UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

STATE OF SOUTH CAROLINA, Plaintiff, v. UNITED STATES; UNITED STATES DEPARTMENT OF ENERGY; DR. ERNEST MONIZ, in his official capacity as Secretary of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION; and LT. GENERAL FRANK G. KLOTZ, in his official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security. Defendants.	Case No. 1:16-cv-00391-JMC

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In 50 U.S.C. § 2566, Congress enacted a scheme for constructing and operating a facility to process mixed-oxide ("MOX") fuel at the Savannah River Site ("SRS") in South Carolina. In a series of interlocking provisions, Congress made clear that even if construction fell behind schedule, it still wanted the facility to be built and operated. South Carolina asks this Court to interpret one provision within that scheme in a way that would negate other parts of the statute and defeat the overall goal of processing MOX, even after delays. The Fourth Circuit and the Supreme Court have repeatedly warned against interpretations that render statutes self-defeating. In its Opposition, South Carolina does not contest any of the specific absurdities Defendants have identified.

Instead of giving South Carolina such a drastic remedy, Congress provided a simpler one: the assistance payment. Monetary relief makes sense because of the myriad technical, legal, safety, and national security obstacles involved in transporting plutonium—difficulties Congress acknowledged in section 2566(c) itself. *See* 50 U.S.C. § 2566(c) (requiring that any removal be "consistent with [NEPA] and other applicable laws"). But that remedy, to the extent it is available on the merits, lies in the Court of Federal Claims, not federal district court.

Consistent with section 2566, Defendants have identified a path forward that would remove 6 metric tons of defense plutonium for final disposition outside of South Carolina. Defendants will, if required, defend the merits of this decision at summary judgment. But this Court should not accept South Carolina's invitation to restructure the Nation's nuclear weapons disposition policy through judicial fiat, when Congress has provided a monetary remedy to compensate South Carolina for its purported injuries.

ARGUMENT

I. South Carolina Has Mischaracterized the State of Plutonium Disposition

As explained in their opening memorandum, Defendants have adopted a course of action for removing multiple tons of defense plutonium from South Carolina and disposing of them at the Waste Isolation Pilot Plant ("WIPP") in New Mexico. *See* Mot. to Dismiss at 10. Under this approach, defense plutonium at SRS will be packaged for shipment through a process called down-blending, where plutonium is mixed with inert materials, rendering the combined product suitable for disposal at WIPP. *See* Dep't of Energy, Record of Decision, *Surplus Plutonium Disposition*, 81 Fed. Reg. 19588, 19589-91 (Apr. 5, 2016) ("Record of Decision"). "Blending for disposal at WIPP is a proven process that is ongoing at SRS . . . . [D]isposal of this surplus non-pit plutonium will avoid long-term impacts, risks, and costs associated with storage." *Id.* at 19591. A fire and an unrelated waste spill at WIPP in early 2014 has prevented shipments from SRS for the past two years; WIPP operations are scheduled to resume in late 2016. *Id.*

Defendants have been working to address the defense plutonium at SRS for the last decade. In carrying out the MOX program, they have faced precipitous increases in the cost of constructing and operating the MOX facility. Estimates for the total cost of the program have increased by at least a factor of five. *See* Gov't Accountability Office, *Plutonium Disposition Program*, at 32-33, GAO-14-231, Feb. 2014. In April 2015, after multiple years of research and analysis, Defendants published a 495-page report under the National Environmental Policy Act (NEPA) analyzing different options for disposing of defense plutonium located at SRS. *See Final Surplus Plutonium Disposition Supplemental Environmental Impact Statement*, DOE/EIS-0283-S2, Apr. 2015. In

December 2015, Defendants published a Federal Register notice announcing that, based on their NEPA analysis, their preferred alternative for disposing of six tons of the defense plutonium at SRS was emplacement at WIPP. *See* Dep't of Energy, *Preferred Alternative for Certain Quantities of Plutonium*, 80 Fed. Reg. 80348 (Dec. 24, 2015). And in April 2016, Defendants issued a Record of Decision announcing their decision to carry out that plan. *See* Record of Decision, *supra*. They explained that the WIPP approach "will allow the DOE/NNSA to continue its progress on the disposition of surplus weapon-usable plutonium in furtherance of the policies of the United States to ensure that surplus plutonium is never again readily used in a nuclear weapon, and to remove surplus plutonium from the State of South Carolina." *Id.* at 19591.

