No. 21-60743

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

SUPPLEMENTAL BRIEF FOR FEDERAL RESPONDENTS

TODD KIM
Assistant Attorney General

JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-5442
justin.heminger@usdoj.gov

MARIAN L. ZOBLER
General Counsel

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 415-1956
andrew.averbach@nrc.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Federal Register Notices

INTRODUCTION

The Court should not reach the major questions doctrine articulated in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), because Petitioners' challenges are jurisdictionally deficient in multiple respects. But if the Court reaches the merits, the doctrine does not apply to the Nuclear Regulatory Commission (NRC)'s approval of a license to temporarily store spent nuclear fuel away from reactors. The question of statutory interpretation before this Court is not "extraordinary" under *West Virginia*. The agency has licensed away-from-reactor storage for more than 40 years, and its power to do so lies in the heartland of the agency's authority, not in a legislative "backwater." Moreover, NRC's exercise of its authority presents no questions of deep economic and political significance. It does not directly affect tens of millions of people, it does not result in billions of dollars in costs, and it does not impinge on authority reserved to the states.

Even if Petitioners had raised a major question, Congress has answered it by bestowing on NRC clear authority to issue licenses like the one issued here. In three core provisions of the Atomic Energy Act (AEA), Congress empowered NRC to issue licenses to possess the source, byproduct, and special nuclear material that spent fuel comprises. This unambiguous and specific grant of authority confirms that the agency has acted consistently with Congress's intent.

ARGUMENT

1. The scope of NRC's authority is not properly before this Court, and so the major questions doctrine issue is not before the Court either. First, Petitioners have failed to demonstrate standing. *See* Federal Respondents' Br. at 27-30. Moreover, Texas, which has invoked the major questions doctrine, never argued before the agency that NRC lacked authority to issue away-from-reactor storage facilities. It could have raised such an argument as a contention before the agency or via petition for rulemaking. *See* 10 C.F.R. §§ 2.309; 2.335(b); 2.803(e). Its failure to participate in the adjudicatory proceedings prevents it from being a "party aggrieved" within the meaning of the Hobbs Act and divests the Court of jurisdiction. *See* Federal Respondents' Br. at 30-36.

2. In any event, this case does not raise a major question, as defined in *West Virginia*. There, the Court explained that in "ordinary cases," the traditional rules of statutory construction, including the "words of a statute" and "their place in the overall statutory scheme," define the scope of agency authority. *West Virginia*, 142 S. Ct. at 2607-08. Nonetheless, the Court recognized that there are "extraordinary cases in which 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; emphasis added). Yet none of the indicia that

the Court recognized in *West Virginia* that might turn a conventional dispute about statutory interpretation into an extraordinary one is present here.

a. In *West Virginia*, the Court observed that the Clean Air Act provision that the Environmental Protection Agency (EPA) relied on was "ancillary" to the Act's primary authority, that it had been employed only a "handful of times" since enactment of the statute in 1970, and that "[t]hings changed" when the EPA promulgated the Clean Power Plan, using an "obscure" provision to "drive a[n] . . . aggressive transformation in the domestic energy industry." *Id.* at 2602-04.

By contrast, the materials license issued here reflects a conventional exercise of NRC's longstanding and exclusive authority over a matter that lies at the core of its expertise. In 1954, Congress established as one of the AEA's express purposes a program to control the "possession" of radiologically significant material by licensed parties. *See* 42 U.S.C. § 2013(c); *see also* 42 U.S.C. § 5844 (creating, upon establishment of NRC in 1974, an "Office of Nuclear Material Safety and Safeguards" responsible for regulating licensed materials). Pursuant to Congress's instructions, the agency has issued *thousands* of licenses for the possession of source, byproduct, and special nuclear materials. *See* https://www.nrc.gov/materials.html (last visited August 3, 2022). And in 1980, NRC promulgated regulations at 10 C.F.R. Part 72, governing the issuance of licenses for the storage of spent fuel both at and away from reactors. *See* Final Rule, Licensing

Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693 (Nov. 12, 1980). These licenses concern fuel that is are not subject to regulation by other agencies or states. *See* 42 U.S.C. § 2021(b)(3) (states cannot regulate special nuclear materials in quantities sufficient to form a critical mass); 10 C.F.R § 150.15(a)(7)(i).

In short, the agency's longstanding interpretation of the AEA and issuance of licenses pursuant to Part 72 for away-from-reactor storage, *see* Federal Respondents' Br. at 41, demonstrate that the license issued to ISP lies in the heartland of NRC's exclusive authority and practice. It should come as no surprise that, per its name, the Nuclear Regulatory Commission can regulate spent nuclear fuel. *West Virginia* does not control for this reason alone.

b. Moreover, neither the authority to regulate temporary away-from-reactor storage sites generally nor the license here presents a question of "economic and political significance." *Cf. West Virginia*, 142 S. Ct. at 2608. Indeed, the question that Texas identifies in its Brief (at page 4) is not *whether* NRC has the authority to license the storage of spent fuel (a conclusion that has "long been recognized," *Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 2004), and that Texas does not contest), but *where* the agency may exercise that authority—a limitation that the AEA unambiguously does *not* impose. *See* Federal Respondents' Br. at 38-39.

