

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

NUCLEAR REGULATORY COMMISSION,)
ET AL.,)
Petitioners,)
v.) No. 23-1300
TEXAS, ET AL.,)
Respondents.)

INTERIM STORAGE PARTNERS, LLC,)
Petitioner,)
v.) No. 23-1312
TEXAS, ET AL.,)
Respondents.)

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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
18
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.
22
23
24
25

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

2 (10:07 a.m.)

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

7 Mr. Stewart.

8 ORAL ARGUMENT OF MALCOLM L. STEWART

9 ON BEHALF OF THE PETITIONERS IN CASE 23-1300

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

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

22 If the Court reaches the merits, it
23 should reverse the court of appeals' judgment.
24 The Atomic Energy Act prohibits the unlicensed
25 possession of spent nuclear fuel's constituent

1 parts while authorizing the Commission to
2 license private interim storage of those
3 substances. The Nuclear Waste Policy Act left
4 that scheme intact.

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 a -- 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 -- 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 -- a moment ago, I think it's in
8 920 F.2d, said that this was an aspect of
9 agencies' traditional broad authority to
10 regulate their own procedures. And as -- as
11 I --

12 JUSTICE KAGAN: Does it go -- it seems
13 to go beyond the statutory language itself. Is
14 that correct? Do you agree with that?

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

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

24 MR. STEWART: Yeah.

25 JUSTICE GORSUCH: And Fasken, their

1 interest is affected and they requested a
2 hearing. Those -- those things are undisputed,
3 right?

4 MR. STEWART: Yes.

5 JUSTICE GORSUCH: So --

6 MR. STEWART: I -- I --

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

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

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

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

1 to have been allowed to intervene, it ought to
2 have been made a party.

3 But the fact is it wasn't --

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

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

14 JUSTICE GORSUCH: Well --

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

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

1 Circuit didn't address it.

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

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

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

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

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

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

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

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

3 MR. STEWART: Well, we've -- I mean, I
4 think it would be our -- our burden --

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

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

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

16 MR. STEWART: Yes, typically so.

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

22 MR. STEWART: Well, I think the
23 question -- if the question is -- first, our
24 position would be the question should be, did
25 Fasken, in fact, intervene in the proceedings

1 and become a party? And it didn't. But, even
2 if the question is should Fasken have been
3 allowed to intervene, did Fasken -- was Fasken
4 improperly denied a right to intervene that it
5 had under the statute, the D.C. Circuit resolved
6 that issue against it, and it didn't seek direct
7 review of that determination either before the
8 en banc D.C. Circuit or before this Court.

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

15 In other words, you're -- you're --
16 you're saying, procedurally, the D.C. Circuit
17 made a ruling about whether or not Fasken was
18 entitled to intervene. They did not -- they,
19 Fasken, did not seek rehearing en banc, did not
20 seek cert. But I suppose, to the extent now
21 that we are considering their party status, I
22 guess there's a suggestion that maybe they
23 should be able to raise that issue in this
24 proceeding?

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

1 that's not the way it would work in -- in
2 district court litigation. For instance, if a
3 party moved to intervene in a district court
4 proceeding and was denied intervention, if it
5 wanted to become a party, it would need to
6 appeal from the denial of intervention.

7 And if it appealed from the denial of
8 intervention and lost again in the court of
9 appeals, it couldn't simply take an appeal from
10 the district court's ultimate merits ruling and
11 ask the court on that appeal to hold that the
12 prior decision denying it leave to intervene
13 had -- had been erroneous.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Counsel, we
16 don't normally require parties to seek en banc
17 review or seek cert before -- and -- and forfeit
18 rights at the expense of not doing so. I would
19 hate to say the rule is you've got to seek cert
20 every time you want this type of thing to be
21 applied.

22 MR. STEWART: Well, I think what
23 they -- what Fasken is essentially attempting to
24 do here at least in part is to ask the Court in
25 this proceeding to rule on the question of

1 whether it had a statutory right to intervene
2 and whether it was wrongly denied a review.

3 And if Fasken thinks that's the sort
4 of issue that warrants the -- this Court's
5 attention, then it should have sought --

6 CHIEF JUSTICE ROBERTS: Well, I
7 mean --

8 MR. STEWART: -- this Court's review
9 directly.

10 CHIEF JUSTICE ROBERTS: Well, I mean,
11 maybe it doesn't think it warrants this Court's
12 attention because there's no split or the usual
13 criteria that we have for cert. But I -- I
14 don't think it's part of an exhaustion
15 requirement that you've got to seek en banc
16 review and certiorari. That's pretty -- I
17 mean -- I mean, I think that's unusual. Those
18 remedies are strictly limited and may not at all
19 be applicable to what is nonetheless a perfectly
20 valid legal claim.

21 MR. STEWART: Well, I think, in -- in
22 general, if -- if you have a court of appeals
23 decision that come outs -- comes out against you
24 and you want the court in some future proceeding
25 to kind of behave on the assumption that that

1 decision was wrong, you really need to seek
2 whatever form of review is available at that
3 time rather than ask the court in the subsequent
4 proceeding to -- to hold that the former court
5 got it wrong.

6 JUSTICE SOTOMAYOR: What happens in a
7 normal --

8 JUSTICE ALITO: Why should --

9 JUSTICE SOTOMAYOR: I'm sorry.

10 JUSTICE ALITO: Go ahead.

11 JUSTICE SOTOMAYOR: What happens in a
12 normal litigation? Let's assume it's not an
13 agency. There's a motion to intervene by a
14 party. Are they required to appeal?

15 MR. STEWART: Yes. If they -- if they
16 want to become parties, they -- if they are
17 denied intervention, then -- and they want to
18 have the rights and obligations that go with
19 party status in the underlying litigation, they
20 would need to appeal from the denial of
21 intervention.

22 And if they lost there, they couldn't
23 take an appeal from the merits judgment in the
24 case and essentially ask for a second bite at
25 the apple, ask the court of appeals in the

1 merits appeal to revisit the question of whether
2 intervention should be granted.

3 JUSTICE SOTOMAYOR: We would never --

4 JUSTICE ALITO: Why should --

5 JUSTICE SOTOMAYOR: -- have any ending
6 to litigation if parties who want to intervene
7 could come in at any point in time, even after
8 judgment, raising new issues, when they weren't
9 parties below?

10 MR. STEWART: Yes.

11 JUSTICE ALITO: Why shouldn't Fasken
12 have been allowed to intervene? If this had
13 been a -- a civil proceeding, he certainly would
14 have met the requirements for intervention,
15 would he -- would it not?

16 MR. STEWART: Yes.

17 JUSTICE ALITO: If this was a -- if
18 this --

19 MR. STEWART: Yes.

20 JUSTICE ALITO: He meets -- he would
21 meet Rule 24, right?

22 MR. STEWART: Yes. He --

23 JUSTICE ALITO: So why -- why -- why
24 was he kept out of this?

25 MR. STEWART: Basically, because

1 the -- the Commission or the -- yeah, the --
2 first, the Atomic Safety and Licensing Board and
3 then the Commission found that he had -- found
4 that Fasken had failed to raise a genuine issue
5 of law or fact.

6 And it's important to realize that the
7 issues that Fasken was trying to raise as an
8 intervenor were very different from the one that
9 is at issue now.

10 Fasken was not arguing at that stage
11 that the NRC lacked statutory authority to
12 license offsite storage. It was making much
13 more fact-specific environmental objection --
14 asserting much more fact-specific environmental
15 objections to the project.

16 JUSTICE SOTOMAYOR: Did the State
17 raise the issue it's raising today in any of the
18 proceedings below?

19 MR. STEWART: Not -- not in the agency
20 proceedings. It raised the -- the statutory
21 argument in the court of appeals but not the
22 end --

23 JUSTICE SOTOMAYOR: Not before the
24 agency?

25 MR. STEWART: And the -- the -- the

1 State didn't even attempt to intervene in the
2 agency licensing proceeding.

3 JUSTICE SOTOMAYOR: And they have an
4 absolute right to intervene?

5 MR. STEWART: They don't have an
6 absolute right to intervene. They -- they
7 have -- there are more, I would say, forgiving
8 or more hospitable standing requirements for the
9 State, but the State still has to identify an
10 admissible contention under the NRC's
11 intervention rules.

12 JUSTICE JACKSON: Would you say that
13 one of the purposes of the party requirement in
14 the Hobbs Act is to ensure that are -- issues
15 are raised before the agency?

16 MR. STEWART: It would say that as a
17 purpose. I would also have to concede that the
18 purpose is achieved imperfectly because the
19 Hobbs Act doesn't have what is sometimes
20 referred to as an issue-exhaustion requirement.
21 That is, the Hobbs Act requires that you be a
22 party, but at least under the terms of the
23 statute, there is no requirement that, as a
24 party, you raise the same issue that you want to
25 raise in court.

1 JUSTICE GORSUCH: Mr. -- Mr. Stewart,
2 I understand your argument to be that the "party
3 aggrieved" language in the Hobbs Act is narrower
4 than the "person adversely affected" language in
5 the APA. Is that right?

6 MR. STEWART: Yes.

7 JUSTICE GORSUCH: Would anything
8 prohibit Fasken or Texas from bringing an APA
9 challenge in district court under -- as -- as
10 persons aggrieved?

11 MR. STEWART: I -- I think the
12 exclusive review scheme of the Hobbs Act
13 would -- would do that, unless the Court
14 concluded for some reason that the Hobbs Act
15 review scheme was inadequate and that the
16 exclusivity of the -- the court of appeals
17 review scheme should be accepted for that --
18 made an exception to for that reason.

19 JUSTICE GORSUCH: Okay. The -- the
20 ultra vires argument perhaps could be brought
21 there, you think?

22 MR. STEWART: I -- I don't think ultra
23 vires really maps on to what the Court has
24 looked to at least recently because the ultra
25 vires exception turns on kind of how -- how bad

1 is the agency error alleged to be or did it
2 represent a -- an exercise of authority that the
3 agency doesn't have.

4 Whether that is so or not doesn't
5 really speak to the question whether the Hobbs
6 Act review mechanism would be adequate to
7 address the sort of error.

8 If I may, I'd like to address the
9 merits.

10 JUSTICE KAGAN: If I could ask you one
11 more, Mr. Stewart?

12 MR. STEWART: Sure.

13 JUSTICE KAGAN: I mean, I take your
14 point that the issue before us is not whether
15 there was proper intervention here, whether the
16 intervention should have been given.

17 But still, isn't it a little bit odd
18 to say that the agency whose -- whose action is
19 being challenged in court has so much control by
20 virtue of its regulatory -- its -- its -- its
21 regulations on intervention to dictate who gets
22 to challenge the action?

23 MR. STEWART: Well, I think the
24 agencies will always have some control. So, for
25 instance, if you need -- if you have to comply

1 with agency rules in notice-and-comment
2 proceedings in order to file suit in court, the
3 agency may say: Submit comments within 90 days
4 and submit them to the following e-mail address.
5 And if you try to submit comments, but they're
6 untimely or they go to someone else, that may
7 affect the court's review authority.

8 The other thing I would say in this
9 particular setting is there was an alternative
10 route available that didn't -- for judicial
11 review of the current statutory claim that
12 didn't require intervention in the licensing
13 proceedings. Fasken or Texas could have filed a
14 petition for rulemaking, and it could have asked
15 under the Commission's rules that the licensing
16 proceeding be set -- be held in abeyance.

