No. 17-60191

In the United States Court of Appeals for the Fifth Circuit

TEXAS, *Petitioner*,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF ENERGY; JAMES RICHARD "RICK" PERRY, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF ENERGY; UNITED STATES NUCLEAR REGULATORY COMMISSION; KRISTINE L. SVINICKI, IN HER OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION; UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD; THOMAS MOORE, PAUL RYERSON, AND RICHARD WARDWELL, IN THEIR OFFICIAL CAPACITIES AS UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD JUDGES; UNITED STATES DEPARTMENT OF THE TREASURY; AND STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE TREASURY, *Respondents,*

and

NUCLEAR ENERGY INSTITUTE; ENERGY NORTHWEST; KANSAS GAS AND ELECTRIC COMPANY D/B/A WESTAR ENERGY; KANSAS CITY POWER & LIGHT COMPANY; KANSAS ELECTRIC POWER COOPERATIVE, INC.; WOLF CREEK NUCLEAR OPERATING CORPORATION; UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI; AND TENNESSEE VALLEY AUTHORITY, *Intervenor-Respondents,*

and

STATE OF NEVADA, *Intervenor-Respondent*.

Original Action under the Nuclear Waste Policy Act

TEXAS'S RESPONSE IN OPPOSITION TO THE STATE OF NEVADA'S COUNTERMOTION TO DISMISS

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INTRODUCTION

From the outset of this litigation, Texas has maintained a disinterested position on *where* the federal government licenses and builds a permanent repository for spent nuclear fuel. Texas's position is that Respondents must follow the law, which, in its amended form, requires them to pursue a license for a repository at Yucca Mountain, Nevada. And for 35 years now, Respondents failed to do just that.

Nevada, not Texas, intervened in this case to add a political question about the suitability of Yucca Mountain as a repository. But Congress's political decision to designate Yucca Mountain as the site for consideration, and the Nuclear Regulatory Commission's ("NRC") evaluation of that site are topics that lie outside the scope of Texas's lawsuit. Texas requests judicial intercession to enforce compliance with the law as written, which includes the Department of Energy's ("DOE") unconditional obligation to pursue Yucca Mountain licensure, and NRC's responsibility to act on the Yucca license and make a decision as to the site's suitability. As part of the role Texas asks the Court to undertake, Texas prays for the Court to order DOE and NRC to request funding from Congress to carry out their unconditional statutory duties. What Congress chooses to fund is a political question, outside of Texas's requests, and independent of whether DOE and NRC must do all they can to fulfill their legal mandates—something they failed to do throughout the past presidential administration. Thus, Texas's original action does not raise political questions—Nevada does.

Moreover, as stated in Texas's reply in support of a declaratory judgment and preliminary injunction against DOE, Reply 15–18, ECF No. 00514037666, none of

its claims are time-barred, because Respondents violations of the Nuclear Waste Policy Act ("NWPA" or "Act") are continuous. DOE still has not accepted an ounce of spent nuclear fuel ("SNF"); DOE continues to engage in consent-based siting; and NRC continues to hold the Yucca Mountain proceedings in abeyance. Nevada's countermotion to dismiss is meritless and must be denied.

ARGUMENT

I. Nevada, Not Texas, Raises Political Questions.

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). "'Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.'" *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). But political questions are not the same as political cases. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Thus, the political question doctrine is a "narrow exception," *Zivotofsky*, 566 U.S. at 195, that requires a "'discriminating inquiry into the precise facts and posture of the particular case,' rather than 'semantic cataloguing of issues as implicating 'foreign policy' or 'national security,'" *Kuwait Pearls Catering Co., WLL v. Kellogg Brown & Root Servs., Inc.*, 853 F.2d 173, 178 (5th Cir. 2017) (quoting *Lane*, 529 F.3d at 558; *Baker*, 369 U.S. at 211–12).