In light of these efforts, there is no basis for South Carolina's allegation that Defendants "cannot make a good faith argument that they even attempted to remove" plutonium from SRS. Opp. 9 n.5; *id.* at 19 (alleging that Defendants intend to make SRS the "permanent 'dumping ground' for plutonium"). South Carolina makes no mention of the actions Defendants are *already taking* to remove defense plutonium from SRS.

These and other merits issues would have to be addressed if the Court reached summary judgment. *See* Mot. to Stay, ECF No. 20, at 6-8. It would have to decide whether Defendants' present efforts are satisfying any obligations they have under the statute. If not, the Court would *then* have to decide what relief, if any, was appropriate. Courts may only award injunctive relief that is both feasible and equitable under the circumstances. *See, e.g.*, *Lord & Taylor, LLC v. White Flint, L.P.*, 780 F.3d 211, 217 (4th Cir. 2015) (explaining that a district court must "assess the practical difficulties of enforcement of an injunction" and make a "feasibility determination"). In the meantime,

South Carolina suggests that if the Court finds it has a cause of action, Defendants have somehow conceded that it "is entitled to a judgment as a matter of law." Opp. 9-10 & n.5. As the foregoing discussion shows, by arguing that South Carolina has no cause of action to force the instant removal of defense plutonium, Defendants are in no way conceding the merits of that claim.

II. South Carolina Has No APA Cause of Action to Force Removal

In its Opposition, South Carolina offers no explanation for the multiple absurdities that its interpretation of section 2566(c) would produce in the statutory scheme. This is a striking omission. The Fourth Circuit and the Supreme Court have repeatedly stressed that a court misinterprets a statute when it construes a provision in a way that produces absurd or self-defeating consequences for the larger scheme.

In their Motion to Dismiss, Defendants explained how South Carolina's interpretation would defeat the very purpose of the statute—producing MOX fuel at SRS—by requiring that Defendants remove all post-2002 defense plutonium from SRS by 2022, even if the MOX production objective was subsequently achieved, solely based on a missed deadline eight years earlier. *See* Mot. to Dismiss 15-23. This would have destroyed any incentive to achieve the MOX production objective *after* 2014—an achievement that other parts of the statute explicitly contemplate and encourage. *See* 50 U.S.C. §§ 2566(d)(1), 2566(d)(2), 2566(e).

Congress, Defendants, and South Carolina have all been acting inconsistently, for many years, with South Carolina's interpretation. If that interpretation were correct, then as soon as it was clear that the facility would not be processing MOX until close to 2022, all subsequent efforts to construct the facility have been in vain. *See* Gov't Acc. Off.,

Plutonium Disposition Program, at 24, GAO-14-231, Feb. 2014 (describing Defendants' 2013 estimate "that the MOX facility would start operations in November 2019 and that it would take approximately 15 years to complete the mission to dispose of 34 metric tons of surplus weapons-grade plutonium"). And yet Congress has kept funding construction, as recently as late 2015, knowing full well that the facility would not be operational until shortly before, and possibly after, 2022. *See* Nat'l Defense Auth. Act for 2016, Pub. L. No. 114-92, § 3119(a)(1), 129 Stat. 1197 (Nov. 25, 2015). Presumably Congress did not think it was mandating that Defendants construct the MOX facility just in time to remove all defense plutonium from SRS. South Carolina's interpretation would also mean that its calls to continue the project—lobbying that continues to this day, Compl. ¶¶ 74-80—have been pure fiction, because the facility would suddenly have no defense plutonium at SRS to process as soon as it was built. That result is not simply inconvenient, it is absurd.