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

23 And that was the procedural route that
24 the State of Utah took to get to the -- the D.C.
25 Circuit. It filed a petition for rulemaking

1 asking that the Commission rules that authorize
2 offsite storage be modified because they were
3 inconsistent with the statute. The Commission
4 denied that petition. And Utah filed a petition
5 for review of that denial in the D.C. Circuit.

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

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

13 So Yucca Mountain was supposed to be
14 the permanent solution.

15 MR. STEWART: Yeah.

16 JUSTICE GORSUCH: Congress so
17 ordained -- I think it said it had to be done by
18 1998. No president has complied with that in
19 all the years since. We've spent something like
20 \$15 billion on it. It's a hole in the ground.
21 And you parties seem to think the Yucca Mountain
22 project is dead.

23 And if that's true and there's no
24 different permanent repository, how is this
25 interim storage that the government is

1 authorizing here in any meaningful sense and
2 especially when I think ISP's given a 40-year
3 license? That doesn't sound very interim to me.

4 MR. STEWART: Well --

5 JUSTICE GORSUCH: And it's renewable
6 too apparently.

7 MR. STEWART: It -- it is renewable.
8 If -- if they applied for a renewal of the --
9 license, there would be a new Commission
10 adjudication. And to the extent that --

11 JUSTICE GORSUCH: Forty years from
12 now.

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

18 I -- I don't mean to seem glib, but
19 the -- the repository is intended to keep
20 nuclear waste stored safely for a temp --

21 JUSTICE GORSUCH: Yeah. On -- on a --
22 on a concrete platform in the Permian Basin,
23 where we get our oil and gas from. So,
24 hopefully, we won't have radiated oil and gas.

25 MR. STEWART: And, of -- of course,

1 that was an objection that the -- the State and
2 Fasken made. But that -- that's not the
3 question that is before the Court today.

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

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

23 And so the Commission's role is to
24 decide whether this is safe and consistent with
25 the statute. But the Respondents' position

1 would place roadblocks in the way of people like
2 ISP and people like those who currently control
3 the nuclear waste trying to devise
4 market-oriented solutions to the problem.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: Mr. Stewart, I do
9 think it's somewhat strange that the NRC gets to
10 choose who -- which parties are able to
11 challenge it later on.

12 But -- but that aside, what's your
13 argument that the Nuclear Regulatory Commission
14 has the authority to establish -- to store
15 nuclear waste off the -- offsite by a private
16 party?

17 MR. STEWART: Well, there are -- there
18 are three -- there are really, in a sense, six
19 stat -- five pertinent statutory provisions
20 here. The -- the relevant constituent parts of
21 spent nuclear fuel are source material, special
22 nuclear material, and by-product material, and
23 for each of those constituents, there is a
24 statutory provision that says the unlicensed
25 receipt, use, or possession of this substance is

1 illegal.

2 But then there's -- for each of those,
3 there's a cognate provision that says: But the
4 Commission can issue a license for private
5 storage. And -- if certain criteria are
6 satisfied. And if the Commission issues a
7 license for private storage of each of the three
8 constituent parts, it can do it in the same
9 license, and that adds up to a license to
10 possess spent nuclear fuel.

11 JUSTICE THOMAS: Does it say permanent
12 offsite by a private person --

13 MR. STEWART: This is not permanent --

14 JUSTICE THOMAS: -- who is not a --
15 who -- who's not a nuclear power plant, for
16 example, but simply storage?

17 MR. STEWART: It -- it is -- it is not
18 permanent. It is still interim, but, yes, it
19 is -- there are really three categories. There
20 is at the site of an operating nuclear reactor,
21 and then at the other extreme is a facility
22 like -- like ISP's, which is -- would be at a
23 location where no -- no nuclear reactor has ever
24 operated.

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

1 counted eight facilities where the Commission
2 has licensed storage of spent nuclear fuel at
3 locations where a nuclear reactor once operated
4 but where the reactor has been decommissioned.
5 And, in three of those instances, the NRC
6 renewed the -- the -- I'm sorry, the materials
7 license after the facilities license for the
8 reactor itself had expired.

9 And so, for relevant purposes, they
10 seem to us similarly situated to the ISP
11 facility. They are now stand-alone storage
12 facilities even though they are at locations
13 where reactors once operated.

14 JUSTICE THOMAS: Well, I mean, that's
15 in part because the facilities closed down and
16 you -- the material is left where the facility
17 used to be. But is there any comparator for a
18 large amount -- I forget how many metric tons
19 we're talking about here -- is transported to a
20 separate private facility for virtually
21 permanent storage?

22 MR. STEWART: Well, I -- I guess
23 the -- the GE Morris facility has been in -- is
24 a standalone facility that's been in operation
25 since, you know, I think -- around 1980 or

1 before. So I -- I don't think the volumes are
2 the same as the ones that ISP contemplates.

3 But the -- the two things I would say
4 are, first, the -- the volume of waste is not
5 going to -- in the United States, is not going
6 to change depending on whether licenses like
7 these are granted. Grantings license to possess
8 the spent nuclear fuel in a storage facility is
9 not going to increase the volume of nuclear
10 waste. It's just going to change where in the
11 country it would be stored.

12 And with respect to permanence versus
13 temporary status, the -- there's no reason to
14 think that if the Court rules against us and the
15 waste has to stay at the site of the
16 decommissioned reactors, it will stay there for
17 any shorter period of time. It's still going to
18 stay somewhere until a permanent repository is
19 opened up.

20 And the third thing -- and this goes
21 to the point I was making before about
22 market-based solutions and ISP's motivation --
23 part -- part of the suboptimal character of
24 continued storage at the decommissioned sites is
25 that you have a bunch of places around the

1 country that now serve no other purpose but to
2 store spent nuclear fuel when once they were
3 operating reactors. And, clearly, ISP and some
4 of its potential contracting parties think that
5 it would be better to centralize the fuel at one
6 location so that the other locations could be
7 returned to what's been referred to as
8 greenfield status.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 MR. STEWART: They can be put to
11 alternative uses.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Alito?

14 JUSTICE ALITO: Is there more --
15 excuse me. Is there more security around
16 facilities that are owned by the federal
17 government than around these private facilities?

18 MR. STEWART: I -- I don't know the
19 answer to that. I mean, certainly, the
20 Commission, in determining whether the -- the
21 licensee has met the requirements, wants to
22 be -- wants to verify that there will be what
23 the Commission views as adequate security
24 arrangements.

25 JUSTICE ALITO: Suppose this is

1 allowed and 40 years go by, and then there's an
2 application to renew the license. Would it be
3 permanent at that time, or what if it's renewed
4 and it's another 40 years?

5 MR. STEWART: It -- it would still
6 not --

7 JUSTICE ALITO: It will never become
8 permanent?

9 MR. STEWART: It -- it would still not
10 be permanent. And, again, you -- you would have
11 the same dilemma if the waste is left at the
12 decommissioned nuclear reactor sites. That is,
13 at some point, the storage -- the -- the
14 materials license will expire. The Commission
15 will have to decide whether a new license should
16 be issued. We're -- we're going to confront
17 that -- until a repository is made available,
18 we're going to confront that dilemma at some
19 locations within the country. It's just a
20 question of where those locations will be.

21 And the other point I would make about
22 security at federal versus private, the -- the
23 decommissioned reactor sites I'm referring to
24 are also private sites. They -- they would be
25 governed by the same arrangements that would

1 govern ISP.

2 JUSTICE ALITO: Which statutory
3 provision -- I know you cite a number of them.
4 Which one do you think provides the strongest
5 support for your argument?

6 MR. STEWART: Well, I think -- I would
7 say two things. The first -- first, I would
8 point the Court to the licensing procedure --
9 provisions in the Atomic Energy Act, which are
10 42 U.S.C. 2073(a), which deals with special
11 nuclear material; 2093, which deals with source
12 material; and 2111, which deals with by-product
13 material. And the Commission, from 1980, has
14 regarded those -- has had published regulations
15 that treat those as authority to license private
16 storage of spent nuclear fuel.

17 The other thing I would point the
18 Court to in the Policy Act is that the Policy
19 Act was enacted in 1982, two years after the
20 Commission's rules had been promulgated.
21 Congress clearly expressed its approval of
22 private storage, focusing on onsite storage, but
23 it didn't create new licensing mechanisms for
24 that to occur. And so --

25 JUSTICE ALITO: Alright, thank --

1 thank you, Mr. Stewart. One other -- one final
2 question. 2073(a) refers to special nuclear
3 material, not to spent nuclear waste, and
4 special nuclear material has a -- a specific
5 narrow definition.

6 MR. STEWART: Yes, and there is also a
7 provision -- I think it's 22-0 -- 01(h) -- that
8 says various authorizations can be combined in a
9 single license. And the -- the -- the three
10 constituent parts of spent nuclear fuel that
11 require a license are special nuclear material,
12 source material, and by-product material. And
13 so the Commission has always believed that a
14 license that covers each of those will be
15 sufficient to cover spent nuclear fuel because
16 there's nothing else that needs to be licensed.

17 And then the other point I would make
18 is, if that were not true, the Commission would
19 be equally unable to license onsite storage
20 because these are the same provisions it relies
21 on to license storage at the site of a nuclear
22 reactor.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: Counsel, these --

1 the onsite storage requires security to watch
2 this product -- inert product and make sure that
3 nobody breaks in. So what we're talking about
4 is that there is a danger to the community by
5 these inactive facilities holding on to the
6 spent nuclear waste because the degree of --
7 the -- the cost associated with the storage in
8 terms of security is greater, isn't it?

9 MR. STEWART: Yes. And that was one
10 of the justifications that ISP gave, that it
11 was -- it was more economical to have security
12 for one centralized facility than to have
13 separate security for different facilities
14 around the country.

15 JUSTICE SOTOMAYOR: 2201 basically
16 authorizes the agency "to establish by rule,
17 regulation, or order such standards and
18 instructions to govern the possession and use of
19 special nuclear material, including all the
20 by-product materials, as the Commission may deem
21 necessary or desirable to promote the common
22 defense and security or to protect health or to
23 minimize danger to life or property."

24 MR. STEWART: Yeah. And so the
25 Commission is --

1 JUSTICE SOTOMAYOR: I look at that as
2 the direct authorization to set forth the terms
3 of possession and license, correct?

4 MR. STEWART: Yes. And I -- I think
5 the Commission was on solid ground when it
6 promulgated the rules in 1980, but when Congress
7 stepped in two years later and enacted some new
8 provisions but without disturbing the -- the
9 preexisting licensing scheme, that was an
10 effective ratification.

11 JUSTICE SOTOMAYOR: You know, I --
12 I -- I'm finding it curious that in a country
13 that's celebrating its 250th year that some of
14 my colleagues think that 40 years can't be
15 temporary. I hope that we make it another 250,
16 but, if it takes 40 or 80 years for a solution
17 to come, it would still be temporary, correct?

18 MR. STEWART: Yes. And, as I say,
19 the -- it -- it -- whether you want to think of
20 it as temporary or permanent or quasi-permanent,
21 it's going to be the same length of time
22 regardless of whether the waste is at an ISP
23 facility or at the site of a decommissioned
24 reactor.

25 JUSTICE SOTOMAYOR: And in a time in

1 which the danger to the community continues to
2 exist?

3 MR. STEWART: Yes.

4 JUSTICE SOTOMAYOR: If we keeps going
5 on something that can't -- that -- if we keep
6 permitting storage in facilities that have had
7 to shut down?

