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Overuse of the Primary Jurisdiction Doctrine: How It Erodes Environmental Justice and a Proposed Solution

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> *It is doubtful that [Franz] Kafka, a Czechoslovak, was aware of the Supreme Court's decision in* Texas & Pacific Railway *when he wrote* The Trial. *It is also unlikely that he could have predicted that the doctrine of primary jurisdiction would be applied to an action for abatement of a pollution-caused nuisance. But, if Kafka had foreseen and understood these occurrences, perhaps the parable of the man from the country would end as the man lay before the closed doors of the court of equity, while the lights of the Law burned brightly within. Dying from emphysema induced by polluted air, the man would find the entrance barred by a great steel door, upon which is inscribed "Primary Jurisdiction Doctrine."*[1]

I. INTRODUCTION

Hot-button topics such as environmental justice,[2] standing,[3] and personhood[4] loom large in environmental litigation and scholarship today. Also conspicuous in environmental law is the power of the administrative state.[5] Yet, less visible issues related to administrative law lurk beneath the surface of environmental litigation, impacting public health and environmental stewardship.

One such issue surfaces when both a court and an administrative agency are authorized to adjudicate a claim.[6] This jurisdictional overlap affords defendants an arsenal of administrative law defenses they can raise to escape liability.[7] Among these defenses is the doctrine of primary jurisdiction.

The primary jurisdiction doctrine is a longstanding, judicially crafted mechanism under which a court may dismiss or stay an issue for resolution by an administrative agency with technical expertise.[8] Despite the doctrine's long history, federal courts have yet to adopt a uniform test to determine whether to invoke it, leading to unpredictable outcomes for litigants.[9]

Because federal courts bear a "virtually unflagging obligation" to exercise the jurisdiction granted to them,[10] the primary jurisdiction doctrine should be invoked

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1. Kenneth F. Hoffman, *The Doctrine of Primary Jurisdiction Misconceived: End to Common Law Environmental Protection?*, 2 Fla. St. U. L. Rev. 491, 509–10 (1974) (footnotes omitted) (citations omitted).

2. *See, e.g.*, 3 Frank B. Cross, Federal Environmental Regulation of Real Estate § 3:21 (2023).

3. *See, e.g.*, Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 Ecology L.Q. 1 (2016).

4. *See, e.g.*, Gwendolyn J. Gordon, *Environmental Personhood*, 43 Colum. J. Env't L. 49 (2018).

5. *See* 40 C.F.R. § 1.3 (2023).

6. *See* Louis L. Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037, 1037–40 (1964).

7. *See* Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 Nw. U. L. Rev. 997, 1007–08, 1026–27 (2007).

8. *See* Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 Ohio St. L.J. 541, 542 (2017).

9. *See id.* at 569–72 tbl.3.

10. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

only in rare circumstances. This is a principle the federal judiciary has traditionally abided by.[11] But the primary jurisdiction doctrine has more recently evolved into a common defense in environmental litigation.[12] Recent environmental defendants, moreover, have prevailed on this defense,[13] and future defendants will likely argue for its application, as well.

The underlying purpose of the primary jurisdiction doctrine—to balance the power between courts and administrative agencies when they share jurisdiction—is sound enough.[14] In reality, though, the doctrine allows courts to stay or dismiss otherwise properly cognizable claims.[15] And as applied to environmental litigation, the primary jurisdiction doctrine is particularly dangerous, to plaintiffs, public health, and the environment. Therefore, application of the doctrine in environmental cases must be curbed.

Part II of this Note discusses the current state of administrative law, with a focus on two recent Supreme Court cases that disfavor judicial deference to administrative agencies and support this Note's argument that overuse of the primary jurisdiction doctrine be cabined.[16] Part III traces the history and background of the doctrine, its modern application, and the rise of its use as a defense in environmental cases. Part IV addresses the problems levied on environmental litigation by overuse of the doctrine. In response, Part V argues that the primary jurisdiction doctrine should be applied sparingly in environmental litigation and proposes a test that courts should use to achieve this end. Part VI concludes this Note.

II. THE ADMINISTRATIVE STATE UNDER SCRUTINY

The power of the administrative state has been the subject of great controversy for decades. Proponents maintain that agencies add value by arming legislators and courts with subject-matter knowledge,[17] while opponents contend that agencies

11. *See, e.g.*, United States v. McDonnell Douglas Corp., 751 F.2d 220, 224 (8th Cir. 1984) (warning that courts "should be reluctant to invoke the doctrine of primary jurisdiction" (quoting Miss. Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412, 419 (5th Cir. 1976))); Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 760 (9th Cir. 2015) (describing the primary jurisdiction doctrine as "reserved for a 'limited set of circumstances' that 'requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency'" (quoting Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008))).

12. *See, e.g.*, Sw. Org. Project v. U.S. Dep't of the Air Force, 526 F. Supp. 3d 1017, 1029 (D.N.M. 2021); Brooklyn Union Gas Co. v. Exxon Mobil Corp., 478 F. Supp. 3d 417, 424 (E.D.N.Y. 2020).

13. *See, e.g.*, *Sw. Org. Project*, 526 F. Supp. 3d at 1065–72; Raytheon Co. v. NCR Corp., No. 18-2402, 2019 WL 1367721, at *2–4 (D. Kan. Mar. 26, 2019); Read v. Corning Inc., 351 F. Supp. 3d 342, 350–54 (W.D.N.Y. 2018); Sierra Club v. Chesapeake Operating, LLC, 248 F. Supp. 3d 1194, 1205–09 (W.D. Okla. 2017).

14. *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 63–64 (1956).

15. *See* Reiter v. Cooper, 507 U.S. 258, 268 (1993).

16. Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022); West Virginia v. EPA, 142 S. Ct. 2587 (2022).

17. *See* Franita Tolson, *Fairness Demands the Protection of the Administrative State*, The Hill (Apr. 2, 2018), https://thehill.com/opinion/judiciary/381200-fairness-demands-the-protection-of-the-administrative-

violate the separation of powers as set out in the Constitution.[18] This controversy peaked during the COVID-19 pandemic, when high-profile challenges to agency rules such as the vaccine-or-test mandate for some employers,[19] vaccine requirement for healthcare workers,[20] and eviction moratoria[21] flooded both public consciousness and the federal judiciary's docket.[22] Then, in 2022, the Supreme Court issued two decisions diluting the power of the administrative state.

