Nos. 23-1300 and 23-1312

In the Supreme Court of the United States

NUCLEAR REGULATORY COMMISSION, ET AL.,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

INTERIM STORAGE PARTNERS, LLC,
Petitioner,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR AMICUS PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established to litigate matters affecting the public interest. PLF provides a voice for Americans who believe in limited constitutional government, private property rights, and individual freedom. PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law.

PLF currently represents a client whose access to judicial review would be denied under the government's self-serving interpretation of the Hobbs Act. *See theDove Media, Inc. v. Fed. Commc'n Comm'n*, No. 24-60407 (5th Cir.). More broadly, PLF is interested in preventing agencies from manipulating administrative procedures to evade judicial scrutiny. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120 (2012) (denying agency's use of pre-enforcement compliance orders to escape review).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Nuclear Regulatory Commission (NRC) reads the Hobbs Act to limit judicial review to those who formally participated in the underlying licensing proceeding. Yet this access comes only with the NRC's permission and, indeed, the agency closely regulates third-party intervention into its adjudications. If the

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

government's interpretation of the Hobbs Act is accepted, then "the NRC controls the courthouse door through its authority to determine who may be 'parties' to licensing proceedings." *Texas v. Nuclear Regul. Comm'n*, 95 F.4th 935, 936 (5th Cir. 2024) (Jones, J., concurring in denial of en banc rehearing).

Amicus shows how the NRC, in practice, exercises significant discretionary authority over entry to its in-house tribunals and, by extension, the availability of judicial review under the Hobbs Act. Regardless of whether it amounts to an intentional strategy, the NRC is suppressing judicial review of purely legal questions that speak directly to its own power.

Amicus urges this Court to reject the government's self-serving construction of the Hobbs Act and instead affirm the Fifth Circuit's understanding of the statute's "plain text." *See Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 838 (5th Cir. 2023) ("[T]he plain text of the Hobbs Act requires only that a petitioner have participated—in some way—in the agency proceedings, which Texas did through comments and Fasken did by seeking intervention and filing contentions.").

ARGUMENT

I. The NRC Controls Access to Its Adjudications and, by Extension, the Availability of Judicial Review for Purely Legal Questions

In every NRC licensing proceeding, the applicant is the central party, and the agency's staff also has a right to formally participate. *See* 10 C.F.R. § 2.1202(b). For the rest of the public, however, there is no intervention of right. *See BPI v. Atomic Energy Comm'n*, 502 F.2d 424, 428 (D.C. Cir. 1974) (finding

that the Atomic Energy Act "does not confer the automatic right of intervention"). Instead, the operative statute requires admission for any person "whose interest may be affected." *See* 42 U.S.C. § 2239(a). The NRC interprets the phrase, "whose interest may be affected," as an implicit delegation of authority to deny intervention to those with insufficient "interest" in the proceeding. *See BPI v. Atomic Energy Comm'n*, 502 F.2d at 429 (sustaining the agency's implied authority to "narro[w] those within the larger class to those entitled to participate as intervenors"). On this equivocal legal basis, the NRC closely regulates public access to its adjudications.

Practically speaking, the NRC controls access to its proceedings with heightened pleading requirements. *See* 10 C.F.R. § 2.309. These pleading standards were developed by the NRC through multiple amendments to its rules of practice, resulting in today's robust regime for restricting public access to NRC proceedings. *See* 33 Fed. Reg. 8,588 (June 12, 1968) (enhancing specificity requirements); 37 Fed. Reg. 15,132 (July 28, 1972) (adding criteria by which the NRC could deny intervention); 54 Fed. Reg. 33,168 (Aug. 11, 1989) (adding materiality and broadening specificity requirements); 72 Fed. Reg. 49,474 (Aug. 28, 2007) (enhancing specificity requirements); *see also Union of Concerned Scientists v. Nuclear Regul. Comm'n*, 920 F.2d 50 (D.C. Cir. 1990) (upholding 1989 amendments). These standards "[are] strict by design." *See In re Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3)*, 54 N.R.C. 349, 358 (2001). According to one scholar, "the central thrust" of the NRC's pleading rules "[is] to make intervention and participation in the Commission's licensing proceedings more difficult." Richard Goldsmith, *Regulatory*

Reform and the Revival of Nuclear Power, 20 Hofstra L. Rev. 159, 191 (1991).

