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

RESPONSE TO PETITIONS FOR REHEARING EN BANC

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

RYAN S. BAASCH
Chief, Consumer Protection Division

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

AARON L. NIELSON
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Lanora.Pettit@oag.texas.gov

MICHAEL R. ABRAMS
Assistant Solicitor General

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

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.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, petitioners, as governmental parties, need not furnish a certificate of interested persons.

/s/ Lanora C. Pettit
Lanora C. Pettit
Counsel of Record for Petitioners State of Texas, Governor Greg Abbott, and Texas Commission on Environmental Quality

Table of Contents

Table of Authorities

Page(s)

Cases:

Statutes and Rules:

Other Authorities:

INTRODUCTION

Decades ago, Congress passed the Nuclear Waste Policy Act ("NWPA") to address the Nation's burgeoning nuclear-waste problem by mandating the construction of a permanent repository for such waste in Yucca Mountain, Nevada. Aware that construction would take time, and that some interim storage might be necessary, Congress greenlit some limited stop-gap measures. But Congress has never allowed the Nuclear Regulatory Commission ("NRC") to license a private facility far away from any reactor site to warehouse spent nuclear fuel.

For years, the federal government has "palpably reject[ed]" its statutory obligation. *NARUC v. DOE*, 736 F.3d 517, 519 (D.C. Cir. 2013). As relevant here, in September 2021, NRC proclaimed that the Atomic Energy Act ("AEA"), a precursor statute that has nothing to do with long-term nuclear-waste storage, authorized it to license a supposedly "interim" storage facility in the Permian Basin—more than 1,000 miles from Congress's chosen site at Yucca Mountain. This facility would putatively "store" up to 40,000 metric tons of extremely radioactive waste for decades. Through comment letters, Governor Abbott and the Texas Commission on Environmental Quality ("TCEQ") objected to "unprecedented implications" of a new facility, including the probability that the facility would "become the permanent solution for dispositioning the nation's spent nuclear fuel." Certified Index (C.I. No.) 1148.

When NRC ignored those concerns, Texas did what aggrieved parties do: seek judicial review. A panel of this Court rightly granted the petition. It held that Texas—onto whose soil NRC seeks to dump thousands of metric tons of radioactive

waste—is a "party aggrieved by [NRC's] final order" under the plain text of the Hobbs Act, 28 U.S.C. § 2344. The panel then meticulously searched federal statutes for any basis that would allow NRC to disregard Congress's chosen site for underground "disposal" simply by calling the above-ground, long-term facility a place for "storage." Finding none, the panel vacated the license.

This case indisputably concerns questions of national importance. That is why Congress specifically spoke to the issue. But that alone does not warrant en banc review given the panel's demonstrably correct conclusion that NRC lacks the authority to ignore Congress's command. The petitions should therefore be denied.

Statement of the Issues

1. Whether Texas is a "party aggrieved" under the Hobbs Act.
2. Whether federal law authorizes the challenged license.

Statement of the Case

I. Statutory Framework and Historical Backdrop

In 1954, the AEA declared Congress's policy that "the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise." 42 U.S.C. § 2011(b). The AEA requires private persons to obtain "a license issued by the Commission" to handle nuclear materials. *Id.* § 2131. Congress subsequently gave NRC authority over the possession of specific, constituent elements of spent nuclear fuel—namely, "byproduct material," "source material," and "special nuclear material," *see* 42 U.S.C. §§ 2111(a), 2073(a), 2093(a),

which were defined as distinct from "spent nuclear fuel" itself. *Compare id.* § 2014(e), (z), (aa), *with id.* § 2014(dd).

From the AEA's passage until "the late 1970's," the civilian development of nuclear energy boomed with little concern about disposal of spent nuclear fuel because "[i]t was accepted that spent fuel would be reprocessed," *Idaho v. DOE*, 945 F.2d 295, 298 (9th Cir. 1991). "Waste *disposal* issues were considered to be ones calling for long term research and study, and *eventual* solution." *NRDC v. NRC*, 582 F.2d 166, 170 (2d Cir. 1978). But that "eventual" problem, *id.*, became immediate when, in the "mid-70's," the entire reprocessing concept "collapsed" for technological and political reasons. *Idaho*, 945 F.2d at 298-99.

In 1982, the NWPA tasked the Department of Energy with establishing a suitable location for a permanent, underground geologic repository to dispose of high-level radioactive waste and spent nuclear fuel. 42 U.S.C. § 10132. Congress amended the Act in 1987 to require Yucca Mountain as site for the Nation's first permanent geologic repository, *id.* § 10134, by prohibiting the Department from evaluating other sites, *id.* § 10172a(a). Although it conferred limited authority to approve interim storage, *id.* §§ 10153, 10155(a)(1), 10156, Congress specifically required the Department exercise that authority though "a cooperative agreement under which [the] State . . . shall have the right to participate in a process of consultation and cooperation." *Id.* § 10155(d)(1)-(2).