The first, *American Hospital Association v. Becerra*, involved a challenge to the authority of the Department of Health and Human Services (HHS) to alter hospital reimbursement rates for outpatient drugs under a Medicare statute.[23] The lower court relied on *Chevron* deference, a doctrine requiring judicial deference to an agency's reasonable interpretation of an ambiguous statute delegating authority to the agency, and resolved the case in favor of HHS.[24] The Supreme Court reversed, holding that

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state/ ("Rather than adopting a narrow-minded conception of the Founders' Constitution, impervious to the demands and complications of a modern society, judges should defer to agencies because they have the expertise and knowledge to best . . . implement their statutory mandates.").

18. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 574–77 (1984); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (observing that administrative agencies are permitted to "swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

19. In *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, the Supreme Court granted the plaintiffs' application to stay implementation of the Occupational Safety and Health Administration's vaccine-or-test mandate for employers with more than one hundred employees, reasoning that the agency had exceeded its authority when it "exercise[d] powers of vast economic and political significance" broader than those authorized by Congress. 142 S. Ct. 661, 665 (2022) (per curiam) (quoting Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

20. In *Biden v. Missouri*, the Court held that the Department of Health and Human Services (HHS) did not exceed its authority when it required healthcare workers at facilities participating in Medicare and Medicaid to be vaccinated against COVID-19 absent a medical or religious exemption. 142 S. Ct. 647, 653 (2022) (per curiam).

21. In *Alabama Association of Realtors v. HHS*, the Court considered the Center for Disease Control (CDC)'s second eviction moratorium, describing the statute at issue as a "wafer-thin reed on which to rest such sweeping power." 141 S. Ct. at 2489; *see also* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1175–76 (M.D. Fla. 2022) (striking down the CDC's travel mask mandate as "arbitrary and capricious"), *appeal docketed*, No. 22-11287 (11th Cir. Apr. 21, 2022).

22. Some scholars speculate that recent cases surrounding COVID-19 stand for the proposition that the Court has "shifted from deference to antideference, [and is] actively antagonistic to delegated power." Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. 174, 174 (2022).

23. 142 S. Ct. 1896, 1899 (2022).

24. Am. Hosp. Ass'n v. Azar, 967 F.3d 818, 828 (D.C. Cir. 2020) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)), *rev'd and remanded sub nom.* Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022).

    Advocates for *Chevron* deference contend that it has "greatly empowered administrative agencies to recast the law in accord with current policy preferences, without having to go to Congress for legislative change." Michael McConnell, *Kavanaugh and the "Chevron Doctrine*," Hoover Inst. (July 30, 2018), https://www.hoover.org/research/kavanaugh-and-chevron-doctrine. By contrast, opponents criticize

HHS had exceeded the scope of its statutory power.[25] By choosing not to invoke *Chevron* deference, the Court in *Becerra* signaled its reluctance to find statutes ambiguous, raising the bar for *Chevron*'s application and departing from judicial deference to agency authority.[26]

Second, in *West Virginia v. Environmental Protection Agency*, the Court held that the Environmental Protection Agency (EPA) exceeded its congressionally granted authority when it proposed certain emissions regulations.[27] Embracing the major questions doctrine, under which Congress must "speak clearly" when tasking an administrative agency with "decisions of vast 'economic and political significance,'"[28] the Court concluded that the EPA's interpretation of the statute at issue "represent[ed] a 'transformative expansion in [its] regulatory authority'" unsupported by "clear congressional authorization."[29]

Neither *Becerra* nor *West Virginia* considered the primary jurisdiction doctrine. Yet both decisions reflect the Court's preference for curbing judicial deference to administrative agencies and bolster the argument that the primary jurisdiction doctrine, premised on judicial deference to agencies, is ripe for review.

III. THE HISTORY OF THE PRIMARY JURISDICTION DOCTRINE

When a court and an administrative agency share concurrent jurisdiction over a claim, issues arise concerning which body should adjudicate the claim.[30] There are three instances in which a court and an administrative agency share concurrent jurisdiction: (1) when Congress grants an agency the authority to adjudicate an issue without stripping courts of jurisdiction over the same issue, (2) when an agency's statutory authority to decide an issue is supplemented by judicial remedies, and (3)

Chevron deference as an invitation to Congress to enact ambiguous laws and "avoid making difficult legislative decisions by granting unspecified powers to administrative agencies." Peter J. Wallison, *The Supreme Court Confronts the Administrative State*, Am. Enter. Inst. (Jan. 3, 2022), https://www.aei.org/op-eds/the-supreme-court-confronts-the-administrative-state/.

25. *Becerra*, 142 S. Ct. at 1904–06.

26. *See* J. Michael Showalter et al., *Five Administrative Law Takeaways from Recent Supreme Court Decisions*, Nat'l L. Rev. (July 7, 2022), https://www.natlawreview.com/article/five-administrative-law-takeaways-recent-supreme-court-decisions.

27. 142 S. Ct. 2587, 2616 (2022).

28. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

29. *West Virginia*, 142 S. Ct. at 2610, 2614 (second alteration in original) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324). Constitutional scholars had predicted the Court would revive the nondelegation doctrine, dormant since 1935, to resolve the case. Wallison, *supra* note 24. Premised on constitutional separation of powers, the nondelegation doctrine prohibits Congress from delegating legislative authority to administrative agencies but permits Congress to delegate regulatory power to an agency so long as it articulates an "intelligible principle" to guide the agency's rulemaking. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 408–09 (1928).