8 MR. STEWART: Yes. I mean, I -- the
9 Commission believes that its criteria can make
10 storage at these facilities safe, but, at the
11 same time, the -- the perception that the risk
12 is not zero is what has led people to -- to want
13 a permanent repository.

14 JUSTICE SOTOMAYOR: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?
16 Justice Gorsuch?

17 JUSTICE GORSUCH: I guess I'm
18 struggling with that. I -- I -- I understand
19 your argument before Congress acted the NWPA.
20 But, afterwards, it specifically said that it
21 declined to authorize any storage facility
22 located away from a site of any civilian nuclear
23 reactor and not owned by the federal government.

24 That was its judgment about the
25 security that would be required for this

1 material.

2 MR. STEWART: Well, what it said was
3 that nothing in the Policy Act itself
4 authorized, encouraged, or required -- storage.

5 JUSTICE GORSUCH: No, exactly,
6 because -- because it thought that these were
7 the places that were going to be safest. That
8 was Congress's judgment, whatever ours might be.
9 And I would have thought that the more specific
10 and more recent-in-time statute would --
11 would -- would govern over the general. Isn't
12 that our usual interpretive understanding?

13 MR. STEWART: I mean, certainly, if
14 the Policy Act had said offsite storage is
15 prohibited or the Commission may not license
16 offsite storage, that would trump the
17 preexisting -- authorization in the Atomic
18 Energy Act.

19 But Congress was very careful not to
20 write the statute that way. It basically said:
21 With respect to offsite storage, we will leave
22 the law as it found it. It said nothing in the
23 Policy Act itself --

24 JUSTICE GORSUCH: So that's -- so your
25 argument does hinge on the idea that Congress

1 has later enacted a more specific statute didn't
2 trump the preexisting statute?

3 MR. STEWART: It -- it didn't trump
4 it --

5 JUSTICE GORSUCH: And --

6 MR. STEWART: -- because there was no
7 inconsistency, because saying --

8 JUSTICE GORSUCH: And if we disagree
9 with that, then -- then --

10 MR. STEWART: If -- if you read
11 Section 11 --

12 JUSTICE GORSUCH: 10155 --

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

14 JUSTICE GORSUCH: Yeah.

15 MR. STEWART: -- if you read it to --
16 to -- to be a prohibition on offsite storage of
17 spent nuclear fuel, then, yes, that would trump
18 the Atomic Energy Act's authorization.

19 But, as I say, Congress was aware that
20 the Commission had asserted this authority in
21 regulations two years earlier, and it wrote
22 the -- the language very carefully.

23 JUSTICE GORSUCH: Yeah. And it --
24 it -- its judgment about safety, not ours,
25 controls?

1 MR. STEWART: Yes.

2 JUSTICE KAVANAUGH: But Congress
3 didn't -- explicitly endorse the existing rules,
4 correct, as relevant here?

5 MR. STEWART: It -- it didn't
6 endorse -- it didn't endorse the practice of
7 licensing offsite storage. It clearly endorsed
8 the idea that onsite storage was not only
9 permissible but was to be encouraged.

10 And so there are findings to the
11 effect that the owners and operators of nuclear
12 power plants shall be encouraged to use their
13 existing storage capacity and expand their
14 storage capacity. Federal officials are
15 supposed to encourage that as well.

16 But what -- not only did Congress not
17 bar offsite storage, it also didn't enact any
18 new licensing provisions or, for that matter,
19 any new prohibitions on unlicensed possession.

20 And so Congress clearly contemplated
21 that licensing would continue to be done under
22 the preexisting Atomic Energy Act provisions,
23 and those provisions don't distinguish between
24 onsite and offsite storage.

25 JUSTICE KAVANAUGH: But it still seems

1 a little odd, to pick up on Justice Gorsuch's
2 questions, that Congress would write that
3 provision in 10155(h) in that way without
4 something clearer, because anyone reading that
5 would think, okay, well, onsite storage or
6 federal offsite are the two options that
7 Congress is clearly contemplating in that 1982
8 act.

9 MR. STEWART: You know, the D.C.
10 Circuit in Bullcreek did discuss the legislative
11 history of this provision. And part of the
12 history was prior versions of the bill would
13 have encouraged offsite storage. And Congress
14 wanted to make clear that it wasn't doing that.

15 But I think, even without looking to
16 the history and just looking to the text, it --
17 it's not conceivable that Congress would have
18 chosen this language if its intent was to
19 prohibit the Commission from doing something
20 that it knew the Commission had just asserted
21 the authority to do.

22 It could have said: Nothing in this
23 title, i.e., Title 42, which encompasses both
24 the Atomic Energy Act and the Policy Act, shall
25 be construed to authorize, require, or

1 encourage.

2 Instead, it limited that language to
3 the Policy Act itself. The -- the clear intent,
4 we think, was to leave the Commission's pre --
5 with its preexisting authority over offsite
6 storage but not to expand it or affirmatively
7 encourage it.

8 JUSTICE KAVANAUGH: One -- and one
9 more. That -- the -- the other side responds
10 that the Atomic Energy Act itself does not
11 expressly authorize private offsite storage.

12 I just want to get your succinct
13 answer to that argument.

14 MR. STEWART: It -- it doesn't -- it
15 doesn't speak in so many words of offsite or
16 onsite, but it would be -- it would be equally
17 apt to say that the Atomic Energy Act doesn't
18 expressly authorize onsite storage. That is, it
19 says: People can be authorized to receive and
20 possess the following substances for the
21 following purposes, which include a residual.
22 But it doesn't talk about -- in one way or
23 another about the location where that may occur.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 Justice Jackson?

3 JUSTICE JACKSON: I don't hear you
4 disputing that Congress, in the Policy Act, was
5 expressing its perhaps preference for onsite
6 storage. But I guess the question is: How --
7 how is that objective best accomplished?

8 And it seems to me that Congress, in
9 this statute, was doing so by incentivizing
10 onsite storage, which appears to be a different
11 thing than prohibiting offsite storage.

12 MR. STEWART: Yes, I think that's
13 right. And -- and one of the ways it
14 incentivized onsite storage was the -- the
15 federal storage program ultimately never got off
16 the ground, but during the period when it was
17 potentially in effect, one requirement that you
18 needed to satisfy in order to have access to
19 federal storage was show that onsite storage was
20 not available. And there was no similar
21 requirement with respect to -- to offsite
22 storage. So you could say in that respect
23 Congress put a thumb on the scale in the
24 direction of onsite storage.

25 JUSTICE JACKSON: Encouraging people

1 to do onsite?

2 MR. STEWART: Yes.

3 JUSTICE JACKSON: And -- and I know
4 sometimes the Court is interested in clear
5 statements. So, to the extent that the agency
6 had previously exerted its licensing authority
7 in this way, would one have expected Congress to
8 have made clearly a prohibition statement if it
9 was attempting to preclude offsite storage?

10 MR. STEWART: Yes.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Fagg.

15 ORAL ARGUMENT OF BRAD FAGG

16 ON BEHALF OF THE PETITIONER IN CASE 23-1312

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

19 With respect to the Hobbs Act, if you
20 seek intervention under the agency's rules and
21 that's denied, that's a final order you get to
22 appeal. So I guess I would resist the notion a
23 little bit that there's no judicial review of
24 that.

25 You do have to appeal that within 60

1 days. Fasken did to the D.C. Circuit, like we
2 talked about. That played out the way it did.

3 Fasken did not appeal to the Fifth
4 Circuit within 60 days. It did not appeal until
5 six or seven months later. And I think that's a
6 real problem with looking at what Fasken did at
7 the agency to try to justify the Fifth Circuit's
8 exercise of jurisdiction here.

9 With respect to merits and the Atomic
10 Energy Act, the primary argument of the
11 Respondents here is that the words "spent
12 nuclear fuel" are not separately defined.

13 If they're right, then the Atomic
14 Energy Act does not prohibit the possession of
15 spent nuclear fuel. My client, ISP, never
16 needed a license if they're right. They could
17 have just built this facility.

18 With all due respect, I would suggest
19 that's not a credible interpretation of the
20 Atomic Energy Act.

21 With respect to the Nuclear Waste
22 Policy Act and the references to encouraging of
23 onsite storage, I think it's important to
24 understand the context in which those statements
25 appear.

1 Those are all in subpart (b) of the
2 Policy Act. Subpart(a), I would argue, is the
3 guts of the Act. That's the permanent
4 repository underground for hundreds of -- of
5 thousands of years.

6 Subpart (b) was a very limited,
7 now-expired program involving access to 1900
8 MTUs of federal interim storage, and the context
9 of that makes clear it's self-contained.

10 If you look at the legislative
11 history, it also sheds light on the fact that in
12 the sausage-making of -- of that bill, there was
13 a lot of back-and-forth about whether the
14 industry would have to exercise and exhaust
15 offsite storage before they could access this
16 1900 MTUs of federal storage. The industry
17 didn't want that. Some legislators did want
18 that. Some drafts required them to do that.

19 But that context is how these
20 references to a preference for onsite storage,
21 which are only in subpart (b), came to be and I
22 would respectfully suggest further confirm that
23 it's error to say that there are locational
24 restrictions. Certainly, no locational
25 restrictions appear within the Atomic Energy

1 Act.

2 JUSTICE THOMAS: Well, could you give
3 us a -- a straightforward argument for the
4 authorization for offsite storage at a private
5 facility?

6 MR. FAGG: It's under the Atomic
7 Energy Act. It's 2201(b). It's 2073, 2070 --
8 93 --

9 JUSTICE THOMAS: And so what would
10 your argument be with those recitations?

11 MR. FAGG: They authorize the NRC to
12 license the possession and storage of the
13 constituent elements of spent nuclear fuel
14 without any locational restriction. You're
15 reading -- if you say "onsite," you're reading a
16 term into the Atomic Energy Act that is not
17 there.

18 JUSTICE THOMAS: So there's no --
19 there's no language that you could use to say
20 that spent fuel shall be or is permitted to be
21 stored offsite? You're stitching together, it's
22 seeming, just constituent parts, not just spent
23 fuel. And I'm just looking at, asking, whether
24 or not there's anything you can rely on that
25 speaks to spent fuel in the aggregate being able

1 to be stored offsite at a private facility.

2 MR. FAGG: I -- I -- I do rely upon
3 the three constituent elements adding up to
4 spent fuel, in the same way you have to rely
5 upon the three constituent elements adding up to
6 spent fuel to prohibit the possession of it
7 because, if you don't buy that proposition, you
8 can't have one without the other. You can't say
9 the Atomic Energy Act prohibits the possession
10 of these three items, but it doesn't allow the
11 licensing of these three items.

12 Either -- it's either one or the
13 other. And if the three constituent elements
14 don't add up to spent nuclear fuel for licensing
15 purposes, they can't add up to the prohibition
16 on possession. And I go back to what I said
17 earlier. My client never needed a license. We
18 should have just built this thing. We -- why
19 are we here?

20 JUSTICE SOTOMAYOR: What you're saying
21 I think I understand, which is, if you read the
22 Act, it doesn't say you have to possess it where
23 it's created.

24 MR. FAGG: That -- that is certainly
25 true.

1 JUSTICE SOTOMAYOR: There's nothing
2 there that says possess in any particular place.

3 MR. FAGG: I think that's true. And I
4 think it's also important to -- to keep in mind
5 there was always going to be spent nuclear fuel,
6 okay? Whether reprocessing played out the way
7 people thought it was going to back in the '50s,
8 '60s, '70s, whether Yucca had gotten -- gotten
9 up and running just like it was supposed to, you
10 were always going to have spent nuclear fuel
11 discharged from a reactor, stored for some
12 period of time -- even if you're going to
13 reprocess it, you got to ship it off to a
14 reprocessing site.