And the license under review is for one facility. The Environmental Impact Statement that NRC prepared shows that the facility will have a primarily localized impact during construction and operation and will result only in a barely measurable increase in the use of railways to ship spent fuel to and from the facility. This is far from the assertions of "extravagant statutory power over the national economy" that the Court found must be met with "skepticism." *West Virginia,* 142 S. Ct. at 2609 (cleaned up).

Indeed, the impacts associated with away-from-reactor storage pale in comparison to the "extraordinary" regulatory actions the *West Virginia* Court identified as triggering the major questions doctrine. Those examples include a rule mandating vaccinations for a quarter of the population, *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022); a rule granting permitting authority over millions of pollution sources, *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014); a rule imposing a moratorium on evictions that was applicable to at least 80% of the country and had an economic impact of approximately $50 billion, *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021); and, as in *West Virginia* itself, a rule imposing many billions of dollars in compliance costs—much of which was borne by consumers—eliminating tens of thousands of jobs, and in one projection reducing the gross domestic product by at least a trillion 2009 dollars by 2040, 142 S. Ct. at 2604.

And while Texas may assert that an accident involving storage or transportation *could* have wide-ranging effects, neither *West Virginia* nor its major-questions forerunners relied on the *speculative* (and highly unlikely) impacts of agency action to measure significance; instead, they relied on the direct effects that broad recognition of agency authority would have. Indeed, were such speculative impacts the touchstone of the analysis, a multitude of ordinary actions of NRC and other agencies could be recast as "extraordinary," a result that cannot possibly be what the Supreme Court intended.

3. The Court need not reach the issue of whether the major questions doctrine applies. Even if the issue of whether NRC is permitted to license away-from-reactor storage facilities were properly designated a major question, Congress has clearly and expressly conferred that authority upon NRC.

a. As we explained in our Brief (at 5, 38-40), Congress gave NRC clear and specific authority to grant licenses to parties to possess spent nuclear fuel. That authority is grounded in three AEA provisions governing the types of licensed materials that spent fuel contains. First, the AEA authorizes NRC to issue licenses for the possession of "special nuclear material." 42 U.S.C. § 2073. Second, it authorizes the issuance of licenses to possess "source material." *Id*. § 2092. And, third, it authorizes the issuance of licenses for "byproduct material." *Id*. § 2111; *see also id*. § 2014 (defining each term). These provisions are hardly "oblique"

references, *West Virginia,* 142 S. Ct. at 2614; they reflect an unambiguous authorization for the agency to issue licenses for private parties to possess each of the radiologically significant components of spent fuel.

Moreover, when the agency promulgated 10 C.F.R. Part 72 to provide a framework specifically for the issuance of licenses for the temporary storage of spent fuel, it relied upon these statutory provisions. *See* 45 Fed. Reg. at 74,699. The agency explained that "[l]icenses issued under this Part are limited to the possession of power reactor spent fuel," and it defined "spent fuel" to "include[] special nuclear material, byproduct material, source material and other radioactive materials associated with fuel assemblies." *Id.* at 74,699, 74,700-01; *see also id.* at 74,694 (specifying that a license issued under Part 72 "is a material type of license" rather than a license for a facility, and that "Part 72 includes requirements . . . that are conditions under which a license to possess spent fuel will be issued").

Texas cannot support its novel assertion that, despite authorizing NRC to issue licenses for the possession of the radiologically significant components of spent fuel, Congress did not authorize the issuance of licenses for spent fuel itself. As noted, NRC has issued thousands of licenses for the possession of one or more of the statutorily-defined categories of regulated radiological material, and it has been doing so for decades, permitting items of all shapes and sizes. For example, NRC has long issued licenses for items such as gauges, irradiators, and

radiographic devices because they contain one or more of the categories of radiologically significant materials that Congress specifically directed the agency to regulate. Congress did not need to identify these (and scores of other) items specifically when it provided NRC the authority to ensure that the radiologically significant materials in them do not pose a health and safety risk.