30. *See* Jaffe, *supra* note 6, at 1038–40.

when a factual determination pending before a court requires agency expertise.[31] In these instances, a court may invoke the primary jurisdiction doctrine to dismiss or stay a case in whole or in part.[32]

Widely recognized as the originator of the primary jurisdiction doctrine, the 1907 Supreme Court case *Texas & Pacific Railway Company v. Abilene Cotton Oil Company* involved a shipper's claim that a railroad had charged an unreasonable shipping rate.[33] The Court held that an aggrieved shipper must "primarily invoke redress" through the administrative agency responsible for setting shipping rates, because, absent such deference to the agency, uniformity in rate regulation among common carriers would be destroyed.[34] Uniformity and agency expertise, the Court made clear, are the foundational principles on which the primary jurisdiction doctrine rests.[35]

The Supreme Court refined the primary jurisdiction doctrine in its 1922 decision *Great Northern Railway Company v. Merchants' Elevator Company*, by clarifying that it could be invoked only as to questions of fact, not questions of law.[36] In the decades following its inception, the primary jurisdiction doctrine was applied narrowly to rate regulation and antitrust disputes.[37] But reliance on the doctrine spread to other areas of law after the Court's 1952 decision *Far East Conference v. United States* invited courts to refer to agencies "cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion."[38]

Environmental cases were heard exclusively by courts[39] until the EPA was established in 1970.[40] This new agency was tasked with promulgating environmental

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31. Michael Penney, Note, *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits*, 29 B.C. Env't Affs. L. Rev. 399, 400–01 (2002).

32. *See* Winters, *supra* note 8, at 551.

33. 204 U.S. 426, 430 (1907); *see also* Jaffe, *supra* note 6, at 1042.

34. *Tex. & Pac. Ry. Co.*, 204 U.S. at 446–48.

35. *See id.*

36. 259 U.S. 285, 295–96 (1922). There, when an elevator company sued a railway to recover fees allegedly charged in violation of the railway's tariff rule, the Court determined that the only issue was whether the railway's tariff rule applied—a question of law appropriately resolved only by a court. *Id.* at 288–89, 294–96.

37. *See, e.g.*, Gen. Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940) (applying the primary jurisdiction doctrine to an issue of rate regulation); U.S. Navigation Co. v. Cunard S. S. Co., 284 U.S. 474 (1932) (invoking the primary jurisdiction doctrine in an antitrust case).

38. 342 U.S. 570, 574 (1952); *see also* Winters, *supra* note 8, at 559.

39. *See* Hoffman, *supra* note 1, at 491. Additionally, prior to the nationwide policy shift toward environmental protection in the 1970s, environmental claims were brought under the common law public nuisance doctrine rather than as statutorily authorized citizen suits, as is common today. *See id.* at 498–99.

40. EPA Order 1110.2, Initial Organization of the EPA (1970); *see also* Memorandum from the President's Advisory Council on Exec. Org. to President Richard Nixon (Apr. 29, 1970) ("[T]he nation must adopt a new environmental ethic that assigns great weight to the task of protecting and enhancing our physical environment. The establishment of an Environmental Protection Administration will provide . . . a strong and flexible instrument for reaching that goal."); Reorganization Plan No. 3 of 1970, 3 C.F.R. § 1072 (1970), *reprinted as amended in* 5 U.S.C. app. at 723 (2018), *and in* 84 Stat. 2086 (1970) (special message

regulations and enforcing federal environmental laws to ensure clean air, land, and water in the United States.[41] The doctrine of primary jurisdiction was first applied to an environmental case in 1973, when the Supreme Court of New Mexico dismissed a claim for injunctive relief to abate pollution generated by a power plant.[42] Since then, courts have routinely invoked the primary jurisdiction doctrine to dismiss or stay environmental cases.[43]

For example, in the 2020 case *Melton Properties, LLC v. Illinois Central Railroad Company*, the U.S. District Court for the Northern District of Mississippi relied on the primary jurisdiction doctrine when property owners and farmers sought relief after a railcar crash spilled toxins near their properties.[44] Because an ongoing agency remediation effort was underway, the court invoked the primary jurisdiction doctrine to stay remediation-related claims for 450 days.[45] The court rejected the plaintiffs' argument that the significant delay would cause them irreparable harm, even though the agency remediation effort was projected to take three years to complete.[46]

IV. OVERUSE OF THE PRIMARY JURISDICTION DOCTRINE IN ENVIRONMENTAL LITIGATION

When the primary jurisdiction doctrine was first created, it was applied sparingly to serve the principles of uniformity and agency expertise.[47] In the decades since the

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from then-president Richard Nixon to Congress calling for federal environmental responsibilities to be concentrated in one new agency, the EPA).

41. 40 C.F.R. § 1.3 (2023); *The Origins of the EPA*, EPA, https://www.epa.gov/history/origins-epa (June 24, 2022) (noting that the EPA was established to address "heightened public concerns about deteriorating city air, natural areas littered with debris, and urban water supplies contaminated with dangerous impurities").

42. State *ex rel.* Norvell v. Ariz. Pub. Serv. Co., 510 P.2d 98 (N.M. 1973).

43. *See, e.g.*, C.V. Landfill, Inc. v. Env't Bd., 610 A.2d 145, 146–47 (Vt. 1992) (invoking the primary jurisdiction doctrine to refrain from deciding whether a landfill company's pollution levels required it to obtain an operating permit from a state administrative agency); Bal Harbour Village v. City of North Miami, 678 So. 2d 356, 363–64 (Fla. Dist. Ct. App. 1996) (affirming dismissal under the primary jurisdiction doctrine of a claim alleging that a construction site "would cause substantial water and air pollution, including leakage of hazardous waste"); Read v. Corning Inc., 351 F. Supp. 3d 342, 349, 353 (W.D.N.Y. 2018) (staying under the primary jurisdiction doctrine claims arising from the disposal of hazardous waste); Sw. Org. Project v. U.S. Dep't of the Air Force, 526 F. Supp. 3d 1017, 1065–72 (D.N.M. 2021) (invoking the doctrine of primary jurisdiction to dismiss a claim seeking injunctive relief to abate toxic runoff).

