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 MOTION TO DISMISS

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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/ Michael R. Abrams
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BACKGROUND

Two months ago, the Nuclear Regulatory Commission licensed Interim Storage Partners, LLC (ISP) to operate a so-called "consolidated interim storage facility" in Andrews County, Texas, which lies within the Permian Basin. The company plans to store tons of spent nuclear fuel and Greater-Than-Class-C radioactive waste above ground, in the middle of the world's largest producing oilfield, where it will be a prime target for terrorist attacks. *See* Mot. to Dismiss Ex. 4.

The deadly radioactive waste that ISP plans to store in the Permian Basin poses a greater risk than the State of Texas is prepared to tolerate. *Id.* The State apprised the Commission of these concerns during the administrative proceedings on whether to issue the license, which included a notice-and-comment process. As the Governor explained in his comment letter to the Commission, spent nuclear fuel is so dangerous that it belongs in a deep geologic repository, not on a concrete pad above ground in Andrews County. *Id.* (citing *Nevada v. Dep't of Energy*, 457 F.3d 78, 81 (D.C. Cir. 2006), which notes that the "consensus is that the waste should be stored in an underground repository to be located at Yucca Mountain, Nevada"). The Texas Commission on Environmental Quality (TCEQ) also addressed a comment to the Commission to express doubts that the site will be an "interim" placement for radioactive waste, reasoning that because "the U.S. Department of Energy has been unsuccessful in developing a permanent geologic repository, the TCEQ is concerned that a [consolidated interim storage facility] in Texas will become the permanent solution for dispositioning the nation's spent nuclear fuel." Mot. to Dismiss Ex. 3.

The Commission's decision to issue the license to ISP is not just bad policy; it also is unlawful. The Commission's issuance of the license exceeds its statutory authority. Although the Commission has repeatedly referred to the construction and operation of a "consolidated *interim* storage facility," it defies belief that the facility will be "interim" in any meaningful sense of the word. Instead, as the Governor and TCEQ warned the Commission, Texas is likely to become a permanent repository for spent nuclear waste. The Commission lacks the authority to issue a license for a permanent repository in Texas. *See* 42 U.S.C. §§ 10135-10137 (requiring congressional review of agency siting decision if State or Indian tribe where the site is located objects).

The State now seeks judicial review of the Commission's order issuing the license to ISP.[1] *See* Docket No. 72-1050: *Interim Storage Partners, LLC; WCS Consolidated Interim Storage Facility*; Issuance of Materials License and Record of Decision, 86 Fed. Reg. 51,926 (Sept. 17, 2021) (issuing Materials License No. SNM-2515). The Commission contends, however, that this entire proceeding must be dismissed for

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[1] The Commission references (at 7-8) four petitions for review that were filed in the D.C. Circuit related to the Commission proceedings. But those petitions were filed *before* the Commission's final order of September 13, 2021, and the D.C. Circuit has *sua sponte* directed the parties to address "whether a new petition for review, rather than an amended petition, is required [to] obtain review of the order granting a license." Order, *Don't Waste Michigan v. NRC*, D.C. Cir. No. 21-1048 (Nov. 10, 2021). A premature petition for review cannot win the race to the courthouse under 28 U.S.C. § 2112. *See, e.g.*, *Southland Mower Co. v. U.S. Consumer Prod. Safety Comm'n*, 600 F.2d 12, 13–14 (5th Cir. 1979) (per curiam); *Public Citizen v. NRC*, 845 F.2d 1105, 1108–10 (D.C. Cir. 1988). Venue is thus appropriate in this Court. *See* 28 U.S.C. § 2112(a).

lack of jurisdiction. The Commission concedes (at 9-10) that it received the State's comment letters and addressed them in the Commission's final environmental impact statement. But the Commission insists that the Court lacks jurisdiction because the Commission's rules say so.

The Commission is wrong. The Commission cannot regulate the scope of this Court's jurisdiction, which is statutorily limited only by the Hobbs Act's requirement that the petitioner be a "party aggrieved by the final order." 28 U.S.C. § 2344. The State is such a party: it is unquestionably aggrieved by the license at issue, and it meaningfully participated in the agency proceedings through the detailed comment letters it timely submitted for the Commission's consideration. That suffices to confer aggrieved party status. And even if the Commission is correct that the State was required to comply with the Commission's rules in order to invoke this Court's jurisdiction, circuit precedent eliminates any such requirement "if the agency action is attacked as exceeding the power of the Commission." *Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam). That is the exact challenge, among several, that the State will make in its briefing on the merits.

The motion to dismiss should be denied, and the Court should allow briefing to resume on the merits of the State's petition for review.

ARGUMENT

I. Petitioners Are "Parties Aggrieved" by ISP's License.

A. The State participated in the Commission proceedings.

The Hobbs Act provides that "[a]ny party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344. The Commission contends (at 11-12) that Texas is not a "party aggrieved" by the license because the State "never sought to become a 'party' under the NRC's rules of adjudicatory procedure." But the Commission misstates the "party" inquiry.