The NWPA "is obviously designed to prevent the Department from delaying the construction of Yucca Mountain as the permanent facility while using temporary facilities." *NARUC*, 736 F.3d at 519. Yet delay it did.

"[B]y its own admission," NRC refused to evaluate even a decades-late application to allow the Department to develop Yucca Mountain because it "ha[d] no current intention of complying with the law." *In re Aiken County*, 725 F.3d 255, 258 (D.C. Cir. 2013). That intransigence continued, *Texas v. United States*, 891 F.3d 553, 557 (5th Cir. 2018), even after the D.C. Circuit ordered NRC to "promptly continue with the legally mandated licensing process." *Aiken*, 725 F.3d at 267. Now politically fraught, no other Congressionally authorized solution has come to fruition.

II. The ISP License

In April 2016, Interim Storage Partners' ("ISP") predecessor-in-interest applied for a license to operate a "consolidated interim storage facility" that would use an above-ground, dry-cask storage system to store up to 40,000 metric tons of spent nuclear fuel and highly radioactive waste in Andrews County, Texas. C.I. No. 5. Initially valid for 40 years, *see id.*, that license could be renewed for an additional 20 years, *see* C.I. No. 1148.

Many stakeholders objected. Governor Abbott submitted a comment letter, C.I. No. 1128, as did TCEQ, which warned of the facility's "unprecedented implications" and the "significant unease" it created with the public, C.I. No. 1148. On September 13, 2021, NRC nonetheless issued the license.

III. The Panel's Decision

The State, Governor Abbott, and TCEQ sought review under the Hobbs Act, which permits "[a]ny party aggrieved by" NRC's final order to "file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344. The

State maintained that it is a "party aggrieved" because it objects to the storage of the Nation's nuclear waste within its borders, and because both it and its officials "participated in the agency proceeding under review." *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). Substantively, the State asserted that federal law does not authorize the storage of spent nuclear fuel away from the relevant reactor site.

The panel unanimously agreed with the State's arguments and vacated the license. The panel explained that "the plain text of the Hobbs Act requires only that a petitioner have participated—in some way—in the agency proceedings," which Texas did through comments. Op. 15. Next, the panel held that the AEA "doesn't authorize the Commission to license a private, away-from-reactor storage facility for spent nuclear fuel," and that "issuing such a license contradicts Congressional policy expressed in" the NWPA. Op. 18.

ARGUMENT

None of NRC and ISP's three questions presented merit en banc review. As to jurisdiction, despite suggesting the panel created a clear circuit split, the NRC invites this Court to wade into context-specific questions of degree because NRC agrees (as do this Court's sister circuits) the "degree of participation" required for party status "varies." NRC Pet. 7. Moreover, because Texas *did* participate in the proceedings below, this case is a poor vehicle to examine any split of authority regarding whether there is an *ultra vires* exception to the Hobbs Act's participation requirement. In any event, the *ultra vires* exception is rooted in longstanding precedent to prevent agencies from circumventing judicial review of their actions.

On the merits, both NRC and ISP are wrong to insist that the panel misread federal law, which provides no plausible textual support for licensing the ISP facility. Moreover, because the panel's decision rested on plain statutory text, ISP's complaint that the panel improperly invoked the major-questions doctrine as an alternative basis for its holding is beside the point. It also rings hollow given that the petitions themselves highlight how this case *does* present major, nationally significant questions to which Congress must speak—and indeed, has spoken.

I. The State of Texas Is a "Party Aggrieved" Under the Hobbs Act.

A. To start, en banc review of whether Texas is an "aggrieved party" under the Hobbs Act is unnecessary because Texas "participated in the agency proceeding under review." *Wales Transp.*, 728 F.2d at 776 n.1. Submitting a comment in a rulemaking confers "party" status under the Hobbs Act. *See Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997). As does "commenting on a petition in agency proceedings that resulted in a declaratory ruling." *ACA Int'l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018). Because the Hobbs Act's textual requirement of "party" status does not distinguish adjudicative and rulemaking proceedings, the same rule applies to administrative adjudications like this one. *See Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973). And, as NRC recognized in its final environmental-impact statement, the Governor and TCEQ *did* submit comments during the licensing process. *See* 85 Fed. Reg. 27,447, 27,448 (May 8, 2020); C.I. No. 125; C.I. No. 1128; C.I. No. 1148. That participation suffices to allow this Court to consider Texas's arguments.

