No. 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 Nuclear Regulatory Commission

JOINT SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's order dated July 13, 2022, Petitioners hereby jointly submit the following supplemental briefing regarding *West Virginia v. EPA*, 142 S. Ct. 2587 (2022):

1. This case concerns a question of paramount national importance that has been vigorously debated for decades by Congress, various stakeholders (including state and local governments), and the general public: Where can federal regulators authorize storage of the Nation's commercial spent nuclear fuel, widely regarded as the most hazardous substance known to mankind? Texas explained in prior briefing that this question triggers the Supreme Court's "major questions" doctrine, and that the Nuclear Regulatory Commission here lacks the particularly clear statutory authority it would need to survive review under that doctrine. Texas Opening Br. 15-16; Texas Reply Br. 11-12. *West Virginia* confirms the merits of both arguments.

2. In *West Virginia*, the Court explained that there are certain cases where "there may be reason to hesitate before accepting a reading of a statute that would, under more ordinary circumstances, be upheld." 142 S. Ct. at 2609 (cleaned up). This happens when the "history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at 2608 (cleaned up). When this doctrine applies, the Court uses a special mode of statutory analysis: the agency must support its assertion of authority with more than just a "plausible textual" statutory argument. *Id.* at 2609. "The agency instead must point to *clear* congressional authorization for the power it claims." *Id.* (emphasis

added). The Court enumerated specific factors to determine whether an agency's assertion of authority presents a "major question." Those factors confirm that the doctrine applies to the core statutory question in this case of whether the Nuclear Regulatory Commission may authorize storage of commercial spent nuclear fuel—and to the corollary question of whether the Commission may authorize consolidated storage of DOE-titled spent nuclear fuel—at a private, away-from-reactor facility (all without the hosting State's consent to boot).

3. As an initial matter, this case presents a major question because the Commission has taken regulatory action that Congress considered, but failed to enact on its own. *Id.* at 2614. The intensity of Congress's interest in an issue—even where Congress fails to actually enact legislation—demonstrates the "importance of the issue" for the major questions doctrine. *Id.*; *see also id.* at 2621 n.4 (Gorsuch, J., concurring) (elaborating upon the relevance of failed enactments in the major questions analysis). Thus, failed legislation that proposed "similar measures" to those an agency adopts confirms that the major questions doctrine is applicable. *Id.* at 2614 (majority opinion). This factor is present here in spades: since 2015 alone, Congress has considered nearly 30 measures that would have addressed storage and disposal of commercial nuclear waste. *See* Cong. Rsch. Serv., *Civilian Nuclear Waste Disposal* at 19-27 (Sept. 17, 2021). Many of these measures were more than merely "similar," *West Virginia*, 142 S. Ct. at 2614—one even would have "explicitly authorize[d] [a federal regulator] to enter into contracts with privately owned spent fuel storage facilities." *Civilian Nuclear Waste Disposal*, *supra*, at 37.

4. In addition, this case presents the rare instance where Congress has actually *announced* that the issue presents a major question. The Nuclear Waste Policy Act explicitly recognized that the question of where to store the Nation's nuclear waste is a "major subject[] of public concern." 42 U.S.C. § 10131(a)(7); *see also NRDC v. NRC*, 685 F.2d 459, 494 (D.C. Cir. 1982) (Edwards J., concurring) (nuclear waste regulation "may prove to be one of the most important [issues] to be decided by the United States courts in this century"). Indeed, the Nuclear Waste Policy Act established a permanent nuclear waste solution and limited interim storage framework. *See* 42 U.S.C. §§ 10222(a)(5)(A), 10101(18) (expressly prohibiting the federal government from assuming responsibility for storage and taking title to spent nuclear fuel until "commencement of operation of a repository"); 42 U.S.C. §§ 10151(b)(2), 10168(b) (expressly limiting construction of federal interim storage facilities to the DOE for Interim Storage and Monitored Retrievable Storage facilities). But the Commission concedes that that statute "says nothing about the agency's authority" in this case. Commission Br. 43.

5. This case also presents a "major question" because the Commission "claim[s] to [have] discover[ed] in a long-extant statute an unheralded power"—*i.e.*, power that one would expect to be apparent, but that for decades no one saw. *West Virginia*, 142 S. Ct. at 2610. When the Atomic Energy Act was passed in 1954, no one thought the Commission was given power to license private, away-from-reactor storage for spent nuclear fuel. Texas Reply Br. at 8-9 (citing multiple authorities for this proposition). Indeed, more than 20 years after the Atomic Energy Act

was passed, the Commission admitted as much: It announced that its "regulations . . . deal with the handling of spent fuel and other high-level wastes . . . only to the extent that such activities are related to *on-site* activities carried on by" a nuclear power plant licensee. 42 Fed. Reg. 34,391, 34,392 (July 5, 1977) (emphasis added). And in 1978 the Commission explicitly requested that Congress grant it the power it asserts here. Texas Reply Br. at 10. But Congress did not do so. Although the Commission adopted its "Part 72" regulations in 1980, the agency would wait another two decades before pulling this "unheralded" power out of a hat, *West Virginia*, 142 S. Ct. at 2610, in the *Bullcreek* case—the only instance prior to this one where the Commission licensed a new, private, away-from-reactor storage facility for spent nuclear fuel.[*] *See* Texas Reply Br. at 12.