"To be an aggrieved party, one must have *participated* in the agency proceeding under review." *Wales Transp., Inc. v. I.C.C.*, 728 F.2d 774, 776 n.1 (5th Cir. 1984) (emphasis added). The State did participate: the Commission invited comments on its draft environmental impact statement, the Governor and TCEQ submitted comments, and the Commission engaged with those comments in its final environmental impact statement. *See* 85 Fed. Reg. 27,447 (requesting comments); Mot. to Dismiss Ex. 3 & Ex. 4 (submitting the State's comments); Mot. to Dismiss at 10 (acknowledging that the Commission addressed the State's comments in Appendix D to the Commission's final Environmental Impact Statement); *see also Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1177–78 (9th Cir. 2021) (finding that States were "parties aggrieved" when state agencies submitted comments to federal agency). Indeed, although not relevant for the jurisdictional inquiry, this submission of comments fully complied with the

Commission's own rules for objections regarding environmental impact statements. *See* 10 C.F.R. §§ 51.73, 51.91, 51.117.

Submitting a comment in a rulemaking suffices to confer "party" status under the Hobbs Act. *See Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997) ("Petitioners *clearly* [enjoy 'party' status] because each participated in the Commission's informal rulemaking by filing comments . . . ." (emphasis added)); *see also Am. Trucking Ass'ns, Inc. v. FMCSA*, 724 F.3d 243, 246 (D.C. Cir. 2013); *NASUCA v. FCC*, 457 F.3d 1238, 1250 (11th Cir. 2006). The same is true for "commenting on a petition in agency proceedings that resulted in a declaratory ruling." *See ACA Int'l v. FCC*, 885 F.3d 687, 711–12 (D.C. Cir. 2018).

And the same must be true here for this administrative adjudication for at least two reasons. First, the Hobbs Act makes no distinction between adjudicative and rulemaking proceedings in its requirement of "party" status. *Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973). Second, the requirement that a party participate in agency proceedings ensures that the agency is aware of the objections to its eventual decision so that it can develop and compile a robust administrative record for appellate review. *See, e.g.*, *ACA Int'l*, 885 F.3d at 711–12 (emphasizing the centrality of having presented a view to the agency to qualify as an aggrieved party); *Gage*, 479 F.2d at 1219–21 (describing the difficulty of appellate review absent such a developed record). Because the State (along with many other commenters) participated in the Commission's administrative proceedings, the State ensured that this Court can comprehensively evaluate the merits of the parties' contentions.

The Commission argues (at 17–18) that the State cannot be a "party" because the State did not seek a hearing in accordance with the Commission's rules, on top of submitting comments from the Governor and TCEQ. But "party" status under the Hobbs Act cannot depend on getting a hearing, given the Supreme Court's holding—in a case involving this very agency—that "Congress intended to provide for initial court of appeals review of all final orders in licensing proceedings whether or not a hearing before the Commission occurred or could have occurred." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). Nor does the Commission's argument about the effect of its own rules conform with the principle that it is for courts, rather than agencies, to determine who is an aggrieved party under the Hobbs Act. *See, e.g.*, *Massachusetts v. NRC*, 878 F.2d 1516, 1520 (1st Cir. 1989); *Clark & Reid Co. v. United States*, 804 F.2d 3, 5 (1st Cir. 1986).

The Commission also cites *Gage*, 479 F.2d at 1217, for the proposition that petitioners who were never parties to the underlying Atomic Energy Act proceedings cannot obtain judicial review under the Hobbs Act. But *Gage* actually undermines the Commission's position. There, the petitioners challenged a rulemaking decision of the Atomic Energy Commission in which they had neither filed comments nor taken any other action while the matter was before the agency. *Id.* at 1217. The petitioners argued that their failure to comment was not fatal to their challenge because the Hobbs Act's "party aggrieved" requirement applies only in appeals from *adjudicative* proceedings and not rulemakings. *Id.* at 1218. The D.C. Circuit disagreed, holding that the Hobbs Act's limitations also apply to notice-and-comment rulemaking. *Id.* The *Gage* petitioners did *not* submit comments, so they were jurisdictionally

barred. But here Texas *did* submit comments, so jurisdiction obtains under *Gage*'s reasoning. And it makes no difference that here we are dealing with an adjudication instead of a rulemaking. *Id.* ("The clear words of the statutes involved make no distinction between orders which promulgate rules and orders in adjudicative proceedings.").

The Commission also argues (at 12-13) that Texas is not a party under the Commission's rules because, in adjudications, those rules require formal intervention in order to obtain "party" status. But other circuits have recognized that whether an entity is a "party aggrieved" is not dependent upon the agency's labeling of an entity as a "party." *See, e.g.*, *Clark & Reid Co.*, 804 F.2d at 6 (refusing to "equate the regulatory definition of a 'party' in an [agency] proceeding with the participatory party status required for judicial review under the Hobbs Act"). Such a recognition faithfully applies the principle that Congress, and not an administrative agency, has the authority to strip federal courts of the power of judicial review. *See Kucana v. Holder*, 558 U.S. 233, 251–52 (2010); *Barrios Garcia v. DHS*, 14 F.4th 462, 474 (6th Cir. 2021); *Make the Road New York v. Wolf*, 962 F.3d 612, 623–24 (D.C. Cir. 2020). "[I]t is 'axiomatic' that agencies can neither grant nor curtail federal court jurisdiction . . . ." *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir. 1999).