The political question doctrine is inapplicable to Texas's original action because the NWPA requires Respondents to seek funding for siting a permanent repository,

none of the *Baker v. Carr* factors for political question cases are present in the original action, and courts need not abstain from appropriations questions. Importantly, Nevada limits its political question objection to Texas's requests that the Court grant relief that will result in the completion, via approval or disapproval, of the Yucca Mountain license: (1) declare Respondents in violation of the Act for failing to request the funding necessary for the licensure proceedings (Pet. 25, ¶¶ 3–4), (2) order Respondents to seek the funding necessary to complete the proceedings (Pet. 26, ¶¶ 7–8), and (3) order the release of Nuclear Waste Fund money to complete the proceedings (Pet. 26, ¶ 11). Nev. Mot. 16. Nevada does not raise, and therefore waives, its political question argument as to the remaining nineteen prayers for relief in the original action. This means that even if the Court grants Nevada's motion on the political question doctrine, which it should not, it cannot dismiss the entirety of the original action. But, as stated below, the Court should reject Nevada's political question doctrine arguments and deny its countermotion.

A. The NWPA Requires Respondents to Seek Funding for Their Unconditional Statutory Duties.

The NWPA requires the Secretary of Energy to submit a budget of the Nuclear Waste Fund that includes estimates of expenditures from the Nuclear Waste Fund. It also requires that this information be included in the President's budget. *See* 42 U.S.C. § 10222(e)(2) ("The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of Title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary

of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government."). Similarly, even as an independent agency, NRC must report to the President for submission to Congress its short- and long-range goals, priorities, and plans on permanent disposal of high-level radioactive waste. 42 U.S.C. § 5877. In other words, the NWPA requires DOE and NRC to seek funding to fulfill their unconditional statutory mandates, something they have failed to do since Fiscal Year 2011.[1]

B. The *Baker* Factors Show that Texas's Original Action Does Not Concern Political Questions.

In *Baker v. Carr*, the Supreme Court "prescribed six factors for determining whether a nonjusticiable political question is presented:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> (2) a lack of judicially discoverable and manageable standards for resolving it;
>
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> (4) the impossibility of a court's undertaking the independent resolution without expressing lack of the respect due coordinate branches of government;
>
> (5) an unusual need for unquestioning adherence to a political decision already made;

[1] U.S. Dep't of Energy, FY 2011 Congressional Budget Request, Vol. 7 at 174–75 (Feb. 2010), https://energy.gov/sites/prod/files/2013/05/f0/FY11Volume7.pdf.

> (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Kuwait Pearls, 853 F.3d at 178–79 (quoting *Baker*, 369 U.S. at 217). "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker*, 369 U.S. at 217.

Application of the doctrine is "so highly individualized as to suggest that there is no political question doctrine at all, but only a number of discrete questions that have been characterized as political." Charles Alan Wright & Arthur R. Miller, 13C Fed. Prac. & P. § 3534 (3d ed. 2017). The controlling question is whether the underlying statute allows Executive discretion, and what the scope of that discretion might be. But even a dismissal based on a finding that the Executive has acted within his discretion may not be an application of the political question doctrine; rather, it is a decision that the challenged action is within constitutional and statutory limits. Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 Yale L.J. 597, 601 (1976). The court, rather than saying "we cannot rule on this issue," is saying "we rule that the executive has stayed within his discretion in acting in this way." *Id.*

First, the power to request funding for congressionally mandated programs is not constitutionally committed to one branch of government. The Constitution bestows the appropriations power on the Congress. *See* U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). But, as Nevada concedes, the Executive may recommend spending to Congress, especially when that spending is mandated by a congressional

act. U.S. Const. art. II, § 3. Indeed, the Judicial Branch requests funding from Congress, even while it recognizes that Congress makes the ultimate decision on the level of appropriations. *United States v. Will*, 449 U.S. 200, 202 (1980). A court may order an Executive or independent agency to request funding to complete an unconditional duty placed upon it by Congress.