Courts should not interpret Congress's statutes to shatter their own objectives. The Fourth Circuit cases cited by South Carolina make this plain. In *Nat'l Coalition for Students with Disabilities v. Allen*, 152 F.3d 283 (4th Cir. 1998), the Fourth Circuit instructed that courts must depart from "the plain language of a statute . . . in the rare circumstance when . . . a literal application would frustrate the statute's purpose or lead to an absurd result." *Id.* at 288 (quoted at Opp. 12). Similarly, in *Stone v. Instr. Lab. Co.*, 591 F.3d 239 (4th Cir. 2009), the court made clear that "[c]ourts will not . . . adopt a 'literal' construction of a statute if such interpretation would thwart the statute's obvious purpose or lead to an 'absurd result,'" *id.* at 249 (quoting *Chesapeake Ranch Water Co. v. Bd. of Comm'rs of Calvert Cty.*, 401 F.3d 274, 280 (4th Cir. 2005)), and it took great pains to explain why its interpretation of the statute at issue did not create any absurdities,

id. at 248, 249 & n.10, 250 (cited at Opp. 21). South Carolina, by contrast, makes no effort whatsoever to deal with the multiple absurdities Defendants have identified. *See* Mot. to Dismiss 20-23; *compare* Opp. 20-21. That omission is fatal to its claim.

The avoidance of absurdities is not a mere theoretical possibility. The Fourth Circuit has time and again used the canon against absurdities to depart from interpretations that appear clear in isolation but are unworkable in context. *See, e.g.*, *King v. Burwell*, 759 F.3d 358, 368 (4th Cir. 2014), *aff'd*, 135 S. Ct. 2480 (2015); *Aremu v. Dep't of Homeland Security*, 450 F.3d 578, 583 (4th Cir. 2006); *Chesapeake Ranch Water Co.*, 401 F.3d at 278-80; *United States v. Mathena*, 23 F.3d 87, 92-93 (4th Cir. 1994). Other circuits have called it a "golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Kelly v. United States,* 924 F.2d 355, 361 (1st Cir. 1991).

The Supreme Court itself consistently applies the principle that courts should "not construe a statute in a manner that leads to absurd or futile results." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 138 (2004). *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) (departing from the literal terms of a provision, after parsing the "broader structure of the Act," including the plain meaning's consequences for other provisions and for the overall statutory goals); *id.* at 2493 (courts "cannot interpret federal statutes to negate their own stated purposes"); *Graham Cty. Soil & Water Cons. Dist. v. United States*, 559 U.S. 280, 290 (2010) (describing courts' duty "to construe statutes, not isolated provisions"); *United States v. American Trucking Ass'n*, 310 U.S. 534, 543

(1940) ("When [the plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.") (collecting cases).

Rather than impose a mandatory duty that would defeat the statutory purpose of operating a MOX facility even in the face of delays, Congress reasonably chose a different mechanism to enforce the removal deadlines in section 2566(c): the assistance payment. Through the interplay between subsections (c) and (d), Congress told the Department to process MOX by certain dates or begin removing defense plutonium from SRS, and instructed that if it did not, it would have to pay the assistance payment subject to appropriations. Subsection (c) thus sets processing and removal goals, and subsection (d) sets the consequences for failing to meet those goals.[1] South Carolina cannot seriously contend that the two provisions "serve separate and distinct purposes." Opp. 15. Reading section 2566 "as a symmetrical and coherent regulatory scheme," *FDA v. Brown & Williamson*, 529 U.S. 120, 133 (2000), it is clear that section 2566(c) does not impose the sort of mandatory duty that can be enforced through 5 U.S.C. § 706(1).

South Carolina's arguments to the contrary are unavailing. It makes much of the fact that the statute uses "shall" in other provisions to impose what Defendants have assumed are mandatory duties. Opp. 11-12. But such an interpretation of those provisions does not produce self-defeating absurdities in the way South Carolina's interpretation of section 2566(c) does. Besides, "the presumption of consistent usage

[1] South Carolina points to section 2566(d)(2)(B), which provides that "[n]othing in this paragraph may be construed to terminate, supersede, or otherwise affect any other requirements of this section." It is unclear how this provision helps illuminate the nature of any particular requirement. The statute contains multiple instructions, in almost all of its subsections. *See id.* § 2566(a), (b), (e), (f), (g). This non-specific provision surely is not enough to overcome the damage to the overall statutory scheme entailed by South Carolina's interpretation of section 2566(c).

readily yields to context," *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2441-2442 (2014), and "a statutory term may mean different things in different places." *King*, 135 S. Ct. at 2493 n.3.

