IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

RMS OF GEORGIA, LLC D/B/A CHOICE REFRIGERANTS, *Plaintiff*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency, *Defendants*.	CIVIL CASE NO. 23-cv-4516-VMC

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Plaintiff Choice Refrigerants (Choice) filed this case to obtain a remedy for Congress unconstitutionally divesting itself of legislative power. Congress abdicated its responsibility to establish the law determining how Choice's business opportunities would be reduced as its products are phased out of the market. Congress violated the Constitution, specifically Article I § 1. This Court has general federal question jurisdiction over such claims arising under the Constitution.

EPA is the defendant in this suit solely because Congress gave EPA authority to implement the statute, the American Innovation and Manufacturing Act of 2020 (AIM Act), and Congress cannot be sued directly. EPA's argument that the Clean Air Act (CAA) applies here and strips this Court of jurisdiction disregards the limitations in the CAA's text, conflates the types of "agency action" subject to exclusive CAA jurisdiction, and ignores the distinctions between the causes of action Choice asserts and the remedies that are available in the separate courts.

EPA's paradoxical assertions that Choice has over-litigated and simultaneously slept on its rights and that dismissing or staying this action resolves alleged claim splitting would be risible but for the serious implications to Choice's business. EPA and CAA limitations forced Choice to bring separate actions every time EPA undertakes a separate agency action. Choice initially sought a remedy against EPA under the CAA for EPA's own unconstitutional behavior, but EPA's

procedural arguments prevented consideration of Choice's claim on the merits. Any delay and multiplicity of suits result from the CAA's limits and EPA's tactics.

Meanwhile, Choice suffers. The AIM Act prohibits companies from participating in the market for Choice's products—certain hydrofluorocarbons (HFCs)—without "allowances." Congress's allowance scheme is unconstitutional. Yet, since 2022 and for every year that passes without a remedy, Choice must limit its market activity and sustain unrecoverable losses. This Court has jurisdiction, and justice demands that Choice's claim be adjudicated to a final judgment.

BACKGROUND

I. THE AIM ACT'S CAP-AND-TRADE SCHEME

The AIM Act mandates that HFCs be phased down in the U.S. market, resulting in an 85% decrease by 2036. *See* 42 U.S.C. § 7675(e)(2)(C). The phasedown occurs by way of a cap-and-trade program. The cap is enforced through "allowances," limited authorizations to produce or consume HFCs. *Id.* § 7675(b)(2). Production or consumption of HFCs is prohibited without a "corresponding quantity" of allowances. *Id.* § 7675(e)(2)(A).

Congress provided no direction in the AIM Act as to who would get HFC allowances. The Act merely provides that EPA shall issue a rule phasing down HFCs "through an allowance allocation and trading program" consistent with the Act. *Id.* § 7675(e)(3). Congress provided no policy, no standard, and no other guidance to

limit EPA's discretion in granting or refusing to grant allowances.

This lawsuit challenges the AIM Act's unconstitutional transfer of legislative power from Congress to the executive branch; specifically, the power to set the policy and standards for who may continue in the market and at what market share.

In implementing the Act, EPA issued at least two proposed and final rules, as well as three "notices" of the allowances granted for any given year. None of these is relevant to whether Congress acted unconstitutionally, and none is the subject of this case. Further, so far as Choice is aware, it has complied with the AIM Act and associated regulations and is not subject to any EPA enforcement action.

II. CHOICE'S EFFORTS UNDER THE CLEAN AIR ACT

Choice is a small refrigerants company based in Georgia that has been in the business over 15 years, selling patented and other products now subject to the AIM Act. When EPA issued its first notice of annual allocations, Choice received fewer allowances than expected based on its market share. Choice learned that EPA credited some of its allowances to a former business partner and granted allowances to a foreign entity that pirated Choice's product. *See* Compl. ¶¶ 62–68, 72, ECF 1.

Due to complications of jurisdiction arising from the AIM Act's partial incorporation of the CAA[1], Choice simultaneously filed two lawsuits. Choice filed in the D.C. Circuit, challenging both EPA's rule and allocation notice. *See* Pet., *RMS*

[1] *See* 42 U.S.C. § 7675(k)(1)(C).

of Georgia, LLC v. EPA, No. 21-1253 (D.C. Cir. Dec. 6, 2021) ("*HARDI*"), Doc. 1926118 (Dec. 6, 2021). Then, because the notice might be considered regional rather than national, Choice also challenged the notice in the Eleventh Circuit. *See RMS of Georgia, LLC v. EPA*, 64 F.4th 1368 (11th Cir. 2023) ("*RMS*").

