No. 17-60191

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *Petitioner*,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF ENERGY; JAMES RICHARD "RICK" PERRY, in his official capacity as United States Secretary of Energy; UNITED STATES NUCLEAR REGULATORY COMMISSION; KRISTINE L. SVINICKI, in her official capacity as Chairman of the United States Nuclear Regulatory Commission; UNITED STATES NULCEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD; THOMAS MOORE, in his official capacity as United States Nuclear Regulatory Commission Atomic Safety and Licensing Board Judge; PAUL RYERSON, in his official capacity as United States Nuclear Regulatory Commission Atomic Safety and Licensing Board Judge; RICHARD WARDWELL, in his official capacity as United States Nuclear Regulatory Commission Atomic Safety and Licensing Board Judge; UNITED STATES DEPARTMENT OF TREASURY; STEVEN T. MNUCHIN, in his official capacity as United States Secretary of the Treasury, R*espondents,*

and

NUCLEAR ENERGY INSTITUTE; ENERGY NORTHWEST; KANSAS GAS AND ELECTRIC COMPANY D/B/A WESTAR ENERGY; KANSAS CITY POWER & LIGHT COMPANY; KANSAS ELECTRIC POWER COOPERATIVE, INC.; WOLF CREEK NUCLEAR OPERATING CORPORATION; UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI; AND TENNESSEE VALLEY AUTHORITY, *Intervenor-Respondents,*

and

STATE OF NEVADA, *Intervenor-Respondent*.

NEVADA'S OPPOSITION TO TEXAS'S MOTION FOR A DECLARATORY JUDGMENT AND A PRELIMINARY INJUNCTION AND NEVADA'S OPPOSED COUNTERMOTION TO DISMISS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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I. INTRODUCTION

President Trump's recently introduced budget contains a $120 million request to restart the same Yucca Mountain nuclear waste dump that the Nation's elected representatives, after years of extensive and democratic debate, scuttled through lack of funding.[1] Rather than allow congressional decision-making to run its course once again, Texas's Petition asks this Court for the extraordinary relief of usurping the budgetary process and directing Respondents—Executive Branch agencies and officers—to complete a laundry list of tasks, including the requesting and spending of unappropriated funds to rush through the Yucca Mountain adjudicatory and licensure processes.[2] Indeed, Texas opposed the Federal Respondents' request to hold this matter in abeyance pending the legislative appropriations process.[3] But this Court cannot wield its Article III power to force the Executive to request a certain level of funding or coerce Congress to appropriate a certain amount of funds "*necessary…to complete*" the licensing and adjudicatory processes.[4] Texas's improper attempt to drag this Court into the budgetary process rests on nonjusticable political questions.

But Texas doesn't stop there. Its Petition also makes the extreme request to enforce and hold certain Respondents in contempt of the D.C. Circuit's 2013

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[1] Office of Management and Budget, *A New Foundation for American Greatness: Budget of the U.S. Government for Fiscal Year 2018* (May 2017), *available at* https://www.whitehouse.gov/omb/budget (proposing $120 million for Yucca Mountain related activities).

[2] Pet. ¶¶3-4, 6-8, 11.

[3] Fed. Resp'ts Mot. Abeyance 9.

[4] Pet. ¶¶7-8, 3-4, 11.

mandamus order in *Aiken II*—a separate action at the heart of Texas's Petition that Texas has never tried to join.[5] Texas no doubt recognizes the improper scope of its list of cascading remedies and so limits its present declaratory and injunctive Motion to its first two prayers for relief. But first, this Court lacks jurisdiction over both the Petition and the Motion.

