

No. 21-60743

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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STATE OF TEXAS; GREG ABBOTT, Governor of the State of Texas;  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND  
MINERALS, LIMITED; PERMIAN BASIN LAND AND ROYALTY OWNERS,

*Petitioners,*

v.

NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

*Respondents.*

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On Appeal from the Nuclear Regulatory Commission,  
Agency No. 72-1050

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**UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS  
CURIAE NUCLEAR ENERGY INSTITUTE, INC. IN SUPPORT OF  
REHEARING EN BANC**

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October 31, 2023

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1. Pursuant to Federal Rule of Appellate Procedure 29(b)(3), the Nuclear Energy Institute (NEI) respectfully moves for leave to file the attached brief as *amicus curiae* in support of rehearing en banc.

2. NEI is the trade association for the commercial nuclear energy industry. NEI has hundreds of members involved in all aspects of the nuclear industry, including companies licensed to operate commercial nuclear power plants and store commercial spent nuclear fuel in the United States. One of NEI's core functions is to represent its members' interests in litigation that raises issues of critical concern to the industry.<sup>1</sup>

3. NEI has a strong interest in this case. Industry members require licenses from the Nuclear Regulatory Commission (NRC) to undertake nuclear-related activities, and the panel decision here severely undermines the industry's ability to rely on the NRC's administrative licensing proceedings as a general matter, as it permits litigants to dispute the legality of NRC-conferred licenses even if they did not intervene as parties in the administrative proceedings. That result is clearly

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<sup>1</sup> See, e.g., *Texas v. United States*, 891 F.3d 553 (5th Cir. 2018); *New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016); *Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE*, 736 F.3d 517 (D.C. Cir. 2013); *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013); *Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE*, 680 F.3d 819 (D.C. Cir. 2012); *Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007); *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); *Nevada v. DOE*, 457 F.3d 78 (D.C. Cir. 2006); *Nevada v. DOE*, 400 F.3d 9 (D.C. Cir. 2005); *NEI v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004).

inconsistent with the Hobbs Act and decades of precedent interpreting it, and it creates substantial uncertainty for the industry. On top of that, the panel decision upsets the industry's settled expectations regarding the legality of private, away-from-reactor storage facilities for spent nuclear fuel, which offer significant operational and financial efficiencies. NRC has licensed away-from-reactor storage facilities for decades pursuant to its authority under the Atomic Energy Act and in accordance with settled caselaw, but the panel decision here calls into question the legality of all existing and future away-from-reactor storage facilities.

4. NEI is well-equipped to explain the far-reaching impact of the panel decision on the industry. Given its membership, NEI can offer a unique perspective that explains the consequences of the panel decision beyond this case and how it affects the industry at large. NEI has already performed that function as *amicus curiae* in another case involving the license for Intervenor Interim Storage Partners, LLC's away-from-reactor storage facility. *See Don't Waste Mich. v. NRC*, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023).

5. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), NEI states that no party or counsel for a party other than *amicus*, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

6. Counsel for NEI has conferred with counsel for Petitioners, Respondents, and Intervenor about the relief requested in this motion, and they have advised that they do not oppose it.

7. For the foregoing reasons, NEI respectfully requests leave to file the attached brief as amicus curiae in support of rehearing en banc.

Respectfully submitted,

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October 31, 2023

### **CERTIFICATE OF SERVICE**

I hereby certify that, on October 31, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement  
Paul D. Clement

## CERTIFICATE OF COMPLIANCE

I certify that:

1) This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 550 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.2.

2) This brief complies with the typeface requirements of Fed. R. App. P. 27(d)(1) and 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

3) Any required privacy redactions have been made pursuant to Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper submission, and the brief has been scanned for viruses using Windows Defender and is free of viruses.

October 31, 2023

s/Paul D. Clement  
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