C.A. No. 25-0682 Team 9

In the United States Court of Appeals for the Twelfth Circuit

VANDALIA ENVIRONMENTAL ALLIANCE

Appellant,

v.

BLUESKY HYDROGEN ENTERPRISES,

Appellee.

BRIEF OF APPELLANT

Barry Zuckerkorn
Counsel for Appellant
He's Very Good LLP
1234 N. Main St. USA
777-777-7777
barry@hesverygood.com
State Bar No. 1111

TABLE OF CONTENTS

Table of Contents i

Jurisdictional Statement 1

Questions Presented 1

Statement of The Case 2

Blue Sky Hydrogen Enterprises 2

SkyLoop's PFAS Air Emissions 3

The Vandalia Environmental Alliance 4

The VEA's Motion for Preliminary Injunction 5

Procedural History 6

Summary of the Argument 7

Argument 9

I. The District Court incorrectly stayed its proceedings pending appeal of the VEA's preliminary injunction. 10

A. *Coinbase* deviates from traditional principles of judicial discretion, and its mandatory stay ruling should be interpreted as a narrow exception for jurisdictional appeals. 11

B. Even if construed broadly, interlocutory appeals of preliminary injunctions would not trigger the mandatory stay rule from *Coinbase*. 13

II. The damage caused to the VEA's farm by the SkyLoop PFOA air emissions sufficiently meets the special injury requirement for the VEA to establish standing for its public nuisance claim. 14

III. BlueSky's discharge of PFOA particulate matter through aerial emissions qualifies as "disposal" under RCRA, therefore the VEA is likely to succeed on the merits of its RCRA ISE claim. 16

IV. In the context of environmental lawsuits, the irreparable harm prong of the *Winter* test considers harm to the plaintiff as well as harm to the public. 22

A. RCRA's overall purpose and its inclusion of a citizen suit provision urge consideration of public harm in irreparable harm analysis. 24

B. Because the *Winter* test's public interest prong does not explicitly consider public harm, its irreparable harm factor must 26

Conclusion 28

U.S. Supreme Court Cases

Amoco Production Co. v. Gambell, 480 U.S. 531 (1987) 27, 29
Coinbase, Inc. v. Bielski, 599 U.S. 736 (2023).. 12, 13, 14, 15
Griggs v. Provident Consumer, 459 U.S. 56, 58 (1982).. 13, 15
Landis v. North American Co., 299 U.S. 248, 254 (1936).. 14
Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996) 19, 20
Nken v. Holder, 556 U.S. 418, 434 (2009) 14
Sierra Club v. Morton, 405 U.S. 727 (1972) 31
Weinberger v. Romero-Barcelo, 456, U.S. 305 (1982) 27
Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)... passim

U.S. Court of Appeals

Beber v. NavSav Holdings, LLC, 140 F.4th 543 (8th Cir. 2025)... 39, 40
California v. Azar, 911 F.3d 558, 583-84 (9th Cir. 2018) 18
City of Huntington v. Amerisourcebergen Drug Corp., 157 F.4th (4th Cir. 2025) 19
City of Martinsville v. Express Scripts, Inc., 128 F.4th 265 (4th Cir. 2025) 13, 15
Cox v. City of Dallas, 256 F.3d 281 (5th Cir. 2001).. 25
Ctr. for Cmty. Action & Env't Justice v. BNSF Ry. Co., 764 F.3d 1019 (9th Cir. 2014) ...... passim
Davis v. Sun Oil Co., 148 F.3d 606 (6th Cir. 1998).. 23
Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Circuit. 1991)......... 36
Interfaith Cmty. Org. v. Honeywell Int'l Inc., 399 F.3d 248 (3rd Cir. 2005) 23, 24, 30
N. Miss. Med. Ctr., Inc. V. Quartiz Techs., No. 23-00003, 2024 WL 2262684 18
Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803 (9th Cir. 2018) 35
Pakootas v. Teck Cominco Metals, Ltd., 830 F.3d 975 (9th Cir. 2016)....................................... 29
Parker v. Scrap Metal Processors, Inc., 383 F.3d 993 (11th Cir. 2004)..................................... 25
Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989)... 35
United States v. Claiborne, 727 F.2d 842, 850 (9th Cir. 1984) 14
United States v. Power Engineering Company, 191 F.3d 1224 (10th Cir. 1999)......................... 30
United States v. Waste Indus., Inc., 734 F.2d 159,167 (4th Cir. 1984) 24

U.S. District Court Cases

Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1233 (D. Ma. 1986)................................... 17
Citizens Against Pollution v. Ohio Power Company, No. C2-04-CV-371, 2006 U.S. Dist. LEXIS 100839 (S.D. Ohio July 13, 2006) 21
Courtland Co. v. Union Carbide Co., No. 2:19-cv-00894, 2024 WL 4339600 (S.D. W. Va. Sept. 27, 2024) 27, 28, 29, 31
Forester-Hoare v. Kind, 23-CV-537-JPS, 2025 WL 101660, at *3 (E.D. Wis. Jan. 15, 2025) ... 16
Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C., 405 F. Supp. 3d 408 (W.D.N.Y. 2019) 20
Little Hocking Water Association v. E.I. du Pont de Nemours & Company, 91 F. Supp. 3d 940 (S.D. OH 2015) 21, 25, 26
Rhodes v. E.I. Du Pont de Nemours & Co., 657 F. Supp. 2d 751 (2009).................................... 18
United States v. Conservation Chem. Co., 619 F. Supp 162 (W.D. Mo. 1985) 21

W. Va. Rivers Coal., Inc. V. The Chemours Co. FC, LLC, 793 F. Supp 3d 790 (S.D.W. Va 2025) .... passim

State Court Cases

Hark v. Mountain Fork Lumber Co., 127 W. Va. 586, 595-96 (1945) 17
In re Lead Paint Litig., 191 N.J. 405, 436 (2007) 18
Sharon Steel Corp. V. City of Fairmont, 175 W. Va. 479 (1985) 19
Taylor v. Culloden Public Service District, 214 W. Va. 639 (2003) 19

Statutes and Restatement Provisions

28 U.S.C. § 1292(b) 1
28 U.S.C. § 1331 1
42 U.S.C. § 6924(n) 23
42 U.S.C. § 6972 23
42 U.S.C. § 6972(a)(1) 1
42 U.S.C. § 6972(a)(1)(B) 20
42 U.S.C.S. § 6903(3) 22, 27
Pub. L. No. 95-95, § 108(e), 91 Stat. at 696 23
Restatement (Second) of Torts § 821B(1) 16