EPA responded by asserting that Choice could not challenge both a rule and an allocation notice in the same action and arguing that the annual allocation notice suit must proceed in the D.C. Circuit. *See* Mot. to Sever, *HARDI*, Doc. 1931100 (Jan. 18, 2022); EPA Resp. to Jur. Question, *RMS*, ECF No. 16 (Jan. 19, 2022). Choice's cases were not resolved before EPA issued its 2023 allocation; therefore, Choice was forced to file again to preserve its claims against EPA. *See* Pet'rs Statement of Issues, at 2, *RMS of Georgia, LLC v. EPA*, No. 22-1313 (D.C. Cir. Feb. 13, 2023), Doc. 1985792 (asserting allowances were inconsistent with EPA's rule).

In June 2023, the D.C. Circuit issued its opinion regarding EPA's rule. *See Heating, Air Conditioning & Refrigeration Distribs. Int'l ("HARDI") v. EPA*, 71 F.4th 59 (D.C. Cir. 2023). The court refused to address the merits of Choice's constitutional claim. *Id*. at 65–66. The court noted that the CAA provided for review of a "limited category of suits: 'petition[s] for review of *action of the* [EPA] *Administrator*.'" *Id*. at 65. The D.C. Circuit stated that "to the extent that Choice's suit is an objection to the AIM Act alone," it "fails to state a claim under the [CAA]." *Id.*

Next the court noted that Choice's petition and brief framed that case as a challenge to EPA's rule, which would be subject to the CAA. *Id.* In that event, the court found that Choice had not satisfied an administrative exhaustion argument, and the court still could not consider the merits of Choice's claim. *Id.* at 65–66. The D.C. Circuit noted that administrative exhaustion may well be futile because an agency cannot change a statute, and that the exhaustion requirement may not apply if Choice brought its action outside the CAA. *Id.* at 66, 66 n.2. Choice filed this lawsuit to do exactly that, to bring a challenge "to the AIM Act alone," outside of the CAA.

Additionally, 2024 begins a new step in the AIM Act phasedown, so EPA undertook new rulemaking.[2] To preserve its challenge to EPA's act of legislating in the new rulemaking, Choice filed a new CAA action in the D.C. Circuit. *See* Mot. to Dismiss (MTD), Ex. C at 3, ECF No. 17-4. Choice's statement of issues asks whether the Act conferred legislative power such that the "Final Rule and agency action" are "not in accordance with law" and whether the rule is consistent with any intelligible principle that EPA claims is applicable. *See* MTD, Ex. D at 3, ECF No. 17-5.

Because Choice's D.C. Circuit action challenges rulemaking, the only relief available is reversal of "any action of the Administrator." *See* 42 U.S.C. § 7607(d)(9); *see also* 42 U.S.C. § 7607(d)(1) (displacing portions of the

[2] *Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years*, *July 20, 2023*, 88 Fed. Reg. 46,836 (July 20, 2023).

Administrative Procedure Act (APA) including type and scope of review).

III. THIS LAWSUIT

Choice brought suit in this Court under federal question jurisdiction to facially challenge the AIM Act itself—specifically, Congress's unconstitutional act of transferring legislative power to the executive branch. *See* Compl. at 1, ECF No. 1 ("*Congress* transgressed constitutional limitations…"); *id*. ¶¶ 2, 6, 61, 90 (same). Choice invokes 28 U.S.C. § 1331 as its basis for jurisdiction. *Id.* ¶¶ 11, 79. To avoid confusion, Choice's Complaint explicitly states that this case "does not challenge the substance of EPA's rulemaking." *Id*. ¶ 61; *see also*, *id*. ¶ 79 ("Choice is not challenging EPA's rule or rulemaking…"). Additionally, Choice's prayer for relief seeks a declaration that a certain subsection of the AIM Act is unconstitutional, as well as an injunction against *future* enforcement. *Id*. at 25. EPA was named as the defendant because the injunction would run against EPA since Congress is not subject to suit, nor could it be.