15 And -- and -- and it still doesn't get
16 rid of all of it. There's still something.
17 It -- it -- it's not a hundred percent. Even
18 with reprocessing, there's still residual spent
19 nuclear fuel left.

20 So the notion that the Atomic Energy
21 Act wasn't intended by Congress to cover all of
22 those different parts of what might happen or
23 not happen to spent nuclear fuel, again, I would
24 suggest is -- is not -- is not a credible
25 interpretation of the Atomic Energy Act.

1 With respect to -- sticking --
2 sticking with the merits --

3 JUSTICE JACKSON: Can I just ask you,
4 is there any difference between your argument
5 and the government's in this case?

6 MR. FAGG: Substantively, I'm -- I'm
7 not aware of a difference. I think we
8 articulate things a little bit differently, but
9 no.

10 JUSTICE JACKSON: Thank you.

11 MR. FAGG: With respect to the Nuclear
12 Waste Policy Act, I -- I -- I want to emphasize
13 because I think it's a really important fact
14 that the -- the 10 C.F.R. Part 72 regulations
15 that were formally, after notice-and-comment
16 rulemaking, acted on and on the books at the
17 time of the Nuclear Waste Policy Act, and, you
18 know, this wasn't a sort of secret,
19 in-the-pocket exercise of authority.

20 Massive notice and comment over
21 multiple years, a big, thick chunk of the
22 Federal Register with all the comments,
23 including debates about onsite versus offsite
24 storage. Is it a good idea, a bad idea? Not a
25 whisper of the notion that the Atomic Energy Act

1 didn't cover storage of -- of spent nuclear fuel
2 onsite or offsite.

3 And -- and all of that was enacted in
4 1980. All of that was demonstrably known by
5 Congress when it undertook the comprehensive
6 Nuclear Waste Policy Act legislation ultimately
7 at the end of -- of 1982 and '83.

8 And so, to -- to just underscore the
9 fact that in -- in discerning Congress's intent
10 here with these two statutes, I would say that
11 the -- the chronology and the facts confirm that
12 the Nuclear Waste Policy Act, considered with
13 the Atomic Energy Act, underscores and supports
14 our position.

15 JUSTICE KAVANAUGH: Meaning, given
16 what was known -- this is what you're saying, I
17 think -- Congress would have explicitly
18 prohibited private offsite had it -- had it
19 wanted to do so? Is that what you're saying?

20 MR. FAGG: Yes. Yes. And -- and,
21 again, if you go back to what I referred to
22 earlier, the limited sort of provisions within
23 subpart (b), the access to the federal interim
24 storage program, and 10155(h) that we've talked
25 about, "nothing in this chapter shall authorize

1 or encourage," I -- I would suggest and, again,
2 commend the -- the Bullcreek decision both at
3 the agency level and the D.C. Circuit for
4 addressing the -- the real role of that
5 language.

6 You -- it -- it wouldn't make sense if
7 it was not already allowed to say nothing in
8 this statute shall authorize or encourage,
9 right? I -- I mean, because, if it's -- if it's
10 not allowed, it's not allowed. And that's the
11 position of Respondents in this case.

12 And -- and so I think read in context,
13 read -- read correctly within the Nuclear Waste
14 Policy Act and referring to the known,
15 documented history of the Atomic Energy Act,
16 those provisions, again, support the --

17 JUSTICE SOTOMAYOR: What's the source
18 I should go to to get the history you referred
19 to earlier about the various drafts that were
20 being fought on -- about in subpart (b)?

21 MR. FAGG: We -- we cite a couple of
22 them in our reply brief. And, apologies, I
23 don't have them --

24 JUSTICE SOTOMAYOR: Mm-hmm.

25 MR. FAGG: -- handy here right now.

1 But I -- I would refer to our reply brief, and I
2 would in particular refer to the agency's
3 decision below, which we cite, again, in our
4 reply brief, that goes through exhaustively that
5 legislative history. We cite it in -- in a
6 footnote in our reply brief and -- and -- and
7 refer to the specific footnotes within that
8 agency decision that refer back to the various
9 debates. There were draft bills. There was a
10 lot. It was a lot.

11 JUSTICE SOTOMAYOR: All right. Thank
12 you.

13 JUSTICE GORSUCH: Mr. Fagg, what do
14 you say to your friends on the other side's
15 argument that spent nuclear fuel is not simply
16 the combination of source, special nuclear, and
17 by-product materials under the AEA, but it
18 requires other things? Like it must have been
19 withdrawn from the nuclear reactor, it must have
20 undergone -- not have undergone reprocessing?
21 And that's reflected both in the statute -- in
22 the -- in the NWPA and also in the NRC's own
23 regulations.

24 MR. FAGG: I -- I -- I think I
25 would -- I would say factually it's just not the

1 case that when you pull one of these spent
2 nuclear fuel assemblies, which are, you know,
3 15-foot metal with all the uranium rods inside,
4 that there's anything at all in there other than
5 special nuclear material, source material, or
6 by-product material. There's metal sheaths
7 and -- and things that hold this all together.
8 They've become irradiated through the exposure
9 and the -- and the process. And -- and that
10 falls squarely within --

11 JUSTICE GORSUCH: Well, I -- I -- I --

12 MR. FAGG: -- the definition of
13 by-product.

14 JUSTICE GORSUCH: -- I appreciate
15 that. But spent nuclear fuel is defined in the
16 later statute as being withdrawn from a reactor,
17 which doesn't necessarily pertain to the three
18 constituent parts, and it must not have
19 undergone reprocessing.

20 Those are two conditions at least that
21 seem to me to differentiate the two. And I'm --
22 I'm struggling for an answer.

23 MR. FAGG: May I respond?

24 CHIEF JUSTICE ROBERTS: Certainly.

25 MR. FAGG: The -- the -- the -- the

1 answer to that I guess I would say is, well,
2 which way does that cut? So, when Congress
3 added the definition of "spent nuclear fuel" in
4 1988 incorporating the five-year-old definition
5 from the Nuclear Waste Policy Act --

6 JUSTICE GORSUCH: Right.

7 MR. FAGG: -- again, decades and
8 decades and decades of practice have been
9 treating the three constituent elements as spent
10 nuclear fuel for purposes of prohibiting
11 possession and -- and -- and licensing.

12 So I -- I think, again, just factually
13 and looking at the statutory definitions of the
14 three elements, a spent nuclear fuel assembly is
15 those three and nothing else.

16 JUSTICE GORSUCH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas?

19 Justice Alito?

20 JUSTICE ALITO: If Congress wanted to
21 authorize temporary offsite storage of spent
22 nuclear waste, why did it use the term "special
23 nuclear material?"

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

1 JUSTICE ALITO: Yeah, I understand
2 that, but why choose just that? Why not refer
3 to the whole thing?

4 MR. FAGG: Well, in 1954, there wasn't
5 yet a nuclear power plant, okay? When the
6 Atomic Energy Act was passed, the first online
7 commercial plant wasn't going to come on until
8 about 1958 or so. So I -- I think that the
9 logical and -- and -- and probable reason why
10 Congress did this is -- is to reduce it to
11 the -- the most pernicious, if you will,
12 elements of it, okay? So, if you -- if you
13 can't do it with special nuclear material, you
14 can't do it with spent nuclear fuel.

15 And so rather than -- you know,
16 there's all kinds of additional things that may
17 or may not have these elements in them, but --
18 but a -- an efficient and effective way to
19 safeguard the public health and safety, to
20 promote, you know, all the things that the
21 Atomic Energy Act was -- was to promote, was to
22 do it the way it did it, which is reduce it to
23 the minimal elements, if you will, and -- and --
24 and -- and invest the agency with the authority
25 under the provisions we've talked about to

1 regulate those.

2 JUSTICE ALITO: Do you -- would you
3 agree that the State of Texas and those with an
4 interest in the Permian Basin have a
5 reasonable -- that it's reasonable for them to
6 be concerned about the storage in this location?

7 MR. FAGG: I -- I have no reason to --
8 to doubt that they care. I -- I -- I had
9 question why they didn't intervene, like lots of
10 states do and like the regulations specifically
11 allow.

12 I do -- I do -- I would also observe,
13 and it's in the record, Texas originally
14 supported this project and then reversed itself
15 and opposed it. But I -- I don't -- I don't
16 doubt their --

17 JUSTICE ALITO: Well, why was this
18 location chosen?

19 MR. FAGG: It -- you know, there --
20 there's -- there's reams of environmental
21 aspects of this. One of the things is looking
22 at, you know, the potential alternatives.

23 And -- and, you know, no -- nobody
24 close to a location chosen, including the
25 nuclear plants in Oregon and -- and -- and New

1 England, want it there or like it there. But,
2 it -- you know, it was a place that was deemed
3 ultimately, after a lot of study, to have been
4 somewhere where it could be safe, safely stored.

5 JUSTICE ALITO: Do you have a
6 prediction about when there may -- there might
7 be a permanent storage facility?

8 MR. FAGG: I -- I -- I've been in --
9 in this stew for a lot of years, and there's a
10 lot of -- there are a lot of talks. There's a
11 lot of energy. But I think I'd be -- I -- I --
12 as I sit here today, I think, you know, I -- I'd
13 be kidding myself and every -- and the Court if
14 I said I -- I have a date.

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

17 JUSTICE ALITO: Well, if it is decided
18 that the material can be stored offsite
19 temporarily, and "temporary" means more than 40
20 years, maybe more than 80 years, maybe it means
21 250 years, may it -- may it mean -- maybe it
22 means 500 years, what -- where is the incentive
23 to go forward to do what Congress wanted to have
24 done, which is to establish a permanent
25 facility?

1 MR. FAGG: Well, the -- the incentive
2 is what it is, whether the fuel is at the
3 facility my client wants to build it or is
4 scattered across 40, you know, sites all across
5 the country.

6 So, you know, the -- the incentives --
7 and, again, this is an industry that is harmed
8 by DOE's failure. Trying to mitigate it through
9 my client's actions and to sort of punish the
10 industry doubly for DOE's failure and then not
11 allow them to save tens of millions in dollars
12 to mitigate I would suggest is -- is -- is
13 not -- not furthering the incentives that we
14 want in terms of a -- of a -- a critical part
15 of -- a fifth of our nation's power.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 Justice Kagan?

19 Justice Gorsuch?

20 Justice Kavanaugh?

21 Justice Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: Can I just ask you
24 to speak quickly about the party issue? Does it
25 matter whether the intervention motion was

1 wrongly denied at this stage, at this point?

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

6 Again, I resist the notion that
7 there's no judicial review. If you're denied --
8 and -- and to echo something Mr. -- government
9 counsel said, the -- the -- there's all kinds of
10 ways you could say these rules are too
11 restrictive, these rules are -- are -- are --
12 are too much. You -- you can challenge them in
13 a proceeding, you can get a waiver to challenge
14 them in a proceeding, or you can do, as in the
15 Bullcreek proceedings and as Mr. Stewart pointed
16 out, a petition for rulemaking.

17 So that's kind of a long-winded way of
18 saying it's not before this Court in this case
19 about whether Fasken's attempt to become a party
20 was rightly or wrongly decided. The D.C.
21 Circuit said it was rightly decided, and here we
22 are.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Frederick.