Secondary Sources

Agency for Toxic Substances and Disease Registry, *How PFAS Impacts Your Health,* https://www.atsdr.cdc.gov/pfas/about/health-effects.html?CDC_AAref_Val=https://www.atsdr.cdc.gov/pfas/health-effects/index.html, (last updated July 22, 2025) 12
Richard J. Lazarus*, 20th Anniversary Commemorative Issue: Essay the Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 Va. Envtl. L.J. 75, 83 19
Roi Zaken Porat, *PFAS Removal: What Will Change in the Next 3 Years*, IDE Technologies (March 6, 2024), https://ide-tech.com/en/blog/pfas-removal-what-will-change-in-the-next-3-years/ 11
See Environmental Law Practice Guide § 11B.02 (2025) 10, 15
See Recent Cases: Center for Community Action & Environmental Justice v. BNSF Railway Co.,128 Harv. L. Rev. 1272, 1279 24
United States Environmental Protection Agency, *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last updated November 5, 2025) 11
Will Reisinger et. al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 2 (2010) 24

JURISDICTIONAL STATEMENT

This action was brought pursuant to 42 U.S.C. § 6972(a)(1) and Vandalia common law. Vandalia Environmental Alliance (VEA) sent a notice of intent to sue on March 30, 2025 and after 90 days passed, filed suit on June 30, 2025. The United States District Court for the Middle District of Vandalia had jurisdiction over this case pursuant to 28 U.S.C. § 1331. On November 23, 2025, the district court issued an order granting the VEA's motion for a preliminary injunction. On December 1, 2025, BlueSky filed this appeal to the United States Court of Appeals for the Twelfth Circuit; that same day, BlueSky filed a motion to stay proceedings in the lower court pending appeal. BlueSky's motion to stay proceedings was granted on December 8, 2025; the United States Court of Appeals for the Twelfth Circuit permitted the VEA's discretionary, interlocutory cross appeal in an order on December 29, 2025. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this case pursuant to 28 U.S.C. § 1292(b).

QUESTIONS PRESENTED

I. Whether a stay of all proceedings is mandatory pending appeal of the VEA's preliminary injunction under *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023);

II. Whether the damage to the VEA's farmland constitutes sufficient special injury to give it standing to bring a public nuisance claim for BlueSky's PFOA air emissions;

III. Whether BlueSky's aerial emissions of PFOA particulate matter that was deposited onto land and later discharged into groundwater was properly considered disposal under RCRA; and

IV. Whether the irreparable harm prong of the *Winter* test only considers harm to the Plaintiff themself, or whether public harm can also be evidence of irreparable harm sufficient to issue a preliminary injunction.

STATEMENT OF THE CASE

The Vandalia Environmental Alliance (VEA), a regional environmental public interest organization, seeks a preliminary injunction to compel BlueSky Hydrogen Enterprises to cease its emission of PFOA particulates from SkyLoop, Bluesky's waste-to-hydrogen processing facility located in Vandalia. R. 11-16.

Blue Sky Hydrogen Enterprises

BlueSky Hydrogen Enterprises (Bluesky) is a hydrogen company incorporated and headquartered in Richmond, Virginia, and does business in the Appalachian Region, including Vandalia. R. 4. BlueSky has created an advanced waste-to-hydrogen facility in Mammoth, Vandalia called SkyLoop. R. 5. Operations at the SkyLoop facility follow similar processes as other waste-to-hydrogen plants in the region, although SkyLoop handles more complex waste streams due to the vast quantity of landfills located in Vandalia. R. 4-5. SkyLoop's operations can be broken down into three stages. *Id.*

The first stage begins upstream at a waste collection and preparation facility. R. 5. There, incoming materials, such as plastic waste from wastewater treatment plants and by-products from surrounding chemical companies, are sorted, conditioned, and processed into feedstock. *Id.* The feedstock is then transported to the main SkyLoop plant where the second stage commences. *Id.* At this second stage, the processed waste enters a controlled conversion system to extract the hydrogen from inorganic materials and trace residues. *Id.* This conversion process produces a hydrogen-rich synthesis gas and minimizes the formation of unwanted by-products. *Id.* At the third and final stage, the hydrogen-rich gas is cooled, cleaned, and refined to remove particulates, carbon compounds, and other impurities. *Id.* The result is less overall waste and a reliable source of clean hydrogen. *Id.*

While waste-to-hydrogen technologies are useful for tackling waste management issues and creating a clean energy solution, the second stage processes have the potential to emit carbon dioxide (CO2), nitrogen oxides (NOx), and other particulates into the air. *Id.* These air emissions are managed as a core design and operational priority; SkyLoop's process is designed to tightly limit atmospheric releases and ideally treat all process gases before any discharge occurs. R. 6. Because of this potential to emit, SkyLoop has a Title V Clean Air Act permit to regulate these criteria pollutants which it has remained in compliance with since beginning its operations in January 2024. R. 5-6.

SkyLoop's PFAS Air Emissions

The list of pollutants regulated by the Clean Air Act is not exhaustive. R. 8. The emission of many harmful compounds such as PFAS particulates is left unmonitored. *Id.* In March 2025, the 2024 results from the periodic Unregulated Contaminant Monitoring Rule (UCMR) testing of the Mammoth Public Service District's (PSD) water supply were released and showed detectable levels of PFOA. R. 7. PFOAs are part of a class of persistent compounds known as PFAS pollutants, commonly referred to as "forever chemicals." *Id.* Forever chemicals are compounds that do not readily break down in the environment and have a tendency to accumulate in the body. R. 7-8. PFOAs have been linked by regulators to long-term health risks, including cancer, birth defects, and liver problems. R. 7.

The UCMR results for December 2024 showed PFOA levels of 3.9 ppt in the Mammoth water supply. *Id.* PFOA was not detected in the Mammoth water supply in 2023. *Id.* The U.S. Environmental Protection Agency (EPA) recently established a Maximum Contaminant Level (MCL) and Maximum Contaminant Level Goal (MCLG) specifically for PFOAs, at 4 ppt and 0 ppt, respectively. *Id.* That puts the level of PFOAs in the Mammoth water supply 3.9 ppt over the EPA's MCLG and just 0.1 ppt below the MCL less than one year after SkyLoop began its

operations. R. 6-7. While the MCL will not be enforceable until 2029, Mammoth residents are alarmed and the VEA believes that the contamination of the water supply is an environmental and public health crisis that demands immediate attention. R. 7.

The Vandalia Environmental Alliance

The Vandalia Environmental Alliance (VEA) is a regional environmental public interest organization based in the state of Vandalia. R. 6. At the center of the VEA's mission is protection of the State's natural environment and sustainability education. R. 7. In Mammoth, Vandalia, the VEA has an educational outreach center and a small farm called VEA Sustainable Farms, which provides residents the opportunity to learn how to start and maintain a small farm or garden. *Id*. The VEA's farm is located approximately 5 miles south of Mammoth's urban center and 1.5 miles north of the SkyLoop Plant. *Id*.

Because the sudden spike in PFOA in the water coincided with SkyLoop's beginning operations, the VEA conducted a series of investigations and submitted numerous Freedom of Information Act (FOIA) requests to the Vandalia Department of Environmental Protection (VDEP). *Id*. The VEA's investigation revealed that one of SkyLoop's primary feedstocks contained PFOA. *Id*. SkyLoop processes biosolids originating from a wastewater treatment plant that accepts industrial sludge from Martel Chemicals, a chemical company known to use PFAS compounds in its operations. *Id*. VDEP documents affirmed that there was PFOA in Martel's sludge, but it is not required to be removed at the wastewater treatment plant nor at SkyLoop's treatment and processing stages. R. 8.