Second, an order directing an agency to request funding is judicially manageable. The Court may leave to the agency's discretion the amount of funding necessary to fulfill the duty, and, of course, will leave the ultimate appropriations decision to Congress. This is one of the things that Texas's original action seeks: an order directing the DOE and NRC to request the necessary funding. It does not require the Court to decide all that is necessary, but reasonably leaves the gravamen of that decision to Respondents. But since Fiscal Year 2011, DOE and NRC requested zero appropriations for Yucca Mountain because they made the unlawful policy decision to scuttle the project.

Third and fourth, Congress already resolved the policy questions underlying this lawsuit—DOE and NRC must pursue Yucca Mountain. This does not mean that the agencies must ultimately build a repository there, but that they must fully and properly consider it under the parameters of the Act and their authority. What they cannot do is make their own policy decision to ignore an unconditional duty. *In re Aiken Cty.*, 725 F.3d 255 (D.C. Cir. 2013); *Ind. Mich. Power Co. v. U.S. Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). Thus, relief ordering Respondents to request the funding for such activity does not intrude upon any policy decisions of Congress.

Fifth, the need for unquestioning adherence to political decisions weighs in favor of retaining jurisdiction over this matter as outside the political question doctrine. Texas does not seek to overturn Congress's decision to designate Yucca Mountain as the site for a permanent repository. That is a political question left to the legislative branch. Moreover, Texas does not seek to undermine the ability of NRC to adjudicate the Yucca license. Instead, Texas's original action asks the Court to hold Respondents accountable to political questions already resolved by Congress and the NWPA. Ordering the parties to seek funding does not call into doubt Congress's decision.

Sixth, an order by the Court requiring Respondents to seek funding will not result in multifarious pronouncements by various departments and branches on one political question. In fact, the order requested by Texas respects the role each branch plays in securing funding for congressionally mandated actions.

To be sure, a survey of political question doctrine cases reveals that, consistent with the narrow application of the doctrine, courts routinely find that political cases do not involve political questions barred from adjudication. For example, *Baker* explains that while foreign relations, war power, validity of legislative enactments, and status of Indian tribes may all pose political questions, there are nonetheless countless issues and conflicts that arise within these areas that are appropriate for, and oftentimes require, judicial solutions. *Baker*, 369 U.S. 212 (citing cases). Other Supreme Court and Fifth Circuit cases likewise declined to apply the political question doctrine. *See, e.g., Zivotofsky*, 566 U.S. at 194–95 (adjudicating declaratory judgment

claim against Secretary of State for failure to implement Foreign Relations Authorization Act); *INS v. Chadha*, 462 U.S. 919, 940–44 (1983) (reviewing of one-house legislative veto of Executive Branch decision); *Powell v. McCormack*, 395 U.S. 486, 548–49 (1969) (declaratory judgment action by member-elect who was excluded from seat in House of Representatives); *Kuwait Pearls*, 853 F.3d at 184 (breach of contract claim related to military operations in Iraq); *Lane*, 529 F.3d at 568 (fraudulent misrepresentation claim against government contractors working in war zones). This case, too, falls outside the political question doctrine.

C. The Political Question Doctrine Does Not Prevent Courts from Intervening in Appropriations Matters.

Nevada cannot manufacture a political question by questioning equitable remedies that lie within the Court's powers. In *Train v. City of New York*, 420 U.S. 35 (1975), Congress appropriated financial assistance for municipal sewers and sewage treatment works through the Federal Water Pollution Control Act. The EPA Administrator, acting on the President's directive, refused to fully allot the congressionally-appropriated money to the States. *Id.* The city of New York brought an action against the Administrator, and the court held that the statute conferred no discretion on the Executive to withhold funds at the allotment phase, and that the Act required the Administration to allot the full sums authorized to be appropriated. *Id.* at 41.

Similarly, in *Sioux Valley Empire Electric Association, Inc. v. Butz*, 504 F.2d 168 (8th Cir. 1974), the Rural Electrification Administration terminated the two-percent direct loans available under the Rural Electrification Act (REA) and substituted

them with five-percent loans under the Rural Development Act (RDA). In doing so the Administration spent less than half of the money appropriated for REA loans. *Id.* at 171. A rural electric cooperative, which was entitled to a two-percent loan under the REA, sued and sought the two-percent rather than the five-percent annual interest rate. *Id.* The Administration raised the political question doctrine, and argued that judicial review was precluded because the Administrator's action was wholly discretionary. *Id.* at 172. The Eighth Circuit rejected this argument and held that the question involved was one of statutory interpretation and, thus, justiciable. The court then found that, under the REA, the Administration was not given the discretion to terminate all appropriations and the entire program. *Id.* at 175.