44. No. 18-CV-79, 2020 WL 5806890 (N.D. Miss. Sept. 29, 2020).

45. *Id.* at *13–14 (staying injunctive relief and damages claims for ninety days); Melton Props., LLC v. Ill. Cent. R.R. Co., 539 F. Supp. 3d 593, 607–13 (N.D. Miss. 2021) (granting the defendants' motion to extend the stay for an additional 180 days); Melton Props., LLC v. Ill. Cent. R.R. Co., No. 18-CV-79, 2022 WL 628515, at *4–8 (N.D. Miss. Mar. 3, 2022) (granting the defendants' motion to extend the stay for another 180 days).

46. *Melton Props., LLC*, 539 F. Supp. 3d at 612; *Melton Props., LLC*, 2022 WL 628515, at *5–6 (disregarding the plaintiffs' showing that the October 2023 remediation deadline was unlikely to be met).

47. *See* Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446–48 (1907).

doctrine's inception, lower courts have applied it to a broader range of issues, without specific guidance from the Supreme Court. As a result, there is no "fixed formula" among the lower courts to determine whether the primary jurisdiction doctrine should be invoked.[48]

Instead, each circuit has crafted its own factor test. Although they vary, the tests tend to focus on two primary issues: uniformity and expertise.[49] For example, the U.S. Court of Appeals for the Second Circuit weighs the following factors:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings [issued by the court and the agency]; and (4) whether a prior application to the agency has been made.[50]

While at first blush the factor tests followed by the circuits appear similar, courts weigh the factors differently. Some courts focus only on one factor, while others analyze three or four.[51] Other courts stray from the factors altogether. For example, the U.S. Court of Appeals for the Ninth Circuit is unique among the circuits in considering as its guiding principle the risks that accompany delayed proceedings.[52]

Inconsistencies in the circuits' approaches to the primary jurisdiction doctrine extend beyond these factor tests. Although it is settled that a court invoking the doctrine may dismiss or stay a case, the lower courts diverge when determining whether to dismiss a case in its entirety, temporarily stay proceedings, dismiss only certain claims, or stay only certain claims.[53] Moreover, many courts appear reluctant

48. United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).

49. Winters, *supra* note 8, at 549–50.

50. Seneca Nation of Indians v. New York, 988 F.3d 618, 629 (2d Cir. 2021) (quoting Ellis v. Trib. Television Co., 443 F.3d 71, 82–83 (2d Cir. 2006)); *see also* Conservation L. Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61, 72 (1st Cir. 2021); Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686, 691 (3d Cir. 2011); Norfolk S. Ry. Co. v. Balt. & Annapolis R.R., 715 F. App'x 244, 249 (4th Cir. 2017); Elam v. Kan. City S. Ry. Co., 635 F.3d 796, 811 (5th Cir. 2011); Charvat v. EchoStar Satellite, LLC, 630 F.3d 459, 466–67 (6th Cir. 2010); Ill. Bell Tel. Co. v. Glob. NAPs Ill., Inc., 551 F.3d 587, 595–96 (7th Cir. 2008); City of Osceola v. Entergy Ark., Inc., 791 F.3d 904, 909 (8th Cir. 2015); Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 760 (9th Cir. 2015); TON Servs., Inc. v. Qwest Corp., 493 F.3d 1225, 1239 (10th Cir. 2007); Sierra v. City of Hallandale Beach, 904 F.3d 1343, 1351 (11th Cir. 2018); United States v. Philip Morris USA Inc., 686 F.3d 832, 837 (D.C. Cir. 2012); Cal. Indus. Prods., Inc. v. United States, 436 F.3d 1341, 1350 (Fed. Cir. 2006). For further details on the factors followed by each circuit, see Winters, *supra* note 8, at 569–72 tbl.3.

51. *Compare Norfolk S. Ry. Co.*, 715 F. App'x at 249 (considering only one factor), *with Conservation L. Found., Inc.*, 3 F.4th at 72 (weighing three factors), *and Seneca Nation of Indians*, 988 F.3d at 629 (discussing four factors).

52. *Astiana*, 783 F.3d at 760 ("'[E]fficiency' is the 'deciding factor' in whether to invoke primary jurisdiction." (quoting Rhoades v. Avon Prods., Inc., 504 F.3d 1151, 1165 (9th Cir. 2007))). The costs of delay, though, have played a secondary role in the approaches followed by other courts. *See, e.g.*, *Conservation L. Found., Inc.*, 3 F.4th at 74–75; *Ellis*, 443 F.3d at 83; *Philip Morris USA Inc.*, 686 F.3d at 838.

53. *See, e.g.*, Raytheon Co. v. NCR Corp., No. 18-2402, 2019 WL 1367721, at *4 (D. Kan. Mar. 26, 2019) (dismissing a case in its entirety based on the primary jurisdiction doctrine when the plaintiff sought

to invoke the doctrine in common law cases[54] or when damages, not injunctive relief, are sought,[55] because both evaluating common law claims and awarding damages are traditionally within the purview of the judiciary.[56]

Another issue on which courts disagree concerns whether stays based on the primary jurisdiction doctrine are final orders and, thus, appealable. The U.S. Courts of Appeals for the Third, Sixth, Eighth, and Tenth Circuits hold that stays are not final orders unless they effectively terminate proceedings,[57] while the U.S. Courts of Appeals for the First, Second, Fifth, Ninth, Eleventh, and Federal Circuits follow a more liberal approach, recognizing stays that impose lengthy or indefinite delays as final orders that can be appealed.[58] The three other circuits have yet to take a clear position on this question.[59]

The lower courts lack a uniform approach to applying the primary jurisdiction doctrine, which undermines a purpose of the doctrine: to "co-ordinate the relationship between courts and administrative agencies" so that "divergence of opinion between

injunctive and declaratory relief); Zimmerman v. 3M Co., 542 F. Supp. 3d 673, 683 (W.D. Mich. 2021) ("Even if primary jurisdiction could be invoked to dismiss requests for particular remedies, which the [c]ourt doubts, the [c]ourt finds that the doctrine is not applicable in this case."); Talbert v. Am. Water Works Co., 538 F. Supp. 3d 471, 486–88 (E.D. Pa. 2021) (granting stays under the primary jurisdiction doctrine for three of five counts); *Astiana*, 783 F.3d at 761 (9th Cir. 2015) (noting that "[w]hen the purpose of primary jurisdiction is for 'parties [to] pursue their administrative remedies,' a district court will '[n]ormally' dismiss the case without prejudice," yet "when a court invokes primary jurisdiction 'but further judicial proceedings are contemplated, then jurisdiction should be retained by a stay of proceedings, not relinquished by a dismissal'" (second and third alterations in original) (first quoting Syntek Semiconductor Co. v. Microchip Tech. Inc., 307 F.3d 775, 782 (9th Cir. 2002); and then quoting N. Cal. Dist. Council of Hod Carriers v. Opinski, 673 F.2d 1074, 1076 (9th Cir. 1982))).

