IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA, Petitioner,	)	
v.	)	No. 18-1232
UNITED STATES NUCLEAR REGULATORY COMMISSION and DAVID A. WRIGHT, Respondents.	)	

REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

Nevada has responded to our motion to dismiss by asserting that its petition for review arises not under the general provision for judicial review contained in the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10139(a)(1)(A), but, rather, under the provisions of the Act, 42 U.S.C. §§ 10139(a)(1)(B) and (C), that contain no express finality requirement. But Nevada has failed to supply a basis for mandamus relief that these provisions require. And Nevada has conceded the validity of our ripeness arguments and *admitted* that its argument will be reviewable, if review is even necessary at all, upon a final licensing decision with respect to the Yucca Mountain construction authorization application. None of the arguments that Nevada offers provides any basis for deviating from the Court's conclusion, reached in *Nye County v. NRC*, that review of the decision at issue is premature and that dismissal is warranted. The Court should reach the same conclusion here.

ARGUMENT

I. Subsections (a)(1)(B) and (a)(1)(C) of 42 U.S.C. §10139 support mandamus actions, not petitions for review.

In our motion, we established that Nevada's petition cannot proceed under 42 U.S.C. § 10139(a)(1)(C) because that provision contemplates mandamus relief. We noted that Congress used the term "review" in subsection (A)—as well as in subsections (D), (E), and (F)—while using the word "challenging" in subsection (C). Motion at 7. In response, Nevada asserts that "[t]here is no reason to read the term 'challenging', as it appears in 42 U.S.C. § 10139(a)(1)(C) [and, presumably, 'alleging,' as it appears in (a)(1)(B), which we now understand Nevada to invoke], in such a narrow fashion to exclude petitions for review." Response at 2.

But there *is* such a reason: Congress's deliberate omission of the term "review" from subsections (a)(1)(B) or (a)(1)(C). Nevada's argument boils down to the proposition that it can bring a "petition for review" challenging Commissioner Wright's decision pursuant to the only two provisions (out of six) of § 10139(a)(1) that do *not* mention the availability of this vehicle. Nevada's argument is fatally undermined by the plain text of the statute.

Two familiar maxims confirm this interpretation. First, waivers of sovereign immunity must be narrowly construed.[1] *See*, *e.g.*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). Here, Nevada's interpretation of the NWPA would expand the waiver of sovereign immunity by adding additional remedies to the statute. It would allow for "review" of agency action, without the need to demonstrate entitlement to mandamus relief, that Nevada admits is not final. Such an interpretation is clearly contrary to the plain meaning of the statutory text and would constitute an entirely new approach to challenging agency decisions—one that is not supported by an analytical framework.

Second, the rule that *expressio unius est exclusio alterius—i.e.*, that expression of one thing is to the exclusion of another—supports NRC's position. "Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (alteration and quotation marks omitted). Here, Congress explicitly provided for "review" of Commission decisions in four

[1] Contrary to Nevada's claims (Response at 2), we do not argue that sovereign immunity has not been waived for certain classes of cases or fail to distinguish between jurisdiction and sovereign immunity. Instead, we argue that the waiver set forth in the specific statute under which Nevada is proceeding must be narrowly construed and that, irrespective of the Administrative Procedure Act, Nevada's claim does not satisfy the waiver granted by the NWPA.

of the six subsections of Section 10139(a)(1). But it specifically omitted that term in subsections (a)(1)(B) and (a)(1)(C). Nevada has not presented any compelling reason to expand the language crafted by Congress or to assume that the word "review" is somehow implied in the two subsections where it is missing.

Nor does Nevada present a compelling case that its petition for review is authorized by 42 U.S.C. § 10139(a)(1)(B). While that provision permits civil actions alleging the failure of the Commission to make any decision or take any action "required under" Subtitle A of Title I of the NWPA, the very fact that it contemplates enforcement of the agency's obligation to perform statutory requirements indicates that it is designed as a vehicle through which to seek mandamus. Indeed, the "required under" threshold dovetails perfectly with the substantive requirement for mandamus relief, *see, e.g., Consol. Edison Co. of N.Y. v. Ashcroft,* 286 F.3d 600, 606 (D.C. Cir. 2002) ("mandamus is inappropriate except where a public official has violated a 'ministerial' duty"), and was the basis for this Court's issuance of mandamus relief against the NRC in *Aiken County II*, 725 F.3d 255, 258 (D.C. Cir. 2013) (explaining that mandamus is appropriate "to correct transparent violations of a clear duty to act"). And, of course, Nevada fails to identify any *requirement* within Subtitle A that would have compelled Commissioner Wright to recuse himself.