42 U.S.C. §10139(c) requires a party to bring any civil action for judicial review under the Nuclear Waste Policy Act ("Act") "not later than the 180th day after the date of the decision or action or failure to act involved" unless the party was reasonably unaware of the action or inaction. This deadline is jurisdictional, and it is clear from the Petition and the Motion that Texas's challenges are barred. By its own admission, "[t]he thrust of Texas's Petition…is 'equitable relief prohibiting [the Department of Energy] from conducting other consent-based siting activity and ordering Respondents to finish the licensure proceedings.'"[6] The Petition and Motion proclaim that DOE began improperly conducting consent-based siting in 2010 with the Blue Ribbon Commission or, at the latest, in 2013—after *Aiken II* and the release of a strategy document.[7] Likewise, Texas asserts that "[s]ince that [*Aiken*] ruling, Respondents have not taken meaningful steps toward satisfying their statutory obligations" to license Yucca.[8] Lastly,

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[5] Pet. 11 (consent-based siting is "a form of repository siting prohibited under…the order in *Aiken*"); Pet. 5 ("[T]he D.C. Circuit ordered the NRC to complete adjudication of the Yucca application"); Pet. ¶¶13-17 ("civil contempt for failure to comply with…court directives").

[6] Tex. Opp'n NEI Mot. Intervene 1 (citing Pet. 3); *see also* Pet. 5, 17-18.

[7] Pet. 5, 10-11; Mot. 14-15.

[8] Pet. 13.

Texas's Motion takes aim at DOE's purported failure to meet the Act's January 31, 1998 deadline to accept spent nuclear fuel.

Yet despite all these alleged grievous injuries, Texas did not initiate this proceeding until March 2017—years after 42 U.S.C §10139(c)'s 180-day timeframe to contest each of these purported actions and inactions. And courts have rejected the "ongoing breach"[9] theory Texas invokes to escape the jurisdictional time limitation imposed by the statute's plain language. Without authority under 42 U.S.C. §10139, Texas's requests for declaratory, injunctive, and mandamus relief do not save it from dismissal because those requests do not provide an independent basis for jurisdiction, and equitable remedies are unavailable where there is a directly conflicting jurisdictional deadline. Therefore, this Court is without jurisdiction and must dismiss Texas's Petition, deny Texas's Motion, and grant Nevada's Motion to Dismiss.

II. STATEMENT OF FACTS

A. The Yucca Mountain Timeline.

For purposes of this Countermotion only, Nevada will take the facts Texas alleges as true,[10] with certain amplifications that follow. The Act was enacted in 1983. Pet. 7. Among other things, it required the Department of Energy ("DOE") to begin

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[9] Pet. 5.

[10] *See Kardules v. City of Columbus*, 95 F.3d 1335, 1347 & n.4 (6th Cir. 1996) (evaluating a motion to dismiss an appeal, the appellate court "'must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'").

accepting the Nation's spent nuclear fuel on or before January 31, 1998. Pet. 10; Mot. 2. In 1987, with the deadline approaching, Congress amended the Act—over Nevada's objections—to designate Yucca Mountain as the unwilling host for its sister states' nuclear waste. Mot. 3, 5; Pet. 9. However, the Yucca repository was not complete by the 1998 deadline and DOE did not accept any spent nuclear fuel. Mot. 4-5; Pet. 10.

Eventually, in 2008, DOE submitted to the Nuclear Regulatory Commission ("NRC") a license application to build a repository at Yucca. Pet. 10; Mot. 5-6. But two years later, President Obama ordered DOE to withdraw its application. Pet. 10; Mot. 6. DOE's motion to withdraw was ultimately denied. Pet. 10; Mot. 6. Even so, NRC later held the licensing proceeding in abeyance due to lack of funding. Pet. 10; 74 N.R.C. 368, 369-70 (2011).

DOE's attempt to withdraw its application and the decision to suspend the licensing process were subsequently challenged in a D.C. Circuit mandamus action. *In re Aiken Cty.*, 645 F.3d 428 (D.C. Cir. 2011) ("*Aiken I*"). The D.C. Circuit dismissed the action on justiciability, ripeness, and jurisdictional grounds, and because DOE had not taken, or failed to take, any final or discrete agency action that could be challenged. *Id.* at 435-38.

