21-60743

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

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

On Petition for Review of Action by the United States Nuclear Regulatory Commission

SUPPLEMENTAL BRIEF OF INTERVENOR INTERIM STORAGE PARTNERS, LLC

BRAD FAGG
TIMOTHY P. MATTHEWS
RYAN K. LIGHTY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000
brad.fagg@morganlewis.com
timothy.matthews@morganlewis.com
ryan.lighty@morganlewis.com

Counsel for Interim Storage Partners, LLC

CERTIFICATE OF INTERESTED PERSONS

No. 21-60743

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

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioners

- State of Texas; Greg Abbott, Governor of the State of Texas; and Texas Commission on Environmental Quality (collectively "Texas")
    - Counsel for Texas:

        Michael Abrams
        Ryan Baasch
        OFFICE OF THE ATTORNEY GENERAL, STATE OF TEXAS

- Fasken Land and Minerals, Limited; Permian Basin Land and Royalty Owners (together, "Fasken")

    - Counsel for Fasken:

        Allan Kanner
        Annemieke M. Tennis
        KANNER & WHITELEY, L.L.C.

Federal Respondents

- U.S. Nuclear Regulatory Commission

    - Counsel for U.S. Nuclear Regulatory Commission:

        Andrew Paul Averbach
        U.S. NUCLEAR REGULATORY COMMISSION

- United States of America

    - Counsel for United States of America:

        Justin Heminger
        U.S. DEPARTMENT OF JUSTICE

Intervenor-Respondent

- Interim Storage Partners, LLC

Interim Storage Partners, LLC is a limited liability company organized and existing under the laws of the State of Delaware with principal offices in Andrews, Texas. The sole purpose of Interim Storage Partners, LLC is to license, design, construct and operate the Consolidated Interim Storage Facility at the Waste Control Specialists site in Andrews County, Texas. Interim Storage Partners, LLC is jointly owned by Orano CIS, LLC (51%) and Waste Control Specialists, LLC (49%). No other publicly held company has 10 percent or more equity interest in Interim Storage Partners, LLC.

Orano CIS, LLC is owned 100% by Orano USA, LLC. Orano CIS, LLC and Orano USA, LLC are both limited liability companies formed in the State of Delaware. Orano USA, LLC is 100% owned by Orano SA, a French entity. Orano SA is ultimately majority (70%) owned and controlled by the French State, through two French government entities. Two Japanese entities (Mitsubishi and Japan Nuclear Fuel) each own a 5% (non-voting) interest in Orano SA. The remaining 20% interest (non-voting) in Orano SA is held in two (non-voting) trusts, in connection with financing arrangements.

Waste Control Specialists, LLC is wholly-owned by Fermi Holdings, Inc., an investment affiliate of J.F. Lehman & Co. The full ownership chain includes several other privately held J.F. Lehman & Co. investment affiliates, with no individual shareholders owning more than 25% of any of the entities.

- Counsel for Interim Storage Partners, LLC:

Brad Fagg
Timothy P. Matthews
Ryan K. Lighty
MORGAN, LEWIS & BOCKIUS LLP

s/ Brad Fagg
Attorney of Record for Interim Storage Partners, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register Notices

Other Authorities

GLOSSARY OF ABBREVIATIONS

AEA	Atomic Energy Act of 1954
Commission or NRC	U.S. Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982

INTRODUCTION

Properly read, *West Virginia v. Environmental Protection Agency*, No. 20-1530, 2022 WL 2347278 (U.S. June 30, 2022) ("*West Virginia*") requires rejection of the "major questions doctrine" arguments by the State of Texas in this case. In all of the ways that matter, the circumstances that drove the holding of *West Virginia* are the opposite of those in this case.

ARGUMENT

I. The Relevant Facts and Circumstances of This Case

It is important for these purposes to be clear about the underlying facts and circumstances regarding the actual agency action challenged by Texas in this appeal, and the nature of the purported "major questions doctrine" argument by Texas.[1]

The statutory provision upon which Texas' arguments are based is the Atomic Energy Act (the "AEA"), which was passed in 1954,[2] and

---

[1] In its opening brief, petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners ("Fasken") admitted that "the NRC is authorized to license privately-owned away-from-reactor interim facilities for storage of private [spent nuclear fuel]." (Fasken Opening Br. at 23.) Fasken certainly did not invoke the "major questions doctrine," nor argue that it invalidates the agency action at issue in this case.

[2] Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. ch. 14 §§ 2011 *et seq*.).

amended in 1974 to create the Nuclear Regulatory Commission ("NRC"),[3] an independent regulatory commission with broad authority to license and regulate the civilian use of radioactive materials. The statute has long been interpreted and applied as authorizing the NRC to issue licenses to private parties to possess spent nuclear fuel at installations remote from nuclear generators, like the license that Texas challenges here. In particular, the AEA specifically authorizes the NRC to issue licenses for the possession of each of the constituent components of spent nuclear fuel, namely "special nuclear material" (42 U.S.C. § 2073), "source material" (*id.* at § 2092), and "by product material" (*id.* at § 2111). *See also id.* at § 2014 (defining each term).

