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

REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS OR TRANSFER THE PETITION FOR REVIEW OF FASKEN LAND AND MINERALS AND PERMIAN BASIN LAND AND ROYALTY OWNERS

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INTRODUCTION

Fasken Land and Minerals, Limited and Permian Basin Land and Royalty Owners (together "Fasken") and the State of Texas, the Governor of Texas, and the Texas Commission on Environmental Quality (together, "Texas") have responded to our motion to dismiss or, in the alternative, to transfer Fasken's Petition for Review by asserting that this Court is the proper locus to adjudicate petitions for review challenging the issuance of a license to Interim Storage Partners, LLC ("ISP"). Fasken's and Texas's arguments would upend 50 years of precedent confirming that the exclusive avenue for persons not admitted to the licensing proceedings to challenge NRC licensing decisions is by seeking review of the NRC's decision, issued through the agency's adjudicatory process, denying those persons party status. Fasken already took advantage of that opportunity by seeking review in the D.C. Circuit of the NRC's decision denying its request to intervene, and its efforts either to evade applicable exhaustion requirements or to split its claims should not be countenanced. At a minimum, Fasken's Petition should be transferred to the D.C. Circuit, which has ordered consolidated briefing on seven petitions for review related to the ISP license, including Fasken's earlier-filed petition.

ARGUMENT

I. Fasken's Petition for Review should be dismissed because Fasken has already exercised its sole opportunity to seek judicial review by filing a petition for review in the D.C. Circuit.

Fasken wholly ignores the case law we cited from multiple circuits—and cites no case from any circuit suggesting differently—holding that, under the Hobbs Act, the *exclusive* remedy for a putative intervenor who has never obtained party status yet seeks to challenge the issuance of a license is to seek review of the decision that denied its request to intervene. *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."); *Ecology Action v. Atomic Energy Comm'n*, 492 F.2d 998, 1000 (2nd Cir. 1974); *Thermal Ecology Must Be Preserved v. Atomic Energy Comm'n*, 433 F.2d 524, 526 (D.C. Cir. 1970); *see also Nat'l Parks Conservation Ass'n v. FERC*, 6 F.4th 1044, 1049 (9th Cir. 2021) (exercising jurisdiction over petition brought by non-party petitioner because petitioner "is considered a party for the limited purpose of reviewing the agency's basis for denying party status") (cleaned up).

Fasken asserts that it is entitled to seek review of the license before this Court because it "participated in the agency proceedings under review" and was aggrieved by the agency's decision. Fasken Opposition at 6 (quoting *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984)). Yet Fasken has

already sought review of the agency's decision as to its participation in the agency proceedings by petitioning for review in the D.C. Circuit, challenging the NRC's denial of admission to the proceedings. And Fasken has a full and fair opportunity to litigate its alleged aggrievement before that court by when the petitioners in the consolidated petitions file an opening brief or briefs in January.

What Fasken cannot do is seek review (whether in the same court or, even more inappropriately, in a second court), of the agency's final judgment—i.e., its issuance of a license. *See Alaska*, 980 F.2d at 763. The Hobbs Act window for Fasken to seek judicial review opened once—and only once—when the NRC denied its request to intervene in the license proceedings. Fasken seeks to convert its unsuccessful intervention effort into a right to challenge the license. But attempted intervention is not enough. "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." *NRDC v. NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016) (emphasis added). Permitting Fasken to challenge the license itself now would eviscerate the exhaustion requirement. *See Gage v. AEC*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973), *cited in Wales Transp.*, 728 F.2d at 776 n.1. And it would upend the "coherent plan" that Congress designed in the Atomic Energy Act ("AEA")—including through its creation in AEA Section 189 of a hearing opportunity to challenge NRC licensing decisions—for the "prompt

implementation of national nuclear policy." *Quivira Mining v. EPA*, 728 F.2d 477, 482 (10th Cir. 1984).

The opportunity for a party to challenge, under the Hobbs Act, the denial of a request to intervene likewise refutes Fasken's assertion (Opposition at 7) that the NRC can "limit judicial review" by defining who becomes a party. As the existence of Fasken's D.C. Circuit petition (over which Federal Respondents acknowledge Hobbs Act jurisdiction) makes clear, putative intervenors *can* seek judicial review of agency decisions that deny them party status. What they *cannot* do is have two bites at the petition-for-review apple, particularly where, as here, they seek to do so in separate courts of appeals.