2 ORAL ARGUMENT OF DAVID C. FREDERICK
3 ON BEHALF OF RESPONDENT FASKEN LAND
4 AND MINERALS, LTD.

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

7 The 1982 Nuclear Waste Policy Act
8 created a comprehensive program that addressed
9 where and how to store spent nuclear fuel. That
10 program does not include private offsite
11 storage, which Congress specifically ruled out
12 in Section 10155(h).

13 As the later-enacted, more specific
14 act, the Policy Act controls, and the NRC cannot
15 administratively override it.

16 The Atomic Energy Act itself
17 authorizes only onsite storage, not offsite
18 storage. Sections 2133 and 2134 allow the
19 Commission to impose conditions, including
20 safety requirements, on utilization and
21 production facilities' licenses. Reactors are
22 utilization facilities. So licenses cover
23 onsite storage of spent fuel.

24 Because that material is so hot, it
25 takes years to cool, and it can only be done

1 safely onsite by removing the reactor core and
2 moving it immediately into water. And that's
3 why more than about 50 percent of all spent
4 nuclear fuel is in cooling pools around the
5 country.

6 Section 2136, which is not cited in
7 the briefs, says the NRC "may define the various
8 activities at each such facility." And we think
9 that clearly means regulating the safety
10 characteristics of dealing with spent nuclear
11 fuel when it comes immediately out of the
12 reactor core.

13 The Commission's efforts to derive
14 authority from the AEA's material license
15 provisions don't work because storage is not
16 use. As the 1982 Policy Act defines it, storage
17 is "retention for subsequent use, processing, or
18 disposal."

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Why are you a party
21 now?

22 MR. FREDERICK: We're a party now
23 because, under the plain language of the Atomic
24 Energy Act 2339(a)(1)(A), we are affected by the
25 proceeding, we shall be admitted as a party, and

1 we requested a hearing. And those are all
2 indisputed facts.

3 JUSTICE THOMAS: So what do we do with
4 the D.C. Circuit opinion?

5 MR. FREDERICK: I think what you say
6 is that there were two purposes that Fasken
7 wanted to advance as a party. One was to be
8 able to intervene for the purposes of putting in
9 expert testimony and other facts. We were
10 denied that, Justice Thomas, and we're not
11 appealing that now.

12 But the second purpose, which is
13 satisfied by the plain language of the Atomic
14 Energy Act, is to be able to challenge that the
15 NRC approved this license without statutory
16 authority.

17 And the NRC's intervention rules,
18 which are set forth at 2.309 and 2.335, make it
19 very clear that the NRC itself is going to serve
20 as a gatekeeper and does not allow parties to
21 come in and challenge their statutory authority
22 in the licensing proceeding itself.

23 JUSTICE JACKSON: But why isn't this a
24 collateral attack on the intervention decision?
25 I guess I don't understand.

1 MR. FREDERICK: Because, as I said,
2 Justice Jackson, the intervention which we
3 sought was to be able to put in expert testimony
4 and to participate in an -- what was effectively
5 a proceeding to gather evidence.

6 Here, we're bringing a pure legal
7 facial challenge, and we --

8 JUSTICE SOTOMAYOR: Mr. Frederick, it
9 makes no sense to me. What you're saying is,
10 instead of bringing that argument to the agency
11 first, you get, at any point in time that you
12 want to, the right to intervene and argue that
13 they don't have the power.

14 Don't you think the normal course
15 of -- of agency proceeding -- and we've already
16 said that even though agencies sometimes can't
17 decide constitutional questions, there's no
18 question that the agency could have listened to
19 the argument that it statutorily wasn't in power
20 to do so.

21 MR. FREDERICK: Except that their
22 rules say you can't. And so it would have been
23 utterly futile to go to the Commission and say:
24 You're acting ultra vires beyond your statutory
25 authority because the regulations of the NRC

1 say: We are not going to accept that at -- that
2 contention.

3 JUSTICE SOTOMAYOR: And then you could
4 have brought it to the Fifth Circuit.

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

6 JUSTICE SOTOMAYOR: Well --

7 MR. FREDERICK: We did argue --

8 JUSTICE SOTOMAYOR: -- yeah, but you
9 didn't argue it at the time when -- you -- you
10 didn't bring it. You didn't argue it at the
11 time that you moved to intervene.

12 JUSTICE JACKSON: Did you --

13 MR. FREDERICK: That's incorrect.

14 That is -- I --

15 JUSTICE JACKSON: Did you -- did you
16 say --

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

19 JUSTICE JACKSON: Go ahead. Go ahead.

20 MR. FREDERICK: Yeah. We moved to
21 dismiss. The very first motion we filed said:
22 This is not within your statutory authority. We
23 moved to intervene for multiple purposes.

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

1 MR. FREDERICK: We argued to the Fifth
2 Circuit that the --

3 JUSTICE SOTOMAYOR: At -- at the
4 second -- at the second --

5 MR. FREDERICK: Because that was the
6 final order, Your Honor. We challenged the
7 final order as being outside the scope of the
8 authority --

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

11 MR. FREDERICK: No, because the first
12 motion only go -- went to could we intervene for
13 purposes of bringing in evidence to the
14 Commission.

15 And -- and the point here is: Are you
16 going to allow agencies to manipulate their
17 rules so that they can decide who gets to
18 challenge them?

19 JUSTICE SOTOMAYOR: I'm sorry --

20 JUSTICE JACKSON: Quite frankly, I'm
21 worried about party manipulation.

22 I'm trying to understand what basis
23 you now have to say that we should be revisiting
24 the D.C. Circuit's determination that you cannot
25 intervene.

1 MR. FREDERICK: I'm not asking you to
2 do that.

3 JUSTICE JACKSON: Okay. So, if we
4 believe that the law is such that you had to be
5 a party, do you concede that you were not a
6 party at the lower court proceeding?

7 MR. FREDERICK: No.

8 JUSTICE JACKSON: You do not concede?

9 MR. FREDERICK: We do not concede
10 that.

11 JUSTICE JACKSON: Okay.

12 MR. FREDERICK: The Atomic --

13 JUSTICE JACKSON: And the basis for
14 your -- your party participation is what?

15 MR. FREDERICK: The Atomic Energy Act
16 says that if we are affected by the proceedings
17 and we ask for a hearing, the NRC "shall admit"
18 us as a party.

19 JUSTICE KAGAN: Well, that -- that
20 says, Mr. Frederick, why you have a argument
21 that you should have been a party. And maybe
22 you do have a good argument that you should have
23 been a party.

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

1 MR. FREDERICK: No, I think that we
2 were not a party in the sense that we were
3 permitted to do the full evidentiary exposition
4 that we might have liked to have done. And I'm
5 not arguing that we should have -- that that
6 should be revisited.

7 But we are a party under the
8 meaning -- the plain language of the Atomic
9 Energy Act, which says we shall be a party and
10 we shall have an opportunity to say in a
11 judicial review setting --

12 JUSTICE KAGAN: But then you're saying
13 that -- that -- I mean, you know, when I look at
14 this, your only participation in the agency
15 proceeding was to be excluded from it. But then
16 you're saying: Well, if I was excluded wrongly,
17 I'm a party.

18 I -- I mean, how could that be? I
19 mean, that's -- that's -- that's very much
20 against the way we think of this in a judicial
21 context, right, where we look at somebody and
22 they've tried to intervene, and maybe they've
23 been wronged, maybe the court was wrong to say
24 that they can't intervene, but we don't say:
25 Oh, the court was wrong. They really should

1 have been there, and so we're going to give them
2 an opportunity to come in at some later point in
3 time and attack the judgment.

4 It just doesn't work that way.

5 MR. FREDERICK: Well, I would say this
6 is not the normal agency proceeding. The
7 Pacific Legal Foundation says that they have
8 looked at the various agencies. This is the
9 only agency that serves as a gatekeeper to its
10 own proceedings. That's point one.

11 Point two, there are different scopes
12 of party participation. One is that you
13 participate as a full party, bring depositions,
14 bring other evidence.

15 That is not what we are challenging
16 here. What we are saying is that the plain
17 language of the Act gives us the right to say
18 for the first time in court, because the agency
19 won't allow us to say it in the proceedings, you
20 don't have the statutory authority for what you
21 did.

22 JUSTICE JACKSON: But, Mr. Frederick,
23 if we disagree with you, if we think that as a
24 matter of law, what counts as being a party is
25 having the level of participation that you

1 called Category 1, do you concede that you did
2 not have that in this case?

3 MR. FREDERICK: Well, we were
4 foreclosed from having it.

5 JUSTICE JACKSON: All right. So, if
6 we think that in order to be a party for the
7 purpose of the Hobbs Act, you have to have that
8 status, what difference does it make what
9 arguments you're making or whatever? You didn't
10 have that status.

11 MR. FREDERICK: Because the Hobbs Act
12 itself incorporates the Atomic Energy 2339
13 provision that I quoted to you about being a
14 person affected by the license, requesting a
15 hearing, that we shall be admitted.

16 So the Hobbs Act party --

17 JUSTICE JACKSON: Did you make that
18 argument before the court in your
19 intervention -- wasn't that the basis by which
20 you went to the court and said: I need to
21 intervene, look at the Hobbs Act provision that
22 says these things?

23 MR. FREDERICK: No. The -- what we
24 did in the D.C. Circuit was we talked -- and --
25 and the D.C. Circuit, by the way --

1 JUSTICE JACKSON: I'm sorry, that's
2 not the statutory basis for your claiming the
3 right to intervene?

4 MR. FREDERICK: It is. It is.

5 JUSTICE JACKSON: It was, right? So
6 you said to the court: Look at the Hobbs Act.
7 Here are these criteria we need to be able to
8 intervene. And the court disagreed.

9 MR. FREDERICK: I think you're
10 misreading what happened in the D.C. Circuit,
11 Your Honor, with respect. We didn't have an
12 opportunity to challenge the final order in the
13 D.C. Circuit. That could only be done after the
14 final order was made.

15 So what we did challenge was the
16 limited application of the Commission's
17 intervention rules to say they had not been
18 applied correctly.

19 JUSTICE SOTOMAYOR: Mr. Frederick --

20 MR. FREDERICK: That's a much more
21 limited question.

22 JUSTICE SOTOMAYOR: -- it makes little
23 sense. The rule at issue that you wanted to
24 intervene in was a rule that was citing a -- a
25 storage area that you now say they didn't have

1 the authority to do.

2 So, if you were an aggrieved person
3 under the Act, you could have gone to the D.C.
4 Circuit on your first round of appeal and said
5 just that: I can intervene because I have an
6 argument that they've exceeded their statutory
7 authority.

8 MR. FREDERICK: And the D.C. Circuit
9 20 years before had rejected that argument.
10 There was no circuit split.

11 JUSTICE SOTOMAYOR: Oh, so then you
12 could have sought cert here.

13 MR. FREDERICK: And there was no
14 circuit split, Your Honor.

15 JUSTICE SOTOMAYOR: You didn't have
16 to, but you -- but the Hobbs Act requires you to
17 be a -- a party aggrieved, not a person
18 aggrieved.

19 MR. FREDERICK: Let me just say,
20 Justice Sotomayor, if the Court adopts that line
21 of reasoning, the NRC is effectively immune from
22 judicial review because they set the rules for
23 determining what can be a "admissible
24 contention" which has to meet -- surpass the
25 summary judgment standard.