The VEA believes that the PFOA survives SkyLoop's emissions control process and is being released into the air through SkyLoop's stacks and blown northernly by prevailing winds until settling onto surrounding land, including the PSD's wellfield. *Id*. The result of these air emissions is the accumulation of PFOA in the Mammoth PSD's water supply. *Id*. Without proper

treatment technology, residents are consuming water riddled with PFOA and will continue to do so until treatment can be installed. *Id*. Currently, there are no practical means of filtration or mitigation as installing a new treatment system would require a complete system overhaul and the ordering of equipment with a minimum twelve-month lag time. *Id*.

Because of health concerns, the VEA began advising its Mammoth-based members to limit or avoid use of municipal water when possible as there is no safe level of PFOA to drink without increased health risks. R. 8, 12. From this guidance, VEA members ceased drinking the water all together and resorted to buying bottled water. R. 8. However, at the time the issue first surfaced, many were still consuming the water, and much of the Mammoth community continues to drink contaminated water without treatment either out of ignorance or inability to afford an alternative water source. *Id*.

In addition to the public health concerns, the VEA is also concerned about PFOA particulates being deposited on its own farm in Mammoth. R. 9. The VEA's farm is just 1.5 miles north of the SkyLoop Plant. R. 7. Specifically, the VEA is worried that the PFOA settlement is contaminating its soil and crops, undermining both the organization's mission to protect the State's natural environment and its partnership with the community programs that accept its locally grown food. R. 9. The VEA has stopped providing food to the community because it does not want to risk poisoning them with PFOA-contaminated food. *Id*.

The VEA's Motion for Preliminary Injunction

Due to the persistent nature of PFOA particulates, the VEA filed a preliminary injunction requesting that either the Court temporarily shut down SkyLoop or order SkyLoop to cease accepting waste that could contain PFOAs. R. 11. On September 29, 2025 the district court held an evidentiary hearing where the VEA presented testimony from several VEA members regarding their concerns about drinking the PFOA contaminated water from the PSD. *Id*.

Members testified that they would not drink water from the PSD again until they knew the PFOA was removed. *Id*. In the meantime, they had to expend considerable funds each month to buy bottled water. *Id*. The VEA also presented testimony from an air emissions expert who maintained that based on the rates of PFOA accumulation in the PSD water to date, "PFOA levels could reach as high as 10 ppt by May 2026 if SkyLoop's emissions continued." *Id*. Additionally, an expert toxicologist testified that in her "expert opinion to a reasonable degree of certainty," Mammoth residents who continue to drink from the PFOA contaminated PSD water supply "will suffer irreparable harm between now and trial in the form of increased health risks." *Id*. BlueSky did not provide an opposing expert toxicologist. R. 14.

The VEA members also spoke to their enjoyment of the VEA Sustainable Farms and the Executive Director of VEA testified that the VEA had "privately tested the soil" on its Mammoth farm and found "detectable levels of PFOA on the property." R. 11.

Procedural History

Following the VEA's discovery of Bluesky's PFOA emissions, the VEA sent notice of intent to sue Bluesky under RCRA's Imminent and Substantial Endangerment (ISE) provision. *Id*. On June 30, 2025, the VEA filed a lawsuit against Bluesky in the United States District Court for the Middle District Court of Vandalia, raising both a public nuisance claim and an RCRA ISE citizen suit claim. *Id*.

First, the VEA filed a motion for preliminary injunction against Bluesky for its PFOA emissions. *Id*. After the preliminary injunction motion was fully briefed, the district court held an evidentiary hearing on September 29, 2025. R. 14. On November 24, 2025, the district court issued an order granting the VEA's motion for preliminary injunction, finding that the VEA had standing to bring both of its claims and had established all four *Winter* factors. *Id*. The court found that the VEA had experienced "special injury" via damage to its vegetable garden, that

Bluesky's emissions were "disposal" under the RCRA, and that irreparable harm was occurring because of Bluesky's emissions. R. 15.

On December 1, 2025, Bluesky appealed to the United States Court of Appeals for the Twelfth Circuit, asking that the district court's order granting a preliminary injunction be vacated. *Id*. That same day, Bluesky also filed a motion to stay proceedings in the lower court pending appeal. *Id*. On December 8, 2025, against the VEA's wishes, the district court granted Bluesky's motion to stay. R. 16. The VEA then asked the district court for an interlocutory appeal of its stay order, which was granted. *Id*. The Twelfth Circuit permitted the VEA's interlocutory cross appeal and consolidated it with Bluesky's appeal of the court's order granting a preliminary injunction. *Id*. The Twelfth Circuit issued an order on December 29, 2025, setting forth the issues to be briefed and argued on appeal. *Id*.

SUMMARY OF THE ARGUMENT

The District Court erred in extending the mandatory stay ruling in *Coinbase, Inc. v. Bielski* to interlocutory appeals of preliminary injunctions. The rule established in *Coinbase* is a judge made rule that deals with the narrow question of arbitrability and is not applicable to preliminary injunctions. At most, *Coinbase* can logically be extended to appeals dealing with foundational jurisdictional questions. Extending *Coinbase* beyond this narrow context would strip district courts of their longstanding discretionary authority and would frustrate the courts' ability to provide complete and timely relief. Because interim injunction rulings provide little guidance on the disposition of the merits of a case, there is no reason to stay proceedings while a preliminary injunction is pending appeal.

The VEA has standing to bring a public nuisance claim for BlueSky's PFOA air emissions because they sustained three injuries, distinct in kind from the general Mammoth population. While BlueSky's contamination of the Mammoth PSD water supply frustrated the

community as a whole, the emissions from BlueSky's SkyLoop facility also settled onto the VEA's farm, contaminating their soil and ruining their vegetable harvest. This in turn harmed their organizational mission to protect the environment and ended their community outreach efforts.

The Resource Conservation Recovery Act of 1976 (RCRA) is a broad remedial statute intended to supplement media-based laws like the Clean Air Act by looking to the larger picture and focusing on all forms of environmental harm from toxic pollutants. Under this statute, Bluesky's discharge of PFOA particulate matter through aerial emissions from the SkyLoop plant clearly constitutes disposal. Adherence to an order-of-disposal rule as urged by the defendants would disregard the complexities of environmental pollution. The district court properly determined that the VEA was likely to succeed on the merits of its RCRA Imminent and Substantial Endangerment (ISE) claim. This court should not allow such an important enforcement tool for environmental protection like the RCRA citizen suit ISE claim to be handicapped by a pedantic rule that allow polluters to be relieved of liability for their environmental harms on meaningless technicalities.