A follow-up mandamus action was subsequently filed in the D.C. Circuit contending that NRC was still neglecting its statutory duty to process the Yucca license application. *In re Aiken Cty.*, 725 F.3d 255, 258 (D.C. Cir. 2013) ("*Aiken II*"). In 2012,

after the mandamus petition was filed, a panel of the D.C. Circuit held the case in abeyance pending Fiscal Year 2013 appropriations. *Id.* But neither Congress nor NRC acted and the D.C. Circuit finally issued a writ of mandamus against NRC. *Id.* at 259.

Over the dissent of Judge Garland, the panel reasoned that NRC had a legal obligation to continue the licensing process until NRC spent all of the limited remaining funds that Congress had appropriated. *Id.* at 259-60. NRC could not wait until Congress appropriated all the funds necessary to complete the licensing process. *Id.* at 259. Although the panel did not order resumption of the adjudicatory proceeding, it opined that NRC had the duty to spend the remaining funds even though there was the risk of substantial waste if Congress later decided to stop all appropriations. *Id.* at 259-60. The panel acknowledged that "Congress, of course, is under no obligation to appropriate additional money for the Yucca Mountain project….But unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, [NRC] must promptly continue with the legally mandated licensing process." *Id.* at 267.

NRC has been complying with the D.C. Circuit's mandamus order ever since. NRC submits monthly status reports to Congress informing it of NRC's efforts to comply with the mandamus order. The last appropriation NRC received for Yucca Mountain licensing was in federal fiscal year 2011. *See* S.3635, 111th Cong. (2010). As of February 2017, with just a little over $1 million remaining, NRC has spent almost all appropriated funds on statutorily mandated licensing activities, leaving an entirely

insufficient amount to complete the licensing proceeding or even make any significant progress. NRC*, Monthly Status Report Activities Related to Yucca Mountain Licensing Action Report for February 2017* (Mar. 2017). Notably, no party to the *Aiken II* order has ever asserted non-compliance or sought contempt. And Texas has never tried to intervene to enforce any rights under the *Aiken II* order. In fact, in 2013, NRC publically solicited views on how to comply with the *Aiken* order and Texas remained silent. NRC Order (August 30, 2013)(unpub.).

Meanwhile, in 2010, President Obama established a Blue Ribbon Commission to explore alternative nuclear waste disposal methods. Pet. 10-11; Mot. 6. The Blue Ribbon Commission's research led it to conclude that "consent-based siting" is the preferred method for locating a repository site. Pet. 11. "In 2013, DOE released a strategy document outlining its plan to begin the illicit siting." Mot. 15. Texas alleges that DOE published a report "lauding the consent-based siting process" as recently as January 12, 2017. Mot. 7, 14-15. Also, in January 2017, DOE sought public comments on consent-based siting until April 14, 2017. *Id.* (citing 82 FR 43333). The comment period is now closed and DOE has represented to this Court "that it has no present intention of taking further policy action on the previous Administration's *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Waste* document…." Mot. 14; Fed. Respt's Mot. Abeyance 8.

Texas asserts that consent-based siting is "a form of repository siting prohibited under the Act *and* the order in *Aiken County*." Pet. 11 (emphasis added). Texas is adamant that "DOE began conducting illegal, consent-based siting" in 2010. Mot. at 14-15. It proclaims that, "since 2010, DOE has been spending taxpayer money and resources on consent-based siting—money, effort, and energy that should be spent on licensing Yucca Mountain." Mot. 17.

B. Texas Files Suit.

Texas submitted its Petition on March 14, 2017, invoking this Court's original jurisdiction under 42 U.S.C. §10139(a)(1). Pet. 4. While Texas also cites the general mandamus statute (28 U.S.C. §1651), the general declaratory relief statute (28 U.S.C §2201), and Federal Rule of Appellate Procedure 21, Texas relies on the Act to justify its choice of venue and its ability to file this proceeding in front of this Court in the first instance. Pet. 4.