STANDARD FOR DECISION

Choice asserts jurisdiction under 28 U.S.C. § 1331, which provides that "district courts *shall* have original jurisdiction of *all* civil actions arising under the Constitution, laws, or treaties of the United States." (emphases added). To invoke federal question jurisdiction, a complaint "must 'claim a right to recover under the Constitution and laws of the United States,'" which the Eleventh Circuit has

recognized is "not a stringent standard." *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Const. Co.*, 607 F.3d 1268, 1273 (11th Cir. 2010) (quoting *Bell v. Hood*, 327 U.S. 678, 681 (1946)).

Where federal question jurisdiction is available pursuant to a general statute but claimed to be precluded by a more specific statute, the question is whether the specific statute "removes the jurisdiction given to the federal courts." *See Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006). To answer this question, a court must evaluate whether the claim fits within the prohibitory statutory regime, because even where agency action is concerned, statutory review schemes do "not necessarily extend to every claim." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 185 (2023) (hereinafter *Axon/Cochran*); *see also Whitman*, 547 U.S. at 514.

When conducting this analysis, "statutes clearly defining the jurisdiction of the courts … must control … in the absence of subsequent legislation equally express." *Rosencrans v. United States*, 165 U.S. 257, 262 (1897); *see also Axon/Cochran*, 598 U.S. at 208 (Gorsuch, J., concurring) (quoting the same). And "'jurisdiction conferred by 28 U.S.C. § 1331,' in particular, 'should hold firm against mere implication[s]' from other laws." *Axon/Cochran*, 598 U.S. at 208 (Gorsuch, J., concurring) (quoting *Mims v. Arrow Fin. Srvs., LLC*, 565 U.S. 368, 383 (2012)).

As to EPA's claim-splitting defense, EPA bears the burden to establish its defense, with the Court taking the well-pleaded allegations of the complaint as true.

See 3637 Corp., Inc. v. City of Miami, 314 F. Supp. 3d 1320, 1334 (S.D. Fla. 2018) (refusing dismissal on basis of claim splitting finding defendants had not carried burden). Addressing a defense of claim splitting by way of a motion to dismiss is only proper, if at all, when the issue can be resolved at the pleading stage from the face of the complaint and judicially noticeable facts. *See Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 836 n.1 (11th Cir. 2017). Such is not the case here.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT DIVEST THIS COURT OF ITS FEDERAL QUESTION JURISDICTION OVER CHOICE'S CONSTITUTIONAL CHALLENGE TO THE AIM ACT

Here, Choice challenges an unconstitutional statute, asking this Court to review an unconstitutional act by Congress. Such a claim facially falls within this Court's federal question jurisdiction. This case does not challenge a final agency action, as required for EPA to successfully invoke the CAA to prevent jurisdiction. Additionally, when addressing a rulemaking rather than an enforcement action, the CAA does not provide for an injunction or a binding declaratory judgment, the relief that Choice seeks. Thus, as a pure matter of statutory interpretation, the CAA is not applicable and cannot bar Choice's claim.

The difference between types of "agency action"—rulemaking vs. enforcement—is important in analyzing the statutes, cases, and arguments at issue. The cases cited by EPA are distinct from this case, in part because in those cases

plaintiffs sought to reverse an agency *enforcement* action. Choice is not subject to an enforcement action. Straightforward statutory interpretation and the enforcement/ rulemaking distinction render most of EPA's arguments inapplicable. The *Thunder Basin* analysis EPA focuses on further demonstrates that the CAA does not preclude this Court from addressing Choice's constitutional challenge to the AIM Act itself.

A. Choice's Claim in This Case Is Not Subject to Clean Air Act Limitations on Judicial Review

EPA's assertion that this action must be filed in the D.C. Circuit fails by the text of the AIM and Clean Air Acts. Defs.' Mem. Supp. MTD at 13 (ECF No. 17-1) ("Mem."). The AIM Act makes § 307 of the CAA, 42 U.S.C. § 7607, applicable to "this section and any rule, rulemaking, or regulation promulgated by the Administrator[.]" 42 U.S.C. § 7675(k)(1)(C). In this case, Choice challenges a *statute* lacking intelligible limits, a product of *Congress's* drafting, not a "rule, rulemaking, or regulation." As EPA points out, when Choice challenges a rule, EPA's separate but equally unconstitutional exercise of legislative power, it does so pursuant to § 307. *See* Mem. at 9–11. Here Choice challenges Congress's unconstitutional divestment of legislative power, not EPA's exercise of that power.