Environmental harm is cumulative, diffuse, and often invisible until it is far too late. BlueSky continues to emit PFOAs, contaminating the surrounding area, including Mammoths' water supply. Because of this contamination, Mammoth residents face an excruciating choice: expend resources they may not have to purchase water or continue to use water contaminated with forever chemicals. This harm to the public must be considered under the Winter test's "irreparable harm" prong. The test may seem to only consider harm to the plaintiff themself but if public harm is not explicitly considered in its "irreparable harm" prong, it will not get the attention it deserves. The Winter test's "public interest" prong is not primarily concerned with

harm itself, rather it focuses on the result of issuing or not issuing an injunction. RCRA's purpose and its inclusion of a citizen lawsuit provision further enable consideration of public harm within the irreparable harm analysis. Irreparable harm should be determined by reference to the statute being enforced. Though there are regulatory gaps, the overall aim of RCRA is to address hazardous waste before it becomes a problem. Unfortunately, in Mammoth it is already a problem that only an injunction can rectify.

ARGUMENT

Due to the nature of environmental wrongs, typical remedial measures are often inadequate to address sustained harms to the environment and human health. *See Environmental Law Practice Guide* § 11B.02 (2025). While environmental protection legislation such as the Clean Water Act and the Clean Air Act provide some avenues for relief, there remain vast regulatory gaps that empower the disposal of harmful chemical compounds. R. 8. This reflects the circumstances of the present case.

BlueSky Enterprises is emitting Perfluorooctanoic Acids, or PFOAs, into the air of the Mammoth region, contaminating the public water supply and poisoning local food stores by PFOA seeping into the soil of surrounding farmland. *Id*. PFOAs are a part of a group of manufactured "forever chemicals" known as PFAS pollutants. United States Environmental Protection Agency, *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last updated November 5, 2025). Forever chemicals are compounds that "break down very slowly," and have a tendency to "build up in people, animals, and the environment over time," leading to various adverse health and environmental effects. *Id*. "When people consume PFAS, it concentrates and accumulates in their blood, depending on the PFAS chain length, it may take the body years to dispose of it. For this reason, even a very small contamination of

PFAs can result in significant harm." Roi Zaken Porat, *PFAS Removal: What Will Change in the Next 3 Years*, IDE Technologies (March 6, 2024), https://ide-tech.com/en/blog/pfas-removal-what-will-change-in-the-next-3-years/.

PFOAs specifically are "one of the most widely used and studied chemicals in the PFAS group," and have been linked to a myriad of adverse health effects including developmental delays in children, kidney and testicular cancer, decreased fertility, and interference with the body's natural hormones. Agency for Toxic Substances and Disease Registry, *How PFAS Impacts Your Health,* https://www.atsdr.cdc.gov/pfas/about/health-effects.html?CDC_AAref_Val=https://www.atsdr.cdc.gov/pfas/health-effects/index.html, (last updated July 22, 2025). Yet, despite its persistent presence and widely acknowledged harmful properties, PFAS are left widely unregulated. R. 8. EPA advisories on contamination goals do not carry the force of law, and companies currently face limited pressure - at least at the federal level – to remove PFAS from their supply chains. R. 7.

In the interim, while legislation in this area advances and PFAS regulatory gaps close, courts are left with two important tools for relief: judicial discretion and citizen lawsuits. Robin Klundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 ELR 11013 (2004).

I. The District Court incorrectly stayed its proceedings pending appeal of the VEA's preliminary injunction.

The mandatory stay ruling in *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023) is a judge made rule that departs from typical discretionary stay factors and concerns the narrow question of arbitrability appeals. (Jackson, J., dissenting) ("The mandatory-general-stay rule that the Court manufactures is unmoored from Congress's commands and this Court's precedent . . ."). While how far *Coinbase* extends outside the arbitration context - if at all -"is an active subject in the

federal appellate courts," no circuits have yet implicated interlocutory appeals of preliminary injunctions. *City of Martinsville v. Express Scripts*, Inc., 128 F.4th 265, 269 (4th Cir. 2025). Taken that broadly, the mandatory-general-stay rule would interfere with the courts' ability to offer timely relief and would "upend federal litigation as we know it." *Coinbase*, 599 U.S. at 761 (Jackson, J., dissenting) ("Aware that any interlocutory appeal on a dispositive issue grinds the plaintiff's case to a halt, defendants would presumably pursue that tactic at every opportunity"). Accordingly, in the interest of justice, this court should preserve its discretionary stay authority and forego expanding *Coinbase* beyond its logical scope.

A. ***Coinbase* deviates from traditional principles of judicial discretion, and its mandatory stay ruling should be interpreted as a narrow exception for jurisdictional appeals.**

In *Griggs v. Provident Consumer*, 459 U.S. 56, 58 (1982), the Supreme Court set forth a modest common law principal of divestiture: two courts should avoid exercising control over the same order simultaneously to "prevent confusion or waste of time resulting from having the same issues before the courts at the same time." *See United States v. Claiborne,* 727 F.2d 842, 850 (9th Cir. 1984). To meet this end, *Griggs* held that a notice of appeal divests a district court of its control over "those aspects of the case involved in the appeal." 459 U.S. at 58.

Following *Griggs*, the court in *Coinbase* reaffirmed the general divestiture principle and clarified that in some instances "the entire case is involved in the appeal," requiring a mandatory stay of all proceedings pending resolution of the appeal. 599 U.S. at 741. Specifically, the majority held that arbitrability appeals implicate all proceedings of a case because whether a case will be moved to arbitration is a foundational jurisdictional question. *Id*. In *City of Martinsville,* the Fourth Circuit adopted this same reasoning for orders for remand, which was later adopted by the Twelfth Circuit, holding that "just like the motion to compel arbitration, a remand order decides the foundational question: Which forum will hear the case?". 128 F.4th 265 at 270.

While the application of *Coinbase* in *Martinsville* extends the mandatory stay rule outside the question of arbitrability, the majorities reasoning parallels that of *Coinbase* and offers no justification for expanding the rule outside of the jurisdictional context.

Notably, the dissenting opinions for both these decisions heavily criticize interpreting the divestiture rule as an end to the district courts' longstanding discretionary stay authority. *See Coinbase*, 599 U.S. at 756 (Jackson, J., dissenting) ("[T]he majority can identify no other time this Court wielded Griggs to mandate a stay of all merits proceedings just because a distinct procedural question was on appeal"); *see also Martinsville*, 128 F.4th 265 at 274 (Wynn, J., dissenting) ("[T]he majority goes too far when it argues that the Supreme Court gave the Griggs principle the import and scope to apply to every interlocutory appeal of a dispositive issue"). The *Martinsville* dissent specifically notes that *Griggs* was a per curiam opinion "decided decades before *Nken v. Holder*" the Supreme Court case responsible for establishing district courts discretionary authority regarding whether to impose a stay. *See Nken v. Holder,* 556 U.S. 418, 434 (2009).