So, for instance, in *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008), the court adopted "a functional test to determine whether one is a 'party aggrieved' for Hobbs Act purposes." *Id.* at 131. That test asks whether the would-be petitioner "directly and actually participated in the administrative proceedings." *Id.* The court

refused to "equate the regulatory definition of a 'party' in an [agency] proceeding with the participatory party status required for judicial review." *Id.*

The same reasoning should control here. The State participated in the agency proceedings. The Commission recognized the State's participation. And the Commission does not dispute, nor could it, that the State has Article III standing to challenge the license. *See Nat'l Treasury Emps. Union v. Merit Sys. Prot. Bd.*, 743 F.2d 895, 910 (D.C. Cir. 1984) (explaining that the "courts that have considered the scope of § 2344's 'aggrieved party' language have engaged in traditional standing doctrine analysis"). The Court therefore should reject the Commission's attempt to add its own jurisdictional prerequisites on top of the Hobbs Act's "party aggrieved" requirement.

B. The Hobbs Act does not contain a mandatory exhaustion requirement.

The Commission also argues (at 13) that the State's claims are barred as a matter of "non-jurisdictional, mandatory exhaustion," citing *Fleming v. USDA*, 987 F.3d 1093, 1098-99 (D.C. Cir. 2021). In *Fleming*, the court explained that "a nonjurisdictional, mandatory exhaustion requirement functions as an affirmative defense" that must be enforced if raised. *Id.* at 1099. But *Fleming*'s discussion of a challenge to a USDA decision under the Horse Protection Act is inapposite. *Id.* at 1095.

As the court explained in *Fleming*, the statute governing judicial review of the USDA's adjudications expressly requires exhaustion of "all administrative appeal procedures established by the [agency]." *See id.* (citing 7 U.S.C. § 6912(e)). Thus, the "provision imposes a mandatory exhaustion rule, such that a court cannot excuse

a party's failure to exhaust, no matter the reason." *Id.* at 1098. And that meant that the petitioners' failure to comply with the agency's specific administrative appeal procedures barred the petitioners from bringing a petition for review. *Id.*

The Commission has not identified any similar statutory language in the Atomic Energy Act or the Hobbs Act. The inclusion of an express exhaustion provision in another statute indicates that Congress could have included a similar provision that would have required Texas to intervene as a party in the Commission proceedings under the Commission's rules. The fact that Congress did not do so is just one more reason the Commission's arguments fail. The State's petition for review is not subject to dismissal under a mandatory exhaustion rule because no such rule applies here.

In addition, the Commission appears to concede (at 13 n.9) that, to the extent exhaustion is relevant in this proceeding, the courts have concluded that it is relevant on an issue-by-issue basis only. *See Vermont Dep't of Pub. Serv. v. United States*, 684 F.3d 149, 156 (D.C. Cir. 2012) (concluding at the merits stage that petitioners waived one *specific* "objection" by failing to raise it before the NRC). This is then, at most, a response on the merits that the NRC can raise once it has seen the scope of Texas's arguments. It is not a proper basis to dismiss Texas's petition altogether.

II. The Commission Acted Outside the Scope of Its Authority.

Even if Texas were not a "party aggrieved" (it is), the Commission acknowledges (at 14), as it must, that the Fifth Circuit has carved out "instances [where] a person may appeal an agency action even if not a party to the original agency pro-

ceeding": (1) "if the agency action is 'attacked as exceeding the power of the Commission'"; or (2) "if a person, not a party to the agency proceeding, challenges the constitutionality of the statute conferring authority on the agency." *Am. Trucking*, 673 F.2d at 85 n.4 (citations omitted). The Commission fails to identify any Fifth Circuit decision cabining *American Trucking*. And here, the State will argue that by licensing a *de facto* permanent facility for spent nuclear fuel, the agency has exceeded its power. So it is indisputable that at least *some* portions of Texas's challenge to the license in this case are not jurisdictionally barred and must be permitted to proceed to the merits.[2]

For that reason alone, at a minimum, the Court should carry the motion to dismiss with the case to allow the State to develop its attack on the Commission's authority to issue the license. This Court has carried motions to dismiss for lack of jurisdiction in other cases. *See, e.g.*, Order, *Amawi v. Paxton*, No. 21-50360 (July 26, 2021). It should do so here, too, if the motion to dismiss is not denied outright.

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[2] The Commission (at 14-15) recognizes that *American Trucking* is good law but suggests that it was wrongly decided and that it may apply only to orders from the Interstate Commerce Commission. Both points are mistaken: the jurisdictional exception for challenges that claim an agency has exceeded its power are rooted in longstanding Supreme Court case law explaining that these challenges are 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); *see also Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988); *Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1173 (D.C. Cir. 2003).

Conclusion

The Court should deny the motion to dismiss.

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Certificate of Service

On November 15, 2021, this response 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
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This document complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,804 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).

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