

Nuclear Waste Storage Questions Justices May Soon Address

By **Elizabeth Clarke, Christian Bale and Jennifer Fischell** (September 13, 2024, 5:55 PM EDT)

Every fall, shortly before oral arguments in its late October term get underway, the U.S. Supreme Court gathers for its annual long conference, where the justices consider a slew of petitions for certiorari that have accumulated during the court's summer break.

One petition likely to catch the justices' attention was filed by the solicitor general of the United States, on behalf of the Nuclear Regulatory Commission, and addresses important questions affecting the storage of nuclear waste and administrative law.

The petition to review *U.S. Nuclear Regulatory Commission v. State of Texas* stands out in the long-conference pile for a number of reasons — including that the Fifth Circuit decision from which it arises deepened conflicts among the federal courts of appeals. It will be worth watching as the justices consider whether to add it to their docket for October 2024 term.

An NRC License Leads to Litigation Over Nuclear Waste Storage

The case involves a challenge to the NRC's authority under the Atomic Energy Act.

The NRC had licensed a private company, Interim Storage Partners, to temporarily store nuclear waste away from a reactor site in Andrews County, Texas, relying on its authority under the Atomic Energy Act. An oil and gas extraction company called Fasken Land and Minerals and an organization called Permian Basin Land and Royalty Owners (collectively referred to here as Fasken), and the state of Texas challenged the license before the U.S. Court of Appeals for the Fifth Circuit under the Administrative Orders Review Act, commonly known as the Hobbs Act.

The Hobbs Act authorizes a "party aggrieved" by an agency's final order to seek judicial review in a federal court of appeals. The NRC argued, however, that Texas and Fasken were not parties aggrieved by the NRC's licensing order because they were not parties to the underlying administrative proceeding.

The Fifth Circuit heard the case and ruled against the NRC. Citing its precedent, the Fifth Circuit held that the Hobbs Act contains an "ultra vires" exception to the "party aggrieved" requirement — that is, when "the agency action is attacked as exceeding [its] power," the petitioner need not be a party aggrieved to obtain judicial review.[1]

On the merits, the Fifth Circuit held that the NRC exceeded its authority in issuing a license for temporary off-site storage of spent nuclear material. The court reasoned that the Atomic Energy Act enumerates the specific purposes for which the NRC may issue a license for handling nuclear material — such as for research and development — and that temporary storage of spent fuel is not among those purposes.



Elizabeth Clarke



Christian Bale



Jennifer Fischell

The Fifth Circuit also looked to the Nuclear Waste Policy Act, concluding that the statute establishes a "comprehensive statutory scheme for dealing with nuclear waste generated from commercial nuclear power generation," and "contemplates that, until there's a permanent repository, spent nuclear fuel is to be stored onsite at-the-reactor or in a federal facility." [2] The court thus held that the statute does not allow private, offsite storage of the sort the NRC sought to license here.

The NRC Asks the Supreme Court to Resolve Two Circuit Conflicts

The NRC filed a petition for a writ of certiorari, asking the Supreme Court to review the Fifth Circuit's decision, both on the Hobbs Act ultra vires question and the question of the NRC's authority under the Atomic Energy Act. The NRC's petition urges that the Fifth Circuit's decision creates or reinforces circuit splits on both issues.

On the Hobbs Act issue, the NRC argues that the Fifth Circuit's decision reinforces an existing split between the Fifth Circuit and four other courts of appeals. The U.S. Courts of Appeals for the Second, Seventh, Tenth and Eleventh Circuits have all declined to adopt the Fifth Circuit's ultra vires exception to the Hobbs Act's "party aggrieved" requirement.

The Fifth Circuit's decision in this case reaffirms the divide between the Fifth Circuit and other courts of appeals on that issue. And as the NRC's petition notes, the ultra vires issue also affects many other federal agencies whose decisions are subject to review under the Hobbs Act, including the Federal Communications Commission, U.S. Department of Agriculture, U.S. Department of Transportation, Federal Maritime Commission, and Surface Transportation Board.

The NRC also argues that the Fifth Circuit's ruling that the NRC may license storage of nuclear waste only at the site of the reactor creates a new circuit split.

The U.S. Court of Appeals for the D.C. Circuit, in a 2004 ruling in *Bullcreek v. Nuclear Regulatory Commission*, held that the Atomic Energy Act permits the NRC "to license storage of spent fuel at private away-from-reactor facilities," and the U.S. Court of Appeals for the Tenth Circuit has ruled similarly. [3] The Fifth Circuit declined to follow those decisions, reasoning that there was "no textual basis" for that position. [4]

Both Texas and Fasken have opposed certiorari, arguing that the issues occur only infrequently and do not warrant discretionary review.

The Supreme Court Is Poised to Consider the Petition

Although the odds of a grant of certiorari are usually long — the Supreme Court generally grants certiorari in only about 1%-2% of cases [5] — this case has several features that make it a promising candidate for review.

Perhaps most importantly, certiorari is sought here by the U.S. solicitor general, who represents the federal government before the Supreme Court. The court grants the solicitor general's petitions at a far higher rate than any other litigants' — as often as 70% of the time. [6] The fact that the federal government is seeking review thus transforms the typically long odds of a grant into a better-than-even chance of the court granting review.

This case also presents not one, but at least two circuit splits on important federal law issues.

The presence of a circuit split is an important — some would say the most important — factor in the court's consideration of petitions for certiorari.[7] That is because the Supreme Court views itself as having a responsibility to ensure the uniformity of federal law. The court may therefore view this case as an opportunity to ensure uniform interpretation of two federal statutes.

The importance of the issues may also weigh in favor of a grant.

The proper meaning of the Hobbs Act has potentially broad implications for challenges to agency decisions. As the NRC has noted in support of its petition, the Hobbs Act "provides the primary mechanism for judicial review of certain actions of several agencies — including the Federal Communications Commission and the Department of Transportation." [8] In addition, the NRC's authority under the Atomic Energy Act relates to important and potentially fraught issues regarding storage of nuclear waste.

The Supreme Court, moreover, has recently granted certiorari to resolve other important administrative law issues — most notably in *Loper Bright Enterprises v. Raimondo*, where it overruled the long-standing doctrine of Chevron deference, but also in cases involving procedures for agency proceedings and for judicial review of agency decisions.[9] Those decisions may reflect a growing interest among the justices in defining the boundaries of judicial review of administrative actions like the NRC's grant of a license in this case.

The court is set to consider the petition at its long conference on Sept. 30. The court may announce whether it will hear the case when it releases orders from that conference on Oct. 7, if not before. If the Supreme Court grants review, the case will be fully briefed on the merits, argued and decided this term — likely by the end of June.

Elizabeth Clarke and Christian Bale are associates, and Jennifer Fischell is a partner, at MoloLamken LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Texas v. NRC*, 78 F.4th 827, 839 (5th Cir. 2023).

[2] *Id.* at 843-44.

[3] *Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 543 (D.C. Cir. 2004); see also *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004).

[4] *Texas v. NRC*, 78 F.4th at 842.

[5] Supreme Court Procedures, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1>.

[6] Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1493 (2008).

[7] Joseph A. Grundfest, Quantifying the Significance of Circuit Splits in Petitions for Certiorari: The Case of Securities Fraud Litigation, Rock Center for Corporate Governance, No. 254, Mar. 20, 2024 (available at SSRN.com: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4768231).

[8] Reply Brief for Petitioners at 3, *NRC v. Texas*, No. 23-1300 (U.S. Sept. 4, 2024).

[9] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024); *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117 (2024); *Harrow v. Dep't of Def.*, 601 U.S. 480 (2024); *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024).