In two conclusory sentences, Texas tries to demonstrate that its Petition is timely under 42 U.S.C §10139(c)'s jurisdictional deadline. Texas states that "[t]his massive breach of obligation by Respondents is ongoing. Thus, Petition is within [the] 180-day deadline for commencing this action." (internal citations and quotations omitted). Texas summarizes the "massive breach" as consisting of two violations of the Act. Pet. 17. "First, the Executive is violating the Act by conducting consent-based siting activities instead of pursuing Yucca's licensure." Pet. 17, 18-20. "Second, by holding the

Yucca Mountain adjudicatory hearing in abeyance, the NRC and [Atomic Safety Licensing Board] are violating the Act's requirement that they complete an up or down vote on Yucca's licensure…despite *a previous order through a writ of mandamus directing the NRC to continue the licensure process*…." Pet. 17-18 (emphasis added), 20-23.

Texas's current Motion adds a third complaint that is not developed in its Petition. The Motion presents additional details of an alleged series of violations that stem from DOE's failure to collect spent nuclear fuel by January 31, 1998, as required by the Act. Mot. 2-5, 7-13. But because the alleged actions and inactions pleaded by Texas occurred more than 180-days before Texas filed its Petition, this Court lacks jurisdiction and should dismiss this proceeding in its entirety.

III. ARGUMENT

A. Texas Has No Likelihood of Success on the Merits, and this Court Should Dismiss, Because this Court Lacks Jurisdiction Under the Act.

Under the Act, any "civil action for judicial review…may be brought not later than the 180th day after the date of the decision or action or failure to act involved…except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known…." 42 U.S.C. §10139(c). Courts will dismiss for lack of jurisdiction petitions filed after the 180-day deadline and petitions filed before there has been final agency action. *See, e.g., Pub. Citizen v. Nuclear Regulatory Comm'n*., 845

F.2d 1105 (D.C. Cir. 1988) (dismissing petition as both too late and too early); *NSP v. Dep't of Energy*, No. 94-1457, 1995 WL 479714, at *1 (D.C. Cir. July 28, 1995) (dismissing petition for lack of agency action and saying "[n]or can jurisdiction be founded on allegations of 'failure to act'").

Here, to the extent there has been any "final" agency action or inaction—itself a doubtful proposition—the alleged acts or omissions occurred more than 180-days ago. *Texas v. Dep't of Energy*, 764 F.2d 278 (5th Cir. 1985) (discussing "final agency action" under the Act and granting motion to dismiss Texas's petition because DOE's actions were neither "final" nor "ripe"). First, if DOE violated the Act by failing to accept spent nuclear fuel, Texas concedes that this breach happened years ago, on January 31, 1998. Mot. 8-13. And Texas acknowledges that litigation over DOE's failure to accept spent nuclear fuel started years before Texas filed its Petition. *Id.* at 9-13.

Second, Texas's protest of the licensing proceeding "abeyance" accrued in 2011. Pet. 17-18. On September 30, 2011, NRC issued a memorandum and order suspending the proceeding "because both future appropriated NWF dollars and FTEs for this proceeding are uncertain…." 74 N.R.C. 368, 370 (2011). At the latest, Texas's abeyance grievances arose sometime after the D.C. Circuit's *Aiken II* decision in 2013. Texas argues that "since that ruling, Respondents have not taken meaningful steps toward satisfying their statutory obligations." Pet. 13. It repeatedly assails Respondents for continuing to hold the licensing process in abeyance three years after *Aiken II*. *See id.* at

5 ("In [*Aiken*], the D.C. Circuit ordered the NRC to complete adjudication of the Yucca application, and yet, three years later, the NRC continues to hold that process in abeyance."); *id.* at 2 ("In violation of *Aiken County*, NRC and ASLB continue to hold the Yucca adjudicatory hearings in abeyance"); *id.* at 10 ("Despite that [*Aiken*] order, the NRC directed ASLB to hold the Yucca Mountain adjudicatory proceedings in abeyance."); *id.* at 22 ("The ruling in *Aiken County* was clear and unambiguous, but the NRC continues to hold the Yucca Mountain license in abeyance.").