In 1978—*some forty-three years ago*—the NRC issued for public notice and comment a proposed rule in the *Federal Register* that explicitly provided for what Texas now claims the NRC cannot do, *i.e.*, license the possession of spent nuclear fuel "at installations built specifically for this [storage] that are not coupled to either a nuclear power plant or a fuel reprocessing plant." Storage of Spent Nuclear Fuel

[3] Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233.

in an Independent Spent Fuel Storage Installation (ISFSI); Proposed Rule, 43 Fed. Reg. 46,309, 46,309 (Oct. 6, 1978). After public comment, the final rule was promulgated *in 1980*. Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation; Final Rule, 45 Fed. Reg. 74,693 (Nov. 12, 1980).

In the many decades since, the NRC has been open, public, and transparent about its exercise of that authority. *E.g.*, General Electric Co.; Renewal of Materials License for the Storage of Spent Fuel, 47 Fed. Reg. 20,231 (May 11, 1982) (renewal of materials license SNM-2500 for away-from-reactor spent fuel storage facility in Morris, Illinois); Public Service Co. of Colorado; Issuance of Materials License SNM-2504, Ft. St. Vrain Independent Spent Fuel Storage; Installation at the Ft. St. Vrain Nuclear Generating Station, 56 Fed. Reg. 57,539 (Nov. 12, 1991) (materials license issued under 10 C.F.R. Part 72 at site of decommissioning reactor); Private Fuel Storage, Limited Liability Company; Notice of Issuance of Materials License SNM-2513 for the Private Fuel Storage Facility, 71 Fed. Reg. 10,068 (Feb. 28, 2006) (materials license for away-from-reactor spent fuel storage facility in Tooele County, Utah). *See also Bullcreek v. Nuclear Regulatory*

Commission, 359 F.3d 536, 543 (D.C. Cir. 2004) (noting the existence of three "private away-from-reactor storage facilities" at the time of the passage of the Nuclear Waste Policy Act[4] in 1983).

The record further confirms that the rules published in 1978 and promulgated in 1980 were always completely consistent with the NRC's public, open, officially-stated views regarding its statutory authority. For example, in testimony before Congress in 1979, which was included in an agency document referred to as "NUREG-0527," the Commission made clear (contrary to the statements made by Texas in its reply brief at pages 1-2 and 10-11) that "the Commission's authority to regulate waste under the [AEA] is derived from its authority over licensing byproduct materials," and that "waste facility licensing is currently implemented via licensing of the possession of materials." NUREG-0527, *Regulation of Federal Radioactive Waste Activities: Report to Congress on Extending the Nuclear Regulatory Commission's Licensing or Regulatory Authority to Federal Radioactive Waste Storage and Disposal Activities* at G-9, G-10 (Sept. 1979), *available at*:

[4] Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. ch. 108 §§ 10101 *et seq*.).

https://www.nrc.gov/docs/ML1924/ML19249E780.pdf.[5] In connection with discussions regarding NRC licensing authority over *DOE* away-from-reactor storage facilities (and, indeed, the whole document was all about a *DOE* facility and Commission authority *over DOE*), the Commission reaffirmed that it did, in fact, have authority over "the *commercial* storage of spent fuel which is licensed by the Commission." *Id.* at G-16 (emphasis added).

Given these undisputed facts, it is clear that, when the NRC issued the license challenged here (more than forty years later), the NRC had not "discover[ed] in a long-extant statute an unheralded power," nor purported to locate any "newfound power" in any "ancillary provision" of the Act that had "rarely been used in the preceding decades." *West Virginia,* 2022 WL 2347278 at *13 (*citing Utility Air Regulatory Group v. EPA,* 573 U. S. 302, 468 (2014)).

[5] Texas cited NUREG-0527, and made assertions about that document as a central part of its arguments in this case, for the very first time in its reply brief. That was improper. *E.g., Hollis v. Lynch,* 827 F.3d 436, 451 (5th Cir. 2016) ("Reply briefs cannot be used to raise new arguments.") (citation omitted). In its selective quotations from the document, Texas did not include the above-cited Commission statements confirming the type of authority of the Commission that it exercised here.

It is true that much attention has been paid to nuclear waste by Congress over the ensuing years. But, significantly for these purposes, there has never been a proposal to grant to the NRC the authority that Texas now says the NRC does not have, which Congress then rejected, as in *West Virginia*, 2022 WL 2347278, at *13. Debates about the federal acceptance and disposal of spent nuclear fuel by the DOE, including the NWPA, do not undercut the authority exercised by the NRC here. In particular, the NWPA had no impact, and did not disturb, the plain and long settled authority of the NRC to license commercial storage of spent nuclear fuel at installations not coupled to a nuclear power plant. Indeed, the D.C. and Tenth Circuits have so held expressly, and the pre-existing authority of the NRC under the AEA was so obvious that the point was—necessarily—conceded. *Bullcreek,* 359 F.3d at 542; *see also Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004).

