No. 17-60191

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF 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 NULCEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD; THOMAS MOORE, in his official capacity as United States Nuclear Regulatory Commission Atomic Safety and Licensing Board Judge; PAUL RYERSON, in his official capacity as United States Nuclear Regulatory Commission Atomic Safety and Licensing Board Judge; RICHARD WARDWELL, in his official capacity as United States Nuclear Regulatory Commission Atomic Safety and Licensing Board Judge; UNITED STATES DEPARTMENT OF TREASURY; 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*.

NEVADA'S REPLY IN SUPPORT OF ITS COUNTERMOTION TO DISMISS

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I. INTRODUCTION

Texas's Response to Nevada's Countermotion to Dismiss confirms that Texas is too late to the ballgame.[1] Texas agrees that the actions and inactions it challenges occurred more than 180 days ago—outside 42 U.S.C. §10139(c)'s jurisdictional timeframe. Any alleged grievances accrued years back based on the Department of Energy's ("DOE") failure to accept spent nuclear fuel ("SNF") in 1998, the start of consent-based siting in 2010, the licensing proceeding "abeyance" in 2011, and the alleged noncompliance with the D.C. Circuit's *Aiken II* decision in 2013. Under a straightforward, textual application of §10139(c), Texas's entire original proceeding should be dismissed as untimely and lacking jurisdiction.

To stave off an inevitable dismissal, Texas urges this Court to graft "the continuing violation doctrine" onto the Nuclear Waste Policy Act ("NWPA"). But there is no textual or precedential support to do so. The plain language of §10139(c) demonstrates that it is a jurisdictional deadline. And equitable doctrines, like the continuing violation doctrine, cannot excuse jurisdictional filing periods. Texas was unable to point to a single NWPA case adopting a "continuing" or "ongoing" violation exception to the 180-day deadline despite the litigation quagmire that Congress's flawed nuclear policy has created and the many court decisions it has spawned. The only circuit

[1] Tex. Opp'n to Nev.'s Mot. Intervene 1 ("Texas is playing football; but Nevada wants to play baseball.").

to consider Texas's theory in an NWPA original action rejected it. This Court should do the same.

II. ARGUMENT

A. The Continuing Violation Doctrine Does Not Apply to Jurisdictional Deadlines.

Texas reaffirms that the triggering or accrual dates for its factual complaints are 1998 and 2010. It asserts that "[s]ince 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." Resp. 11.[2] Because these dates are well outside the 180-day deadline, Texas's only jurisdictional basis clings to its novel "continuing violation doctrine" theory. Resp. 11-16; Pet. 5.

"The continuing-violation exception is an equitable doctrine that extends the limitations period on otherwise time-barred claims…." *Noack v. YMCA of Greater Houston Area*, 418 F. App'x 347, 351 (5th Cir. 2011). As an equitable doctrine, it cannot excuse jurisdictional filing deadlines like the 180-day cutoff in §10139(c). *Dolan v. U.S.*, 560 U.S. 605, 610 (2010); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982) (Title VII deadline is non-jurisdictional and "subject to waiver as well as tolling when equity so requires").

[2] Texas does not defend its allegations based on the licensing proceeding abeyance or the alleged failure to comply with *Aiken II*. *Klett v. Pim*, 965 F.2d 587 (8th Cir. 1992) (courts lack subject matter jurisdiction to impose contempt of another court's order). Nor does Texas address the mootness issues.

"[W]hen a statute of limitations has been regarded as jurisdictional, it has acted as an absolute bar that cannot be overcome by the application of judicially recognized exceptions such as waiver, estoppel, equitable tolling, fraudulent concealment, the discovery rule, *and the continuing violations doctrine*." *Keohane v. U.S.*, 775 F. Supp. 2d 87, 90 (D. D.C. 2011) (quotations omitted; emphasis added), aff'd, 669 F.3d 325 (D.C. Cir. 2012); *W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 143 (D. D.C. 2008) ("§2401(a) is jurisdictional. As a result…the entire basis for plaintiffs' argument that their complaint is timely—that the continuing violations doctrine tolled the limitations period—is not legally viable."); *Colbert v. Brennan*, 752 F.3d 412, 416 (5th Cir. 2014) (congressionally enacted jurisdictional time limitations are not subject to equitable exceptions).

