioner, the D.C. Circuit's radical departure from fundamental principles of administrative law and the right to judicial review is both unlawful

5. It is also noteworthy that in the briefing before the D.C. Circuit, Holtec never moved to dismiss Petitioner's case for mootness.

and harmful. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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