But as discussed above, the parties have been complying with that decision by submitting status reports and completing tasks as available funds permit. No *Aiken II* party has sought sanctions or contempt for non-compliance, and Texas has never tried to intervene to enforce the D.C. Circuit's order. Further, in a November 2013 Order, NRC issued its choice of tasks to comply with *Aiken II*. 78 NRC 219. It was then, over three years ago, that NRC took the action Texas now complains about—taking steps to resume the licensing process without restarting the adjudicatory hearing. Thus, under 42 U.S.C. §10139(c), Texas is too late to contest the "abeyance." And if Texas contends that *Aiken II* is being ignored, it has another available adequate legal remedy by intervening in that action. *See Commodity Futures Trading Comm'n v. Preferred Capital Inv. Co.*, 664 F.2d 1316, 1321 (5th Cir. 1982) (dismissing for lack of jurisdiction and denying mandamus because petitioner had other adequate means of obtaining the relief).

Third, Texas's attack on consent-based siting is also without jurisdiction as either too late or too early under 42 U.S.C. §10139(c). The face of Texas's Petition asserts that DOE has been exploring consent-based siting since at least 2010 or 2013. Pet. 10-11; *see also id.* at 5 (providing consent-based siting started "[a]t the same time" as *Aiken* decision); *id.* at 11 (asserting that the *Aiken County* order prohibits consent-based siting). Texas reiterates this assertion in its Motion. Mot. 17 ("[S]ince 2010, DOE has been spending taxpayer money and resources on consent-based siting"), 14-15 ("In 2013, DOE released a strategy document outlining its plan to begin illicit siting.").

Still, Texas sat on its rights and did not file a petition with this Court until March 2017—nearly seven years after the Blue Ribbon Commission and almost four years after *Aiken II* and the 2013 strategy document. In fact, Texas waited so long to dispute consent-based siting that apparently DOE has ceased any consent-based siting activities. Fed. Resp'ts Mot. Abeyance 8.[11] Under any objective standard of timeliness, Texas is too late to challenge the implementation of consent-based siting.

At the same time, Texas's challenge to consent-based siting was too early when filed as there was no judicially reviewable final agency action. Neither the 2015 request for public comments nor the 2017 request for public comments on the Draft Consent-Based Siting Process resulted in a final rule. Mot. 15. The 2017 comment period closed on April 14, 2017 and DOE is not taking further action. Merely requesting public

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[11] Texas's prayers for relief related to consent-based siting should also be dismissed as moot.

comments is not a final agency action that this Court can review. *See Texas*, 764 F.2d at 281 (DOE's proposal of two repository sites was "not final for purposes of our review."); *Gulf Restoration Network v. Army Corps of Eng'rs*, No. CV 15-6193, 2016 WL 4987256, at *3 (E.D. La. Sept. 19, 2016) (granting motion to dismiss because decision to close public comment was not final agency action; comment period is an intermediate step in creating final agency action). Accordingly, the comment periods after 2010 and 2013 do not provide final agency action that Texas can contest under 42 U.S.C. §10139 and this Court is without jurisdiction.

There is no "ongoing breach" theory of jurisdiction under 42 U.S.C. §10139 to evade dismissal. The D.C. Circuit's opinion in *Public Citizen v. Nuclear Regulatory Commission*, 845 F.2d 1105 (D.C. Cir. 1988) provides an illustration of similar facts where the court lacked jurisdiction under the Act because the original petition was simultaneously too late and too early. There, several public interest groups filed a petition for rulemaking requesting that NRC promulgate certain regulations. *Id.* at 1106, 1109. Before their petition for rulemaking was denied, the groups also filed a petition for a writ of mandamus under the Act. *Id.* at 1106, 1109. In response to the writ petition, NRC argued that it had already satisfied its statutory obligations by issuing a policy statement well before the petition for rulemaking was filed and, in any event, the court lacked jurisdiction over the writ petition. *See id.* at 1109-10.