54. *See, e.g.*, City of Seattle v. Monsanto Co., No. 16-cv-00107, 2023 WL 2584874, at *1–2 (W.D. Wash. Mar. 21, 2023); Spears v. Chrysler, LLC, No. 08CV331, 2011 WL 540284, at *5–8 (S.D. Ohio Feb. 8, 2011); Sher v. Raytheon Co., No. 08-cv-889-T-26TGW, 2008 WL 2756570, at *3 (M.D. Fla. July 14, 2008).

55. *See, e.g.*, *Spears*, 2011 WL 540284, at *7; *Sher*, 2008 WL 2756570, at *3.

56. *See* Holyfield v. Chevron U.S.A., Inc., 533 F. Supp. 3d 726, 737 (E.D. Mo. 2021). However, not all courts share this reluctance. *See* Melton Props., LLC v. Ill. Cent. R.R. Co., No. 18-CV-79, 2020 WL 5806890, at *13–14 (N.D. Miss. Sept. 29, 2020) (staying both injunctive relief and damages claims to avoid "piecemeal litigation").

57. Strausser v. Township of Forks, 460 F. App'x 115, 119 (3d Cir. 2012); Clark v. Adams, 300 F. App'x 344, 350 (6th Cir. 2008); Window World Int'l, LLC v. O'Toole, 21 F.4th 1029, 1033 (8th Cir. 2022); Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co., 415 F.3d 1171, 1176 (10th Cir. 2005).

58. Conservation L. Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61, 68 & n.2 (1st Cir. 2021) (citing XPO Logistics, Inc. v. Elliott Cap. Advisors, L.P., 673 F. App'x 85, 86 (2d Cir. 2016); Occidental Chem. Corp. v. La. Pub. Serv. Comm'n, 810 F.3d 299, 307 (5th Cir. 2016); Stanley v. Chappell, 764 F.3d 990, 995 (9th Cir. 2014); King v. Cessna Aircraft Co., 505 F.3d 1160, 1165 (11th Cir. 2007); Spread Spectrum Screening LLC v. Eastman Kodak Co., 657 F.3d 1349, 1354 (Fed. Cir. 2011)).

59. *See* Belize Soc. Dev. Ltd. v. Gov't of Belize, 668 F.3d 724, 730 (D.C. Cir. 2012); United States v. Dent, 845 F. App'x 220, 222–23 (4th Cir. 2021); Loughran v. Wells Fargo Bank, N.A., 2 F.4th 640, 645–46 (7th Cir. 2021).

them [does] not render ineffective the statutes with which both are concerned."[60] Moreover, the subtle but significant variations by jurisdiction leave parties seeking relief with uncertainty and inconsistent outcomes. These issues are amplified by the unique threats that the primary jurisdiction doctrine poses to environmental cases.

As applied to environmental litigation, the doctrine of primary jurisdiction is outdated. In particular, when weighing the need for agency expertise, courts fail to account for advances in technology and access to expert witnesses that today allow judges to resolve complex issues once properly addressed only by agencies.[61] Indeed, courts routinely decide disputes involving highly technical and complex issues, by "listening to the testimony of expert witnesses, assessing their credibility, and determining whether or not a litigant has carried the devoir of persuasion."[62] This role does not change merely because a claim arises under environmental law.[63]

Additionally, the primary jurisdiction doctrine was intended as a narrow exception reserved for rare circumstances,[64] but it has morphed into a common defense against all manner of alleged environmental violations.[65] Overuse of the doctrine is genuinely dangerous in environmental litigation because it exacerbates acute risks not present in other areas of law. Left unabated, environmental violations harm plaintiffs, public health, and the environment.[66]

For example, the primary jurisdiction doctrine poses a formidable threat to the growing wave of litigation involving emerging contaminants like toxic per- and polyfluoroalkyl substances (PFAS).[67] Found in many consumer products, PFAS are toxins that accumulate in the human body and lead to adverse health outcomes.[68]

60. N.Y. Indep. Contractors All., Inc. v. Consol. Edison Co. of N.Y., 133 N.Y.S.3d 882, 883 (N.Y. App. Div. 2020) (quoting 150 Greenway Terrace, LLC v. Gole, 831 N.Y.S.2d 224, 225 (N.Y. App. Div. 2007)).

61. *See* Me. People's All. v. Mallinckrodt, Inc., 471 F.3d 277, 293–94 (1st Cir. 2006) ("[F]ederal courts have proven, over time, that they are equipped to adjudicate individual cases, regardless of the complexity of the issues involved. Federal courts are often called upon to make evaluative judgments in highly technical areas . . . .").

62. *Id.* at 294.

63. *Id.* at 293–94.

64. *See* United States v. McDonnell Douglas Corp., 751 F.2d 220, 224 (8th Cir. 1984); Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 760 (9th Cir. 2015).

65. *See, e.g.*, Sw. Org. Project v. U.S. Dep't of the Air Force, 526 F. Supp. 3d 1017, 1065–72 (D.N.M. 2021); Raytheon Co. v. NCR Corp., No. 18-2402, 2019 WL 1367721, at *2–4 (D. Kan. Mar. 26, 2019); Read v. Corning Inc., 351 F. Supp. 3d 342, 350–54 (W.D.N.Y. 2018); Sierra Club v. Chesapeake Operating, LLC, 248 F. Supp. 3d 1194, 1205–09 (W.D. Okla. 2017).