Traditional discretionary stay authority allows courts to craft case-specific solutions and balance all the interests at stake. *See Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (explaining that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). Utilizing *Griggs* 41 years later to wipe out longstanding precedent is therefore an improper use of the court's authority and a dangerous precedent to uphold considering no limiting principles have been applied. 459 U.S. 56. As articulated by Justice Jackson in the dissent, "[T]his endeavor is unfounded, unwise, and-most fundamentally-not our role." *Coinbase*, 599 U.S. at 761 (Jackson, J., dissenting).

B. <u>Even if construed broadly, interlocutory appeals of preliminary injunctions would not trigger the mandatory stay rule from *Coinbase*.</u>

Preliminary injunctions are a vital pretrial tool for ensuring the status quo is maintained while litigation on the merits is pending. This is especially true in environmental harms litigation where the timeliness of relief is crucial to ensure the court can provide adequate relief later. *See Environmental Law Practice Guide* § 11B.02 (2025). For example, in the present case, the VEA's motion for preliminary injunction requests the court to either temporarily shutdown the SkyLoop facility or order SkyLoop to cease accepting waste that could contain PFOAs. R. 11. By requesting this injunction, the VEA is asking the court to prevent BlueSky from inflicting any further harm while the question of whether the emissions of PFOA are permitted is litigated. Thus, intuitively, preliminary injunctions do not implicate the merits of the substantive law claims at issue.

While a likelihood for success on the merits is a consideration the court undertakes in determining whether to order a preliminary injunction, the outcome of that preliminary analysis has no effect on the substantive analysis. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest). In fact, the Ninth Circuit has spoken to this severability by outright discouraging courts from staying proceedings pending an interlocutory appeal of a preliminary injunction because the interim ruling "may provide little guidance as to the appropriate disposition on the merits." *California v. Azar*, 911 F.3d 558, 583-84 (9th Cir. 2018).

District Court's in the Fifth and Seventh Circuit have also declined to apply the *Coinbase* ruling to preliminary injunction appeals. *See Forester-Hoare v. Kind*, 23-CV-537-JPS, 2025 WL

101660, at *3 (E.D. Wis. Jan. 15, 2025) (court directly distinguished that the interlocutory appeal focused on the narrow issue of whether preliminary relief was warranted and thus did not implicate the mandatory stay rule); *see also N. Miss. Med. Ctr., Inc. V. Quartiz Techs.*, No. 23-00003, 2024 WL 2262684, at *7 (court relied on discretionary stay factors to determine whether a stay was mandatory and made no mention of *Coinbase* in its analysis). Likewise, since the appeal in the instant case focuses solely on the issue of whether preliminary relief was warranted, this Court should find that a stay is not mandated under *Coinbase* and instead utilize its discretion and find that a stay of proceedings is not merited.

II. The damage caused to the VEA's farm by the SkyLoop PFOA air emissions sufficiently meets the special injury requirement for the VEA to establish standing for its public nuisance claim.

Since the PFOA particulates emitted from the SkyLoop facility are affecting the Mammoth community at large, the VEA must seek relief for the contamination of its soil by bringing a public nuisance action. R. 12. *See Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 595-96 (1945) ("The distinction between a public nuisance and a private nuisance is that the former affects the general public, and the latter injures one person . . ."). The State of Vandalia has adopted the Restatement (Second) of Torts § 821B(1) which defines public nuisance broadly as "an unreasonable interference with a right common to the general public." (A.L.I 1979). *See City of Huntington v. Amerisourcebergen Drug Corp.*, 157 F.4th 547, 562 (4th Cir. 2025) (public nuisance is "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons").

In the present case, the PFOA emissions are creating a public nuisance by contaminating the public water supply and subsequently forcing community members to cease drinking the water. R. 8. *See Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1233 (D. Ma. 1986) ("The right to be free of contamination to the municipal water supply is clearly a 'right common to the

general public', thus interference with that right would be a public nuisance"). Abating public nuisance and vindicating the rights of the public is ordinarily a claim sought by public officials, however if the "act or condition" causing the nuisance is also resulting in "special injury" to a private citizen, then that citizen may establish standing for a public nuisance claim. *Rhodes v. E.I. Du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 769 (2009). Proving special injury requires the individual bringing suit to demonstrate that the harm they are enduring is "different in kind and degree" from that suffered by the general public. *Rhodes*, 657 F. Supp. 2d at 769. *See In re Lead Paint Litig.*, 191 N.J. 405, 436 (2007) (explaining that a special injury in the public nuisance context is an injury different from those "directly arising from the common right").

For example, the court in *Rhodes v. E.I.* found no special injury where plaintiffs alleged "PFOA contamination of their properties and bodies" and an "increased risk of disease," because when weighed against the injuries endured by the comparative population, absolutely no difference in form nor degree was found. 657 F. Supp. 2d at 769. The plaintiffs and the general population were both suffering harm to their public right to consume clean, safe water from the public water supply. *Id*. at 770. *Rhodes* is clearly distinguishable from the present case. *Id*.

Here, the VEA is specifically alleging that SkyLoop's aerial emission of PFOA particulates settled onto their farmland and contaminated their soil. R. 7. This contamination in turn inflicts three distinct injuries. First, the contamination of air and soil causes actual harm to the food grown by the VEA, rendering the food inedible. Second, the contamination of the soil constructively harms the VEA's relationship with the local charitable organizations in Mammoth that have previously accepted harvest from VEA's farm. *Id*. Finally, the contamination constructively harms the VEA's organizational mission to protect the natural environment of the

Appalachian region. *Id*. In comparison, the harm to the Mammoth community members is contamination of their public water supply. R. 8.

While the special injuries alleged by the VEA are unique, nuisance is "a flexible area of law that is adaptable to a wide variety of factual situations," especially in nuisance actions brought to abate environmental hazard. *Sharon Steel Corp. V. City of Fairmont*, 175 W. Va. 479, 621 (1985). *See Taylor v. Culloden Public Service District,* 214 W. Va. 639, 647-48 (2003) (nuisance theory and case law "is the common law backbone of modern environmental and energy law"). As such, this Court should find that the harms suffered by the VEA sufficiently satisfy the special injury requirement and give it standing to bring its public nuisance claim.

III. BlueSky's discharge of PFOA particulate matter through aerial emissions qualifies as "disposal" under RCRA, therefore the VEA is likely to succeed on the merits of its RCRA ISE claim.

Congress enacted RCRA as "a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). RCRA was intended to close the "last remaining loophole in environmental law." *Ctr. for Cmty. Action & Env't Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1026 (9th Cir. 2014). In contrast to earlier media-based laws like the Clean Air Act, the theoretical justification of RCRA was to look at the larger, overall picture to avoid simply chasing toxic pollutants from one media to the next. Richard J. Lazarus*, 20th Anniversary Commemorative Issue: Essay the Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 Va. Envtl. L.J. 75, 83. While the Administrator of the EPA has chief responsibility to implement and enforce RCRA, *see* 42 U.S.C. § 6928, 6973, RCRA's citizen suit provision, § 6972, permits private citizens to enforce its provisions in some circumstances. *Meghrig*, 516 U.S. at 483 (1996). The

RCRA ISE provision states in relevant part, that any person may commence a civil action on his own behalf:

> against any person… including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent or substantial endangerment to health or the environment.
>
> 42 U.S.C. § 6972(a)(1)(B).

