No. 21-60743

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS;
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;
FASKEN LAND AND MINERALS, LTD. and
PERMIAN BASIN LAND AND ROYATY OWNERS,
Petitioners,
v.
NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action by the
Nuclear Regulatory Commission

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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GLOSSARY

AEA	Atomic Energy Act of 1954
ICC	Interstate Commerce Commission
ISP	Interim Storage Partners, L.L.C.
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act

INTRODUCTION

In our motion to dismiss, we demonstrated that Texas is not a "party aggrieved" within the meaning of the Hobbs Act, 28 U.S.C. § 2344, and is thus not permitted to seek judicial review in this Court, because it did not seek to intervene in the NRC adjudicatory proceedings related to ISP's application for a license. In response, Texas ignores the principle that participation in adjudicatory proceedings presented the "appropriate and available" opportunity constituting a "statutory prerequisite" to judicial review. *Gage v. AEC*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973). It likewise fails to confront the fact that "[t]he degree of participation necessary to achieve party status varies according to the formality with which the proceeding [is] conducted." *Water Transport Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987). Instead, Texas asserts that it obtained party status simply by commenting on the Environmental Impact Statement for the ISP facility. That assertion conflicts with governing statutes and case law from this Court and other circuit courts. Moreover, Texas's position would render completely optional the adjudicatory framework that the NRC, at Congress's direction in AEA Section 189, has established to resolve contentions raised by interested persons about highly technical issues related to nuclear safety. This Court should reject Texas's effort to evade the administrative exhaustion requirements set by Congress.

ARGUMENT

I. Texas ignores the distinction between rulemaking and adjudication.

Texas's response hinges on its assertion that involvement in agency proceedings in any form is enough to confer party status upon it. Response at 5-9. This is incorrect.

Undoubtedly, as Texas asserts (Response at 6), taking part in the notice-and-comment process is sufficient to confer party status with respect to informal rulemaking proceedings. Indeed, we cited *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997), for this proposition. Motion at 17 n.10. However, a greater degree of participation is required when an agency has (1) issued rules for intervening in an adjudication, such as those set forth at 10 C.F.R. Part 2; and (2) communicated those requirements to the public, as the NRC did when it provided notice of the hearing opportunity associated with ISP's application in the *Federal Register*. Motion at 4, 6-7; *Water Transport*, 819 F.2d at 1192; *Alabama Power v. ICC*, 852 F.2d 1361, 1368 (D.C. Cir. 1988) (Hobbs Act review not available where petitioner failed to comply with rules created by agency for participation); *Simmons v. ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983) (observing that, in "structured" proceedings, relevant inquiry is whether petitioner in court attained, or sought to attain, party status before agency); *see also NRDC v. NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016) ("To challenge the Commission's grant of a license renewal, then,

a party must have successfully intervened in the proceeding *by submitting adequate contentions under 10 C.F.R. § 2.309*." (emphasis added)).

Texas does not acknowledge the case law recognizing that a greater degree of participation before the agency is required to seek judicial review of adjudicatory decisions. It relies (Response at 6) instead on *ACA Int'l v. FCC*, 885 F.3d 687, 711-12 (D.C. Cir. 2018), for the proposition that a party may be aggrieved under the Hobbs Act by "commenting on a petition in agency proceedings that resulted in a declaratory ruling." But *ACA International* clarifies that rule applies only "[f]or agency proceedings that do *not* require intervention as a prerequisite to participation." 885 F.3d at 711 (emphasis added). And this caveat is squarely applicable here. The NRC's rules for adjudications *do* require intervention; the NRC issued rules decades ago creating contention admissibility requirements as a precondition to intervention to implement Congress' direction in AEA Section 189 to provide for adjudicatory hearings in licensing proceedings and pursuant its general rulemaking authority in AEA Section 161(p), *id*. § 2201(p), and courts have enforced them ever since. *See, e.g.*, *BPI v. Atomic Energy Comm'n*, 502 F.2d 424, 426-29 (D.C. Cir. 1974) (upholding intervention requirements as consistent with AEA and reasonable); *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004) (upholding revisions to 10 C.F.R. Part 2).

Texas also retreats twice to its assertion, Response at 7, 8, that requiring it to participate in the agency's adjudicatory proceedings "strips" federal courts of the power of judicial review. Its arguments are unpersuasive. Agencies have the right to define the procedures applicable to requests to intervene brought by third parties to proceedings. *See BPI*, 502 F.2d at 426-29. Indeed, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). But the agency's authority to create procedures does not restrict the power of federal courts; it enables agencies to specify the avenues that are "appropriate and available" to intervenors who may seek to challenge agency decisions and to insist upon participation in accordance with these procedures as a precondition to judicial review. *Gage*, 479 F.2d at 1217-18. Any curtailment of Texas's ability to obtain judicial review is not the result of an alleged attempt by the NRC to strip the federal courts of power; it is the result of Texas's unilateral decision not to participate in adjudicatory proceedings in the manner that was

offered and that other entities, who are now before the D.C. Circuit,[1] took advantage of.