6. Finally, as Texas explained in prior briefing, the major questions doctrine applies here because the Commission's claimed authority "significantly alter[s] the balance between federal and state power" in the nuclear waste arena. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (demanding "exceedingly clear" statutory language for this kind of rebalancing); Texas Opening Br. at 15-16. The Commission purports to have power to license essentially indefinite storage of the most hazardous material known to mankind within a State's borders *without* that State's consent. The Commission concedes that this burdens the States with, among other

[*] Even if the Commission's Part 72 regulations could save the Commission from its lack of statutory authority (they cannot, *see* Texas Reply Br. at 13), those regulations did not recognize the concept of a "*consolidated* interim storage facility," which is what the Commission authorized here. *See* Fasken Opening Br. at 24, n.8.

things, necessary emergency preparedness. *See* FEIS 4-75; *see also* Fasken Opening Br. at 10; *id.* at 16-17. The Commission claims this authority even though Congress made clear in the Nuclear Waste Policy Act that States should have a near-absolute say when it comes to depositing nuclear waste within its borders. Indeed, for the limited types of waste facilities Congress expressly authorized under that Act, the States have a *full veto power* over siting, subject to override only by Congress itself. 42 U.S.C. §§ 10135-10138 (for repository); *see also id.* § 10161 (same for monitored retrievable storage facility).

7. Because the major questions doctrine applies here, the Nuclear Regulatory Commission must identify "clear congressional authorization" for its asserted authority. *West Virginia*, 142 S. Ct. at 2614. It has failed to do that.

8. The Commission's best authority actually shows that the agency lacks "clear congressional authorization." Specifically, the Commission's briefing placed heavy reliance (at 5, 7, 35, 42, 43, 45, 49) on *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004). But *Bullcreek* concluded that the Commission's authorizing statute "does not specifically refer to the storage or disposal of spent nuclear fuel." *Id.* at 538. To be sure, *Bullcreek* upheld the Commission's assertion of authority. But it did so without discussing the major questions doctrine. That is perhaps unsurprising because the seminal case often treated as the first "major questions" decision had only been decided a few years prior. *See West Virginia*, 142 S. Ct. at 2608 (discussing *FDA v. Brown & Williamson*, 529 U. S. 120, 159 (2000)). And there was substantial uncertainty at that time over what the case meant for major agency actions. *See West Vir-*

ginia, 142 S. Ct. at 2620 & n.3 (Gorsuch, J., concurring) (discussing other interpretations of *Brown & Williamson*). Understandably, the *Bullcreek* court did not grapple with that doctrine.

9. The Commission's asserted textual basis for its exercise of authority also fails. The Commission identifies a mix of Atomic Energy Act sections that supposedly grant it authority to "issue **materials** licenses to private parties for the '**possession**' of . . . material contained in spent nuclear fuel." Commission Br. 2 (citing 42 U.S.C. §§ 2073, 2092, 2111) (emphasis added). But here the Commission has issued a license to **construct** a **facility**—not just to "possess" "materials"—and the Atomic Energy Act contains specific statutory provisions that govern facilities licenses. *See* Texas Opening Br. 16-17; Texas Reply Br. 5-6. The problem for the Commission is that those specific provisions authorize licenses only for "utilization" or "production" facilities, 42 U.S.C. § 2132, whereas here the Commission has licensed an extra-statutory "storage" facility. And the Commission seems to recognize that the absence of a "storage" facility licensing power is devastating for its position here; why else would it try to jam the square peg of facility construction into the round hole of materials possession?

10. The Commission's expansive view of its implicit authority fares no better for the ISP license for DOE-titled spent fuel because the only "clear" statement from Congress on this issue *undercuts* the Commission. *See* 42 U.S.C. § 10222(a)(5)(A); Fasken Reply Br. at 14-16. Nevertheless finding such a power for the Commission would require "fundamental revision[s]" and a "radical" upheaval of the nuclear statutory structure. *West Virginia,* 142 S. Ct. at 2596 (finding view of

EPA's authority "not only unprecedented; [but] it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind.'") (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)).

11. And even if this Court concludes that the major questions doctrine does not apply, the Commission's assertion of statutory authority still fails. The Commission cannot even muster the "plausible textual basis" that will sometimes suffice to support an agency's assertion of authority. *West Virginia*, 142 S. Ct. at 2609; *see* Texas Reply Br. at 2-13. Indeed, the Commission once admitted to Congress it lacked statutory authority to license a private, away-from-reactor storage facility, and unsuccessfully asked Congress to delegate this power to it. Texas Reply Br. at 10. That should be the end of the matter. *See FTC v. Bunte Brothers*, 312 U.S. 349, 352 (1941) (agency's lack of implicit authority confirmed by its "unsuccessful attempt" to "secure from Congress an express grant of authority").

CONCLUSION

For these reasons and those Petitioners previously briefed, the Court should hold unlawful and set aside the order issuing Materials License No. SNM-2515 and vacate the license.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

/s/ Michael R. Abrams
MICHAEL R. ABRAMS
Assistant Solicitor General
State Bar No. 24087072
Michael.Abrams@oag.texas.gov

RYAN S. BAASCH
Assistant Solicitor General

Counsel for Petitioners State of Texas, Governor Greg Abbott, and Texas Commission on Environmental Quality

/s/ Allan Kanner
ALLAN KANNER
Attorney
ANNEMIEKE M. TENNIS
Attorney
Kanner & Whiteley, L.L.C.
701 Camp Street
New Orleans, LA. 70130
a.kanner@kanner-law.com
a.tennis@kanner-law.com
(504) 524-5777

Counsel for Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners

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/ Michael R. Abrams
Michael R. Abrams

Certificate of Compliance

This brief complies with: (1) the Court's order dated July 13, 2022 because it contains fewer than 10 pages, and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Michael R. Abrams
Michael R. Abrams