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

STATEMENT REGARDING RESPONDENTS' MOTION TO DISMISS OR TRANSFER

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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
Michael R. Abrams
Counsel of Record for Petitioners State of Texas, Governor Greg Abbott, and Texas Commission on Environmental Quality

STATEMENT

On September 13, 2021, the Nuclear Regulatory Commission issued a license for a "consolidated interim storage facility" to store nuclear fuel and radioactive waste in West Texas. 86 Fed. Reg. 51,926 (Sept. 17, 2021). Ten days later, Petitioners the State of Texas, Governor Greg Abbott, and the Texas Commission on Environmental Quality timely filed a petition for review of that final agency action.

The Commission sought to dismiss the petition, arguing that this Court lacks jurisdiction because of Texas's purported failure to comply with certain Commission rules of procedure. The State explained in its response that the relevant provision of the Hobbs Act provides only that the State must be a "party aggrieved" for the Court to have jurisdiction, 28 U.S.C. § 2344, and the State's submission of comment letters during the agency proceedings sufficed to confer that status. The Court declined to dismiss the State's petition for review and instead carried the motion to dismiss with the merits of the case.

Petitioners Fasken Land and Minerals, Limited and Permian Basin Land and Royal Owners filed a separate petition for review of the license. The Commission now seeks to dismiss that petition or in the alternative transfer it to the D.C. Circuit, where several other petitions challenging Commission orders are pending. The Commission's motion cannot affect *Texas's* right to continue as a petitioner in this circuit, and the Commission does not argue otherwise. *See* Mot. 14 (requesting that the Court dismiss or transfer only "Fasken's Petition for Review"). But because the Commission also invoked the proceedings in the D.C. Circuit in its motion to dismiss

the State's petition for review, the State finds it prudent to explain why the proceedings in the D.C. Circuit should not present any obstacle to this Court's consideration of the State's petition.

Under the Hobbs Act, the courts of appeals have jurisdiction over only "final orders of the" the Commission. 28 U.S.C. § 2342(4). Petitioner Fasken (and multiple other parties), however, filed petitions for review in the D.C. Circuit of interlocutory orders that preceded issuance of the license. The D.C. Circuit held those petitions in abeyance pending issuance of the license. *See Don't Waste Michigan et al. v. NRC*, Case No. 21-1048, Doc. No. 1888644 (Mar. 5, 2021). Once the license issued and proceedings resumed, the D.C. Circuit *sua sponte* directed the parties to explain how the court had "jurisdiction over each of the orders identified in the petitions for review." Doc. No. 1921742 (Nov. 10, 2021). The D.C. Circuit expressly questioned whether "a new petition for review, rather than an amended petition, is required [to] obtain review of the order granting a license." *Id.* As the D.C. Circuit's order reflects, no party had filed a "new petition for review" challenging the license itself by that point, which was nearly two months after the license was issued.

That presents a problem under 28 U.S.C. § 2112, which governs petitions for review of agency action that are heard directly in the courts of appeals. Under section 2112, if petitions for review are filed in only one court of appeals "within ten days after issuance of the order," then the agency must "file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order." 28 U.S.C. § 2112(a)(1). Moreover, "[a]ll courts in which proceedings are [later] instituted with respect to the same order, other than the court in which

the record is filed . . . *shall* transfer those proceedings to the court in which the record is so filed." *Id.* § 2112(a)(5) (emphasis added).

As explained above, and as the Commission seemingly concedes, *see* Mot. 10, Texas is the only petitioner either here or in the D.C. Circuit that filed its petition for review within ten days of issuance of the license. Accordingly, the Commission was obligated to file the administrative record with this Court, and it did so on November 3 by filing a certified list of the record's contents. *See* Fed. R. App. P. 17 (filing of "certified list" constitutes filing of the record). But then, rather than advising the D.C. Circuit that this proceeding exists and that the D.C. Circuit is statutorily obligated to transfer *its* cases, the Commission filed *another* certified list in the D.C. Circuit on November 22. *Don't Waste Michigan et al. v. NRC*, Case No. 21-1048, Doc. No. 1923391.

By filing the same record in a second court, the Commission has caused unnecessary complications and seemingly stopped the D.C. Circuit from following section 2112(a)(5)'s command that it "shall transfer those proceedings to the court in which the record is so filed." *See Remington Lodging & Hospitality, LLC v. NLRB*, 747 F.3d 903, 904 (D.C. Cir. 2014) ("[A]ll other courts of appeals *must* then transfer any related proceedings to the court in which the agency files the record." (emphasis added)). The Commission justifies its decision to file the record in two circuits by asserting (at 12) that "the first-to-file rule should be measured from the first petition filed in the D.C. Circuit in February 2021." But that contention cannot be squared with the plain language of the statute. Congress used the word "within" in section 2112(a) to create a filing window, not a deadline. *See Public Citizen v. NRC*, 845 F.2d

1105, 1109 (D.C. Cir. 1988); *W. Union Tel. Co. v. FCC*, 773 F.2d 375, 377–78 (D.C. Cir. 1985) (Scalia, J.). And that window opened with the issuance of the license—the agency's "final order"—on September 13, *not* in, *e.g.*, February 2021, when the only orders that had been issued were non-final collateral ones. If a petition for review of an interlocutory order could win the race to the courthouse, then parties could manipulate venue selection in a way that Congress sought to foreclose. *See Wynnewood Refining Co. v. OSHA*, 933 F.3d 499, 501 (5th Cir. 2019) ("An agency's conduct cannot override [§ 2112(a)(1)'s] statutory command that the appeal be heard in the circuit where the petition for review was first filed. . . . [A]n agency cannot subvert the congressional directive to file the record in the circuit where a party first appealed."); *E. Air Lines, Inc. v. CAB*, 354 F.2d 507, 511 (D.C. Cir. 1965) (noting, as to section 2112, that "Congress . . . was particularly concerned with preventing the agency from selecting the forum by filing the record in the court of its selection"). Indeed, both this Court and the D.C. Circuit have recognized that a premature petition for review cannot win the race to the courthouse under section 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 at 1108–10.

This unusual chain of events makes it is unclear how the D.C. Circuit can continue to hear the pending petitions for review in the *Don't Waste Michigan* matter. No matter what happens with the difficult jurisdictional and venue-related issues presented in *Don't Waste Michigan*, the State's petition for review is properly before this Court and should move forward here. *See* 28 U.S.C. § 2112(a)(5).

Respectfully submitted.

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Certificate of Service

On December 13, 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
Michael R. Abrams

Certificate of Compliance

This document complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,191 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).

/s/ Michael R. Abrams
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