Texas's reliance upon *Massachusetts v. NRC*, 522 F.3d 115 (1st Cir. 2008), and *Clark & Reid Co. v. United States.*, 804 F.2d 3 (1st Cir. 1986), in this regard is likewise unavailing. Response at 8-9. Respondents do not dispute that this Court is the ultimate determinant of its own jurisdiction. But these decisions are consistent with Respondents' position—that seeking an otherwise available administrative hearing before the NRC is a mandatory prerequisite to obtaining judicial review of an NRC licensing decision. *See Clark & Reid*, 804 F.2d at 5 (recognizing that "party aggrieved" requirement "means that a petitioner must have been a party to the agency proceedings"); *Massachusetts*, 522 F.3d at 130-31 (observing that Massachusetts, which had previously sought but was denied "party" status in a licensing proceeding, could nonetheless seek judicial review of a

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[1] In a footnote, Texas suggests that the petitions for review challenging the Commission's adjudicatory decisions were jurisdictionally "premature" because the license had not issued in those cases. Response at 3 n.1. That is incorrect. Persons who seek and are denied party status before the agency can (and, indeed, must, if they seek to be heard) seek judicial review of the decision denying their request for admission to the proceeding within sixty days. *See* 28 U.S.C. § 2344; *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992) ("Having failed to achieve the status of a party to the litigation, the putative intervenor could not later seek review of the final judgment on the merits."). Thus, the NRC has not contested the D.C. Circuit's jurisdiction over those petitions for review by parties that properly sought intervention in the licensing proceeding.

related rulemaking petition, or of a "hypothetical" denial of a stay request as an "interested governmental entity," regardless of whether the state was considered a "party"). And unlike *Massachusetts*, Texas did not participate "directly and substantially" in the adjudicatory proceedings before the agency, *id.*; it did not participate *at all*.

Nor does *Gage* support Texas's position (Response at 7-8). While the court in *Gage* stated that the AEA and Hobbs Act "make no distinction between orders which promulgate rules and orders in adjudicative proceedings," it did so only in considering whether to *extend* the exhaustion requirement applicable to adjudicatory decisions to rulemaking orders, and it ruled that those challenging rulemaking orders *also* were required to participate before the agency, albeit through the notice-and-comment process. *Id.* at 1218. *Gage* did not relax the baseline assumption—which the D.C. Circuit never challenged—that those seeking judicial review of a decision in which a hearing is "appropriate and available" must seek party status in the adjudication before seeking judicial review.

Further, Texas appears to contend that it is an "aggrieved party" under the Hobbs Act because it purportedly has Article III standing. Response at 9. But as the D.C. Circuit observed, "[T]he phrase 'party aggrieved' requires that petitioners have been parties to the underlying agency proceedings, not simply parties to the present suit who are aggrieved in a constitutional (Article III) sense." *ACA Int'l*,

885 F.3d at 711; *see also Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 85 (5th Cir. 1982) ("Nothing in this opinion is meant to equate administrative standing with judicial standing. We recognize that the two concepts of standing are governed by different standards.").

Finally, Texas's reliance upon *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), for the proposition that Congress intended for court of appeals review of all final orders in licensing proceedings regardless of whether a hearing occurred or could have occurred, Response at 7, does not advance its position. The statement that Texas seizes upon referred to the question of whether judicial review was available in the court of appeals, as opposed to district court, for a petitioner who filed a request, pursuant to 10 C.F.R. § 2.206, that the NRC initiate a proceeding to modify, revoke, or suspend a license, and whose request had been denied without a hearing. The petitioner in that case had availed itself of the procedures available to it—requesting that the Commission take action against the license—and the Court held that the agency's decision was judicially reviewable under the Hobbs Act. 470 U.S. at 746. The Court did not interpret or apply the "party aggrieved" language in 28 U.S.C. § 2344; it did not even cite the provision. Nor did the Court suggest, as Texas asserts here, that a party could choose to avoid the necessary step of agency adjudication and instead proceed directly to judicial review.

II. Texas's arguments concerning non-jurisdictional exhaustion are unavailing.

We cited to *Fleming v. USDA*, 987 F.3d 1093, 1098-99 (D.C. Cir. 2021), in our motion to dismiss (at 12-14) to address the possibility that the Court might deem it appropriate to dismiss for "non-jurisdictional, mandatory exhaustion" as opposed to lack of subject-matter jurisdiction. Texas does not address the issue of which vehicle is the appropriate means for the Court to dismiss the case. Texas does, however, state that we have "not identified any . . . statutory language in the Atomic Energy Act or the Hobbs Act" that requires exhaustion. Response at 9-10. This assertion is incorrect.