This heightened pleading standard imposes two burdens. The first is a requirement that a petitioner for intervention establish administrative standing. *See* 10 C.F.R. § 2.309(d). The agency's rules do not specify a standard to guide the assessment of administrative standing. Instead, the NRC has developed its own body of standing law, though the agency looks to "contemporaneous judicial concepts" for guidance. *See In re Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4)*, 82 N.R.C. 389, 394 (2015). Pursuant to this in-house doctrine, a petitioner can establish administrative standing based on either judicial concepts or a geographic presumption for those living within 50 miles of the nuclear power plant in question. *See In re Interim Storage Partners LLC (WCS Consol. Interim Storage Facility)*, 90 N.R.C. 31, 47-48 (Aug. 23, 2019) (explaining agency's standing analysis). But a petitioner who establishes either or both circumstances is not ensured intervention. Ultimately, the decision rests with the agency, which can deny administrative standing for a person who would otherwise meet the requirements for Article III standing. *See Envirocare of Utah, Inc. v. Nuclear Regul. Comm'n*, 194 F.3d 72, 75 (D.C. Cir. 1999) ("The [NRC] . . . is not an Article III court and thus is not bound to follow the law of standing.")

In addition to demonstrating administrative standing to the NRC's satisfaction, the petitioner must also submit at least one viable "contention" that sets forth an issue of law or fact to be raised or controverted. *See* 10 C.F.R. § 2.309(f). A contention must satisfy six criteria, including that it is "material," falls within the proceeding's "scope," and demonstrates a "genuine

dispute." *Id.* § 2.309(f)(1)(i)-(vii). Under the NRC's rules, failure to satisfy even one of the requirements requires the NRC to reject the contention. *See Entergy Nuclear Operations, Inc. (Indian Point, Unit 2)*, 83 N.R.C. 131, 136 (2016). Of course, each of these threshold limits is subject to interpretation, resulting in copious discretion for the NRC to deny petitions to intervene. *See Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 823 F.3d 641, 643 (D.C. Cir. 2016) ("If a party's contentions do not meet the Commission's specificity or relevancy requirements, the agency may deny the hearing request.").

The agency's pleading standards have no analogue in any other agency covered by the Hobbs Act. *See* Dean Hansell, *Nuclear Regulatory Commission Proceedings: A Guide for Intervenors*, 3 UCLA J. of Env't L. and Pol'y 23, n.56 (1982) ("No other federal regulatory agency has a contention requirement[.]"). The Surface Transportation Board, for example, requires only that a petition to intervene sets out "petitioner's interest," its "request . . . for relief," and a statement supporting or opposing the underlying action. *See* 49 C.F.R. § 1112.4.

In the licensing proceeding below, the agency's pleading standards proved insurmountable. The NRC's Atomic Safety and Licensing Board denied intervenor status to most (7 of 11) petitioners (or joint petitioners) based on administrative standing. *See In re Interim Storage Partners*, 90 N.R.C. at 50-51. The NRC declined to hear these standing questions on appeal, because the agency ultimately affirmed the Board's denial of all remaining contentions. *See In re Interim Storage Partners LLC (WCS Consol. Interim Storage Facility)*, 92 N.R.C. 463, 478-79 (Dec. 17,

2020). These rejected contentions included purely legal arguments that mirror the statutory claims now before this Court, *See id.* at 467-68 (denying contention that the license violates the Nuclear Waste Policy Act). In this manner, the NRC denied all third-party participation.

Although courts may review the NRC's decisions denying intervention, this review provides no real constraint on the agency's control over public access to its adjudications. *See* 42 U.S.C. § 2239. In these cases, the only question before a court is whether the NRC abused its discretion in denying intervention, which entails a highly deferential standard of review. *See* 5 U.S.C. § 706(2)(A); *see also Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 823 F.3d at 655 (affirming NRC's "reasonable determination" to deny intervention); *Blue Ridge Env't Def. League v. Nuclear Regul. Comm'n*, 716 F.3d 183, 196 (2013) (holding that the NRC "acted reasonably in denying Petitioners' contentions").

Here, the underlying proceeding perfectly illustrates the limitations of judicial review as a check on the agency's control over access to its adjudications. After the NRC denied all petitions to intervene, several petitioners sought review in the D.C. Circuit, which consolidated the challenges. Framing the question as "whether the [NRC] reasonably applied its hearing regulations," the D.C. Circuit sustained the agency in a cursory and unpublished opinion. *See Don't Waste Mich. v. U.S. Nuclear Regul. Comm'n*, No. 21-1048, 2023 WL 395030, at *2-*3 (D.C. Cir. Jan. 25, 2023). Given the evident permissiveness of abuse-of-discretion review in this context, it follows that the NRC wields effective control over public participation before its tribunals—and, therefore, control over who

may later obtain judicial review of the agency's substantive decisions.

In sum, the government argues that "only a 'party' to the agency proceeding may seek judicial review of Commission orders" under the Hobbs Act, Pet. Br. at 19, yet the NRC controls access to its proceedings. The NRC's interpretation of the Hobbs Act, when combined with its discretionary authority over administrative intervention, leaves the agency with significant discretion to shield its adjudicative orders from judicial review.