Equally flawed is Fasken's invocation of the *ultra vires* exception to exhaustion principles, as set forth in *American Trucking Ass'ns v. ICC*, 673 F.2d 82, 84 (5th Cir. 1982). As an initial matter, the statement recognizing the exception is dictum, *Erie-Niagara Rail Steering Comm. v. STB*, 167 F.3d 111, 112 (2d Cir. 1999), has been roundly criticized and rejected by other courts, *Baros v. Texas Mexican R.R. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005); *see In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986); *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1249 (11th Cir. 2006), and even in this Court has been deemed "exceedingly narrow" and inapplicable when an agency has the ability to determine its own jurisdiction,

Merchants Fast Motor Lines, Inc. v. ICC, 5 F.3d 911, 922 (5th Cir. 1993). Fasken fails to explain how its Petition clears any of these hurdles.

Moreover, Fasken's bare allegation (Fasken Opposition at 7-8) that NRC acted outside of its authority by violating the National Environmental Policy Act ("NEPA") does not trigger the *American Trucking* exception. If it did, the exception would swallow the rule by excusing exhaustion in *all* cases where a petitioner alleges that the agency acted in violation of law. To the extent that Fasken asserts that under the Nuclear Waste Policy Act ("NWPA"), the NRC lacks authority to issue a license for the ISP facility, Opposition at 9, Fasken raised precisely this assertion before the NRC (which considered and rejected it). And Fasken has stated its intent to raise that issue before the D.C. Circuit. *See Don't Waste Michigan v. NRC*, Fasken's Non-Binding Statement of Issues (D.C. Cir. 21-1048), Document No. 1921498, at 2 ("Whether the NRC violated the NWPA . . . by refusing to grant Petitioners a hearing on the question of whether the NRC is prohibited by the APA from issuing a license that contains provisions that would directly violate the NWPA if implemented."). Fasken cannot ground jurisdiction in this Court based on arguments it also plans to make making elsewhere.[1]

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[1] Fasken also asserts that the Administrative Procedure Act ("APA") provides a basis for this Court to exercise jurisdiction. Fasken Opposition at 6 n.4. It is

In short, Fasken's Petition for Review should be dismissed because, as a nonparty to the licensing proceedings, its sole remedy is to seek review of the NRC's denial of its request to intervene, an avenue it is pursuing before the D.C. Circuit. There is no jurisdictional basis for the Court to entertain Fasken's freestanding challenge to the license here.

II. Fasken and Texas inappropriately invoke 28 U.S.C. § 2112.

If the Court declines to dismiss Fasken's Petition, it should transfer the Petition to the D.C. Circuit. Both Fasken and Texas rely on 28 U.S.C. § 2112 to oppose transfer, and they assert that this Court, and not the D.C. Circuit, should be the locus of challenges to the issuance of the ISP license. But their arguments (and Texas's in particular) are based on the erroneous position that Texas's petition was the first one to be properly filed.

As an initial matter, the petitions originally filed in the D.C. Circuit by Don't Waste Michigan (21-1048), Beyond Nuclear (21-1056), Sierra Club (21-1104), and Fasken (21-1147) were not "premature," as Texas claims. Texas Opposition at 3. Each of the petitioners in those cases, including Fasken, were denied party status as a consequence of the Commission's adjudicatory decisions. Under the Hobbs Act,

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incorrect. The APA does not provide an independent grant of jurisdiction where, as here, Congress has enacted a specific scheme for judicial review of agency action that provides an adequate remedy. 5 U.S.C. § 704; *see, e.g.*, *Dresser v. Meba Med. & Benefits Plan*, 628 F.3d 705, 711 (5th Cir. 2010).

the window for these parties to seek judicial review opened upon entry of the adjudicatory decisions (and closed 60 days later). *See* 28 U.S.C. § 2344. As discussed above, issuance of the license did not start or reopen the judicial-review window for those petitioners (or anyone else, like Texas, who was never admitted as a party admitted to the proceedings).

Nor is it an answer for Fasken and Texas to assert that the agency orders under review before this Court are different from the ones properly before the D.C. Circuit, such that Texas' petition somehow anchors the proceedings here. It is true that the orders are different—the properly filed D.C. Circuit petitions challenge the Commission's adjudicatory decisions, while the petitions before this Court purport to challenge the license. But the distinction between the decisions on intervention and the final order on the license ignores the D.C. Circuit's admonition that putative intervenors that seek intervention in litigation (or by comparison, administrative proceedings) but were not admitted to the proceedings, "*could not later seek review of the final judgment on the merits*." *Alaska*, 980 F.2d at 763 (emphasis added).

Moreover, courts evaluating potential transfer under 28 U.S.C. § 2112, including the ones Fasken cites in its opposition (and that we cited in our motion because they support our position), have recognized that strict adherence to a first-to-file rule is not warranted when (1) the first filer is not substantially aggrieved,

Public Service Comm'n for the State of New York v. Federal Power Comm'n, 472 F.2d 1270, 1272 (D.C. Cir. 1972), (2) when a party purports to challenge the second in a sequence of related orders, *Westinghouse v. NRC*, 598 F.2d 759 (3rd Cir. 1979); *BASF Wyandotte Corp. v. Costle*, 582 F.2d 108, 112 (1st Cir. 1978), or (3) when a transfer would undermine the continuity of the proceeding, *Public Service Comm'n*, 472 F.2d at 1272.