To be clear, Nevada could have filed a petition for a writ of mandamus in this Court under 42 U.S.C. § 10139(a)(1)(C) challenging Commissioner Wright's decision not to recuse himself on the grounds that it was unconstitutional.[2] Or it can at some point in the future file a petition for review challenging Commissioner Wright's determination once it is merged into a final decision that is reviewable under 42 U.S.C. § 10139(a)(1)(A). But, in the meantime, it has chosen to do neither, and, for this reason, dismissal of its petition for review is warranted.

II. Nevada's fails to identify a decision of the Commission.

We explained in our motion that Nevada has failed to identify a decision "of . . . the Commission," which is a requirement for a petition for review brought against the NRC under subsection (a)(1)(A). Motion at 15. Although Nevada apparently eschews reliance on subsection (a)(1)(A), it nonetheless contends that

[2] Nevada mischaracterizes Respondents' position with regard to the availability of a constitutional challenge. *See* Response at 2. We do not contend, as Nevada suggests, that constitutional challenges can *only* be brought under subsection (a)(1)(C). Instead, we argue that they must be brought as mandamus actions under subsection (C) if they challenge an action that is not final. Conversely, they may be brought as petitions for review under subsection (a)(1)(A) if they challenge an action that is final. Similarly, Nevada's suggestion that, if we are correct, all judicial challenges to interlocutory recusal decisions must be filed in district court Response at 5, rests on a misunderstanding of our argument. We concede that mandamus relief is available before this Court in recusal cases; we simply note (as Nevada acknowledges) that the State has neither proceeded under such a theory nor supplied a basis for such relief.

Commissioner Wright's determination constitutes a decision of the Commission within the meaning of subsection (a)(1)(B).[3] Response at 4-5. Its arguments are unpersuasive.

First, Nevada cites 10 C.F.R. § 1.1 as support for its claim that a decision by an individual Commissioner is a decision of "the Commission." But that regulation simply defines "Commission" as a collective, *i.e.*, as "the five members of the [Commission] or a quorum thereof sitting as a body, as provided by section 201 of the Energy Reorganization Act of 1974, as amended." Commissioner Wright does not by himself constitute a quorum and his decision is clearly not a decision of the Commission "sitting as a body." And while Nevada correctly observes that 10 C.F.R. § 1.1 defines "Nuclear Regulatory Commission" as "the agency . . . comprising [among others] the members of the Commission," this definition refers on its face to the agency as a whole. *See also* Merriam-Webster Online Dictionary (defining "comprise" as a transitive verb meaning "to be made up of," as in, "The play comprises three acts.").

Second, Nevada cites two cases in which it claims that NRC Staff decisions were reviewed under the Hobbs Act to support its argument that courts have reviewed decisions by "persons" who were not "the Commission." Response at 4-

[3] Subsection (a)(1)(C) does not contain this requirement.

5 (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1981), and *Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979)). But those cases involve decisions by the NRC Staff issued in response to petitions for enforcement action under 10 C.F.R. § 2.206. And under that provision, decisions by the NRC Staff become the final decision of the agency after a specified period of time if the Commission does not intervene to take review of the Staff decision. 10 C.F.R. § 2.206(c)(1); *see also* Petitions for Review of Director's Denial of Enforcement Requests, 42 Fed. Reg. 36,239, 36,239-40 (July 16, 1977) (adding subsection (c)). Thus, these decisions do not support an alternative definition of the word "Commission" in the NWPA.

III. Nevada has not established that its claims are extraordinary.

Nevada concedes that Commissioner Wright's decision is not final for purposes of judicial review. Response at 6. Instead, Nevada argues that its arguments concerning Commissioner Wright's decision fall into that narrow category of "extraordinary prejudgment claims" that courts will hear "in rare circumstances." *Id.*; *see Ass'n of Nat'l Advert. v. FTC*, 627 F.2d 1151, 1156-57 (D.C. Cir. 1979).

We observe at the outset that this Court's recognition in *National Advertisers* of this extraordinary avenue of relief derives from its ability to review cases pursuant to its authority to consider petitions for writs of mandamus. *Id.* at n.9. And, of course, the exacting standard required for mandamus is precisely the

burden that Nevada seeks to avoid having to meet in this case. Its invocation of this avenue for relief fails for this reason alone.