Nor is EPA assisted in its jurisdiction-stripping effort by the fact that the AIM Act applies § 307 to "this section," as well as to rules and rulemaking, because § 307 simply does not give the appeals courts jurisdiction over challenges to the constitutionality of a statute. 42 U.S.C. § 7675(k)(1)(C). Section 307's multiple

provisions addressing judicial review are all limited in scope. First, subsection (b)(1) addresses, among other topics, a "petition for review of … any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter." 42 U.S.C. § 7607(b)(1) ("this chapter" includes the AIM Act). But the legal claim in this case challenges a statute and addresses action taken by Congress, not the EPA Administrator. As the D.C. Circuit recognized, the "Clean Air Act's cause of action authorizes only a limited category of suits: 'petition[s] for review of *action of the Administrator* [of the EPA].'" *See HARDI*, 71 F.4th at 65 (emphasis added). Choice's claim here does not fall within that "limited category" of direct appellate review afforded by § 307.

With respect to rulemaking, § 307 places even greater restraints on judicial review. For these actions, § 307 displaces provisions of the APA, including the scope of review and relief available. *See* 42 U.S.C. § 7607(d)(1) ("section 706 of Title 5 shall not, except as expressly provided in this subsection, apply … ."). Section 307(d) also includes an exhaustion requirement, preempting review of issues not raised in comments during the rulemaking. 42 U.S.C. § 7607(d)(7)(B). Further, a court is only able to "reverse" the action of the Administrator. *Id.* § 7607(d)(9). There is no provision in CAA rulemaking review for a court to enter a declaratory judgment or an injunction that addresses flaws in a statute. *See id.*

The plain text of the AIM Act and CAA's judicial review provisions apply

only to EPA actions. EPA does not deny this and states repeatedly that CAA judicial review applies to agency action. *See*, *e.g.*, Mem. at 1–3; *id*. at 7 ("Challenges to *EPA action* …") (emphasis added). To support its argument, EPA asserts that Choice's challenge to a *statute* passed by *Congress*, asserting a claim arising from the *U.S. Constitution*, is nonetheless focused on EPA action. EPA's argument, however, rests on cases where an *enforcement* agency action was in play, causing courts to find it was the *enforcement* action that was the true object of the lawsuit. Not so here.

B. Lack of an Enforcement Action Here Invalidates EPA's Arguments

EPA misrepresents Choice's position and thereby ignores the key distinction between this case and every jurisdiction-denying case EPA relies upon. EPA sets up a strawman, arguing that Choice believes its assertion of a constitutional claim saves it from CAA exclusive jurisdiction. Mem. at 14. EPA then reasons that the presence of a constitutional claim makes this case akin to *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Mem. at 14–15. But, in *Thunder Basin*, it was not the *type* of claim that drove or stripped jurisdiction, it was the *context* in which the claim arose. EPA cites cases that took place in the face of enforcement actions. There is no enforcement action in the background here.

In *Thunder Basin*, the plaintiff coal company chose to violate a federal mine safety regulation, believing compliance interfered with its rights under labor law statutes. *See* 510 U.S. at 204. The company notified the federal mine safety agency

of its non-compliance and preemptively filed a suit to prevent enforcement. *Id*. at 204–05. Soon thereafter the agency instructed the company to comply with the regulation. *Id*. A district court issued an injunction against the agency's enforcement and the case made its way to the Supreme Court. *Id*. at 205–06.

Given this context, the Supreme Court identified the question as "whether the statutory-review scheme … prevents a district court from exercising subject-matter jurisdiction over a *pre-enforcement challenge* … ." *Id*. at 202 (emphasis added). The Court adopted the view that "the gravamen of Thunder Basin's case is a dispute over an anticipated citation and penalty." *Id*. at 206 (internal citation omitted). The Court noted that because an enforcement action was in the offing, the company's claims would involve only "delayed judicial review," which would be available at the completion of agency enforcement. *Id*. at 207. Indeed, the Court based its standard on the availability of judicial review following agency action. *Id.* ("In cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is 'fairly discernable in the statutory scheme.'") (internal citation omitted).

The Court noted that the statute "establishe[d] a detailed structure for reviewing *violations* of" health standards and regulations that included an agency appeal before imposition of a citation, the availability of interim relief, and expedited review. *Id*. at 207–08 (emphasis added). This review process could be initiated by

an aggrieved mine operator. *Id*. at 209. And Congress had established the agency review process to ensure "rapid abatement of violations" for miner safety. *Id*. at 211.

Here, however, the "delayed judicial review" that might follow an enforcement action is unavailable to Choice. There will be no "initial" agency review of or application of technical industry knowledge to Choice's conduct. There is no violation to abate. The factors driving *Thunder Basin*'s analysis are absent.