NRC nonetheless urges (at 7) the Court to find that no petitioner can be a "party" because the State did not formally intervene in accordance with NRC's

rules, and NRC denied Fasken and Land Minerals' request to do so. This ignores that intervention should be unnecessary for Texas because federal law requires state participation in storage decisions like this one. *Supra* p. 3. Moreover, in complaining (at 11-12) that the panel's approach incentivizes sandbagging, NRC effectively demands the unfettered right to insulate its orders from judicial review by denying intervention. NRC can identify no authority for that remarkable proposition because it is courts—not an administrative agency—that determine aggrieved-party status under the Hobbs Act. *See, e.g.*, *Massachusetts v. NRC*, 878 F.2d 1516, 1520 (1st Cir. 1989). And it is Congress—not an administrative agency—that can strip federal courts of the power of judicial review. *See Kucana v. Holder*, 558 U.S. 233, 251–52 (2010). Considering the "strong presumption" favoring judicial review, the panel rightly rejected this "agency-controlled end-run of the Hobbs Act." *Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 102 (D.C. Cir. 2020).

Because the panel correctly recognized that under the Hobbs Act's text the State *was* a party, Op. 15, this case is ill-suited to resolve NRC's challenge (at 9-11) to this Circuit's limited *ultra vires* exception for whether a non-party may seek review.

B. Beyond that, this Court is correct to recognize that a party harmed by an agency action need not have participated in the original agency proceeding "if the agency action is 'attacked as exceeding the power of the Commission.'" *See* Op. 16 (citing *Am. Trucking Ass'ns v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam). Such challenges have long been presumptively justiciable because "[o]therwise, the [challenger] is left to the absolutely uncontrolled and arbitrary action of a public and

administrative officer, whose action is unauthorized by any law," *Am. Sch. of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 110 (1902), as would be the case here. Indeed, if NRC were correct—and States were denied *any* review—it may raise constitutional problems. *See New York v. United States*, 505 U.S. 144 (1992).

NRC makes much (*e.g.*, at 7) of the D.C. Circuit's putative refusal to hold NRC to the standard set by the Supreme Court. But that Court has applied a similar principle in other contexts. *E.g.*, *Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1173 (D.C. Cir. 2003); *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). Any inconsistency in the D.C. Circuit's approach might justify en banc review in *that* Court, but it does not merit similar treatment here.

Nor is en banc review warranted to avoid "incentiviz[ing] litigants to avoid an agency's proceeding and then ambush the agency by attacking its authority." *Contra* NRC Pet. 11; NEI Amicus Br. 5-6. Again, what ambush? As just discussed, both the State and Fasken raised objections to the agency before it issued the license. And speculating that parties may avoid formal intervention if the Court does not impose an extra-textual intervention requirement ignores that parties are *allowed* to skip that which Congress has not required. Nevertheless, there are a multitude of other reasons that someone would intervene—for example, to develop a more fulsome record for review. *E.g.*, 10 C.F.R. § 2.711. The panel's (entirely correct) jurisdictional holding does not merit the full Court's review because it does not portend the ominous consequences that the petitions (and amici) now raise.

II. NRC Lacks Authority to License a "Consolidated Interim Storage Facility."

En banc review of the Court's merits holding is also unwarranted because "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The NWPA did not authorize NRC to establish a nominally temporary "storage" facility for spent nuclear fuel over a thousand miles from the disposal site that Congress selected. And the AEA gives NRC authority only over certain "constituent elements" of spent nuclear fuel, which Congress expressly distinguished from "spent nuclear fuel." The major-questions doctrine supports the panel's decision regarding these statutes but is not necessary to it.

A. The NWPA provides no authority for the ISP license.

NRC has acknowledged the NWPA does not authorize the ISP license. NRC Br. 43; *see* ISP Br. 19. That is fatal because the NWPA was passed precisely to establish a comprehensive federal plan for spent nuclear waste after the collapse of the private reprocessing industry. *Supra* p. 3.

NRC counters (at 16-17) that the NWPA governs only where the *federal government* can store waste, not where it can license private parties to store it. But the NWPA in multiple provisions deals directly with *private* waste storage. It says, for example, that if the Yucca Mountain repository is not yet available, operators are to "expan[d] [the] storage facilities at the site of [their] power reactor." 42 U.S.C. § 10155(b)(1)(B)(i). It also authorizes NRC to license "technology for the storage of civilian spent nuclear fuel at the site of any civilian nuclear power reactor." *Id.*

§ 10153. And it specifically states it does *not* "encourage, authorize, or require" use of a "storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government." *Id.* § 10155(h). That language contradicts both NRC's position (at 16) that the NWPA addresses only federal storage, and its notion (at 12-14, 17) that it can license private, away-from-reactor storage under a *different* statute.