1 JUSTICE KAGAN: Well, I take that
2 point, Mr. Frederick, and it might very well be
3 that this D.C. Circuit decision is wrong. I
4 mean, it -- it -- it looks to me as though it
5 goes beyond the statute. So I -- I -- I'm
6 pretty sympathetic to that view.

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

12 MR. FREDERICK: Well, I would ask you
13 to reread the language of 2339 of the Atomic
14 Energy Act, which says we are a party. And --
15 and if you're going to apply normal textual
16 canons of strict construction, you would say we
17 are a party.

18 JUSTICE KAGAN: I think that language
19 says you should have been included as a party.
20 I think that language gives you a good reason
21 for saying that -- that the regulation is
22 invalid and a good reason for saying that the
23 D.C. Circuit is wrong. But I don't think that
24 language gives you a good reason for sort of
25 just, you know, making X not X, that you weren't

1 there.

2 MR. FREDERICK: Your Honor, I don't
3 think that the Fifth Circuit's ruling that we
4 were a party that should be allowed to challenge
5 the statutory authority of the agency would deny
6 us party status now.

7 And I -- I do want to emphasize the
8 time point. As Justice Alito pointed out, this
9 license can have this storage for up to 80
10 years. And under the reasoning of that line, no
11 one would ever be able to say, well, you know
12 that -- that nuclear stuff in the west Texas
13 area was done illegally because no one had the
14 appropriate party status because the
15 intervention rules of the NRC said you don't get
16 to intervene.

17 That would be a very crazy way to
18 think about limitations on agency authority that
19 exceed what the statute allows. And I think
20 that if you consider the other side's argument,
21 onsite storage has to be done for safety
22 reasons. The -- the nuclear material that is
23 burned, it is very, very hot. It has to stay
24 onsite.

25 And that's why the facilities license

1 provisions are the easiest way to understand the
2 practical reality that, for 70 years, this
3 material has stayed onsite. When Congress
4 considered in the Policy Act what to do with it,
5 it said either --

6 JUSTICE JACKSON: Mr. Frederick, what
7 do we do about the fact --

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

9 JUSTICE JACKSON: What do -- what do
10 we -- I -- you've said over and over that it's
11 hot and it's hard and all of that. But I would
12 assume that in 70 years, technology changes,
13 that, you know, things happen and people figure
14 out ways to store and move. What -- what --
15 what do we do with that?

16 MR. FREDERICK: Well, the technology
17 hasn't speeded up the cooling process of
18 material that is radioactive.

19 JUSTICE JACKSON: No, I understand,
20 but we have -- we have ISP here saying that they
21 can receive this material.

22 MR. FREDERICK: This -- this material,
23 Justice Jackson, is so hot when it comes out of
24 the core, no human being can get anywhere close
25 to it, which is why it -- the design of the

1 facility that is done by the Commission is to
2 have the spent rods taken down into pools of
3 water.

4 JUSTICE JACKSON: No, I understand. I
5 guess I just don't -- I -- I'm not fully
6 understanding why it matters that the material
7 is so hot and that it's difficult to do in a
8 situation like this in which the Commission has
9 apparently licensed -- that's what you're
10 challenging -- this transfer. So someone thinks
11 it can be done because they've given a license
12 to do it.

13 MR. FREDERICK: And it hadn't been
14 done before this situation. No facility's ever
15 been constructed. The Morris facility that Mr.
16 Stewart adverts to --

17 JUSTICE JACKSON: But why doesn't that
18 fit into the statutory authorization for the
19 Commission to make the determination about
20 whether or not this can be done consistent with
21 safety, et cetera, et cetera?

22 MR. FREDERICK: Because the Policy Act
23 says in five provisions the NRC shall maximize
24 onsite storage. It shall increase technology
25 for onsite storage. It shall, if it has to go

1 offsite, go to a federal facility.

2 JUSTICE JACKSON: And does it say it

3 cannot --

4 MR. FREDERICK: Yes. 101 --

5 JUSTICE JACKSON: -- authorize -- it

6 cannot authorize offsite storage?

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

8 not do private offsite storage.

9 JUSTICE JACKSON: 101 --

10 MR. FREDERICK: 55 --

11 JUSTICE JACKSON: -- 55 --

12 MR. FREDERICK: -- (h).

13 JUSTICE JACKSON: -- (h).

14 JUSTICE KAVANAUGH: What --

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

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

17 clear from these provisions is that the NRC is

18 seeking to use a rulemaking to override a

19 statute.

20 CHIEF JUSTICE ROBERTS: Thank you,

21 counsel.

22 Justice Thomas, anything further?

23 Justice Alito?

24 JUSTICE SOTOMAYOR: Perhaps, in reply,

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

1 I had understood that the pooling --
2 the -- the cooling pools, that many of them are
3 offsite?

4 MR. FREDERICK: No, that's not
5 correct.

6 JUSTICE SOTOMAYOR: All right. Then I
7 misunderstood.

8 MR. FREDERICK: And -- and -- and I --
9 and I can point you to the Blue --

10 JUSTICE SOTOMAYOR: I thought Mr. Fagg
11 had said that, but --

12 MR. FREDERICK: Right. There was a
13 Blue Ribbon Commission report that the
14 President's Blue Ribbon Commission put together
15 that goes through all of this material. It goes
16 through the nuclear process, the history at the
17 storage site. It was published, I think, in
18 2012 or 2013. It answers many of the questions
19 about the practicalities of the nuclear process.

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch?

23 JUSTICE GORSUCH: A couple quick
24 questions, Mr. Frederick.

25 First, with respect to your ultra

1 vires argument, it sure sounds to me a lot like
2 an APA challenge beyond statutory authority that
3 would normally be brought in district court in
4 the first instance. Help me with that.

5 MR. FREDERICK: Well, what I would say
6 is that we have not found a case on all fours
7 with the one that we have where the ultra vires
8 argument was brought directly to the court of
9 appeals.

10 But what I would say is that the
11 jurisdiction, the exclusive jurisdiction
12 provision of the Hobbs Act, 2342(4) --

13 JUSTICE GORSUCH: I understand. If
14 you get in the Hobbs Act, you're in the Hobbs
15 Act. But assume we're not in the Hobbs Act.

16 MR. FREDERICK: Right. But what I'm
17 saying is that 2342 says all final orders, the
18 exclusive jurisdiction --

19 JUSTICE GORSUCH: I see.

20 MR. FREDERICK: -- shall be in the
21 courts of appeals. And so our reading of that
22 is that that answers the question of where you
23 can bring the argument. It doesn't say --

24 JUSTICE GORSUCH: Got you.

25 MR. FREDERICK: -- how or what the

1 argument is.

2 JUSTICE GORSUCH: I follow you.

3 And then, with respect to the struggle
4 over the D.C. Circuit order, I didn't see
5 anything in the opinion addressing the statutory
6 question, so -- and I didn't see anybody below
7 arguing that that -- that -- normally, for issue
8 preclusion to have an effect, that you have to
9 have a ruling on -- on the question at hand.

10 MR. FREDERICK: Correct.

11 JUSTICE GORSUCH: And somebody has the
12 burden to show that it applies. And I didn't
13 see either ruling on this question in the D.C.
14 Circuit.

15 MR. FREDERICK: That's correct. And
16 that's --

17 JUSTICE GORSUCH: And I didn't see the
18 government suggest or ISP suggesting that you
19 were precluded as a matter of collateral
20 estoppel.

21 MR. FREDERICK: That's correct.
22 They've not made that oral waiver argument. And
23 that's why it's important to understand the
24 difference between an intervenor party and just
25 a party to be able to say under the plain

1 language of the Act you violated the Act.

2 You've gone beyond the Act in approving this
3 license.

4 JUSTICE GORSUCH: All right. Thank
5 you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: One of the
9 arguments on the other side is the Commission's
10 interpreted the statutory scheme the same way
11 for, you know, five decades and that that
12 consistent, longstanding interpretation has
13 itself significant weight as we interpret the
14 statute.

15 You want to respond that?

16 MR. FREDERICK: Yes. Thank you for
17 asking that question, Justice Kavanaugh.

18 If you look at the Federal Register
19 for the 1980 rules, there are two paragraphs on
20 the question of does the agency have the
21 authority to do offsite storage. One paragraph
22 says many commenters think it's a bad idea to do
23 it anywhere but onsite. The second paragraph
24 says some commentators think that it's okay to
25 do it offsite.

1 So we think it should be -- we should
2 have the authority to choose. They don't cite
3 any provisions of the Atomic Energy Act. They
4 don't ground that policy in any particular
5 statutory language.

6 It was the Commission's decision to do
7 this simply on the basis of what they thought
8 was a good idea. And then two years later, when
9 Congress comprehensively addressed the subject
10 in the Policy Act, the agency should have gone
11 back and redone its rules. It didn't do that.

12 And that's why Mr. Stewart has to make
13 a -- a rather convoluted statutory argument
14 deriving from these provisions in the Atomic
15 Energy Act that don't speak to the question.

16 JUSTICE KAVANAUGH: Well, is it really
17 that convoluted? It's basically that the Act
18 was understood to authorize this, that the
19 Commission recognized that authority, that
20 Congress in 1982 had a chance to, was well aware
21 of this issue and did not expressly preclude
22 this, and then that's been the way it's been
23 for, you know, 50 years.

24 MR. FREDERICK: Well, it is not how it
25 has been. The only example they have is a

1 former reprocessing facility. That is a
2 production facility as defined in the Atomic
3 Energy Act. That's the Morris plant.

4 When reprocessing failed, they had to
5 do something with the spent nuclear fuel that
6 had been sent to the Morris plant, and so what
7 they did was a kind of a jerry-rigged approach
8 and said: It's here, we don't want to move it,
9 let's just keep it here, and we'll store it
10 onsite.

11 And that has become the exemplar of
12 their longstanding interpretation for offsite
13 storage. It -- it is really a stretch and makes
14 no relation to the statutory test at all.

15 JUSTICE KAVANAUGH: One of the reasons
16 longstanding interpretations matter, of course,
17 is that private parties rely on those, and the
18 amicus brief, for example, of the Nuclear Energy
19 Institute makes -- makes clear that a lot of
20 investment has happened based on what appeared
21 to be a settled understanding of the authority.

22 Do you want to respond to that?

23 MR. FREDERICK: Yeah. There --
24 there's been no actual construction of an
25 offsite facility ever. There have only been

1 three approvals. One, the Bullcreek example,
2 was never built. So that license was approved,
3 no facility. The only two other ones are before
4 this Court. It's Holtec in New Mexico, ISP in
5 Texas.

6 JUSTICE KAVANAUGH: And then last
7 question. Petitioners' counsel said, if your
8 statutory argument is correct, they never needed
9 a license to begin with.

10 You want to respond to that?

11 MR. FREDERICK: Yeah. What I started
12 with on the material -- on the facilities
13 license is that in order to ensure the safe
14 operation of the facility under 2133, 2134, and
15 2136, the Commission has always asserted the
16 authority to make sure safe operations occur
17 onsite, but that's part of the facilities
18 license, which means you don't move it off the
19 facility, which is the whole argument that
20 they're trying to make here by saying it's
21 lawful to take what is a materials license
22 and -- and contort what authority that they were
23 really asserting under the facilities license
24 provision.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 Justice Jackson?