The "glaring deficiencies" South Carolina sees in Defendants' interpretation rest on a position Defendants have not advanced. South Carolina alleges that, under Defendant's reading, if they "had removed one metric ton of plutonium in 2014 or 2015, . . . they would not have any obligations under Section 2566(d)(1)." Opp. 13 (bold and underline omitted). That is wrong. Defendants have never argued that pre-2016 removal would "extinguish[]" any obligations under section 2566(d), Opp. 14—obligations that are neither triggered nor negated by removal. South Carolina's objections are thus the product of its own misunderstanding. Indeed, it is South Carolina's interpretation that would render parts of section 2566(d) inoperative. *See* Mot. to Dismiss at 21.

Just as South Carolina has no response to the absurdities occasioned by its interpretation, it has no answer to the legislative history's silence on an injunction to empty SRS of defense plutonium in 2022 based on a failure to meet a 2014 deadline. One would have thought that, if such a drastic poison pill had been intended, someone would have mentioned it at some point. Once again, South Carolina's own citations prove the point. In the Department's report to Congress in February 2002, it explained that South Carolina was "counting on *disposition* [through MOX production] as a means to avoid becoming the 'dumping ground' for surplus weapons-grade plutonium." Opp. 18 (emphasis added). If South Carolina had a cause of action to obtain an injunction forcing removal, why was it "counting on disposition" to achieve removal? South Carolina also quotes its Congressman, John Spratt, who announced on the House floor

that South Carolina "only took the plutonium with the promise that a processing facility and ultimate removal would be forthcoming." Opp. 19 n.12. But the only remedy he mentioned to "make sure this happened" was "[t]he penalty payments." *Id.*

Whether or not the Department helped draft the statute does not change any of this, as South Carolina argues. *See* Opp. 15-18. There is no question that section 2566 seeks removal of plutonium from South Carolina, in the event that the MOX production objective is not achieved. But the question remains what Congress chose as the enforcement mechanism: an injunction under the APA, or the assistance payment.[2] As Defendants have argued—and South Carolina has not contested with any specificity—injunctive enforcement wreaks havoc with the overall scheme in a way Congress could not have intended, a result that the Fourth Circuit and Supreme Court have frequently gone out of their way to avoid.[3]

III. South Carolina's Monetary Claim Cannot Be Brought in This Court

South Carolina may not advance its claim for monetary relief in this Court for three independent reasons. For a monetary claim to be cognizable in district court, each

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[2] The correspondence cited in the Opposition does not help answer this question, because it does not even mention the assistance payment, or any other part of section 2566(d). *See* Opp. 16-18. That section, along with recent appropriations, provides powerful evidence that Congress wanted the MOX facility built even after the 2014 deadline—a purpose that would be negated by South Carolina's interpretation of section 2566(c).

[3] The gravity of the assistance payment belies South Carolina's suggestion that, under Defendants' interpretation, they would have no obligation to remove defense plutonium from South Carolina. *See* Opp. 12. As intended by Congress, the assistance payment not only compensates South Carolina, it also provides a strong incentive for the Department to remove plutonium—an "ace in the hole," as South Carolina's congressman put it. That incentive is clearly working. After several years of required analysis under NEPA and other laws, Defendants have finalized a plan to remove multiple tons of defense plutonium from SRS. *See* Record of Decision, *supra*.

of the following must be true: the claim must not seek "money damages," 5 U.S.C. § 702, there must not be another statute that "impliedly forbids the relief which is sought," *id.*, and there must not be an "adequate remedy" elsewhere, *id.* § 704. "The three limitations function in the disjunctive; the application of any one is enough to deny a district court jurisdiction under the APA." *Suburban Mortgage Assoc., Inc. v. HUD*, 480 F.3d 1116, 1126 (Fed. Cir. 2007); *accord Transohio Savings Bank v. Director*, 967 F.2d 598, 607 (D.C. Cir. 1992) (cited at Opp. 23-24). The money claim in this case fails all three.