RCRA is "intended to confer upon the courts the authority to eliminate any risks posed by toxic wastes." *Interfaith Cmty. Org. v. Honeywell Int'l Inc.*, 399 F.3d 248, 260 (3rd Cir. 2005). RCRA is a remedial statute that courts have construed and applied in a liberal, though not unbridled, manner. *Davis v. Sun Oil Co.*, 148 F.3d 606, 609 (6th Cir. 1998). RCRA's ISE provision is "'essentially a codification of the common law public nuisance' and is intended to be construed 'more liberal[ly] than [its] common law counterparts.'" *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 434-35 (W.D.N.Y. 2019) (alterations in original) (quoting *United States v. Waste Indus., Inc.*, 734 F.2d 159,167 (4th Cir. 1984). Courts have determined that "given RCRA's language and purpose, Congress must have intended that 'if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment.'" *Interfaith Cmty. Org.*, 399 F.3d at 259 (quoting *United States v. Conservation Chem. Co.*, 619 F. Supp 162, 194 (W.D. Mo. 1985)). In order to prevail under the RCRA ISE provision, a plaintiff must prove:

> (1) that the defendant is a person, including but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.

Parker v. Scrap Metal Processors, Inc., 383 F.3d 993, 1015 (11th Cir. 2004) (quoting *Cox v. City of Dallas*, 256 F.3d 281, 292 (5th Cir. 2001).

On appeal, BlueSky only contests whether the district court properly determined that aerial emissions of PFOA particulate matter deposited onto land and later discharged into ground waters can constitute disposal under RCRA. It is not contested by either party that the PFOA particulate matter emitted by BlueSky is "solid waste" under RCRA. R. at 12. Therefore, only the second prong of the VEA's RCRA ISE claim is at issue.

The district court properly adopted the reasoning from *Little Hocking Water Association v. E.I. du Pont de Nemours & Company*, 91 F. Supp. 3d 940 (S.D. OH 2015), and *Citizens Against Pollution v. Ohio Power Company*, No. C2-04-CV-371, 2006 U.S. Dist. LEXIS 100839 (S.D. Ohio July 13, 2006), and rejected the reasoning from the distinguishable *BNSF Railway Company*, 764 F.3d at 1019. This Court should affirm the district court's finding that BlueSky's discharge of PFOA particulate matter through aerial emissions qualifies as disposal under RCRA. RCRA defines "disposal" as the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. 42 U.S.C.S. § 6903(3).

The instant case fits plainly within the concept of disposal contemplated by the statute. BlueSky's own description of the processing of air emissions at the SkyLoop facility makes this clear: "the process is designed to tightly control reaction conditions, limit atmospheric releases, and ideally treat all process gases before any *discharge* occurs." R. 6 (emphasis added). That the PFOA particulate matter is first discharged into the air and then deposited into or on any land or water is a distinction without a difference. Furthermore, the Executive Director of the VEA has

testified that soil on its farm had detectable levels of PFOA when tested, R. 14, making clear that the solid waste is "discharge[d], [or] deposite[d] . . . into or on any land..." 42 U.S.C. § 6903(3).

This Court should not adopt the reasoning provided by *BNSF Railway Company*, 764 F.3d at 1024, and should keep the order-of-disposal rule confined to the unique facts of that case dealing with diesel exhaust from railyards. That court held that under § 6903(3) "disposal" is strictly confined to a particular order where "solid waste is *first* placed 'into or on any land or water' and is *thereafter* 'emitted into the air.'" *Id.* This rule is contrary to RCRA's purpose of closing the last remaining loophole in environmental law and supplementing earlier media-based laws with a regulation that looked to the broader picture. This is made clear by the presence of § 6924(n) which requires the EPA to promulgate regulations "for the monitoring and control of *air emissions* at hazardous waste treatment, storage, and disposal facilities . . . ." 42 U.S.C. § 6924(n). While the *BNSF Railway Company* court asserted that the citizen-suit provision does not permit individuals to enforce § 6924(n), *BNSF R. Co.*, 764 F.3d at 1024*,* the citizen-suit provision contains no explicit exclusion of § 6924(n) from its ambit. *See* 42 U.S.C. § 6972.

Key to the *BNSF Railway Company* court's decision was their examination of the specific legislative history of the 1977 overhaul of the Clean Air Act (CAA) prohibiting federal regulation of indirect sources of air pollution like the defendant's railyards to resolve any lingering ambiguity as to the definition of "disposal". 764 F.3d at 1027. The CAA defines an "indirect source" as any "facility, building, structure, installation, real property, road, or highway, which attracts, or may attract, mobile sources of pollution." Pub. L. No. 95-95, § 108(e), 91 Stat. at 696. BlueSky's SkyLoop facility cannot be said to be an "indirect source" of pollution as defined by the CAA, it does not attract mobile sources of pollution in the same way

a railyard does, instead "air emissions at SkyLoop are managed as a core design and operational priority," R. 6, thus it is properly subject to federal regulation under both the CAA and RCRA.

The instant case is easily distinguishable from the facts presented in *BNSF Railway Company;* there, Congress specifically considered but ultimately did not adopt provisions requiring the EPA to adopt national standards for emissions from locomotives when it passed amendments to the CAA in 1970. 764 F.3d at 1026. Here, the EPA has taken some action regulating PFOA by setting a MCL and a MCLG at 4 ppt and 0 ppt respectively. R. 7. That these regulations do not come into force until 2029, R. 7, is of no importance since

"Congress intended citizen suits to supplement government action, to make up the balance of necessary enforcement . . . when underfunded or over-worked agencies [cannot] ensure that all laws are complied with." Will Reisinger et. al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 2 (2010).

Subsequent Ninth Circuit courts chafed with the reasoning in *BNSF Railway Company* and indicated that if they were not bound by previous circuit precedent, they may have adopted other reasoning. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 983 (9th Cir. 2016) ("Plaintiff's interpretation appears a reasonable enough construction of § 9607(a)(3), and if we were writing on a blank slate, we might be persuaded to adopt it. However, we do not write on a blank slate."). This Court should not limit RCRA liability to a particular order-of-disposal. RCRA suits are often highly complex and factually intensive cases that a strict order-of-disposal rule is not suited for. *See Recent Cases*: Center for Community Action & Environmental Justice v. BNSF Railway Co.,128 Harv. L. Rev. 1272, 1279 ("future courts should rely on case-by-case analyses of potential disposals to avoid the negative consequences of an inflexible rule.").

Adopting the order-of-disposal rule would allow toxic polluters to avoid liability for grievous environmental harms on the technicality of how it was disposed, stripping courts of their broad power "to eliminate any risks posed by toxic wastes." *Interfaith Cmty. Org.*, 399 F.3d at 260.