So too for the other cases EPA cites where federal district courts were found without jurisdiction. *See* Mem. at 14–17. In each case, the plaintiff was subject to agency enforcement and the question was whether court action could proceed during the enforcement process. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 5, 7 (2012) (petitioners were fired, started but abandoned agency process); *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016) (plaintiffs were respondents in SEC enforcement action); *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996) (EPA found state violated CAA); *Missouri v. United States*, 109 F.3d 440, 441 (8th Cir. 1997) (same).

In these cases, the courts noted that the questions related to collateral attacks, with the lawsuits' objective being the nullification of enforcement actions. *See Elgin*, 567 U.S. at 14 (observing collateral suits in district courts would lead to "inconsistent decisionmaking and duplicative judicial review" statutory review sought to prevent); *Hill*, 825 F.3d at 1237 (issue was "whether respondents in an SEC administrative enforcement action can bypass [agency] review scheme by filing

a collateral lawsuit"); *Virginia*, 74 U.S. at 523 ("the practical objective of the complaint is to nullify final [enforcement] actions of EPA"); *Missouri*, 109 F.3d at 442 (finding Missouri "seeks to nullify" effects of EPA's deficiency findings).

In EPA's cases, the courts have "considered a statutory-review scheme in which an agency tribunal 'effectively fills in for the district court, with the court of appeals providing judicial review.'" Mem. at 15. But that is not this case; there is not an EPA "tribunal" that considers rulemaking, and the rulemaking does not include fact-finding for rules as they are applied. Further, EPA's cases "rejected litigants' attempts to bypass statutory-review requirements by raising claims directly in district court." Mem. at 16. It is impossible for Choice to "bypass statutory review requirements" for a non-existent enforcement action. Choice does not seek to nullify EPA enforcement action, but rather to force Congress to complete the task of legislating before delegating administration to EPA. The *Thunder Basin* "rubric" that EPA asks this Court to apply depends upon the question of whether a petitioner may advance judicial review contrary to a Congressionally-created enforcement scheme. *See* Mem. at 14. Here, there is no applicable enforcement scheme to evade.

C. The *Thunder Basin* Factors Favor Jurisdiction Here

Even were *Thunder Basin* and its progeny applicable,[3] proper analysis of its

[3] *See Axon/Cochran*, 598 U.S. at 205–10 (Gorsuch, J., concurring) (noting "sheer incoherence" of the "*Thunder Basin* project," expressing preference for primacy of

factors and the CAA's rulemaking judicial review provisions still defeats EPA's argument. EPA says the *Thunder Basin* cases "identif[y] three factors to help determine whether litigants' claims were of the type Congress intended to be reviewed within a statutory structure." Mem. at 14 (cleaned up). These factors—the risk of foreclosing meaningful judicial review, whether the proposed court action is "wholly collateral" to the statutory review scheme, and whether the action asserts claims "outside the agency's expertise"—all favor this Court's jurisdiction. *Id.*

1. Dismissal Would Foreclose Meaningful Judicial Review

First, meaningful review and relief would be foreclosed if this Court does not adjudicate Choice's claim. As noted above, Choice is not subject to an enforcement action, so judicial review is not available via that route. Moreover, the Supreme Court has been clear that requiring a litigant to violate the law to obtain review is not a "'meaningful' avenue of relief." *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490–91 (2010) ("We normally do not require plaintiffs to 'bet the farm … by taking violative action … .'") (citations omitted).

EPA contends that Choice's "nondelegation claim can be heard in the D.C. Circuit" as part of Choice's challenge to the rule EPA recently issued. Mem. at 16. As EPA also notes, however, the D.C. Circuit concluded that because Choice did not

---

statutory interpretation, and noting absence of agency orders subject to statutory review scheme).

raise the constitutional issue in comments to EPA in 2021, Choice "forfeited its nondelegation claim," at least as applicable to EPA's first rule. Mem. at 10. Further, any CAA claim about EPA action related to the 2021 rule had to be brought in 2021. *See* 42 U.S.C. 7607(b)(1). EPA does not explain how Choice's claim can be fully heard and redressed in the D.C. Circuit in this circumstance.