Here, §10139(c)'s deadline is jurisdictional and is not subject to equitable tolling or extension through the continuing violation doctrine. The statute provides that "[a] civil action for judicial review *described under subsection (a)(1) of this section* may be brought not later than the 180th day after the date of the decision or action or failure to act involved…." (emphasis added). In turn, "subsection (a)(1) of this section," sets the "[j]urisdiction of United States courts of appeals" and states that "the United States court of appeals *shall have original and exclusive jurisdiction* over any civil action—for review of any final decision or action [or] alleging the failure of the Secretary, the President, or the Commission to make any decision or take any action required under this part…."

42 U.S.C. §10139(a)(1)(A)-(B) (emphasis added). Read together, the plain language of subsections (a) and (c) establish that the 180-day deadline is jurisdictional. *Ariana M. v. Humana Health Plan of Tex., Inc.*, 854 F.3d 753, 757 (5th Cir. 2017) (statutory interpretation begins with the statute's plain language and structure).

Other courts have recognized the jurisdictional nature of §10139(c). *Nuclear Energy Inst., Inc. v. E.P.A.*, 373 F.3d 1251, 1286-87 (D.C. Cir. 2004) ("Statutes providing for judicial review, including section 119 of the NWPA, 42 U.S.C. §10139, are jurisdictional in nature and must be construed with strict fidelity to their terms.") (quotations omitted); *Pub. Citizen v. N.R.C.*, 845 F.2d 1105, 1110 (D.C. Cir. 1988) (dismissing for lack of jurisdiction an NWPA action that was both too early and too late under §10139(c)); *see also PSEG Nuclear, L.L.C. v. U.S.*, 465 F.3d 1343, 1349 (Fed. Cir. 2006) ("The NWPA contains only one jurisdictional provision, section 119.").

Texas makes no effort to refute the jurisdictional nature of the deadline, and its attempt to distinguish *Public Citizen* is unavailing. Texas claims that *Public Citizen* "was not about a continuing violation, but the publication of a singular document." Resp. 16. The petitioners there were engaging in the same sleight of hand that Texas tries here. Those petitioners contested "NRC's *ongoing* failure to promulgate binding regulations pursuant to §306." *Id.* at 1107. But the agency had acted; the petitioners were simply trying to "dress up" the agency's action as a failure to act. *Id.* at 1108.

Texas similarly tries to cloak DOE's consent-based siting with the appearance of inaction. Texas acknowledges that "[s]ince 2010, DOE spent time and money on [an] unlawful consent-based siting document." Resp. 15. In other words, the gravamen of Texas's complaint is that DOE started consent-based siting years ago. Despite relying on actions, Texas argues, in the same paragraph, that its Petition is timely "because it sued under part (a)(1)(b)"—governing inaction—"not (a)(1)(A) of section 10139," governing review of any final decisions or actions. *Id.* Yet Texas cannot disguise DOE's consent-based siting action as inaction to avoid the expiration of the jurisdictional deadline. By its own admission, consent-based siting started in 2010. Consequently, Texas was required to file suit within 180 days. It did not.[3]

Public Citizen also directly addresses Texas's claims that DOE is continuing to violate the 1998 deadline to accept SNF and that NRC is continuing to violate the deadline to issue a decision on the license application within four years. The D.C. Circuit rejected the "ongoing failure" theory and held that "[w]here as here the statute requires agency action within a certain time limit, it is not obvious why the agency's inaction as of that date should not trigger the time limits of any statute on which the challengers rely for jurisdiction. This is especially so where the time limit expressly runs from the

[3] In passing, Texas references DOE's January 2017 draft consent-based siting document but Texas does not contend that the document is final agency action that brings its Petition within the 180-day window. Resp. 15. Nor does Texas argue that closing the public comment period in April 2017 constitutes final agency action rendering its Petition timely. The 2013 "strategy document" is also outside the period. Pet. 11. *Texas v. D.O.E.*, 764 F.2d 278, 282 (5th Cir. 1985).