That many NWPA provisions are directed to the federal government, *e.g.*, 42 U.S.C. § 10131(a)(4), does not change this analysis. Congress provided extensive protections for state and local governments, including rights of participation in the site-selection process and a veto to the siting decision altogether, subject to override only by both Houses of Congress. *Supra* p. 5; 42 U.S.C. §§ 10135-10138. The state interests protected by these statutes—which, here, involve Texas's most important oil-producing region, *see* C.I. No. 1128—do not change depending on whether a repository is owned by the federal government or private party. If anything, our federal system is typically more skeptical of private efforts to impose obligations on States—not less. *Cf., e.g.*, *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022).

B. The AEA does not authorize the ISP license.

Even if NRC could evade the limitations of its authority under the NWPA by reference to some other statute, the AEA doesn't cut it because—as NRC's own authority demonstrates—the AEA "does not specifically refer to the storage or disposal of spent nuclear fuel." *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004). It authorizes NRC to license "utilization" or "production" facilities. 42 U.S.C.

§ 2132. But these terms do not contemplate a stand-alone storage facility, away from a nuclear reactor. *See* 42 U.S.C. § 2014(v), (cc).

1. NRC nonetheless insists (at 13) that at least three AEA provisions support its position: 42 U.S.C. §§ 2073, 2093, and 2111. But these provisions do not mention nuclear-facility construction or the spent nuclear fuel that the ISP facility will house once constructed. Instead, those provisions principally govern the possession of "Special Nuclear Material" (Subchapter V, including Section 2073), "Source Material" (Subchapter VI, including Section 2093), and "Byproduct Materials" (Subchapter VII, including Section 2111). NRC concedes as much but suggests (at 13) that spent nuclear fuel "contains each of these materials."

Federal law distinguishes those "constituent elements" from "spent nuclear fuel" itself. A neighboring provision directs NRC to set rules for transferring "byproduct materials, source materials, special nuclear materials, high-level radioactive waste, *spent nuclear fuel*, transuranic waste, and low-level radioactive waste." 42 U.S.C. § 2210i(b); *see id.* § 2210h(2)(B) (similar). Consistent with this distinction, "fuel that has been withdrawn from a nuclear reactor following irradiation," is defined directly from "the constituent elements of which have not been separated by reprocessing." *Id.* §§ 2014(dd), 10101(23). "[A] material variation in terms suggests a variation in meaning," *Landry's, Inc. v. Ins. Co. of Pa.*, 4 F.4th 366, 370 (5th Cir. 2021), which means NRC's statutory authority applies *only* to specified constituent elements.

Even if the lesser (constituent parts) could somehow include the greater (spent nuclear fuel), Sections 2073 and 2093 authorize licenses for the "possession" of special or source nuclear material for enumerated *reasons*, such as for research and development. 42 U.S.C. §§ 2073(a)(1), 2093(a)(1). The only facilities that it authorizes are those established under "section 2133" for utilization and production. *Id.* §§ 2073(a)(3), 2093(a)(3). This does not include "storage" or "disposal," in part because section 2111, which similarly governs "possession" of byproduct material, specifically mentions a "disposal" (but not storage) facility. *Id.* § 2111(b)(1). To that end, federal law authorizes disposal only of *certain types* of significantly less hazardous "byproduct material" that are not constituent parts of spent nuclear fuel. *Id.*; 10 C.F.R. § 72.3. Taken together, these provisions reflect that Congress knew that "possession" does not by its ordinary meaning include long-term placement of nuclear waste in a repository—whether termed "disposal" or "storage." And Congress specified when it did and did not want to allow NRC to license such activities.

2. Equally off-base is NRC's criticism (at 15), joined by Holtec (at 5), that the panel improperly ignored the legislative history of the "catchall" provisions in subsections 2073(a)(4) or 2093(a)(4), which allow possession "for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter," 42 U.S.C. § 2073(a)(4); *id.* § 2093(a)(4) (materially similar). Legislative history cannot trump statutory text. *E.g.*, *United States v. Kaluza*, 780 F.3d 647, 658 (5th Cir. 2015). And the panel appropriately noted (at 19) that the canon of *ejusdem generis* "limits general terms [that] follow specific ones to matters similar to those speci-

fied." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 n.19 (2012) (alteration in original). Under this canon, the "catchall" provisions are not superfluous. *Contra* ISP Pet. 11. Texas does not dispute that these provisions cover more than licenses for research, development, or a utilization or production facilities. But a license must at least resemble those enumerated categories. A storage dump of the type contemplated here does not. *See* Texas Reply Br. 5-6, 10-11.