Further, whether a statutory regime provides "meaningful" review depends, in part, on the relief the reviewing court can provide. In *Thunder Basin*, for example, the court found that the plaintiff would not suffer irreparable harm during the agency proceeding and noted that any penalties would be due only after review by a court. *Thunder Basin*, 510 U.S. 218; *see also Axon/Cochran*, 598 U.S. 191–92 (finding post-enforcement judicial review inadequate where plaintiff would suffer "here-and-now" injury during pendency of agency proceeding and where post-enforcement review would only vacate agency action, not remedy separation-of-powers violation); *Elgin*, 567 U.S. at 22 (noting that on review Federal Circuit could award "reinstatement, backpay, and attorney's fees"); *accord Missouri*, 109 F.3d at 442 (noting Missouri was not time-barred from pursuing its claims during enforcement).

Here review of EPA rulemaking is constrained by 42 U.S.C. § 7607(d)(9), which provides only that a court may "reverse" an "action of the Administrator." There is no indication from this text that a court of appeals could, for instance, issue a binding declaratory judgment. Nor is there any indication that a court of appeals

could enjoin EPA from enforcing a constitutionally deficient regulation. Whatever the reasoning of a court may be in "reversing" agency action, such a reversal does not produce an enforceable "judgment" that could prevent relitigating the issue. This lack of meaningful relief cuts against the CAA as providing for meaningful review.

The circumstances surrounding the AIM Act raise further concerns about whether rulemaking statutory procedures provide "meaningful judicial review." EPA issued its first notice of proposed rulemaking on May 19, 2021. *See* 86 Fed. Reg. at 27,150. Any comments regarding the proposed rule were due by July 6, 2021. *Id*. At the time, affected parties could not know what the final rule would ultimately contain, how EPA would interpret it, or how it would impact them directly. Choice, aware of certain business issues, diligently raised them in the comments it timely submitted. It was not until October 2021—after EPA released its final rule and its notice of allocations—that the significant and disproportionate impact for Choice became clear. Choice then raised a constitutional argument against the rule in its D.C. Circuit petition. But that court found itself precluded from addressing the merits of Choice's claim. Judicial review is not meaningfully available where a party must identify its constitutional claims within 45–60 days without knowledge of how the statute and new regulation will impact it. The combination of provisions in 42 U.S.C. § 7607(b) and (d) do not allow for meaningful judicial review, so the first and "most important" factor favors this Court's retaining jurisdiction.

2. The Lawsuit Is "Wholly Collateral" to an Agency Proceeding

The second *Thunder Basin* factor, whether the proposed lawsuit is "wholly collateral" to an agency proceeding, also favors jurisdiction. The Supreme Court found the Axon and Cochran lawsuits were collateral to the agency proceedings because the lawsuits were "challenging the [agencies'] power to proceed at all, rather than actions taken in the agency proceeding." *Axon/Cochran*, 598 U.S. at 192. The Court then noted that collateral suits "object to the [agencies'] power generally, not to anything particular about how that power was wielded." *Id*. at 193. So too here.

The Supreme Court has noted there is absolutely nothing EPA can do to remedy an inappropriate vesting of legislative power. In *Whitman v. American Trucking Associations*, the lower court found that EPA acted in the face of an unconstitutional vesting of legislative power and remanded to EPA to identify the required statutory standards or to report to Congress. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 463 (2001). The Supreme Court soundly rejected this remedy.

> The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

Id. at 473. Choice's claim here does not depend on EPA's taking any action;[4] it depends on Congress's action.

Additionally, EPA's effort to construe Choice's claim in this case by reference to Choice's earlier separate case, brought under a separate jurisdictional provision, fails. Disregarding the actual pleadings in the various cases, EPA claims that Choice "challenges EPA action that is subject to the AIM Act's review procedures," and that the D.C. Circuit held that Choice's "nondelegation claim was 'best read as' and '[i]n substance,' a challenge to an EPA Rule." Mem. at 17. But in the D.C. Circuit action, which Choice explicitly brought pursuant to the CAA, Choice's petition asked "the court for review of [EPA's] final rule." *see* Pet. at 2, *HARDI*.

Choice's D.C. Circuit cases challenge what the Supreme Court labeled as separate, independent constitutional violation: EPA's "exercise of the forbidden legislative authority." *Am. Trucking*, 531 U.S. at 473. But this case asserts that "Congress transgressed constitutional limitations when it transferred legislative power" to EPA and seeks a declaration that AIM Act subsection (e)(3) violates the Constitution. Compl. at 1. Choice's separate cases neither assert the same claim, nor seek the same remedy.