II. The NRC Prevents Percolation of Purely Legal Questions Regarding the Agency's Purported Power

These concerns are not merely hypothetical. Irrespective of its actual intentions, the NRC is precluding courts from scrutinizing purely legal questions regarding its purported statutory authority.

An example will elucidate this point. Since the Nuclear Waste Policy Act (NWPA) changed the course of national policy on the storage of spent nuclear fuel, the NRC has issued three licenses like the one at issue in this case, involving the private storage of spent nuclear fuel at new sites located away from the reactor. *See* 88 Fed. Reg. 30,801 (May 12, 2023) (granting license to Holtec International to operate in New Mexico); 86 Fed. Reg. 51,926 (Sept. 17, 2021) (granting license to Interim Storage Partners, LLC to operate in Texas); 67 Fed. Reg. 18,253 (Apr. 15, 2002) (granting license to Private Fuel Storage L.L.C. to operate in Utah); *see also Texas v. U.S. Nuclear Regul. Comm'n*, 78 F.4th 827, 832-33 (5th Cir. 2023) (explaining NWPA). In the first proceeding, more than two decades ago, the NRC agreed to hear a contention that

the NWPA conflicted with the agency's asserted authority. *See Priv. Fuel Storage L.L.C.*, 55 N.R.C. 260, 264-65 (Apr. 3, 2002). Although the NRC ultimately granted the license, the adversely affected party still had recourse to meaningful judicial review on this NWPA question. *See Bullcreek v. Nuclear Regul. Comm'n*, 359 F.3d 536, 542-43 (D.C. Cir. 2004).

However, in the two more recent proceedings, including the one underlying this case, the NRC refused to hear this same purely legal "contention" that the NWPA conflicts with the agency's purported authority. *See In re Holtec Int'l (HI-STORE Consol. Interim Storage Facility)*, 91 N.R.C. 167, 173-76 (Apr. 23, 2020); *In re Interim Storage Partners*, 90 N.R.C. at 56-59. In both instances, the D.C. Circuit upheld the NRC's denial of intervention in a deferential opinion that failed to seriously address the challengers' statutory arguments. *See Beyond Nuclear, Inc. v. U.S. Nuclear Regul. Comm'n*, 113 F. 4th 956 (D.C. Cir. 2024) (upholding denial of intervention in *Holtec* proceeding); *Don't Waste Mich. v. U.S. Nuclear Regul. Comm'n*, No. 21-1048, 2023 WL 395030, at *2-*3 (D.C. Cir. Jan. 25, 2023) (affirming denial in *Interim Storage Partners* proceeding). After the D.C. Circuit affirmed the agency's denials of intervention, the NWPA issue was removed from the jurisdiction of all courts that accept the NRC's interpretation of the Hobbs Act. By regulating access to its proceedings, the NRC thus suppressed lower court percolation of this serious statutory question regarding its own authority.

Under the NRC's interpretation of the Hobbs Act, the agency can regulate the availability of judicial review for its licensing decisions, as discussed above. However, the agency's interpretation of the Hobbs Act "may vary depending on the type of agency proceeding

involved." *See* Pet Br. at 28. For informal rules, it is comparatively easier to become a "party aggrieved" under the Hobbs Act; it is "enough" to submit a comment. *See ibid.* The NRC, therefore, wields far less control over judicial review of its rulemakings than it does for its adjudications. This dichotomy encourages the agency to employ adjudicative procedures, even where an inclusive rulemaking clearly is more appropriate. *C.f. Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

It is fair to wonder if this perverse incentive is at work at the NRC. After the failure of the Yucca Mountain repository roiled national policy, good governance principles seemingly would call for the NRC to exercise its generic rulemaking authority to update its storage regulations, which are 45 years old. *See* 42 U.S.C. § 2201(p) (rulemaking authority); 45 Fed. Reg. 74,693 (Nov. 12, 1980) (promulgating current storage rules). A participatory process would seem especially warranted, given the obvious nationwide implications. Yet instead of conducting a rulemaking, the NRC has formulated its post-Yucca storage policy through two case-by-case licensing proceedings, including the one at issue in this controversy. While the NRC's preference for adjudications makes little sense from a good governance perspective, it makes perfect sense from a public choice perspective. By funneling its policymaking into adjudications, the agency can shield its post-Yucca policy from judicial scrutiny, including the purely legal determinations that underwrite this policy.

CONCLUSION

The Court should affirm the Fifth Circuit's holding on justiciability under the Hobbs Act.

Respectfully submitted,

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JANUARY 2025