Indeed, a strict application of the order-of-disposal rule would lead to absurd results where a defendant may claim that sludge dropped from a tank twenty feet in the air is not covered by RCRA since it was not "*first* placed 'into or on any land or water'." *BNSF F. Co.*, 764 F. 3d at 1024. An order-of-disposal rule would provide a perverse incentive to defendants to merely adjust the manner of disposal to avoid RCRA liability, while still causing environmental harm. The *BSNF Railway Company* court provided no limitation or guidelines to their order-of-disposal rule beyond claiming their order of disposal rule was not inapposite to *United States v. Power Engineering Company*, 191 F.3d 1224 (10th Cir. 1999). 764 F.3d at 1025. However, *Power Engineering Company* involved aerosolized waste being sprayed onto soil in a mist from air scrubbers a few feet above the ground, necessarily traveling through the air, F.3d at 1231, and the *BNSF Railway Company* court provided no reasoning as to what height solid waste must be sprayed at to constitute disposal and not emission. 764 F.3d at 1025.

Instead, this Court should affirm the district court and adopt the reasoning provided in the nearly indistinguishable case of *Little Hocking Water Association*, 91 F. Supp. 3d at 966. That court also dealt with aerial emission of PFOA particulate matter (though the term C8 was primarily used) from a defendant's stacks, carried by wind and deposited on a plaintiff's vegetation and surface soils, which then leached into the groundwater contaminating the surrounding water supply *Id.* at 949. Furthermore, the harm in that case, and this case, was not to air quality, but the contamination of soil and groundwater which that court found to be "precisely the type of harm RCRA aims to remediate in its definition of 'disposal'." *Id.* at 965. This is

distinguishable from the harm alleged in *BNSF Railway Company* which was inhalation of diesel particulate matter both directly from vehicle emissions and after particles had fallen to the earth and had been re-entrained into the air. 764 F.3d at 1021. While *BNSF Railway Company* dealt with harm that partially occurred before any contact with land or water, *Little Hocking Water Association* and the instant case deals exclusively with harm after the particulate matter has been "deposit[ed] . . . into or on any land or water so that such solid waste...may enter the environment . . . or discharge[] into any waters, including ground waters." 42 U.S.C.S. § 6903(3).

BlueSky's discharge of PFOA particulate matter through aerial emissions qualifies as disposal under the broad remedial purpose of the RCRA. Adoption of an order-of-disposal rule disregards the complexities of environmental pollution, needlessly restricts the vital enforcement tool of RCRA ISE citizen suits, and provides perverse incentives to defendants to avoid RCRA liability based on mere technicalities of how toxic waste was disposed.

For these reasons, this Court should grant the VEA's request for preliminary injunction.

IV. In the context of environmental lawsuits, the irreparable harm prong of the *Winter* test considers harm to the plaintiff as well as harm to the public.

The *Winter* test outlines standards for success in preliminary injunctions, requiring that a plaintiff independently establish that (1) they are likely to succeed on the merits of their claim; (2) they are likely to suffer irreparable harm in the absence of relief; (3) the balance of equities tips in their favor; and that (4) an injunction is in the public interest. *Winter*, 555 U.S. at 22.

On its face, the *Winter* test's second prong, "irreparable harm," concerns only irreparable harm to the plaintiff themself, foreclosing consideration of irreparable harm to the public. *Id.* This cannot be. *See W. Va. Rivers Coal., Inc. V. The Chemours Co. FC, LLC*, 793 F. Supp 3d 790, 813 (S.D.W. Va 2025). Especially in the context of environmental lawsuits, harm to the

plaintiff, the public, or a combination of both can be sufficient to issue an injunction. *See Weinberger v. Romero-Barcelo*, 456, U.S. 305, 312 (1982) (stating that in environmental lawsuits, "flexibility rather than rigidity" has "distinguished considerations of injunctive relief); *W. Va. Rivers Coal,* 793 F. Supp 3d at 809-15; *Courtland Co. v. Union Carbide Co.*, No. 2:19-cv-00894, 2024 WL 4339600, at 14 (S.D. W. Va. Sept. 27, 2024) (explicitly considering public harm under the *Winter* test's irreparable harm prong).

Unfortunately, the irreparable harm prong of the *Winter* test is "especially punishing to environmental cases" as harm is distinct in the environmental context. *W. Va. Rivers Coal,* 793 F. Spp. 3d at 809-10. *See Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987). The effects of environmental harm are cumulative, diffuse, and often invisible until it is far too late. *W. Va. Rivers Coal,* 793 F. Spp. 3d at 809-10 (stating that proving irreparability in the environmental context is not just difficult; it is nearly impossible for the "poisoned plaintiff" who has not yet been "diagnosed with cancer").

Forever chemicals, like the PFOAs in Bluesky's emissions, are associated with a range of adverse health effects including cancer, birth defects, and liver problems. *Id.* at 798; R. 7-8. Because they persist in the environment and in the body, typically without immediate visible effects, their harm is incremental and cumulative. *W. Va Rivers Coal*, 793 F. Supp. 3d at 804. In the immediate case, Bluesky's PFOA emissions are also far-reaching; the VEA is not the only party being harmed. R. 8. Residents still using Mammoth's tap water, either out of ignorance or inability to afford another water source, are actively being harmed by exposure to PFOAs. *Id.*

Public harm should be considered within the *Winter* test's irreparable harm analysis because the "public interest" prong does not explicitly consider harm to the public; environmental harm is distinct; and RCRA authorizes citizen lawsuits. *See W. Va. Rivers Coal*,

793 F. Supp. 3d at 809-15; *Cortland Co.*, No. 2:19-cv-00894, 2024 WL 4339600 at 14. Though a preliminary injunction is an "extraordinary measure never awarded as of right," the government has already determined that environmental resources, such as clean water, are extraordinary priorities. *See Winter*, 555, U.S. at 9; *W. Va. Rivers Coal*, 793 F. Supp. 3d at 809.

A. RCRA's overall purpose and its inclusion of a citizen suit provision urge consideration of public harm in irreparable harm analysis.

To some, the *Winter* elements as initially articulated are reasonable in every context. *W. Va. Rivers Coal*, 793 F. Supp. 3d at 802. In practice, if applied strictly, they amount to a "slow suffocation" of citizen lawsuits. *Id.* at 809. If the VEA cannot invoke harm to the public in the *Winter* test's irreparable harm analysis, the citizen suit will be nothing more than a "paper-right" and meaningful relief will elude the people of Mammoth. *Id.* By offering causes of action through public nuisance lawsuits as well as the citizen lawsuit provision of RCRA, Congress has given the people options to enforce environmental protections. *Id.*

Irreparable harm should be determined by reference to the purposes of the statute being enforced. *See W. Va. Rivers Coal*, 793 F. Supp. 3d at 810; *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018); *Sierra Club v. Marsh*, 872 F.2d 497, 502-03 (1st Cir. 1989) (stating that the type of harm that may be irreparable "will be different according to each statute's structure and purpose"). Case law in this area suggests that the underlying goal of a statute is more important than its procedures. *See Amoco*, 480 U.S. at 544; *Nat'l Wildlife*, 886 F.3d at 818 (stating that when assessing whether purposes of the statute "constrain equitable discretion" it is error "to focus on the statutory procedure rather than on the underlying substantive policy").