[4] Choice's claim became ripe—and Choice was harmed—once the AIM Act was implemented and Choice's market share and business opportunities were reduced. But EPA's responsibility for implementing the AIM Act does not convert Choice's claim that Congress acted unconstitutionally into a claim challenging agency action.

3. There is No Relevant Agency Expertise

Nor does the third *Thunder Basin* factor, the relation of the claim to an agency's expertise, favor EPA's argument. Indeed, the Supreme Court has repeatedly found that agencies have no special expertise in evaluating the constitutionality of statutes. *See, e.g.*, *Axon/Cochran*, 598 U.S. at 194–95 ("agency adjudications are ill suited to address structural constitutional challenges") (citation omitted); *id*. (noting an agency may know "a good deal" about policy but "nothing special about the separation of powers"); *Free Enter. Fund*, 561 U.S. at 491 (in claims presenting "standard questions of administrative law," not requiring industry knowledge, courts are at no disadvantage to agencies); *Thunder Basin*, 510 U.S. at 215 ("we agree that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.") (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

EPA argues agency expertise matters "since an agency's interpretation of a statute that it regularly construes might alleviate constitutional concerns." Mem. at 16 (quotations and citations omitted). However, an agency cannot cure an improper delegation of power by supplying otherwise lacking "intelligible principles." *See Am. Trucking*, 531 U.S. at 472–73; *W.Va. v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1147–48 (11th Cir. 2023) ("When Congress does not provide an intelligible principle, an agency cannot cure the 'unconstitutionally standardless delegation of

power by declining to exercise some of that power.'") (quoting *Am. Trucking*, 531 U.S. at 473); *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361 (5th Cir. 2021) (finding agency cannot supply clarity for a vague statute, "it must come directly from the statute"). Even applying *Thunder Basin*, this Court should maintain its jurisdiction.

II. PLAINTIFF HAS NOT SPLIT A CLAIM

EPA wrongly asserts this case should be dismissed due to claim splitting. It fails to acknowledge differences in Choice's claims, pleadings, and demands for relief. Mem. at 20. "Claim splitting has been analyzed as an aspect of res judicata or claim preclusion." *Vanover*, 857 F.3d at 841. EPA bears the burden of proving this affirmative defense. *See Thorsteinsson v. M/V Dranger*, 891 F.2d 1547, 1550–51 (11th Cir. 1990); *West v. Wells Fargo Bank, N.A.*, No. 16-cv-393, 2017 WL 9474220, *5 (N.D. Ga. Jan. 4, 2017).

"It is well-established that the general rule against splitting causes of action does not apply when suit is brought in a court that does not have jurisdiction over all of a plaintiff's claims." *Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 84 F.3d 1388, 1392 (11th Cir. 1996) (citing Restatement (Second) of Judgments § 25 cmt. e (1982)). The Supreme Court noted that res judicata does not apply "when a plaintiff was unable to obtain a certain remedy in the earlier action." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 328–29 (2011) (Sotomayor, J., concurring); *id.* at

329 (quoting Restatement (Second) of Judgments § 26(1)(c) (1980) ("claim preclusion does not apply where '[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction'")); *id.* (quoting Restatement of Judgments § 62, comment k (1942) ("[W]here a plaintiff brings an action in a State in which the courts have jurisdiction only with reference to one portion of his cause of action, he is not barred from maintaining an action in a proper court for the other portion[.]")). Congressional action cannot be remedied under the CAA.

Differences in remedy may not be dispositive in claim-splitting analysis, but here they highlight that Choice's suits assert different causes of action. Choice's cause of action here arises out of the Constitution's mandate that Congress not divest its legislative power. U.S. CONST. art. I, § 1. Congress's unconstitutional act produced a statute that Choice seeks to have declared unconstitutional and enjoined. *See Bell*, 327 U.S. at 684 ("it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *Free Enter. Fund*, 561 U.S. at 491 n.2 (rejecting idea that separation-of-powers claim not subject to "private right of action ... under the Constitution").

Judicial review of agency action is, however, a separate cause of action. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) ("The APA confers a general cause of action…"). *Baker v. Bell*, 630 F.2d 1046, 1057 (5th Cir. 1980)

(discussing "implied cause of action" under APA Section 504). Choice's claims address separate actors and have separate sources seeking independent remedies.