More recently, in *American Hospital Association v. Burwell*, 812 F.3d 183, 193–94 (D.C. Cir. 2016), the D.C. Circuit held that a district court erred in dismissing a petition for writ of mandamus to the Secretary of Health and Human Services to process administrative appeals of denials of reimbursement claims for Medicaid patients within a statutory timeline. The Secretary argued, in part, that she had insufficient funds to comply with the statutory requirements and had no clear duty to act. *Id.* at 191. The court, however, found that the Secretary's duty was ministerial, not discretionary, and it was unconditional because the statute used the word "shall." *Id.* at 190. It also noted that the Association was not seeking mandamus for the Secretary to reach a certain result, but that she act within the timeframes established by the statute. "[H]owever many priorities the agency may have, and however modest its personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction in the face of a statutory deadline." *Id.* at 191

(quotation marks and citation omitted). Finally, the court noted that if Congress gives the agency insufficient resources, the Secretary must obey the congressionally imposed mandates above discretionary duties. *Id.* at 193.

Here, the NWPA places mandatory duties to act on DOE and NRC. The Act even uses the same mandatory language as *American Hospital Association*: shall. *See* 42 U.S.C. §§ 10134(b) ("If the President recommends to the Congress the Yucca Mountain site . . . and the site designation is permitted to take effect under section 10135 of this title, the Secretary [of Energy] *shall* submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective"); 10134(d) ("The Commission *shall* consider an application for a construction authorization" and "the Commission *shall* issue a final decision") (emphasis added). Texas does not contend that NRC must reach a particular conclusion on the Yucca Mountain license application. Rather, Texas simply seeks to compel DOE and NRC to fulfil their unconditional statutory obligations by seeking the funding they need to make a decision—one way or the other. Respondents had the ability to use the appropriated funds available to them, and to seek more if necessary, to complete the Yucca application. Even when funds ran low, they could have sought more. This is especially true for NRC, which, as an independent agency, did not need to yield to the President's unlawful requests to stop an ongoing proceeding. Instead, NRC, like DOE, had "no current intention of complying with the law." *Aiken*, 725 F.3d at 258.

Finally, *National Wildlife Federation v. United States*, 626 F.2d 917 (D.C. Cir. 1980), upon which Nevada relies, is inapposite. Nev. Mot. 18–20. As an initial matter, the court did not reach a decision on the political question issue. *Id.* at 925 n.14. Thus, any discussion of that issue is dicta. But, regardless, the issue in the case was not whether the President requested *any* funding for the Forest Service, but whether that funding was *adequate*. *Id.* at 921. Here, Texas seeks orders directing Respondents to seek the funding necessary to complete the Yucca Mountain license application. It does not require the Court to adjudicate the nuances of exactly what is necessary, but, consistent with the Constitution, ask the Court to hold Respondents accountable for their unconditional NWPA duties to complete the Yucca license. *See Covelo Indian Cmty. v. Watt*, 551 F. Supp. 366, 378–79 & n.10 (D.D.C. 1982) (distinguishing *National Wildlife Federation* and holding class action for declaratory and mandatory relief under Indian claims statute did not involve political question as to duty of Secretary of the Interior to submit legislative proposals to Congress to resolve claims).

The political question doctrine does not bar Texas's requests for equitable remedies that order Respondents to seek additional funding to fulfil their unconditional statutory duties.