4 JUSTICE JACKSON: Do -- do you concede
5 that the "party aggrieved" language is
6 jurisdictional?

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

9 JUSTICE JACKSON: No, I understand.
10 I'm just asking you, is it a jurisdictional
11 provision?

12 MR. FREDERICK: I'm not sure. I think
13 courts of appeals have treated the 60-day
14 provision as jurisdictional for appeal. I'm not
15 sure that they've treated who constitutes a
16 party as being jurisdictional, but what I would
17 say to that, Justice Jackson, is that in all of
18 those Hobbs Act conditions, you should look at
19 the organic statute for the Commission first
20 because the FCC has two different appellate
21 mechanisms. One is a Hobbs Act provision and
22 the other is not a Hobbs Act provision.

23 JUSTICE JACKSON: All right. Well,
24 I -- I'm just trying to understand the argument
25 that I think you're now making, which is that

1 there's a difference between being an intervenor
2 party for the purpose of any party aggrieved and
3 being a party who wants to make the particular
4 claim of ultra vires.

5 MR. FREDERICK: Well --

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

8 MR. FREDERICK: Well, what I'm -- I
9 think we were the former. I think the
10 language --

11 JUSTICE JACKSON: Well, you didn't --
12 you didn't get intervene -- intervenor status.

13 MR. FREDERICK: I'm -- I'm not
14 challenging that, Justice Jackson, but I'm not
15 saying we're not aggrieved. We clearly are
16 aggrieved. And we are aggrieved under any --

17 JUSTICE JACKSON: I didn't ask you
18 whether you were aggrieved. I'm trying to
19 figure out whether you're a party.

20 MR. FREDERICK: Yes.

21 JUSTICE JACKSON: And -- and -- and --
22 and the distinction that you've now made is the
23 difference between parties who were intervenors
24 and parties who would like to claim ultra vires.
25 I don't see any statutory basis for that

1 distinction, but I'm just trying to even
2 understand where it comes from.

3 MR. FREDERICK: What I'm saying,
4 Justice Jackson, is there are two routes for us
5 to assert our party status, okay? One is under
6 the Atomic Energy Act, which we clearly satisfy.
7 The other is under the Commission's rules for
8 intervention, which the Commission ruled against
9 us on.

10 I acknowledge we lost the second one
11 and it's not before this Court. But that
12 doesn't mean we don't satisfy the statutory
13 requirements that would be --

14 JUSTICE JACKSON: Thank you. I
15 understand your argument.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Nielson.

19 ORAL ARGUMENT OF AARON LLOYD NIELSON
20 ON BEHALF OF RESPONDENTS TEXAS, ET AL.

21 MR. NIELSON: Mr. Chief Justice, and
22 may it please the Court:

23 I hope to make several additional
24 points, but I want to start with three quick
25 ones.

1 First, Justice Kavanaugh was right in
2 PDR Network that the Hobbs Act covers a wide
3 variety of orders. Under Clark -- Clark
4 v. Martinez, where one provision has multiple
5 applications, the Court applies a lowest common
6 denominator interpretation to all of them. Even
7 in the D.C. Circuit, if you file comments,
8 that's enough to challenge a rule and a
9 declaratory ruling in adjudication.

10 Second, Congress added to the A -- to
11 the AEA the NWPA's definition of "spent nuclear
12 fuel." The Court needs to interpret today's AEA
13 and address Petitioners' obvious superfluity.

14 And, finally, you know, if anyone
15 thinks this is temporary, I have a bridge to
16 sell you.

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

22 I welcome the Court's questions.

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

25 MR. NIELSON: Correct, Your Honor.

1 So, I mean, listen, effectively, we did
2 intervene, but I would say this goes back to
3 understanding of the Hobbs Act.

4 The Hobbs Act does not just apply to
5 this agency. It applies to a whole bunch of
6 agencies and a whole bunch of different types of
7 orders. So, if you file a comment in an FCC
8 rulemaking, you're good. Or, even at the D.C.
9 Circuit, if you file a declaratory ruling, which
10 is a form of adjudication, you discussed this in
11 McKesson, that's also -- it's enough to file a
12 comment.

13 So that's what Texas did here. And
14 I -- I think it's important to understand kind
15 of what happened.

16 JUSTICE KAGAN: But, General --

17 MR. NIELSON: Yes.

18 JUSTICE KAGAN: -- I mean, this was an
19 adjudicatory proceeding. So the way people
20 understand who parties are in an adjudicative
21 proceeding, it's -- it's -- it's not enough to
22 send in a letter.

23 MR. NIELSON: Well, a couple
24 responses. One, so is a declaratory ruling.
25 And in the D.C. Circuit, declaratory rulings,

1 it's enough to send a comment. So their
2 distinction doesn't work on its own terms. And
3 I would point the Court there to Petition
4 Appendix 18a. That is where the Fifth Circuit
5 discusses the D.C. Circuit precedent on that
6 point.

7 But, second, this is a very strange
8 type of adjudication. By statute, Congress has
9 said that if they're going to do this type of
10 license, they need to open up to NEPA, which is
11 a -- a notice-and-comment process, in the middle
12 of the adjudication. This is not a normal
13 adjudication.

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

17 MR. NIELSON: I think it certainly
18 helps that it was a governor of a state.

19 JUSTICE KAGAN: Well, I don't see
20 really how it does help under the statute. I
21 mean, it's nice that he was the governor of the
22 state, but I don't see how you can make a legal
23 argument on that basis. If somebody is a party
24 by virtue of sending in a letter under this
25 statutory scheme, anybody is a party by virtue

1 of sending in a letter.

2 MR. NIELSON: Well, so, again, we
3 think that if you file a comment -- and it
4 wasn't just a letter; it's comments -- as part
5 of the notice-and-comment process, but if they
6 solicit you, which is what happened here -- I'd
7 point the Court to the record on this one. This
8 was JA 292. They asked us, they solicited our
9 comments, and then we responded to that.

10 Even under their -- their best case,
11 this Water Transport case from the D.C. Circuit
12 that they rely on, if the agency solicits your
13 participation and you respond to that, that
14 counts in the D.C. Circuit, their case.
15 That's -- and, again, that's their best case.

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

19 JUSTICE KAGAN: I -- I mean, the
20 question, General, is what does "party" mean?
21 And it seems to me "party" means somebody who
22 has participated in an agency proceeding with
23 the degree of formality required for that
24 proceeding.

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

1 party may very well mean I submitted a comment
2 in a notice-and-comment process. But -- but
3 that's not the degree of formality that's
4 associated with a proceeding of this kind.

5 And, you know, you -- you didn't
6 intervene. You didn't even try to intervene,
7 unlike Mr. Frederick's client. I -- I don't see
8 how we can say that you were a party.

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

13 JUSTICE KAGAN: It's not a chameleon.
14 It's like different proceedings might understand
15 who parties are differently. I mean, that's --
16 that's -- that's not anything weird.

17 There are three separate processes,
18 and the way you participate in those three
19 separate processes are -- are different because
20 different rules apply, because the processes are
21 understood to -- parties in -- in adjudications
22 are different from parties in rulemakings.

23 MR. NIELSON: Okay. So I guess a
24 couple of responses. One, I don't agree under
25 the Hobbs Act that you're going to

1 distinguish -- it's -- it's one word that has to
2 apply to both. But say I'm wrong about that.

3 JUSTICE KAGAN: It -- it -- it is one
4 word.

5 MR. NIELSON: Yeah.

6 JUSTICE KAGAN: It means have you
7 participated with the degree of formality that's
8 necessary for the kind of proceeding it is? And
9 if you are, you're a party. It's one
10 definition.

11 MR. NIELSON: Okay. So say I'm wrong
12 about this. So I'm agreeing with you for -- for
13 purposes of this answer. I would still say what
14 we're talking about here is a lot closer to a
15 hybrid between a rulemaking and an adjudication
16 than a pure adjudication. This is a licensing
17 which Congress said by statute they have to take
18 our comments. And then we filed those comments
19 in response.

20 And the argument that we are making
21 today was presented to the agency by Sierra
22 Club, and the agency said no, we're not going to
23 even consider that. We're not going to take
24 that contention.

25 So we're in the position here where

1 they've asked for our comments, we've responded
2 to their comments. The arguments we want to
3 make they've already said they're not going to
4 hear. It seems very strange to say that the
5 State of Texas is not a party. We're obviously
6 aggrieved. And, by the -- their own
7 regulations, they asked for our participation
8 and we participated.

9 JUSTICE SOTOMAYOR: Are you defending
10 the Fifth Circuit's ultra vires holding? Or
11 saying, even if you weren't a party aggrieved,
12 we could hear your appeal under the theory of
13 ultra vires? I didn't see you or Fasken
14 spending a whole lot of ink on that in your
15 briefs.

16 MR. NIELSON: Well, I mean, I think
17 the more straightforward point is that we are a
18 party under the Hobbs Act. Or, if not, if
19 Fasken is truly a party, and then this is all
20 academic for us.

21 JUSTICE SOTOMAYOR: Okay.

22 MR. NIELSON: But --

23 JUSTICE SOTOMAYOR: So you're not.
24 Thank you.

25 MR. NIELSON: No. But, no, I

1 certainly am. I certainly am, and here's why.
2 If I am wrong about the Hobbs Act, then we
3 really are in a situation where we don't have
4 meaningful judicial review. If they can really
5 cut us out by saying we're not going to take
6 your contentions because we think you're wrong
7 on the merits and that's somehow okay, then we
8 are in the world of ultra vires review.

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

12 JUSTICE JACKSON: Could you have moved
13 to intervene? Is there -- was there something
14 precluding the State of Texas from moving to
15 intervene in this case?

16 MR. NIELSON: Well, other than, Your
17 Honor, they asked for our participation, I
18 don't --

19 JUSTICE JACKSON: No, I understand. I
20 understand what you actually did.

21 MR. NIELSON: Yeah.

22 JUSTICE JACKSON: I'm just saying, you
23 say there's no meaningful judicial review. And
24 I'm just wondering, if there is an avenue for
25 you to become a party with the requisite degree

1 of formality, say, by requesting intervention,
2 was there a reason why you couldn't have done
3 that?

4 MR. NIELSON: Yeah. So I would go
5 back to what Mr. Stewart said earlier, which is,
6 even for states, you have to have an admissible
7 contention. And the argument that we were
8 making was the exact same argument Sierra Club
9 made, and they said that's not an admissible
10 contention.

11 I would point the Court to 10 C.F.R.
12 2.335, which is their procedure if they wanted
13 to screen out these types of things, which
14 essentially says, if you think you're operating
15 outside of -- if we were operating outside of
16 the law, well, then you have to file a petition
17 for rulemaking. That is not meaningful judicial
18 review.

19 JUSTICE GORSUCH: General --

20 MR. NIELSON: That is not how judicial
21 review works.

22 JUSTICE GORSUCH: General -- General,
23 I take your point that if this were a
24 rulemaking, you'd be a party. I get that. I
25 also understand the instinct that adjudications

1 are sometimes different, though I know this
2 Court has held that objecting shareholders in a
3 class action suit are parties for purposes of
4 appeal even though they haven't intervened.

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

7 MR. NIELSON: Sure. I mean, one, I
8 would say let's look at the dictionary. Both
9 parties point the Court to the 1951 Black's Law
10 Dictionary. Look at the big text, not the
11 little text underneath that they rely on. Look
12 at the big front-line text that he uses in the
13 1951 Black's Law Dictionary. I would say there.
14 But I'd also say whatever you say "party" means
15 for Hobbs Act purposes, it has to be big enough
16 to include rulemaking because it's the very same
17 word.