The D.C. Circuit agreed with NRC that the court lacked jurisdiction. The court held that "Petitioners' suit was too late to challenge the Policy Statement," and similar to the 2017 consent-based siting public comment, the petitioners were "too early to challenge NRC's denial of their request for rulemaking" because the denial occurred *after* the mandamus petition was filed. *Id.* at 1109-10. Relying on a decision by then-Judge Scalia, the D.C. Circuit found that the "too early" jurisdictional defect was not cured when the rulemaking petition was denied while the writ proceeding was pending. *Id.* at 1109-10.

To avoid dismissal, the *Public Citizen* petitioners—like Texas here—"argue[d] that they [were] not barred by either of th[ose] deadlines because they [were] not challenging the Policy Statement itself, but rather NRC's *ongoing* failure to promulgate binding regulations….Under petitioners' logic, the mere issuance of a policy statement could not start the time clock running." *Id.* at 1107 (emphasis in original).

The D.C. Circuit rejected this argument. It reasoned that "where as here the statute requires agency action within a certain time limit, it is not obvious why the agency's inaction as of that date should not trigger the time limits of any statute on which the challengers rely for jurisdiction. This is especially so where the time limit expressly runs from the challenged 'action or failure to act,' as is true of 42 U.S.C. §10139(c)." *Id.* at 1108. "Our acceptance of petitioners' argument," the court concluded

"would make a nullity of the statutory deadlines. Almost any objection to agency action can be dressed up as an agency's failure to act." *Id.*[12]

The same result should obtain here. The actions and inactions Texas alleges occurred in 1998, 2010, or 2013, respectively. The 180-day timeframe to assert any of the alleged challenges expired long ago. This Court should not allow Texas to effectively reset the clock—and expand this Court's jurisdiction—by "dressing up" stale actions or inactions as "ongoing breaches." Such an interpretation of 42 U.S.C. §10139 would conflict with the statute's plain language and render the 180-day deadline meaningless.

Texas's requests for declaratory, injunctive, or mandamus relief do not nullify the 180-day jurisdictional deadline or provide an independent ground for jurisdiction. 42 U.S.C. §10139 is the sole statutory basis that enables Texas to file its Petition before this Court in the first instance. Without 42 U.S.C. §10139, none of the other statutes or appellate rules that Texas invokes allow it to proceed directly to a court of appeals. Specifically, 28 U.S.C. §1361 states that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee

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[12] The three cases cited by Texas's Petition don't support an "ongoing" timeliness theory. Pet. 4-5. Two cases stemmed from the government's breach of agreements to collect spent nuclear fuel. In *Alabama Power Co. v. Department of Energy*, 307 F.3d 1300 (11th Cir. 2002), the court reviewed a settlement agreement arising from a "massive breach" of contract to begin disposal of spent nuclear fuel. The court found the action timely because petitioners were challenging the recent settlement agreement, not the original contract. *Id.* at 1312. The court didn't address any type of "ongoing" breach claim. *Boston Edison Co. v. U.S.*, 658 F.3d 1361 (Fed. Cir. 2011) mentioned an "ongoing" breach of a contract to collect spent fuel rods but did not involve a timeliness challenge. 42 U.S.C. §10139(c) wasn't cited. *State v. Nuclear Regulatory Commission*, 824 F.3d 1012, 1022 (D.C. Cir. 2016) reviewed an environmental impact statement. Timeliness was not at issue and NRC conceded jurisdiction.

of the United States or any agency thereof to perform a duty owed to the plaintiff." Texas's request for injunctive relief, citing Federal Rule of Appellate Procedure 21 is, in substance, a request for mandamus without its own jurisdictional basis. Pet. 4 ("The Court may issue injunctive relief pursuant to Fed. R. App. P. 21"); *see Petraco-Valley Oil & Ref. Co. v. Dep't of Energy*, 633 F.2d 184, 195 (Temp. Emer. Ct. App. 1980) (original application to court of appeals for "injunctive relief" was "in substance under the All Writs Act an application for mandamus") (citing Fed. R. App. P. 21).