challenged 'action or failure to act,' as is true of 42 U.S.C. §10139(c)." *Pub. Citizen*, 845 F.2d at 1108.[4]

According to Texas, DOE had an "unconditional duty to accept SNF" by January 31, 1998, Resp. 11; 42 U.S.C. §10222(a)(5)(B), and NRC had a statutory obligation to issue a final decision on the Yucca application by June 2012. Resp. 15; 42 U.S.C. 10134(d). Therefore, the 180-day clock to challenge DOE's and NRC's inactions started after the expiration of those statutory dates. This is especially so because §10139(c) specifically contemplates that its deadline applies to the "failure to act." Painting the continuing violation doctrine "gloss" onto §10139(c) would effectively render the 180-day deadline chosen by Congress unnecessary and meaningless. *U.S. v. Block*, 635 F.3d 721, 723 (5th Cir. 2011). As the D.C. Circuit concluded, the "acceptance of [Texas's] argument would make a nullity of statutory deadlines." *Pub. Citizen*, 845 F.2d at 1108.

[4] In dicta, the court stated that "since 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.* For support, the court cited *Sierra Club v. Thomas*, 828 F.2d 783, 788-90, 794 n.78 (D.C. Cir. 1987). Congress has partially abrogated *Thomas*, including its jurisdictional holding. *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015). And besides, the cited portion discussed an EPA statutory scheme that involved both nondiscretionary and discretionary duties to act timely. 828 F.2d at 788-90. The court indicated that if the agency's duty to act by a certain date was discretionary, a challenge to agency inaction should have a corresponding relaxed timeframe. *Id.* at 789. Here, Texas asserts that DOE had a nondiscretionary duty to accept SNF in 1998 and NRC had a nondiscretionary duty to issue a final decision by June 2012. Because DOE and NRC had mandatory, nondiscretionary duties to act by dates certain, Texas is not entitled to "a parallel relaxation for persons complaining of [discretionary] inaction."

The authority relied upon by Texas does not support applying the continuing violation doctrine to §10139(c) because each of those cases involved a non-jurisdictional statutory deadline that, unlike §10139(c), could be excused by equitable doctrines. For instance, in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002), the Supreme Court specifically highlighted that "the filing period is not a jurisdictional prerequisite to filing a Title VII suit. Rather, it is a requirement subject to waiver, estoppel, and equitable tolling when equity so requires." (quotations omitted).

Heath also involved Title VII's non-jurisdictional deadline along with 42 U.S.C. §1983. 850 F.3d 731 (5th Cir. 2017). This Court held that "[t]he continuing violation doctrine applies the same to Title VII hostile work environment claims as it does to such claims brought under section 1983." Thus, contrary to §10139(c), §1983's limitations period is non-jurisdictional and may be relieved by the continuing violation doctrine.

Texas fares no better with *Newell Recycling Co. v. E.P.A.*, 231 F.3d 204 (5th Cir. 2000). *Newell* involved the statute of limitations in 28 U.S.C. §2462. *Id.* at 206. It is, however, well-established that §2462 is subject to equitable tolling. *See U.S. v. Core Labs., Inc.*, 759 F.2d 480, 484 (5th Cir. 1985) ("The government may, however, be entitled to invoke the equitable powers of the Court to toll the §2462 limitations period in this case."). The availability of equitable tolling demonstrates that §2462 is not a

jurisdictional deadline and, accordingly, *Newell* does not indicate that the continuing violation doctrine applies to the jurisdictional deadline at issue here.[5]

B. The Amount of Funding Requested for the Licensing Process is a Nonjusticiable Political Question.

As the NEI Intervenors' suggest,[6] and the Federal Respondents seem to agree,[7] this Court's analysis could end with the foregoing application of the statutory text and precedent. Even so, five of Texas's prayers for relief suffer from an additional defect that independently warrants dismissal. Those requests ask for an order from this Court directing the Federal Respondents to request from Congress a certain amount of funding to complete the Yucca Mountain licensing process. In its Response, Texas beats a partial retreat from the relief *actually* requested and disclaims the intent to dictate the level of funding that the Executive Branch proposes. Resp. 6 ("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.").