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

21 MR. NIELSON: Correct, Your Honor.
22 And I would also -- again, this is back on the
23 Tenth Circuit days, you wrote a decision in In
24 re Wolseley --

25 JUSTICE GORSUCH: Oh, gosh.

1 MR. NIELSON: -- where the court --
2 where -- I thought it was a wonderful opinion.

3 (Laughter.)

4 MR. NIELSON: And the court
5 explained --

6 JUSTICE GORSUCH: I wish I could
7 remember it.

8 (Laughter.)

9 MR. NIELSON: The court explained the
10 Clark v. Martinez point, which it says is tied
11 to the rule of law itself. You can't have a
12 word that means different things in different
13 applications. If it's the same word, it means
14 the same thing. You have to have the lowest
15 common denominator to capture them all.

16 But, if I -- if I may, I'd like to
17 turn to the merits, though I'm happy to keep
18 discussing jurisdiction.

19 I think that, for me, the most kind of
20 straightforward way to understand the problem
21 with their argument is Congress amended this
22 statute. Congress amended this statute and took
23 the definition of "spent nuclear fuel" from the
24 Nuclear Waste Policy Act and placed it in the
25 AEA.

1 So there are provisions of the AEA
2 that make no sense at all under their
3 interpretation. I'd point the Court to 42
4 U.S.C. 2210(i), which lists all of these terms
5 in the same sentence. So, if spent nuclear fuel
6 is just the same thing as the other three
7 constituent parts, that sentence is -- it's --
8 is nonsense. That cannot possibly be the
9 correct reading of the statute.

10 I would also point the Court if I may
11 to where did Congress say they didn't want this?
12 One is 10155(h), which we've been talking about,
13 which is inexplicable under their theory, but
14 also 10131(a)(3), where Congress said in its
15 findings -- paraphrasing here -- we are unhappy
16 with what has happened before. You don't see
17 that very often from Congress, but Congress said
18 we are displeased with what has happened before.
19 And then you go on to 1015(h), which says keep
20 it onsite.

21 JUSTICE JACKSON: Mr. Nielson, if
22 spent nuclear fuel is not the same as the three
23 constituent parts, why did ISP need a license at
24 all?

25 MR. NIELSON: Yeah. So I think this

1 is where -- a couple answers. One, I agree
2 with -- with Mr. Frederick that the answer is
3 the licensing of the facility. You have to have
4 a safe facility, so you have to have some way to
5 keep the very, very, very hot nuclear waste
6 safe.

7 But the other is -- is physics. If
8 you have a license to take some sort of product
9 or -- or material onto a facility and you have a
10 license to use that facility, but you have no
11 license to take it off the facility, you know,
12 per Newton, it stays where it is.

13 JUSTICE JACKSON: No, I'm just asking
14 about --

15 MR. NIELSON: And that --

16 JUSTICE JACKSON: -- I'm asking about
17 the statutory possession requirement. I thought
18 you had to have a license to possess this kind
19 of material and its -- this constituent parts,
20 and everybody has believed that that equals
21 spent nuclear fuel.

22 MR. NIELSON: Yeah.

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

1 MR. NIELSON: No, Your Honor. And I'd
2 point the Court back to Pacific Gas and also the
3 first line of ISP's brief and the first line of
4 Paul Clement's brief.

5 The -- the way you start with nuclear
6 power, going back to 1946, is right after
7 Hiroshima. There is a federal monopoly on all
8 of this. No private ownership of any of this
9 stuff.

10 Congress then, in 1954, opens it up
11 for the first time and says: We're going to
12 allow some private ownership or possession of
13 these things, and said: These are the three
14 types of things that we are going to allow.
15 They did not allow spent nuclear fuel.

16 So, if you start with the baseline of
17 there's a federal monopoly and no one can do any
18 of this, and then you have three exceptions, you
19 can't have a fourth exception. I --

20 JUSTICE KAVANAUGH: What about the
21 idea that the 1954 Act arguably authorizes this;
22 when you get to 1980, the Commission says it
23 does; 1982, Congress is very aware of this issue
24 and certainly aware of the Commission -- where
25 the Commission is on this and yet does not

1 preclude it, and that's remained the settled
2 understanding ever since?

3 The basic same argument I asked
4 Mr. Frederick.

5 MR. NIELSON: Yeah. Sorry.

6 JUSTICE KAVANAUGH: But that seems
7 kind of an unusual step by Congress. They --
8 they might not have had the votes to prohibit it
9 in 1982, might be one -- one interpretation,
10 big-picture interpretation of what happened
11 there.

12 Do you just want to respond to all
13 that?

14 MR. NIELSON: Yeah, sure. So, one,
15 again, I would point the Court to 10155(h) and
16 10131(a)(3).

17 JUSTICE KAVANAUGH: Yeah. And if
18 10155(h) does not prohibit.

19 MR. NIELSON: Okay. But it is
20 inexplicable under their view.

21 But I would also point the Court to
22 the congressional brief, where they explain the
23 early statements of the agency after the passage
24 of the Policy Act, which I don't think are
25 consistent with what we're hearing now.

1 There's also the time. What strikes
2 me is, if we've always had this power, then why
3 didn't -- why wasn't until after the agency gave
4 up on Yucca Mountain that suddenly you started
5 getting these applications?

6 It's very bizarre, it seems to me,
7 that if there's always been this power and
8 everybody understood this power exists, it
9 wasn't until the agency said, oh, actually,
10 we're not going to do Yucca Mountain, that
11 suddenly said, oh, let's go back to this power
12 that's already existed.

13 JUSTICE SOTOMAYOR: Wait a minute,
14 because it was told it had to try everything
15 else.

16 MR. NIELSON: Well --

17 JUSTICE SOTOMAYOR: It was told in the
18 1982 Act that it wanted to encourage onsite --
19 the federal government to take it, et cetera.
20 So it couldn't run to do something that Congress
21 said: Try everything else.

22 MR. NIELSON: Yeah. And the
23 fallback --

24 JUSTICE SOTOMAYOR: And we've run out
25 of everything else.

1 MR. NIELSON: Well, I disagree with
2 that, Your Honor. But the fallback that
3 Congress said was federal facilities, federal
4 facilities.

5 And this goes back to the point that I
6 think Justice Alito was making. What are the
7 incentives for Congress here?

8 If New Mexico and Texas are left
9 holding the bag, every other state will be
10 happy. They will be pleased because this waste
11 will stay in Texas forever.

12 The only way we're going to get a
13 national solution to this problem is by Congress
14 to get everybody there and figure it out. They
15 tried to do that with Yucca Mountain, and it
16 didn't work.

17 But the answer isn't: Well, I guess
18 we're just going to put it on Texas now. No,
19 Congress needs to go back and fix the law. If
20 the law is broken, it's on Congress, Congress to
21 fix it. It's not this Court's job, and it's not
22 the agency's job.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

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

1 CHIEF JUSTICE ROBERTS: Justice
2 Thomas?
3 Justice Alito?
4 Justice Sotomayor?
5 JUSTICE SOTOMAYOR: When are we in the
6 business of giving Congress incentives?
7 MR. NIELSON: No, Congress gave the
8 agency incentives. Congress said: Do this,
9 Agency.
10 JUSTICE SOTOMAYOR: All right. Thank
11 you, counsel.
12 CHIEF JUSTICE ROBERTS: Justice?
13 Justice Gorsuch?
14 JUSTICE KAVANAUGH: In your opening,
15 you used the phrase "terrorist bulls-eye," which
16 is obviously distinct language.
17 We've known of that at least since
18 September 11th, 2001. Yet Texas supported this
19 project, as I understand it -- correct me if I'm
20 wrong -- for several years. Can you -- in the
21 mid-2010s.
22 MR. NIELSON: Yeah -- yeah. I --
23 JUSTICE KAVANAUGH: Can you explain
24 that, if it was a terrorist bulls-eye?
25 MR. NIELSON: Yeah, I would like to

1 correct it.

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

7 He is saying: The federal government
8 has failed its obligations and has not done what
9 Congress said. You're not going to have an
10 answer for this for decades. And now Texas is
11 in the spot of, what are we supposed to do?
12 They're going to build it across the border in
13 New Mexico. Texas needs to have some sort of
14 ability to have some say in this.

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

20 Governor Abbott comes in before this
21 license and he says: No, essentially, over my
22 dead body are you going to do this, citing the
23 terrorist concerns that we are identifying.

24 Also, look at the brief from -- the
25 congressional brief, which does this as well.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice

3 Barrett?

4 Justice Jackson?

5 Thank you, counsel.

6 Mr. Stewart.

7 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

8 ON BEHALF OF THE PETITIONERS IN CASE 23-1300

9 MR. STEWART: Thank you, Mr. Chief

10 Justice. Just a few quick points.

11 First, Mr. Frederick referred to 42

12 U.S.C. 2239(a), which refers -- deals with the

13 Commission adjudications. But that provision

14 doesn't say, if a person satisfies certain

15 requirements, that person becomes a party or is

16 a party.

17 What it says is, under certain

18 circumstances, the Commission "shall admit any

19 such person as a party to such proceedings."

20 It's a directive to the Commission.

21 And it's indisputable here that the

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

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

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

25 should have been admitted.

1 Second, Mr. Frederick said that when
2 spent nuclear fuel comes out of the reactor,
3 it's too hot to handle or too hot to move. And
4 there is an initial period of at least five
5 years when it has to be placed in a pool, and
6 I'm told that it's rare, though not
7 unprecedented, that the -- the pool is moved.

8 But, after that time, even when the
9 waste is stored at the site of a nuclear
10 reactor, it's often moved into cask storage.
11 It's in the same containers where it would be
12 stored at ISP's facility.

13 Third, Mr. Frederick referred to the
14 1980 Federal Register notice. There was a -- a
15 two-paragraph discussion, I think it's Heading
16 Number 18, offsite versus onsite storage.

17 But it was all about policy. Some
18 commenters said onsite storage is better as a
19 policy matter, some commenters said offsite
20 storage is better as a policy matter. No
21 commenter at that time questioned the
22 Commission's statutory authority to choose one
23 or the other or both, and the Commission chose
24 both.

25 The next thing I'd refer to is there

1 was a reference to the facilities license that,
2 Justice Kavanaugh, I think you asked: How would
3 the ISP facility be illegal if your view of the
4 materials licensing provisions is correct? And
5 the answer was: They would still need a
6 facilities license.

7 That's not correct. The facilities
8 licensing provisions apply only to production or
9 utilization facilities. If you operate a
10 nuclear reactor, you need both a facilities
11 license to operate the reactor and a materials
12 license to possess the -- the relevant stuff.

13 But an ISP -- ISP's proposed facility
14 is not either a production or utilization
15 facility. All it needs is the materials
16 license.

17 And it's true that in determining
18 whether to grant the materials license the
19 Commission will examine the nature of the
20 facility, is it safe, is it secure, but that
21 doesn't convert it into a facilities license.

22 And, Justice Kavanaugh, you laid out
23 the sequence of events that led to the current
24 understanding or the until-recent understanding
25 that offsite storage is permissible. And I'd

1 add only one, and that's the D.C. Circuit's
2 decision in Bullcreek, which was a little over
3 20 years ago.

4 And that was when the question whether
5 the Policy Act had superseded the Atomic Energy
6 Act's licensing provisions and precluded off
7 site storage, it was teed up then. And the D.C.
8 Circuit decided that, no, the Commission's
9 offsite licensing authority remained intact.
10 And we've been another 20 years since then.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:43 a.m., the case
15 was submitted.)

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