Further, 28 U.S.C. §2201 provides that this Court may only issue declaratory relief "[i]n a case of actual controversy within its jurisdiction…." 28 U.S.C. §2201. In other words, this Court can only grant a declaratory judgment if this Court already has jurisdiction over the action, which it does not have here. And the All Writs Act, 28 U.S.C. §1651, provides no aid. "It is settled law that '[t]he All Writs Act is not an independent grant of appellate jurisdiction.'" *Council Tree Commc'ns, Inc. v. F.C.C.*, 503 F.3d 284, 292 (3d Cir. 2007) (quoting *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999)).

The D.C. Circuit has described the 42 U.S.C. §10139(c) deadline as "jurisdictional," *see Pub. Citizen*, 845 F.2d at 1110, and the Supreme Court has held that "[t]he expiration of a 'jurisdictional' deadline prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons." *Dolan v. U.S.*, 560 U.S. 605, 610 (2010). Consequently, Texas cannot use declaratory,

injunctive, or mandamus relief to avoid 42 U.S.C. §10139(c) and its Petition should be dismissed.

B. Texas's Demands for Funding involve Nonjusticiable Political Questions.

At the center of Texas's prayer for relief are requests for mandamus directing the Federal Respondents "to request additional *necessary funding* from Congress *to complete* the Yucca Mountain" adjudicatory and licensing processes. Pet. ¶¶7-8 (emphasis added). Without a congressional appropriation, it asks for an order releasing "all *necessary* Nuclear Waste Fund money…*to complete*" Yucca Mountain. *Id.* at ¶11 (emphasis added). Texas also requests declaratory judgments that the Federal Respondents violated the Act and *Aiken II* "by failing to request appropriations from Congress *to complete* the Yucca Mountain" licensing and adjudicatory processes. *Id.* at ¶¶3-4 (emphasis added). Each of these requests involve nonjusticiable political questions that this Court lacks jurisdiction to consider.

Courts treat a motion to dismiss on political question grounds as a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 948 (5th Cir. 2011). They "do so because '[t]he concept of justiciability,' as embodied in the political question doctrine, 'expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art[icle] III.'" *Id.* (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 215 (1974)). "At its core, the political

question doctrine 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" *Id.* at 949 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986)).

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth the six factors to consider when deciding whether a case presents a political question. The Court held that a case involves a political question when there is found:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The presence of any one of these factors indicates that the case involves a nonjusticiable political question. *Id.*

Texas's congressional funding requests offend a number of these considerations. First, the Constitution reserves the task of formulating the federal budget and appropriations to Congress and the Executive, not the courts. U.S. Const. art. I, §9, cl. 7; *id.* at art. II, §3. Second, there are no manageable standards for this Court to use when determining whether the Federal Respondents requested the "necessary funding…to complete" the licensing and adjudicatory processes. There is simply no identifiable

yardstick against which this Court could measure whether the Federal Respondents have requested enough funds to afford due process in those monumental proceedings. Third, it would be impossible for this Court to decide whether the funds requested from Congress were "necessary" without rendering policy judgments on what constitutes a "complete" process in scope, speed, and length. For instance, the "necessary" amount of funds is directly proportional to the speed by which the hearing is rushed through.