66. *See* Bruce R. Runnels, Note, *Primary Jurisdiction in Environmental Cases Suggested Guidelines for Limiting Deferral*, 48 Ind. L.J. 676, 681 (1973).

67. *See Risk Management for Per- and Polyfluoroalkyl Substances (PFAS) Under TSCA*, EPA, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-and-polyfluoroalkyl-substances-pfas (Jan. 26, 2023).

68. Mark P. Nevitt & Robert V. Percival, *Can Environmental Law Solve the "Forever Chemical" Problem?*, 57 Wake Forest L. Rev. 239, 242 (2022) ("Today, thousands of PFAS of unknown toxicity enter our streams of commerce unabated, untested, and unregulated."); EPA, *supra* note 67 (stating that PFAS are found in "cleaners, textiles, leather, paper and paints, fire-fighting foams, and wire insulation").

Misapplying the doctrine to delay the resolution of PFAS cases would facilitate the continued use of toxins in consumer products and the onset of irreversible health issues.[69] Furthermore, invoking the primary jurisdiction doctrine to defer cases when hazardous waste poses imminent harm to human health is reckless, especially because agencies are "unlikely to act . . . unless the problem is already an agency priority."[70]

Also unique to environmental cases is the environmental plaintiff—often an individual or nonprofit organization seeking to enforce a cleanup or challenge industry practices detrimental to human and environmental health.[71] These plaintiffs, likely equipped with fewer resources than the corporate defendants they are up against, are less capable of withstanding lengthy stays or dismissals.[72] Consequently, when courts stay or dismiss issues under the doctrine of primary jurisdiction, they leave these vulnerable plaintiffs without redress and unable to sustain their cognizable claims in the long term.

The risks of invoking the primary jurisdiction doctrine in environmental cases are further aggravated by systemic problems in how agencies function. Particularly, the EPA is entrusted with critical environmental actions such as enforcement, remediation, and permit issuance and renewal. Yet, due to policy changes or lack of resources,[73] delays in these EPA actions are rampant.[74]

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69. Federal courts have yet to invoke the primary jurisdiction doctrine in PFAS litigation, but given the rising prevalence of such cases, courts will likely dismiss or stay PFAS cases under the doctrine in the future. *See, e.g.*, Dew v. E.I. du Pont de Nemours & Co., No. 18-CV-73, 2019 WL 13117100 (E.D.N.C. Apr. 17, 2019); Zimmerman v. 3M Co., 542 F. Supp. 3d 673 (W.D. Mich. 2019); Parris v. 3M Co., 595 F. Supp. 3d 1288 (N.D. Ga. 2022); *see also* John Gardella, *"No Safe Level of PFAS" – The Next Litigation Soundbite*, Nat'l L. Rev. (Dec. 7, 2021), https://www.natlawreview.com/article/no-safe-level-pfas-next-litigation-soundbite (speculating that companies using PFAS will face "decades of litigation").

70. Jeff Belfiglio, Note, *Hazardous Wastes: Preserving the Nuisance Remedy*, 33 Stan. L. Rev. 675, 688 (1981) ("[T]he benefits of deferring to agencies in hazardous waste cases are smaller because the likelihood that the agency will act is slim."); *see also* Hoffman, *supra* note 1, at 491 ("[T]he primary jurisdiction doctrine destroys both . . . traditional authority and . . . jurisdiction, replacing them with administrative control by agencies that, most commentators agree, are unresponsive to public needs.").

71. *See, e.g.*, Sierra Club v. Chesapeake Operating, LLC, 248 F. Supp. 3d 1194, 1198–99, 1205–09 (W.D. Okla. 2017) (dismissing under the primary jurisdiction doctrine an environmental advocacy organization's claim asserting that activities by oil and gas extraction companies contributed to an increase in earthquakes in Oklahoma and Kansas).

72. *See* Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, 44 Harv. Env't L. Rev. 169, 171–72 (2020); Runnels, *supra* note 66, at 681 & n.39.

73. *See* Richard J. Pierce, Jr., *Primary Jurisdiction: Another Victim of Reality,* 69 Admin. L. Rev. 431, 436–37 (2017).

74. *See National Pollutant Discharge Elimination System (NPDES)*, *NPDES Permit Status Reports*, EPA, https://www.epa.gov/npdes/npdes-permit-status-reports-current (Oct. 3, 2022) (reporting that, as of September 2021, there were 284 expired permits awaiting reissuance and twenty-two new permit applications pending approval that were over 180 days old); Off. of Inspector Gen., EPA, The Coronavirus Pandemic Caused Schedule Delays, Human Health Impacts, and Limited Oversight at Superfund National Priorities List Sites 8 (2022) (observing that the COVID-19 pandemic "caused schedule delays and changed or extended exposures of human health . . . to hazardous substances, pollutants, or contaminants").

For instance, federal environmental law requires a company that qualifies as a "major source" of pollutants to obtain a permit approved by the EPA to operate.[75] Review for permit approval or renewal, however, can take years, even decades.[76] Still, courts have invoked the doctrine of primary jurisdiction to dismiss or stay environmental disputes on the ground that a party's permit application or renewal was pending before the EPA.[77] Resultant agency delays impact environmental litigation, as courts point to pending agency actions as justifications for invoking the primary jurisdiction doctrine and as conditions precedent for resuming proceedings.

In addition, agencies are swayed by pervasive lobbying efforts and the ever-shifting political climate.[78] Industry and political influence on agency action call into question the integrity of the primary jurisdiction doctrine, which rests on the assumption that agencies are independent decisionmakers.[79] This assumption is untethered from reality: It disregards the political gymnastics that shape agency priorities and decisions, including evidence of agency "employees who have had scores of off-the-record meetings with representatives of regulated firms."[80]

Climate change, for instance, is an area where agency action is susceptible to industry and political influence.[81] Nevertheless, courts continue to throw cases concerning climate change back to agencies under the primary jurisdiction doctrine.[82] In doing so, courts abdicate their role as independent adjudicators responsible for checking industry influence and the political branches.