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[5] *Schoeffler v. Kempthorne* evaluated 28 U.S.C. §2401(a). "Courts of Appeals have divided on the question whether §2401(a)'s limit is 'jurisdictional.'" *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 145 (2008) (Ginsburg, J., dissenting). If §2401(a) is jurisdictional, the continuing violation doctrine cannot apply. On the other hand, if §2401(a) is non-jurisdictional, the case is distinguishable from §10139(c)'s deadline. In any event, *Schoeffler's* continuing violation doctrine discussion was dicta because the court found the action to be timely. 493 F. Supp. 2d at 817 ("The Court is not required to address plaintiffs' alternative argument under the continuing violations doctrine…."); *cf. Jersey Central Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103 (3d Cir. 1985) (discussing mootness, not jurisdictional deadlines).

Texas has not established a continuing violation even if the doctrine applies. The failure to accept SNF, the start of consent-based siting, the licensing proceeding abeyance, and "noncompliance" with *Aiken* are discrete acts from which Texas may allegedly feel ill effects; those instances are not serial unlawful acts occurring within 180 days. *Heath*, 850 F.3d at 740.

[6] NEI Resp. to Nev. Countermot. nn.2, 26.

[7] Fed. Resp'ts' Resp. to Nev. Countermot. 1.

However, Texas's Petition is clear: it demands that the Court force the Executive to request the appropriation level "necessary" "to complete" the licensing process. Pet. ¶¶3-4, 7-8, 11. Texas's Response reiterates it "seeks orders directing Respondents to seek *the funding necessary to complete* the Yucca Mountain licensing application." Resp. 11 (emphasis added). As set forth in Nevada's Countermotion, this Court cannot order—or supervise—the Executive's requests for certain funding amounts because the Executive's view of what constitutes a "complete" process and the funds "necessary" to accomplish it involve policy judgments and nonjusticiable political questions.[8] Countermot. 16-20.

Texas does not identify authority allowing an Article III court to micromanage the amount of the Executive's appropriation requests. *Train v. City of N.Y.*, 420 U.S. 35 (1975) merely held that the Executive cannot withhold funds that Congress has already earmarked in specified amounts. *Sioux Valley Empire Electric Association, Inc. v. Butz*, 504 F.2d 168 (8th Cir. 1974) likewise involved the Executive's impounding of funds that effectively terminated a congressionally authorized program. In this case, consistent with *Aiken II*, NRC has been spending the existing appropriated funds and submitting status reports to Congress. Unlike *Train* and *Butz*, there are no additional funds that NRC is refusing to spend.

[8] Subject to the participants' due process rights.

American Hospital Association v. Burwell, 812 F.3d 183 (D.C. Cir. 2016) is also inapposite. It did not consider a request to order the Executive to ask for a certain funding level. Rather, the case involved the mounting Medicare appeals backlog and the HHS Secretary's efforts to meet statutory deadlines. *Id.* at 187-88. The parties did not contend, for example, that the Secretary should request—or the court should order—all the funds necessary to complete the appeals in a certain timeframe. Although the court remanded to the district court to consider whether mandamus was appropriate, the court noted that the Secretary was making "good faith efforts to reduce the delays within the constraints she face[d]." *Id.* at 192. And as with Yucca Mountain, "the backlog and delays have their origin in the political branches, and ideally the political branches should resolve them." *Id.* at 192-93.

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III. CONCLUSION

Texas's alleged actions and inactions accrued years ago and the continuing violation doctrine does not apply to forgive §10139(c)'s jurisdictional deadline. Therefore, Texas's entire original proceeding should be dismissed.

Dated: June 29, 2017.

By: /s/ Jordan T. Smith

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CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 2,597 words, except for the items excluded from the word count pursuant to Federal Rule of Appellate Procedure 32(f), as determined by the word-count function on Microsoft Word 2013.

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 Garamond 14-point font.

/s/ Jordan T. Smith

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2017 an electronic copy of the foregoing motion was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/Sandra Geyer