However, even assuming that Nevada had properly asserted an "extraordinary circumstances" argument, neither of the categories of statements by Commissioner Wright that it identifies would support immediate review by this Court. Rather, the statements upon which Nevada relies fall within the heartland of claims asserting prejudgment of an issue by a decisionmaker and are ones that can be raised, in accordance with the general rule identified in our motion, after a final licensing decision on the merits.

Nevada attempts to characterize Commissioner Wright's previous participation on a Yucca Mountain Task Force as evidence of clear bias (fueled, allegedly, by "passion") with respect to the licensing proceeding now pending before the Commission. Response at 7-8. But Nevada does not mention that the Commissioner dispassionately focused on the completion of the *process* of licensing a spent fuel repository that the NWPA contemplates. Motion, Exh. 2, at 11-14. Nor does Nevada cite to the Commissioner's recognition—expressed both in the very statements upon which Nevada relies and in the recusal decision itself—that the process may lead to the conclusion that Yucca Mountain is not a suitable site for a repository. *Id.* at 12-13. And Nevada's reliance on the affidavit that Commissioner Wright signed in connection with the Yucca Mountain

licensing proceeding, Response at 8-10, is a variant of the same dispute. As the Commissioner explained in his decision, the affidavit was submitted merely to demonstrate his organization's standing to assert that that the Department of Energy should adhere to the process called for by the NWPA for determining the suitability of the Yucca Mountain site. Motion, Exh. 2, at 6. Disputes such as the ones raised by Nevada's recusal request are to be expected in a system in which people with a substantial specialized experience are named as heads of agencies and must sit in an adjudicatory capacity, and Nevada has not demonstrated otherwise.

To be clear, it is not our goal in this motion to dismiss to argue the merits of Commissioner Wright's decision, and the Court need not resolve the merits now. Rather, we describe the parties' views as a means of describing the rather conventional nature of the challenge that has been raised. And this dispute is qualitatively no different than the disputes raised in similar cases, including *Nye County*, in which this Court has deferred review of a recusal decision pending the completion of proceedings before the agency.

Moreover, to resolve the issue of whether the recusal determination presents such a pressing issue as to warrant immediate relief, one need only look to Nevada's response, wherein the State *concedes* that Commissioner Wright's decision is not effectively unreviewable on appeal and will in fact be fully

reviewable if the State is ever aggrieved by a final decision on the construction authorization application. Response at 10-11. Nevada has no basis to assert that it needs extraordinary relief to protect its rights now when it admits that the default process for review of a decision by the agency under the NWPA will provide it with a wholly adequate remedy, should it need to pursue one, in the future. *See Nye County v. NRC*, No. 13-1260 (D.C. Cir. Oct. 22, 2013) (per curiam) (Document #1462418) (explaining, as one of two bases for denying the petitioners' request, that mandamus relief is not available if there is another adequate remedy available).

IV. Commissioner Wright's decision is not ripe for review.

Nevada all but concedes the lack of ripeness of its claims when it acknowledges that it would have an adequate means of review if a series of contingent events take place that results in a decision by which it is aggrieved. Response at 10-11. It further acknowledges that there is no cognizable hardship associated with waiting until agency action is complete because this hardship exists in every case. *Id.* at 12.

The only argument Nevada in support of its claim of ripeness is that the NWPA expresses a preference for immediate review. Response at 12. But it does not. While Congress provided a time limit for completing proceedings before the *agency*, *see* 42 U.S.C. § 10134(d), it did not express any preference (let alone an

"emphatic" one, *Gen'l Electric Co. v. EPA*, 290 F.3d 377, 381 (D.C. Cir. 2002)) for immediate review of interlocutory decisions. In fact, the statutory time limit for the completion of agency proceedings could just as easily be read as a preference for judicial review following the agency's expeditious completion of its work.

In short, Nevada has provided no basis for the Court to depart from its conclusion in *Nye County* that petitions of the type Nevada has filed are not ripe for consideration at this stage of the licensing proceedings. Thus, even assuming that it had raised a claim that fell within any of the jurisdictional requirements of 42 U.S.C. § 10139(a)(1), dismissal would still be warranted.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our motion to dismiss, this Court should dismiss Nevada's petition for review.

Respectfully submitted,

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October 31, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(2)(C), I hereby certify:

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on October 31, 2018, I filed the foregoing REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS with the U.S. Court of Appeals for the District of Columbia Circuit by filing it with the Court's CM/ECF system. That method is calculated to serve:

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