

ORAL ARGUMENT NOT YET SCHEDULED

**In the United States Court of Appeals
For the District of Columbia Circuit**

DON'T WASTE MICHIGAN, ET AL.,

Petitioners

v.

U.S. NUCLEAR REGULATORY COMMISSION
AND UNITED STATES OF AMERICA,*Respondents*

INTERIM STORAGE PARTNERS, LLC,

*Intervenor for Respondents***No. 21-1048**(Consolidated with Nos.
21-1055, 21-1056, 21-1179,
21-1227, 21-1229, 21-1230,
21-1231)**INTERIM STORAGE
PARTNERS, LLC'S
OPPOSITION TO SIERRA
CLUB'S MOTION FOR
SUPPLEMENTAL
BRIEFING**

Intervenor Interim Storage Partners, LLC (“ISP”) respectfully submits the following opposition to “Sierra Club’s Motion for Supplemental Briefing,” dated July 29, 2022 (the “Motion”).

Sierra Club requests the opportunity to submit additional briefs regarding the Supreme Court’s decision in *West Virginia v. EPA*, 2022 WL 2347278 (U.S. June 30, 2022). Another petitioner, Beyond Nuclear, submitted a purported Rule 28(j) letter regarding that case, to which both

the Federal Respondents and ISP have already responded. Sierra Club's motion for yet more briefing in these appeals should be denied for a host of reasons.

First, no petitioner in this case has challenged the NRC's authority under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.*, to grant the license at issue.¹ Sierra Club admits that it "did not brief that issue," blaming this Court's length-of-brief restrictions in this appeal. Motion at 3. Those reasonable restrictions, however, neither excuse Sierra Club's determination to not attempt to make the argument in this case, nor justify Sierra Club's after-the-fact effort to make brand new arguments after briefing is complete. *West Virginia* is all about—indeed it is only about—whether "Congress in fact meant to confer the power the agency has asserted." *West Virginia*, 2022 WL 2347278 at *11. Neither Sierra Club nor any other petitioner in this appeal has disputed that with respect to the Atomic Energy Act and the NRC. Further briefing in this case regarding *West Virginia* is therefore not appropriate.

¹ Indeed, this Court has expressly held such authority to exist. *See, Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536, 542 (D.C. Cir. 2004) ("the NRC had authority under the AEA to regulate private away-from-reactor storage facilities.").

Second, unlike in this case, one of the petitioners in the pending appeal before the United States Court of Appeals for the Fifth Circuit, namely the State of Texas, did purport to argue that the NRC's issuance of the challenged licensed "violates the major questions doctrine." Reply Brief of State Petitioners at 11, *State of Texas et al. v. Nuclear Regulatory Commission*, No. 21-60743 (5th Cir. May 16, 2022) (Doc. No. 516321267). Accordingly, supplemental briefing regarding the import of *West Virginia* made sense in that case. Not so, here.

Third, by its very terms, *West Virginia* does not reflect a "new statement of the law," as Sierra Club alleges. Motion at 3. The majority expressly rejected that characterization of its holding, finding, instead, that its ruling was grounded in "a series of significant cases" going back many years. *West Virginia*, 2022 WL 2347278 at *13 (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). As noted, prior to the decision in *West Virginia*, another petitioner in another appeal made a lack-of-authority argument regarding the NRC relying on those earlier cases. Sierra Club did not, and it is too late now.

For all of these reasons, ISP respectfully requests that the motion by Sierra Club be denied.

Dated: August 5, 2022

Respectfully submitted,

s/ Brad Fagg _____

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CERTIFICATE OF COMPLIANCE

This response complies with the length limit of FED. R. APP. P. 27(d)(2)(A) and D.C. Cir. R. 27(a)(2) because it contains 487 words. This response also complies with the typeface and type-style requirements of FED. R. APP. P. 27(d)(1)(E), 32(a)(5)(A), 32(a)(6), and D.C. Cir. R. 27(a)(2) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated: August 5, 2022

s/ Brad Fagg

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