II. The Holding and Rationale of *West Virginia* Requires Rejection of Any "Major Questions Doctrine" Argument by Petitioners in This Case.

There are a plethora of threshold issues which dictate dismissal or denial of these petitions without even getting to consideration of *West Virginia*, including jurisdiction, exhaustion, and, indeed, whether

licensing of storage of a different kind of nuclear waste at an existing nuclear waste storage facility would even be a "major question." Putting all of that aside for the moment, however, there are at least three key distinctions between this case and *West Virginia*, which further compel a determination that the "major questions doctrine" as described in *West Virginia* has no applicability here.

First, the cited linchpin of the Supreme Court's decision in *West Virginia* was the "newness" of the rule there challenged. "Things changed" upon promulgation of the new agency rule, and there was a lack of precedent for the challenged agency action. *West Virginia*, 2022 WL 2347278, at *7, 13. Here, as described above and as Texas (necessarily) admits, the circumstances are the opposite—the rule providing for licensing of away-from-reactor possession of spent nuclear fuel with which Texas takes issue was openly and publicly promulgated *in 1980*. (Texas Opening Br. at 7). And, the Commission has consistently issued licenses of the sort challenged here *for decades*. (Resp. Br. at 40-41).

Second, in *West Virginia* the Supreme Court cited the fact that Congress had "considered and rejected" the newly-asserted agency

position at issue. *West Virginia*, 2022 WL 2347278, at *16. Here, again, it's the opposite. Despite the decades of open, express, and public exercise of licensing authority by the Commission just like that exercised in this case, Congress never said a word about curtailing that authority. Indeed, the well-known existence of private away-from-reactor storage facilities licensed by the NRC, and the potential role of DOE regarding use of such facilities, was a recognized part of the congressional debates and compromises that led to the NWPA. *See* S.Rep. No. 97-282 (1981); H.R.Rep. No. 97-491, pt. 1 (1982); 128 Cong. Rec. 28,032 (1982); *Bullcreek*, 359 F.3d at 543. And, fundamentally, debates about the role and obligations of *DOE* have nothing to do with the *Commission's* authority over private interim storage exercised here. The congressional silence regarding the Commission's authority in light of all of the "attention" paid to nuclear waste over the years is the inverse of the circumstances described by the Supreme Court in *West Virginia*, and further disproves Texas' arguments in this case.

Third, the Supreme Court in *West Virginia* held that the agency had "never regulated" in the manner being challenged in that case. 2022 WL 2347278, at *16. Not so, here. The safety-based nuclear licensing by

the Commission undertaken in this case is precisely what the Commission does all of the time, and the exercise of such authority has been at the very core of the Commission's mission since its inception. This case, manifestly, is not a circumstance where an agency is "asserting a highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia*, 2022 WL 2347278, at *13. While the AEA might not "specifically refer to the storage or disposal of spent nuclear fuel," *Bullcreek*, 359 F,3d at 538, it has long been recognized, including by the Supreme Court, that the AEA confers on the NRC the authority to license and regulate the storage and disposal of such fuel. *E.g., Pacific Gas & Elec. v. State Energy Res. Conservation & Dev, Comm'n*, 461 U.S. 190, 207 (1983); *Illinois v. Gen Elec. Co.*, 683 F.2d 206, 214-15 (7th Cir. 1982); *Jersey Central Power & Light v. Township of Lacey*, 772 F.2d 1103, 1112 (3rd Cir. 1985). According to the majority in *West Virginia*, nothing at all like that could be said to exist in that case.

In short, whatever the precise metes, bounds, and triggers of the "major question doctrine" might be in light of *West Virginia*, it is clear that the doctrine has no applicability to this case whatsoever.

CONCLUSION

For the reasons stated above and in the prior submissions, the Court should either dismiss or deny the Petitions for Review.

Dated: August 3, 2022

Respectfully submitted,

s/ Brad Fagg
BRAD FAGG
TIMOTHY P. MATTHEWS
RYAN K. LIGHTY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000
brad.fagg@morganlewis.com
timothy.matthews@morganlewis.com
ryan.lighty@morganlewis.com

Counsel for Interim Storage Partners, LLC

CERTIFICATE OF SERVICE

On August 3, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

s/ Brad Fagg
BRAD FAGG

CERTIFICATE OF COMPLIANCE

This brief complies with the Order of the Court dated July 13, 2022, because, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and Circuit Rule 32.2, this brief does not exceed 10 pages. This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5)(A) and Circuit Rule 32.1 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 (body) and 12-point (footnotes) Century Schoolbook font.

s/ Brad Fagg
BRAD FAGG