EPA paints too broadly when it claims Choice's cases involve the same parties, and "arise from EPA's implementation" of the AIM Act. Mem. at 21. Choice's cause of action here would exist even if the agency had not taken any implementing actions. Since "remedies sought in the second action could not have been sought in the first action," claim preclusion, hence claim splitting, is a non-issue, Choice's case in this Court should proceed. *See* 18 WRIGHT & MILLER, FED. PRAC. AND PROC. § 4412 (3d ed. 2023).

III. THIS SUIT SHOULD NOT BE STAYED

For the same reasons, this case should not be stayed. There is no redundancy in Choice's causes of action or remedies, and a stay yields no efficiency. Choice will be prejudiced by a stay, but EPA will not be harmed while this case proceeds. In evaluating a stay, a "court must weigh competing interests and maintain an even balance." *Certain Underwriters at Lloyd's v. Strategic Cap. Ptrs., LLC*, No. 21-cv-5211, *2 (N.D. Ga. Aug. 23, 2022) (Calvert, J.) (citation omitted). Here the balance favors proceeding, and EPA cannot carry its burden to obtain a stay. *Interim Healthcare, Inc. v. Interim Healthcare of Se. La., Inc.*, No. 19-cv-62412, 2020 WL 3078531, at *10 (S.D. Fla. June 10, 2020) (party seeking stay bears burden).

First, Choice would be disadvantaged if the stay were issued. There is no

certainty that the D.C. Circuit will reach the merits of Choice's claim; even if it does, and Choice prevails, the only relief the D.C. Circuit could offer would be to reverse EPA's regulation. While that case pends for potentially a year[5], and longer if there is an appeal, Choice's constitutional claim would linger. *See Tomco Equip. Co. v. Se. Agri-Systems, Inc.*, 542 F. Supp. 2d 1303, 1308 (N.D. Ga. 2008) ("Prejudice may also arise when the party opposing the stay has other claims pending that … will ... be put on hold during the stay."). The validity of EPA's actions have no bearing on the statute's constitutionality, thus holding this case in abeyance would prejudice resolving Choice's constitutional attack on the statute. These facts not only evince potential prejudicial delay against Choice, but they negate EPA's notion that a stay would promote judicial economy. *See Interim Healthcare*, 2020 WL 3078531, at *9 (Staying this case will not "promote judicial economy, reduce confusion or prejudice, [or] prevent possibility of inconsistent resolutions.")

Choice has been without relief since the Act's inception due to CAA jurisdictional hurdles, EPA tactics, and the ordinary delay of litigation. A stay would further delay relief from an unconstitutional restraint on Choice's business. Choice will continue to suffer unrecoverable business losses should this Court stay this case. *See Ironridge Global IV, Ltd. v. SEC*, 146 F.Supp.3d 1294, 1371 (N.D. Ga. 2015)

[5] *U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits*, USCOURTS.GOV (Sept. 30, 2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2022.pdf

(financial harm caused by a sovereign immunity-shielded agency is irreparable).

Second, EPA can demonstrate no harm. The D.C. Circuit case is limited to the administrative record, so there will be no duplicative discovery. This case (challenging the constitutionality of Congress's AIM Act) and the D.C. Circuit case (challenging the constitutionality of EPA's legislating) both present questions of law that will be resolved by motion practice; there will be no trials. Further, given EPA's claiming similarity between the cases, even additional briefing will not present a significant burden, certainly not for the United States Department of Justice.

"Motions to stay are generally disfavored because they can often lead to case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Interim Healthcare*, 2020 WL 3078531, at *10. Issuing an indefinite stay pending the D.C. Circuit's review of the petition would be particularly pointless and improper.

CONCLUSION

The CAA rulemaking provisions do not strip away this Court's federal question jurisdiction. Nor does or could Choice assert the same claim and seek the same relief here as in its CAA action. Only this Court can provide the remedies Choice seeks, and continued delay in deciding the constitutionality of the AIM Act interferes with Choice's need for prompt relief. EPA's motion should be denied.

January 10, 2024

Respectfully submitted,
/s/ *Zhonette M. Brown*

Zhonette M. Brown*
Kaitlyn D. Schiraldi*
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
Tel.: (202) 869-5210
Fax: (202) 869-5238
zhonette.brown@ncla.legal
kaitlyn.schiraldi@ncla.legal

Braden Boucek
GA Bar No. 396831
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd, Ste. 104
Roswell, GA 30075
Tel.: (770) 977-2131
Fax: (770) 977-2134
bboucek@southeasternlegal.org

**Admitted pro hac vice*