Fourth, even if this Court could measure the amount of "necessary" funding to "complete" the processes without rendering policy judgments, it could not do so without criticizing the funding judgments of Congress and the Executive Branch. Again, the level of criticism will be proportional to the difference between this Court's idea of "necessary" and "complete" and the Executive's request. Finally, there will inevitably be embarrassment to all three branches of government when they cannot agree on the precise amount of funding "necessary" to "complete" the processes.[13]

Other courts have indicated that the amount of the Executive Branch's budget request is a nonjusticiable political question. For instance, in *National Wildlife Federation v. U.S.*, 626 F.2d 917 (D.C. Cir. 1980), a group sued for declaratory, injunctive, and mandamus relief against the President based on his proposed fiscal year 1979 budget and the Forest and Rangeland Renewable Resources Planning Act. That act required

[13] Texas's funding related relief requests should also be dismissed as moot because the Executive has already submitted a budget to Congress with the amount of money it deems sufficient or necessary.

the President "to submit, with the Forest Service budget request, a statement 'express[ing] in qualitative and quantitative terms the extent to which the programs and policies projected under the budget meet the policies approved by the Congress.'" *Id.* at 920. If the budget requested an amount less than required to fully implement Congress's programs, the President was required to explain the "'reasons for requesting the Congress to approve the lesser programs or policies presented.'" *Id.*

When President Carter submitted a proposed budget for $1.8 billion, instead of the $2.4 billion necessary to fully implement the statutory programs, the group sued. *Id.* at 920-22. The group claimed that the President failed to adequately express the extent to which the budget was lower than the amount necessary for full implementation and failed to explain his reasons for favoring certain aspects of the budget over the others. *See id.* at 922. The district court dismissed the action on mootness and political question grounds. *Id.* at 923.

Most relevant here, the D.C. Circuit briefly discussed nonjusticiablity and the political question doctrine. *Id.* at 924-25. And while it rested its ruling on the discretionary nature of declaratory and mandamus relief, it explained that judicial "restraint is necessary where, as here, appellants ask us to intervene in wrangling over the federal budget and budget procedures. Such matters are the archetype of those best resolved through bargaining and accommodation between the legislative and executive branches." *Id.* at 924. "These concerns," the court continued, "are intertwined with

constitutional and prudential limitations on federal court jurisdiction [and] arguably present[] a nonjusticiable political question." *Id.* at 924-25.

The court addressed the *Baker* factors and acknowledged "the Constitution itself recognizes the important role played by the elective branches in formulating the federal budget." *Id.* at 924 n.14. The court noted that it would be difficult for it to determine whether the President's budget request explanation complied with the act and that it was not clear that standards existed to judge the President's compliance. *Id.* The same is true of the Federal Respondent's appropriation requests for Yucca Mountain.

C. There is No Reason to Alter the Status Quo.

A preliminary injunction's purpose is to maintain the status quo pending review. *Griffin v. Box*, 910 F.2d 255, 263 (5th Cir. 1990). But as described above, Texas admits that the status quo for all of its complaints has been unaltered for years. The relief requested by Texas would alter the status quo, not preserve it. Moreover, Texas has not identified any new or urgent irreparable injury that justifies injunctive relief at this late stage, especially since Texas waited almost three months after filing its Petition to file this Motion. Any injury suffered by Texas has been the same for years and it will not incur any additional harm while the congressional and regulatory mechanisms run their course.

IV. CONCLUSION

For these reasons, Nevada requests that Texas's entire original proceeding be dismissed.

Dated: June 12, 2017.

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CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 5,184 words, except for the items excluded from the work count pursuant to Federal Rule of Appellate Procedure 32(f), as determined by the word-count function on Microsoft Word 2013.

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 Garamond 14-point font.

3. I hereby certify that, in accordance with Fifth Circuit Rule 27.4, I contacted all other parties regarding Nevada's countermotion. NRC reserves the right to respond after reviewing the countermotion. The non-NRC Federal Respondents have no position on the countermotion and reserve the right to respond once it is filed. Texas opposes Nevada's countermotion to dismiss.

/s/ Jordan T. Smith

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2017 an electronic copy of the foregoing motion was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/Sandra Geyer