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75. *Who Has to Obtain a Title V Permit?*, EPA, https://www.epa.gov/title-v-operating-permits/who-has-obtain-title-v-permit (May 25, 2022). Under these circumstances, a permit is a legally binding document "designed to improve compliance by clarifying what [companies] must do to control . . . pollution." *Basic Information About Operating Permits*, EPA, https://www.epa.gov/title-v-operating-permits/basic-information-about-operating-permits/ (Feb. 6, 2023).

76. *See* EPA, *supra* note 74; Sierra Club, Inc. v. Granite Shore Power LLC, No. 19-cv-216, 2019 WL 8407255, at *1 (D.N.H. Sept. 13, 2019) ("[T]he court declines to delay these proceedings until the EPA issues a revised final permit as part of its now 27-year-long administrative review.").

77. *See, e.g.*, Jones v. Rose, No. CV 00-1795, 2005 WL 2218134, at *28–29 (D. Or. Sept. 9, 2005); *see also* Wild Fish Conservancy v. Salazar, 688 F. Supp. 2d 1225, 1238 (E.D. Wash. 2010) (invoking the doctrine when a permit application was pending before a state agency). *But see Sierra Club, Inc.*, 2019 WL 8407255, at *1 ("[T]he primary jurisdiction doctrine does not compel this court to wait and see if the EPA will issue new permit conditions . . . before determining whether the defendants have violated the conditions of the existing permit.").

78. Pierce, *supra* note 73, at 433–36; Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 Admin. L. Rev. 99, 102 (2011).

79. *See* Pierce, *supra* note 73, at 432–33.

80. *Id.* at 433; *see also* Wagner et al., *supra* note 78, at 102 ("The resultant, regular communications between agency officials and industry are alleged to induce the former to see the world through the eyes of the latter.").

81. *See* Sara Mogharabi et al., *Environmental Citizen Suits in the Trump Era*, 32 Nat. Res. & Env't 3, 4–5 (2017). For example, in October 2015, the Obama administration began implementing the Clean Power Plan to limit emissions contributing to climate change; these efforts were foiled in 2017 when the Trump administration dismantled the plan. *Id*. at 4.

82. *See, e.g.*, Sw. Org. Project v. U.S. Dep't of the Air Force, 526 F. Supp. 3d 1017, 1065–72 (D.N.M. 2021) (invoking the primary jurisdiction doctrine to dismiss a claim seeking relief from pollution after an oil spill at a U.S. Air Force base).

The originally high bar to invoke the primary jurisdiction doctrine has eroded with the passage of many decades. Now unrecognizable, the doctrine of primary jurisdiction is far too often invoked unnecessarily. The uncertainty and delays cast onto environmental litigants by the doctrine overshadow the minimal benefits that accrue when courts invoke it. The primary jurisdiction doctrine has departed from the principles on which it was founded—uniformity, expertise, and the balance of powers—and today is a powerful tool that defendants wield to delay or altogether avoid adjudication of environmental claims against them.[83] Courts should not wait for the EPA to catch up on its list of pending actions or trust the "toxicity honor system,"[84] particularly when the dangers threatened by environmental violations are grave and only worsen with time. Instead, courts must reconsider their respective approaches to the primary jurisdiction doctrine and limit application of the doctrine in environmental disputes.

V. PROPOSED SOLUTION: A UNIFORM TEST TO CABIN THE PRIMARY JURISDICTION DOCTRINE IN ENVIRONMENTAL DISPUTES

The lower federal courts should adopt a uniform analysis to determine the narrow circumstances in which applying the primary jurisdiction doctrine to environmental disputes is appropriate. Specifically, a court should consider the following three factors: (1) the risks that accompany delayed proceedings, (2) whether the issue before the court is one exclusively within an agency's expertise, and (3) whether agency referral or action is necessary to maintain regulatory uniformity. When weighing these factors, a court should view the bar to invoke the doctrine as high.

Taking each component of the proposed analysis in turn, a court's principal consideration should be the risks of delay posed by invoking the primary jurisdiction doctrine. When evaluating this factor, a court should measure the degree of delay, accounting for agency lags and priorities.[85] Analysis of this first factor also requires a court to contemplate whether the plaintiff is an individual or nonprofit organization unable to weather a delay. Further, if the delay threatens public or environmental

83. *See* Winters, *supra* note 8, at 542–43 ("The doctrine has become a tool that permits courts to stay or dismiss a case . . . without a finding that such a referral is necessary to forward the purpose of the regulatory scheme. This use of primary jurisdiction causes harm . . . ." (footnote omitted) (citation omitted)).

84. The "toxicity honor system" places the burden on private companies, not the EPA, to report the harms posed by new chemicals to public health and the environment. Nevitt & Percival, *supra* note 68, at 242 (quoting Robert Bilott, Exposure: Poisoned Water, Corporate Greed, and One Lawyer's Twenty-Year Battle Against DuPont 95 (2019)). This "self-reporting and self-policing" system contravenes the "'precautionary approach,' a core environmental principle that seeks to prevent harm from occurring in the face of scientific uncertainty." *Id.*

85. *See* Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 761 (9th Cir. 2015) (noting that invoking the primary jurisdiction doctrine is "not required when a referral to [an] agency would significantly postpone a ruling that a court is otherwise competent to make"). Minimal risks of delay might include an instance when an agency has yet to issue guidance on a matter but the court finds such guidance is imminently forthcoming, or when an agency has expressed directly to the court that the issue at hand is one of priority presently occupying the agency's limited resources. *See id.*

health, this factor should weigh against invoking the doctrine of primary jurisdiction. If a court deems the risks of delay minimal, only then should it analyze the remaining two factors. Weighing delay as the foremost consideration lessens the unique challenges associated with applying the primary jurisdiction doctrine to environmental cases.