II. The Court Possesses Jurisdiction Over Texas's Claims.

Since 1998, DOE has failed to perform its unconditional duty to accept SNF from commercial reactors. Instead, since 2010, it has been spending taxpayer money on consent-based siting that the NWPA expressly prohibits. Not surprisingly, these

two violations of the Act favor Nevada, by delaying the need for a permanent repository and distracting DOE to focus on other possible locations for that repository. Thus, Nevada, like Respondents, contends that the Court lacks jurisdiction to adjudicate these claims, Nev. Mot. 8–16, but as established in Texas's Reply in support of a declaratory judgment and preliminary injunction against DOE, Texas Reply 15–18, ECF No. 00514037666, these continuing violations are ripe for adjudication by the Court.

Under the NWPA, a "civil action for judicial review . . . may be brought not later than the 180th day after the date of the decision or action or failure to act involved." 42 U.S.C. § 10139(c). Limitations statutes "are intended to keep stale claims out of the courts," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982), but "[w]here the challenged violation is a continuing one, the staleness concern disappears," *id.* The Fifth Circuit applies the continuing violation when "the cumulative effect of [an injury is based on] a thousand cuts, rather than on any particular action taken by the defendant," so "the filing clock can-not begin running with the first act, because at that point the plaintiff has no claim; nor can a claim expire as to that first act, because the full course of conduct is the actionable infringement." *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 737 (5th Cir. 2017) (quotation omitted).

The Supreme Court and Fifth Circuit apply the continuing violation doctrine in various context similar to this case. In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court held that hostile work environment claims fall under the contin-

uing violations doctrine because they typically comprise a series of acts that collectively constitute one unlawful practice. 536 U.S. 101, 117 (2002). Despite Title VII's requirement that a charge "shall be filed within [180] days after the alleged unlawful employment practice occurred," *id.* at 109, the continuing violations doctrine allows plaintiffs to recover outside the limitations period, *id.* at 118–19.

In *Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204 (5th Cir. 2000), this Court applied the continuing violation doctrine to an environmental waste case where the EPA fined a company for unlawfully stockpiling waste for ten years, *id.* at 205, though there was a five year statute of limitations, *id.* at 206 (citing 28 U.S.C. § 2462). The company argued that claims accrued when the waste was first deposited on its land, *id.* at 206, but the Court found the violation continuing and held the limitations period did not begin until the unlawfulness ceased. *Id.* (citing *Fiswick v. United States*, 329 U.S. 211, 216 (1946) (finding statute of limitations for continuing offenses runs from last day of continuing offense)). *See also Schoeffler v. Kempthorne*, 493 F. Supp. 2d 805, 817–20 (W.D. La. 2007) (applying continuing violations doctrine to Endangered Species Act case involving failure to perform a non-discretionary duty, notwithstanding interim performance of non-final acts).

Since at least English common law, courts have recognized the continuing violation doctrine's vibrancy in claims that tend not to accrue at a single moment in time. *See Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 513 (1968) ("We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we are dealing with conduct which constituted a con-

tinuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover." (internal citation omitted)); *Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1108 (3d Cir. 1985) (nuclear waste case was not moot because of a continuing violation); William Blackstone, 3 Commentaries 219–20 ("every continuance of a nuisance is [considered] a fresh one").

Texas's "civil action" under the NWPA is brought to adjudicate claims based on 35 years of continuing action, inaction, and broken promises by the Respondents—violations that persist every day. Contrary to Nevada's position, Nev. Mot. 9–12 (referring to "final" agency action), this case is not a routine petition for review or writ of mandamus based on 42 U.S.C. § 10139(a)(1)(A) (governing "review of any final decision or action of the Secretary, the President, or the Commission"). While *Texas v. U.S. Department of Energy*, 764 F.2d 278, 285 (5th Cir. 1985), warranted a dismissal because it involved an attempted challenge to final agency action that the Court held was not final, the circumstances here are different. Rather, Texas's original action is similar to the environmental and employment claims in *Newell* and *National Railroad*, wherein the unlawful actions or inactions occurred over a lengthy period of time. Under these cases, a plaintiff may sue within the statutory time period based on any of the unlawful actions or inactions—exactly what Texas has done here.