The AEA and the Hobbs Act together make clear that the Court's jurisdiction is only invoked when a "party" (or a person denied party status) challenges a "final order" in a "proceeding" conducted under Section 189 of the Atomic Energy Act. 28 U.S.C. § 2344; 42 U.S.C. § 2239(b).[2] Indeed, it is precisely this language that led the D.C. Circuit in *Gage*—and this Court in *Wales*

[2] The Hobbs Act reinforces this understanding by providing, in setting forth who may appear in court to defend an agency decision, that "[t]he agency, and *any party in interest in the proceeding before the agency* whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspend, *may appear as parties thereto* of their own motion and *as of right*, and be represented by counsel in any proceeding to review the order." 28 U.S.C. § 2348 (emphasis added); *see Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366-67 (11th Cir. 2002).

Transportation—to conclude that participation before the agency is the "statutorily prescribed prerequisite" to Hobbs Act review. *Gage*, 479 F.2d at 1217; *Wales Transp., Inc. v. ICC,* 728 F.2d 774, 776 n.1 (5th Cir. 1984). Texas has no answer to these cases, other than to assert that the exhaustion requirement does not apply to them, yet somehow has also been met. And the requirement plainly has not been satisfied.

III. Texas cannot take solace in any "ultra vires" exception.

Finally, Texas contends that even if it is not a "party aggrieved," this Court has recognized an exception to the exhaustion requirement for actions that are allegedly outside the scope of an agency's authority. Response at 10-11. This contention misapprehends the vitality of this theory and its applicability to this case.

First, Texas incorrectly states (Response at 11) that we "fail[ed] to identify any Fifth Circuit decision cabining *American Trucking*." In fact, we specifically noted (Motion at 14-15) that the statement in *American Trucking*—which is itself *dicta*—has been roundly criticized and that its underpinnings have been eroded by subsequent decisions. And we highlighted this Court's recognition that the exception has been "squarely rejected" by other courts, *Baros v. Texas Mexican R.R. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005), is "exceedingly narrow," *id*., and is inapplicable where the agency has the authority to decide the scope of its own

authority, *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993). As in *Baros*, Texas "had an affirmative duty to intervene before the agency in any of the proceedings involving" the license, and "[b]y failing affirmatively to act to protect [its] interests by intervening in the agency proceedings," Texas "cannot now advance [its] claims in a collateral action that necessarily challenges several agency decisions and orders as being issued" outside the NRC's authority. 400 F.3d at 238.

Texas does not grapple with these decisions. Nor does it make any effort to explain why, even assuming it exists, this exception should apply here. The Commission has the ability and the authority to determine whether licensing a facility for the storage of spent fuel is somehow inconsistent with the Nuclear Waste Policy Act and thus beyond its authority. Indeed, the Commission entertained arguments to precisely this effect when it dismissed various contentions of the parties who are now before the D.C. Circuit, including expressly rejecting the assertion that "issuing the license would exceed [its] statutory authority." *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463, 467-69 (Dec. 4, 2020).

Moreover, framing the issue that Texas identifies as one going to the "authority" of the NRC expands this narrow exception far beyond *Baros* and *Merchants Fast Motor Lines*. While Texas asserts that the ISP license somehow

creates a *de facto* permanent nuclear waste repository, its assertion not only ignores that the facility is only licensed for 40 years of operation but flies in the face of applicable precedent. Indeed, "it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of [spent] fuel." *Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 2004); *id.* at 543 (rejecting argument that passage of NWPA repealed NRC's authority under AEA to license spent fuel storage at private away-from-reactor facilities). If Texas were correct about the scope of the exception, then any person could avoid the statutory exhaustion requirement simply by asserting that the license is "really", or "effectively," or, as here, "*de facto*," something that is beyond the agency's statutory authority. There is no basis in the Atomic Energy Act or the Hobbs Act for permitting such recharacterizations of agency action to evade the agency's procedures and to proceed directly to court without the benefit of the agency's considered judgment. At a minimum, if the Court permits Texas to invoke this exception, it should limit Texas's arguments to its narrow and unfounded assertion that the NRC lacks authority to license the facility at issue.

CONCLUSION

Respondents respectfully request that this Court dismiss Texas's Petition for Review.

Respectfully submitted,

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November 22, 2021

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

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CERTIFICATE OF SERVICE

I certify that on November 22, 2021, I served a copy of **RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS** upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

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