ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DON'T WASTE MICHIGAN et al., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents, and INTERIM STORAGE PARTNERS, L.L.C., Intervenor-Respondent.	)	No. 21-1048, consolidated with Nos. 21-1055, 21-1056, 21-1179, 21-1127, 21-1229, 21-1130, 21-1131

FEDERAL RESPONDENTS' OPPOSITION TO MOTION FOR SUPPLEMENTAL BRIEFING

Federal Respondents (the Nuclear Regulatory Commission (NRC) and the United States of America) oppose Petitioner Sierra Club's motion for supplemental briefing to address the Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), because the principles the Court articulated in *West Virginia* were not raised by any of the petitioners here and because the petitioners have not raised any issues of statutory interpretation concerning the agency's authority to issue away-from-reactor spent fuel storage licenses.

1. These are consolidated petitions for review relating to NRC's issuance of a license to Intervenor Interim Storage Solutions for the storage of spent nuclear fuel. Petitioners filed three opening briefs on March 18, 2022, and Federal Respondents filed their brief on June 6, 2022. On June 30, 2022, the Supreme Court decided *West Virginia*. On July 13, 2022, Petitioner Beyond Nuclear filed a Rule 28(j) letter informing the Court about the decision. A week later, on July 20, 2022, Petitioners filed their three reply briefs, none of which mentioned either *West Virginia* or the major questions doctrine. Intervenor Interim Storage Partners and Federal Respondents filed letters responding to Beyond Nuclear's Rule 28(j) letter on July 25, 2022, and July 27, 2022, respectively. More than a week after briefing closed, on July 29, 2022, Petitioner Sierra Club requested that the Court allow another round of supplemental briefs (both opening briefs and reply briefs from each party) on the impact of *West Virginia* on the issues in this case. Sierra Club Motion at 8. Sierra Club's request (which is not joined by any other party, including its co-Petitioner Don't Waste Michigan) should be denied because the central issue in *West Virginia*—the major questions doctrine—is not properly before the Court in these cases and does not bear on the issues that have been raised.

2. The major questions doctrine, as articulated in *West Virginia*, is not currently before the Court, and Sierra Club's request to belatedly introduce the

issue is unjustified. When this Court established a briefing schedule and format, it reminded all Petitioners, including Sierra Club, that "Petitioners must raise issues and arguments in the opening brief" and that the Court "ordinarily will not consider issues and arguments raised for the first time in the reply brief." Order, Doc. No. 1921742 (Nov. 10, 2021). Yet as we explained in our response to the Rule 28(j) letter submitted by Petitioner Beyond Nuclear, Inc., no party to this case raised the major questions doctrine in the briefing in this case, and no petitioner has challenged the agency's authority to issue licenses to store spent fuel. Federal Respondents' Letter, Document No. 1956624 (July 27, 2022). Indeed, no Petitioner (including Sierra Club) even cited *West Virginia* in their three reply briefs, even though the decision was issued on June 30, 2022, twenty days before replies were filed.

3. Sierra Club admits that it did not brief the issue about the Commission's licensing authority under the Atomic Energy Act, but it contends that the issue "was not voluntarily waived" because of the word limit imposed by the Court. Sierra Club Motion at 3 ("But because of the restriction on the length of the briefs imposed by the Court, Sierra Club did not brief that issue, so it was not voluntarily waived."). Not surprisingly, Sierra Club cites no authority for the proposition that a party's decision to not brief an issue may be excused if the court granted it fewer words than it requested. Sierra Club is responsible for its choice

of which issues and arguments to present to the Court, and its decision to allocate its word allotment to other issues and arguments does not excuse its waiver.

4. To be sure, Sierra Club incorporated by reference an argument Petitioner Beyond Nuclear has asserted in its separate Brief that NRC's issuance of the license in this case violates the Nuclear Waste Policy Act (NWPA) because the license authorizes the storage of spent fuel to which the Department of Energy owns title. This argument does not implicate the major questions doctrine, which is a tool of statutory interpretation to be employed in a narrow category of cases in which there is "reason to hesitate before concluding that Congress meant to confer []authority" upon an agency. *West Virginia*, 142 S. Ct. at 2608. As we have explained in Federal Respondents' Rule 28(j) letter response and brief, Federal Respondents *agree* with Petitioners that that the NWPA prohibits ISP from storing waste owned by the Department of Energy. Thus, there is not even an issue of statutory interpretation for the Court to resolve, and certainly not one that requires application of the major questions doctrine, which applies only in "extraordinary" circumstances. 142 S. Ct. at 2608. Even if petitioners' briefs did raise a statutory interpretation question, the major questions doctrine does not apply for the reasons stated in our response to Beyond Nuclear's Rule 28(j) letter. Federal Respondents' Letter at 1-2, Document No. 1956624 (July 27, 2022).

5. The same is true of Sierra Club's assertion that the major questions doctrine somehow affects in arguments arising under the National Environmental Policy Act. (Motion at 7-8). Sierra Club's briefs do not suggest any statutory interpretation question with respect to the public participation arguments that it raised and the principles articulated in *West Virginia* have nothing to do with the agency's process for addressing comments from the public concerning proposed licenses.

6. Sierra Club also asserts that *West Virginia* "was the first case to actually refer to and rely on the major questions doctrine" and that it did not have the opportunity to brief the issue. Sierra Club Motion at 2. This argument is unpersuasive. The decision in *West Virginia* makes plain that, while the label may be new, the principles underlying the major questions doctrine are derived from "an identifiable body of law that has developed over a series of significant cases" dating back more than twenty years. 142 S. Ct. at 2610.

7. Sierra Club relies on the fact that Federal Respondents sought leave to file supplemental briefs before the Fifth Circuit concerning the major questions doctrine in *Texas v. NRC*, No. 21-6074 (5th Cir.). In that case, Texas, as well as some of the Petitioners in this case, are also challenging the NRC's issuance of a license to Interim Storage Partners. However, the differences between *Texas* and this case both refute Sierra Club's arguments concerning the availability of the

major questions doctrine argument and illustrate why Sierra Club is wrong. Unlike the Petitioners here, Texas asserted before the Fifth Circuit in its brief (filed on February 7, 2022, before *West Virginia* was decided) that "no language in the AEA grants the Commission the power to license private, away-from-reactor storage facilities for spent nuclear fuel," and it further asserted, based on the very case that the Supreme Court cited in *West Virginia*, that "courts expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." Brief of Texas Petitioners (ECF # 00516194148) at 15-16 (quoting *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (cleaned up)). Texas chose to challenge the NRC's authority under the AEA and specifically invoked major question principles in support of its argument; Sierra Club and the other Petitioners here did not. That distinction explains why supplemental briefing after *West Virginia* was appropriate there and is not warranted here. And in the Texas case, where such briefing was appropriate, Federal Respondents have explained in their supplemental brief why the major questions doctrine still does not apply. *See* Supplemental Brief for Federal Respondents, Document No. 00516418413, Case No. 21-60743 (5th Cir. Aug. 3, 2022).

For all these reasons, the Court should deny Sierra Club's request for supplemental briefing.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that FEDERAL RESPONDENTS' OPPOSITION TO MOTION FOR SUPPLEMNTAL BRIEFING complies with the formatting and type-volume restrictions of the rules of the U.S. Court of Appeals for the District of Columbia Circuit. The motion was prepared in 14-point, double spaced, Times New Roman font, using Microsoft Word 2013, in accordance with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The motion contains 1,290 words and therefore complies with Fed. R. App. P. 27(d)(2)(A).

/s/ Andrew P. Averbach
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August 5, 2022