DOE missed the contractual and statutory 1998 deadline to accept SNF from commercial reactor sites, and it continues to miss that deadline with each passing day. *See Pac. Gas & Elec. Co. v. United States*, 536 F.3d 1282, 1284 (Fed. Cir. 2008) ("DOE does have a statutory obligation 'reciprocal to the utilities' obligation to pay' to dispose of waste beginning January 31, 1998") (quoting *Ind. Mich.*, 88 F.3d at

1277). The breach is "ongoing." *Boston Edison Co. v. United States*, 658 F.3d 1361, 1366 (Fed. Cir. 2011). In fact, "at this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one." *New York v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 1012, 1015 (D.C. Cir. 2016). And, but for the continuing violations, DOE would not continue to pay damages to nuclear utilities for its continuing failure to accept SNF by the 1998 date. DOE Resp. 14 n.9. It makes no difference whether Texas was aware of a claim prior to filing, or decided to await the adjudication of other cases. Texas's claims are ripe for adjudication.

DOE's unlawful consent-based siting is based on a series of actions that continued at least through its January 2017 policy publication. *See* U.S. Dep't of Energy, Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Waste 5 (Jan. 12, 2017). Since 2010, DOE spent time and money on unlawful consent-based siting document. Texas's request for relief from DOE's unlawful activity is neither too early nor too late, as a matter of law. Under the continuing violation doctrine, Texas may sue on any of DOE's unlawful consent-based siting from 2010 onward; it did not need to await final agency action because it sued under part (a)(1)(B), not (a)(1)(A) of section 10139.

Similarly, although, the underlying motion is directed at DOE, NRC lacks clean hands. NRC failed to fulfill its unconditional obligation to make a decision on DOE's Yucca Mountain application within four years. The NWPA provides that NRC "shall consider an application," and "shall issue a final decision" within four years. 42 U.S.C. § 10134(d). Since DOE filed the application in June 2008, *Aiken*, 725 F.3d

at 258, NRC had until June 2012 to issue a final decision. That deadline has "long since passed." *Id.* But NRC's violation of the NWPA is continuing because it continues to do some work, albeit minimal, and updates the D.C. Circuit on its progress. Nev. Mot. 10.

Nevada's reliance on *Public Citizen v. NRC*, 845 F.2d 1105 (D.C. Cir. 1988), misses the mark. Nev. Resp. 12–14, June 12, 2017, ECF No. 00514029509. Public Citizen was not about a continuing violation, but the publication of a singular document. *Public Citizen*, 845 F.2d at 1106. Though it was argued that NRC's publication of regulations was generally an ongoing proposition, the court ruled that the "agency ha[d] acted" as to the specific regulation in question. *Id.* at 1108. "[S]ince the courts may allow agencies some running room even where there are specific statutory deadlines, conceivably courts may provide a parallel relaxation for persons complaining of inaction." *Id.* (citing *Sierra Club v. Thomas*, 828 F.2d 783, 788-90, 794 n.78 (D.C. Cir.1987)). But since *Public Citizen* addressed a single rule, there was no need to apply the continuing violations doctrine to that case.

Texas's original action lands well within the 180 day statute of limitations in the NWPA because Respondents' violations of the Act are continuing.[2]

[2] NEI argues for dismissal of Texas's prayers for restitution and disgorgement, NEI Resp., ECF No. 00514045402, but those claims are not properly before the Court at this juncture because Nevada did not move for dismissal of those claims. Restitution and disgorgement, as antidotes to perennial federal indecision or inaction, may be appropriate for consideration by the Court at a later stage of the litigation if Respondents are unable (or unwilling) to complete their obligations under the Act.

Conclusion

Texas's original action does not raise political questions and Texas satisfies all the jurisdictional prerequisites to this lawsuit. Nevada's countermotion to dismiss must be denied.

Respectfully submitted this 22nd day of June, 2017.

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Certificate of Compliance

I hereby certify that this brief complies with: (1) the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 4,466 words; and (2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word.

/s/ David Austin R. Nimocks
David Austin R. Nimocks

Certificate of Service

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