By enacting RCRA, Congress established a national program for hazardous waste management that governs its treatment, storage, and disposal. *See Hazardous Waste Treatment*

Council v. South Carolina, 945 F.2d 781, 783 (4th Circuit. 1991); *Courtland Co.*, No. 2:19-cv-00894, 2024 WL 4339600 at 207. RCRA authorizes states to develop and implement their own hazardous waste management scheme in lieu of the federal program. *Courtland Co.*, No. 2:19-cv-00894, 2024 WL 4339600 at 207. For example, in West Virginia, the West Virginia Hazardous Waste Management Act operates in lieu of RCRA but contains the same substantive protections and prohibitions. *Id.*

RCRA attempts to address hazardous waste before it becomes a problem. *Hazardous Waste*, 945 F.2d at 783. To this end, RCRA and its West Virginia equivalent provide citizens with private causes of action to seek relief against present or future risks of harm to health or the environment created by the handling, storage, treatment, transportation, or disposal of waste. R. 10. These citizen suits can be commenced against any person, or entity, who has "contributed to the past or present handling of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972.

In pursuing citizen suits, individual citizens essentially take on the role of "private attorney generals" to defend the rights of the public. *W. Va. Rivers Coal*, 793 F. Supp. 3d at 813. This statutory mechanism is one of the core provisions of RCRA and enables further consideration of public harm in the immediate case. *Id.* The type of harm that Mammoth residents are experiencing because of Bluesky's disposal actions is the exact type of harm RCRA aims to prevent. R. 7-8.

In *Winter*, the plaintiffs sued under a statute that did not contain a citizen suit provision. *See Winter*, 555 U.S. at 12. Further, the *Winter* plaintiffs sought to enforce a procedural action; they did not attempt to stop the precise conduct that the defendant-polluter was undertaking. *See Id*. (seeking enforcement of an order requiring the U.S. Navy to complete an Environmental

Impact Statement). Unlike the plaintiffs in *Winter*, The VEA's citizen suit represents a concern that is central to the substantial purpose of RCRA, related to more than just procedure. *See Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *W. Va. Rivers Coal*, 793 F. Supp 3d at 804.

Bluesky's disposal activities do constitute irreparable harm to both the public and to the plaintiffs in the immediate case, as represented by the VEA's public nuisance and citizen suit claims. R. 9. Because Mammoth currently lacks any treatment technology capable of removing PFOAs from drinking water before it is distributed to consumers, Mammoth residents face a "terrible choice." R. 8. They must either abstain from using water that comes from their public water supply, or subject themselves to the adverse health effects associated with toxic pollutants. *See e.g. W. Va. Rivers Coal*, 793 F. Supp. 3d at 798 (where individuals who lived on or engaged with the Ohio River faced the same choice because of defendant-polluter's contamination); R. 8-9. Left with no choice other than to purchase bottled water for all of their water-related needs, many Mammoth residents are continuing to use the water without treatment. R. 9. Ultimately, the public faces an irreparable harm that the court can only address through injunctive relief. *Id.*

B. Because the *Winter* test's public interest prong does not explicitly consider public harm, its irreparable harm factor must

The *Winter* test considers public interests in a variety of ways. *See W. Va. Rivers Coal*, 793 F. Supp. 3d at 814; *Courtland Co.*, No. 2:19-cv-00894, 2024 WL 4339600 at 14. Importantly, the *Winter* test's irreparable harm prong is separate from its public interest prong; they each reflect important and distinct concerns related to the public. *See Winter*, 555 U.S. at 20; *W. Va. Rivers Coal*, 793 F. Supp. 3d at 814. While the public interest prong considers the consequences of an injunction, it does not specifically consider the harm a plaintiff seeks to enjoin. *W. Va. Rivers Coal*, 793 F. Supp. 3d at 814-15.

When undertaking public interest analysis under the *Winter* test, courts consider the effect of a potential injunction on the defendant, the public, and the plaintiff. *See W. Va. Rivers Coal*, 793 F. Supp. 3d at 815; *Courtland Co.*, No. 2:19-cv-00894, 2024 WL 4339600 at14. In *W. Va Rivers Coal., Inc. v. The Chemours Co. FC, LLC,* plaintiffs alleged that the defendant-company was actively contaminating a local water source. 793 F. Supp. 3d at 799. In resolving the plaintiff's preliminary injunction request under the *Winter* test, the court balanced the public's interest in clean water with the public's interest in the manufacturing processes of the plant that was allegedly contaminating the water. *Id.* at 814. Because neither *public interest* consideration explicitly contemplated the *public harm* resulting from the defendant's actions, the court determined that the public harm must be considered within the irreparable harm prong, lest it not be considered at all. *Id.*

The irreparable harm prong, however, specifically considers harm resulting from the defendant's actions. *See e.g. W. Va. Rivers Coal*, 793 F. Supp. 3d at 814-15 (considering harm resulting from defendant's pollution of local drinking water). "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Beber v. NavSav Holdings, LLC*, 140 F.4th 543, 461 (8th Cir. 2025). To demonstrate irreparable harm, the movant must show harm that is "likely" in the absence of an injunction. *Winter*, 555 U.S. at 22 (rejecting the previous "possibility of harm" standard in favor of a more stringent "likelihood of harm" standard). The harm should be imminent enough that there is a clear and present need for equitable relief. *Beber*, 140 F.4th at 461 (finding that economic loss on its own is not an irreparable harm if the losses can be recovered).

In the immediate case, the VEA, its members, and the general population of Mammoth are experiencing irreparable harm as a result of Bluesky's PFOA disposal. R. 8. Bluesky's emissions are contaminating Mammoth's drinking water with forever chemicals. R. 7. Regrettably, the city currently lacks technology capable of treating its water supply to make it potable. R. 7-8. Because the harm being experienced by the public, resulting from Blueksy's actions, is incremental, cumulative, difficult to quantify, and ongoing, it is only redressable through injunctive relief. *Winter*, 555 U.S. at 22; R. 7-8. For these reasons this Court should consider the public harm in its *Winter* analysis under the irreparable harm prong.

CONCLUSION

For these reasons, this Court should vacate the stay ordered by the United States District Court for the Middle District of Vandalia and grant the VEA's preliminary injunction.

____
Barry Zuckerkorn
Counsel for Appellant
He's Very Good LLP
1234 N. Main St. USA
777-777-7777
barry@hesverygood.com
State Bar No. 1111

Appendix B

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing [Party Name] certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 1, 2023.

Respectfully submitted,

Team No. **9**