These conditions are manifest here. *See* Federal Respondents' Motion at 10-12. Consistent with these decisions, the Court should transfer Fasken's November 2021 Petition to the D.C. Circuit, which has jurisdiction over Fasken's original and properly filed August 2021 petition for review. That court can evaluate the jurisdictional soundness of Fasken's second petition (and determine the extent to which the arguments raised therein are effectively duplicative of its first—an assertion Fasken denies but about which it provides no specifics).

Texas references "the difficult jurisdictional and venue-related issues presented in *Don't Waste Michigan*," the consolidated petitions in the D.C. Circuit. Texas Opposition at 5. But these difficulties are directly attributable to Texas and Fasken. The venue issue arose because Texas and Fasken petitioned for review in

this Court, rather than the D.C. Circuit.[2] And the jurisdictional issue arose because Texas and Fasken petitioned for review of an NRC order without successfully intervening in the agency proceedings and exhausting the required agency procedures.

In addition, Texas asserts that "[b]y 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." Texas Opposition at 4. This is incorrect. For one thing, as Texas acknowledges, *id*., an agency's filing of the record "cannot subvert the congressional directive to file the record in the circuit where a party first appealed." *Wynnewood Refining Co. v. OSHA*, 933 F.3d 499, 501 (5th Cir. 2019). For another, the Commission's record in this Court is not "the same" as the record in the D.C. Circuit because Texas is challenging the NRC's license without having sought to participate in the agency's proceedings, and the record before the D.C. Circuit includes the materials submitted to the NRC's Atomic Safety and Licensing Board and the Commission as part of the

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[2] Fasken *could* have filed its original petition for review in this Court, but it chose to file in the D.C. Circuit. Likewise, Fasken does not contend that it faced any obstacle to filing the present Petition for Review in the D.C. Circuit. To be sure, venue is proper in this Court. But having first chosen the D.C. Circuit as its preferred venue, Fasken's decision to file its related Petition in a different venue is inefficient and improper.

adjudication. Texas' failure to exhaust its administrative remedies has deprived this Court of the ability to hear from the agency that Congress assigned to resolve in the first instance issues within its expertise. Moreover, although Federal Respondents have filed the administrative record in this Court, they also have moved to dismiss Texas's petition because it is jurisdictionally deficient.

Finally, the need to consider whether Section 2112 is properly invoked here underscores the jurisdictional defects underlying Fasken's and Texas's petitions for review. Fasken suggests that Section 2112 requires the transfer to this Court of the follow-on petitions in both the D.C. Circuit and the Tenth Circuit, even though litigation related to the ISP license proceedings was properly initiated in the D.C. Circuit beginning in February of this year. Texas goes even further, questioning "how the D.C. Circuit can continue to hear the pending petitions for review in the *Don't Waste Michigan* matter." Texas Opposition at 5. The suggestion that the proceedings in this Court should leapfrog the four jurisdictionally sound petitions before the D.C. Circuit filed well before Texas' petition undermines well-settled exhaustion principles that have governed judicial review of NRC decisions since the agency's inception.

Through enactment of the AEA, Congress specifically created a means by which third parties could raise concerns related to the issuance of licenses by the NRC by requesting a hearing before a panel of experts, and it channeled judicial

review of these third parties' arguments through the NRC's adjudicatory process. *See* 42 U.S.C. § 2239 (providing for hearing opportunities in licensing proceedings); *id.* § 2241 (providing for creation of Atomic Safety and Licensing Boards, to be composed primarily of technical experts); *Quivira Mining*, 728 F.2d at 482 (noting that an "integral part" of Congress's "coherent plan for the development and regulation of nuclear energy" was the speedy and final review of agency actions); *see, e.g.*, *Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 196 (D.C. Cir. 2013) (reviewing the agency's decision not to admit putative intervenors' contentions and determining, after its review of the adjudicatory record, that the agency acted reasonably). Fasken's and Texas's suggestion that the Court should review the issuance of the license, independent of the adjudication, is inconsistent with the statutory command that arguments relating to the issuance of licenses implicating issues "at the frontiers of science," *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983), be routed through the specialized hearing process that Congress created.

CONCLUSION

Respondents respectfully request that this Court dismiss Fasken's Petition for Review or transfer it to the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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December 16, 2021

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

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

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/s/ Andrew P. Averbach
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CERTIFICATE OF SERVICE

I certify that on December 16, 2021, I served a copy of **REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS OR TRANSFER THE PETITION FOR REVIEW OF FASKEN LAND AND MINERALS AND PERMIAN BASIN LAND AND ROYALTY OWNERS** 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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