Second, a court should consider whether the issue is one solely within an agency's expertise. If it is not, this factor should mitigate against invoking the primary jurisdiction doctrine. An issue, even if highly technical or complex, is not exclusively within an agency's expertise when the task before the court is one within the "core competency" of the judiciary.[86] Notably, it is within the "core competency" of a court to consider expert witness testimony when deciding a technical or complex case.[87] Also material to this inquiry are the advances in technology and broader access to information since the doctrine's inception that enable a court to untangle complicated issues without agency input. In contrast, an issue is solely within an agency's expertise if resolution of the issue requires an agency's answer or if the task is within the exclusive statutory purview of an agency.[88]

If the issue is found to be one solely within an agency's expertise, the next question should be whether an alternative method of obtaining agency input is available.[89] And should such a method be available, this second factor must weigh against invoking the primary jurisdiction doctrine. This consideration balances two fundamental aspects of the doctrine: agency expertise and selective application.

Third, a court should contemplate whether agency referral is necessary to the uniformity of the federal regulatory scheme at issue. The question here should be not whether agency referral would "advance,"[90] "promote,"[91] or "impact"[92] regulatory uniformity, but rather whether such uniformity would be "destroy[ed]" absent agency referral.[93] This third factor comports with the primary jurisdiction doctrine's original purpose of maintaining regulatory uniformity.[94]

When a court identifies the rare case to which the primary jurisdiction doctrine properly applies, several additional restrictions should be observed. First, only a limited stay, rather than a dismissal, should be granted. And the stay order must impose a specific time period; it cannot be indefinite. This restriction reduces the

86. Me. People's All. v. Mallinckrodt, Inc., 471 F.3d 277, 293–94 (1st Cir. 2006).

87. *Id.*

88. *See, e.g.*, *Astiana*, 783 F.3d at 761 (finding that the district court did not err in invoking the primary jurisdiction doctrine because "[d]etermining what chemical compounds may be advertised as natural on cosmetic product labels" is a complicated task that Congress assigned to an agency).

89. *See* Winters, *supra* note 8, at 596 ("If the issue's complexity is insurmountable, courts can request agency input by amicus brief if necessary.").

90. Charvat v. EchoStar Satellite, LLC, 630 F.3d 459, 466 (6th Cir. 2010).

91. Elam v. Kan. City S. Ry. Co., 635 F.3d 796, 811 (5th Cir. 2011).

92. Chlorine Inst., Inc. v. Soo Line R.R., 792 F.3d 903, 909 (8th Cir. 2015) (quoting DeBruce Grain, Inc. v. Union Pac. R.R. Co., 149 F.3d 787, 789 (8th Cir. 1998)).

93. Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

94. *See id.* at 446–48.

possibility that legitimate claims will be put on hold permanently, thereby appreciating the dangers that environmental violations pose to vulnerable litigants, public health, and the environment. Moreover, this requirement recognizes the right of plaintiffs to judgment on the merits of their properly cognizable claims.

Further, a court should not stay an entire case under the primary jurisdiction doctrine; instead, only requests for injunctive relief should be stayed. Expressly narrowing the doctrine's application to requests for injunctive relief aligns with the well-established principle that the doctrine has no place in claims for damages squarely within the judiciary's domain to calculate.[95]

Finally, if a defendant raises the doctrine based on a pending agency action, a stay should be granted only if the agency action is active and warrants consideration by the court.[96] As to agency actions that merit judicial attention, Congress has already provided guidance. Under the Resource Conservation and Recovery Act, a citizen suit is barred when an agency has "commenced and is diligently prosecuting an action," is "actually engaging" in a remedial action, or has "incurred costs to initiate . . . and is diligently proceeding with a remedial action."[97]

A court should strictly adhere to these enumerated instances as the only agency actions that justify application of the primary jurisdiction doctrine in such environmental cases. Importantly, speculation as to future agency action that could render a request for injunctive relief moot should play no role where a plaintiff already has a cognizable claim,[98] because a prolonged stay based on speculation alone is contrary to congressional intent.[99] This final requirement assures that plaintiffs receive proper redress and balances power between courts and agencies by ensuring that judicial orders do not interfere with regulatory efforts.

VI. CONCLUSION

The inevitable overlap in authority between courts and administrative agencies at times necessitates application of the primary jurisdiction doctrine to ensure the appropriate balance of power. Oftentimes, however, the doctrine does not serve that balance, particularly in environmental litigation.

When the Supreme Court decided *Texas & Pacific Railway Company* in 1907, it crafted the doctrine of primary jurisdiction to apply in a particular context during a

95. *See* Holyfield v. Chevron U.S.A., Inc., 533 F. Supp. 3d 726, 737 (E.D. Mo. 2021); Spears v. Chrysler, LLC, No. 08CV331, 2011 WL 540284, at *7 (S.D. Ohio Feb. 8, 2011).

96. Although some courts consider agency action by asking merely whether a prior application has been made to an agency, *see, e.g.*, Seneca Nation of Indians v. New York, 988 F.3d 618, 629 (2d Cir. 2021); Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686, 691 (3d Cir. 2011), that standard is not stringent enough.

97. 42 U.S.C. § 6972(b)(2)(C).

98. A legitimate concern that a judicial order granting injunctive relief would directly conflict with an agency remediation can be mitigated by staying a request seeking such relief for a limited period.

99. *See* PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 619 (7th Cir. 1998) (cautioning that invoking a judge-made abstention doctrine can amount to an "end run around [the Resource Conservation and Recovery Act]").

time when agency authority was far narrower in scope and less beholden to political and corporate influence than it is today. In the absence of a consistent approach among the lower courts for applying the doctrine, this Note proposes a uniform analysis that considers the risks of delay as the primary factor, updates the meaning of agency expertise to reflect modern times, recognizes uniformity as a core principle, and permits only a narrow application of the doctrine.

The analysis proposed in this Note would significantly clarify when the primary jurisdiction doctrine should be invoked in environmental cases and restore the doctrine to its rightful place as a limited device for balancing power. Moreover, this solution would bring the primary jurisdiction doctrine into the twenty-first century and in line with the realities of modern administrative agencies. Importantly, the approach proposed in this Note appreciates the urgency accompanying environmental claims and the compelling need to protect litigants, public health, and the environment.

The ever-growing environmental justice movement guarantees that the doctrine of primary jurisdiction will continue to be raised by defendants accused of harming the health of humans and the environment. The need for a modified and uniform test for the primary jurisdiction doctrine has never been more dire.