Finally, Texas incorrectly suggests in a footnote in its Reply (at 7 n.3) that the Commission is not relying (and cannot rely) on 42 U.S.C. § 2073(a)(4) as a source of authority to issue licenses to store spent fuel. *See* 42 U.S.C. § 2073(a)(4) (authorizing NRC to issue licenses to possess special nuclear material "for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter"); *see also id.* § 2093(a)(4). But beyond failing to raise the issue before the agency, Texas has provided no basis to question the agency's judgment, on a matter at the core of its expertise, that the authorization of licenses due to the need for additional spent fuel storage reflects an appropriate use of its authority. 45 Fed. Reg. at 74,693; *see also* Federal Respondents' Br. at 59-65 (discussing the basis for issuance of the license and NRC's recognition of the demand for offsite storage by spent fuel generators); *cf. Biden v. Missouri*, 142 S. Ct. 647, 652-53 (2022) (upholding HHS Secretary's conditioning of Medicare and Medicaid payments upon vaccination requirement for recipients' healthcare employees, based on authority to take action that Secretary deems "necessary to

promote and protect patient health and safety").

b. The *West Virginia* Court also observed that the clarity of Congress's grant of authority to EPA was undermined by Congress's repeated refusal to provide through legislation the authority that the agency claimed by rule. 142 S. Ct. at 2614. This is not the case here, where, 40 years after the passage of Part 72, Congress has never indicated that NRC had strayed beyond its authority in licensing temporary away-from-reactor storage. Texas claimed in its Rule 28(j) letter that Congress has "consistently rejected" the agency's assertion of authority here. But its reliance on Congress's consideration of bills permitting the Department of Energy (DOE) to enter into contracts with privately owned storage facilities is misplaced. Congress's failure to enact legislation is not a sound basis for statutory interpretation. *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1747 (2020); *cf. West Virginia*, 142 S. Ct at 2614 (stating that the Court could not "ignore" failed bills only after detailing other reasons to apply major questions doctrine). In any event, those bills raise a completely separate legal issue—DOE's ability to pay for storage of waste to which the *government* holds title. The license at issue here permits only the storage of privately owned fuel. There is no dispute that legislation would be required before DOE-owned fuel could be stored at this facility. *See* Federal Respondents' Br. at 43-47, 53-57.

Moreover, just two years after NRC's promulgation of Part 72, Congress

enacted the Nuclear Waste Policy Act of 1983. As discussed at pages 42-49 of our Brief (and as two courts of appeals have held), the NWPA did not disturb NRC's pre-existing AEA authority, of which Congress was aware, to license spent fuel storage. To the extent Congress's intent may be discerned outside the AEA's text, the NWPA and the following 40 years of inaction is strong evidence that Congress *acquiesced* in NRC's clear articulation in Part 72 of its authority to license spent fuel storage, both at and away from reactors. *Cf. NRDC v. NRC*, 582 F.2d 166, 171 (2d Cir. 1978) ("It is incredible that AEC and its successor NRC would have been violating the AEA for almost twenty years with no criticism or statutory amendment by Congress, which has been kept well informed of developments.").

CONCLUSION

The Court should not address the applicability of the major questions doctrine, both because it lacks jurisdiction over the Petitions for Review and because, even if it does have jurisdiction, Congress has unambiguously authorized the agency to license the offsite storage of spent nuclear fuel. In any event, the doctrine does not apply because the agency's authority to license and regulate spent fuel storage lies at the core of its expertise and its exclusive and longstanding authority, and because the question of *where* the agency may authorize such storage—the only question presented for review—does not present an issue of extraordinary political or economic significance.

Respectfully submitted,

/s/ *Justin D. Heminger*
TODD KIM
Assistant Attorney General

JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division

/s/ *Andrew P. Averbach*
MARIAN L . ZOBLER
General Counsel

ANDREW P. AVERBACH
Solicitor
U.S. Nuclear Regulatory Commission

August 3, 2022

CERTIFICATE OF SERVICE

I certify that on August 3, 2022, I served a copy of the foregoing **BRIEF FOR FEDERAL RESPONDENTS** upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

Michael Abrams
Michael.Abrams@oag.texas.gov, maria.williamson@oag.texas.gov, valeria.alcocer@oag.texas.gov

Ryan Baasch
Ryan.Baasch@oag.texas.gov

Justin Heminger
justin.heminger@usdoj.gov, efile_app.enrd@usdoj.gov

Arnold Bradley Fagg
brad.fagg@morganlewis.com

Allan L. Kanner
a.kanner@kanner-law.com, k.crowell@kanner-law.com, m.shumate@kanner-law.com, c.stamant@kanner-law.com

Annemieke Monique Tennis
a.tennis@kanner-law.com

Ryan Kennedy Lighty
ryan.lighty@morganlewis.com

Timothy P. Matthews
timothy.matthews@morganlewis.com

/s/ Andrew P. Averbach
Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit set forth in the Court's order of July 13, 2022, because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 10 or fewer pages.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ *Andrew P. Averbach*
ANDREW P. AVERBACH

Counsel for Respondent
U.S. Nuclear Regulatory Commission