Indeed, it is unclear how ISP's license carries out the purposes of the AEA at all. In its merits brief, NRC insisted (at 62) the ISP facility will "encourage[] new power plant applicants to enter the market" and prevent existing plants from "shut[ting] down." The D.C. Circuit adopted that argument in *Bullcreek*, 359 F.3d at 543, but started from a flawed premise: that the AEA delegates NRC authority to promote entry into the nuclear energy market. It then asked whether the NWPA "*repeal[ed] or supersede[d]*" this pre-existing authority. *Id.* The Supreme Court has held, however, that the AEA "does not give [NRC either] comprehensive planning responsibility," or authority to advance what is "economically wise" for nuclear reactors. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 218, 223 n.34 (1983). Because the recodification canon presupposes that the authority claimed by the agency already exists when it is putatively ratified by Congress, *In re Benjamin*, 932 F.3d 293, 300 (5th Cir. 2019), it does NRC no good to repeatedly invoke (at 12-13, 16-17) Congress's supposed acquiescence in a 1980 regulation rather than statutory text. Put another, because NRC never had such authority in the

first place, there was no power for the NWPA to repeal or retain, and the panel correctly rejected *Bullcreek* (and the Tenth Circuit's later adoption of it) as unpersuasive. Op. 21.

C. The panel's decision is consonant with *West Virginia v. EPA*.

The final issue presented is just as unworthy of the Court's en banc resources: that the "panel's invocation" of the major-questions doctrine conflicts with *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). ISP Pet. 14. For one thing, the panel's discussion of the issue was dicta: It rested its decision on the unambiguous language in the two relevant statutes. Op. 25.

Even if that were not the case, the panel's decision is consistent with the key principle of *West Virginia*: Congress should set policy on the major issues of our time. Here, Congress found the handling of spent nuclear fuel is a major question that significantly implicates States. *See* 42 U.S.C. §§ 10131(a)(7), *id.* § 10131(a)(6); *cf. New York*, 505 U.S. at 150, 188 (State governor was "understandably perturbed" by prospect of storing the nation's radioactive waste which posed "a pressing national problem"). It refused to delegate to NRC the power to license a private, away-from-reactor storage facility—which NRC's leadership has previously admitted it does not have. NRC, NUREG-0527, *Regulation of Federal Radioactive Waste Activities*, at G-8, G-10 (Sept. 1979), https://perma.cc/ECF4-JMKU (last visited Dec. 11, 2023). Since 2015 alone, Congress has considered nearly 30 measures that would have addressed this problem without adopting any change to existing policy. *See* Cong. Rsch. Serv., *Civilian Nuclear Waste Disposal* at 19-27 (Sept. 17, 2021). This intensity of interest underscores the "importance of the issue." *West Virginia*, 142 S. Ct. at 2614.

ISP tries (at 15) to distinguish NRC's actions here from EPA's actions in *West Virginia* by insisting that NRC has "consistently applied" its Part 72 regulations in unspecified "analogous circumstances" since they were adopted in 1980. *Cf.* NRC Br. 16. But there are no analogous circumstances given the court order requiring NRC to comply with its statutory obligation to license Yucca Mountain was only issued in 2013. *Aiken*, 725 F.3d at 267. Even if that were not the case, there is no "adverse possession" rule of administrative law that "insulates [agency] disregard of statutory text." *Rapanos v. United States*, 547 U.S. 715, 752 (2006). "A regulation's age is no antidote to clear inconsistency with a statute." *Brown v. Gardner*, 513 U.S. 115, 122 (1994). Because NRC's actions here are plainly inconsistent with the language adopted by Congress, that should be the end of the matter. *See FTC v. Bunte Brothers*, 312 U.S. 349, 352 (1941).

Conclusion

The petitions for rehearing en banc should be denied.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Ryan S. Baasch
Chief, Consumer Protection Division

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

Aaron L. Nielson
Solicitor General

/s/ Lanora C. Pettit
Lanora C. Pettit
Principal Deputy Solicitor General
Lanora.Pettit@oag.texas.gov

Michael R. Abrams
Assistant Solicitor General

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

Certificate of Service

On December 11, 2023, this document 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/ Lanora C. Pettit
Lanora C. Pettit

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 35(e) because it contains 3,878 words, excluding exempted text; 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/ Lanora C. Pettit
Lanora C. Pettit