A. South Carolina Has an Adequate Remedy

The most obvious reason why South Carolina cannot bring its money claim in this court is that the Court of Federal Claims can provide an "adequate remedy," 5 U.S.C. § 704, because that court can award all of the monetary relief to which South Carolina may be entitled. Regardless of whether a claim seeks compensatory or specific relief under *Bowen v. Massachusetts*, 487 U.S. 879 (1988), courts in the decades since have generally found this to be the easier limitation to address. *See Suburban Mortgage*, 480 F.3d at 1125 ("[T]he better course is to ask first whether the cause is one over which the Court of Federal Claims has jurisdiction under the Tucker Act. . . . If the suit is at base a claim for money, and the relief available through the Court of Federal Claims under the Tucker Act—a money judgment—will provide an adequate remedy, the inquiry is at an end."); *accord Randall v. United States*, 95 F.3d 339, 346 (4th Cir. 1996).

South Carolina's money claim plainly meets the Tucker Act's jurisdictional requirements. 28 U.S.C. § 1491(a)(1). Those requirements are met whenever "the claim is for more than $10,000 and is based on a money-mandating statute, regulation, or constitutional provision, or an express or implied contract with the Government."

Suburban Mortgage, 480 F.3d at 1125-26. Tucker Act jurisdiction is far broader than actions for "money damages" under 5 U.S.C. § 702. As the Court explained in *Bowen*, "[t]here are . . . many statutory actions over which the Claims Court has jurisdiction that enforce a statutory *mandate* for the payment of money rather than obtain *compensation* for the Government's failure to so pay." 487 U.S. at 900 n.31 (emphases added); *see id.* ("The jurisdiction of the Claims Court . . . is not expressly limited to actions for 'money damages,' whereas that term does define the limits of the exception to § 702.") (citations omitted). Because South Carolina's claim is for more than $10,000 and is premised on a money-mandating statute, it falls within the Court of Federal Claims' jurisdiction.

South Carolina's two arguments to the contrary have no merit. It states that the Court of Claims "only has jurisdiction over a claim of statutory breach and damages compensating for loss caused by injury from such breach." Op. 24. It is not clear what "statutory breach" means. The Tucker Act itself makes clear that its jurisdiction extends beyond breach-of-contract actions. 28 U.S.C. § 1491(a)(1) (extending jurisdiction to, *inter alia*, "any claim against the United States founded [upon] . . . any Act of Congress"). And *Bowen* explicitly says that jurisdiction extends beyond "compensation" claims. 487 U.S. at 900 n.31; *contra* Opp. 27. South Carolina further argues that section 2566(d) is not enforceable in the Court of Claims because "any payment of the economic and impact assistance penalty is wholly within the discretion of the Federal Defendants." Opp. 26. Surely South Carolina does not mean to concede that the payment is, at present, within Defendants' discretion, as such a concession would preclude relief under the APA. *See* 5 U.S.C. §§ 701(a)(2), 706(1); *Angelex Ltd. v. United States*, 723 F.3d 500, 506 (4th Cir. 2013) ("Because the action that occurred in this case is explicitly committed to the

discretion of the [agency] pursuant to [the statute], we conclude that this matter was unreviewable, and thus, the district court lacked subject matter jurisdiction."); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).[4] Nor does a defendant's ability to have avoided a money claim negate Tucker Act jurisdiction, Opp. 26-27—the same is true of every single breach-of-contract claim the Court of Claims routinely hears.

The "adequate remedy" considerations in *Bowen* were very different. *See Bowen*, 487 U.S. at 901-08. In that case, Massachusetts sought a determination that a certain category of medical care was reimbursable under Medicaid; it did not simply seek a specific sum of money. *See id.* at 885-87. The Court held that a pure money judgment in the Court of Claims was not adequate to resolve that claim. First, the money at issue was incidental to the underlying question about the structure of the Medicaid program, and the Court of Claims lacked jurisdiction to resolve that underlying question. *Id.* at 905. Here, by contrast, South Carolina does not seek a non-monetary ruling whose incidental effect would be monetary; it seeks a specific sum of money, *see* Compl. at 32 (para. C), and there is no question that the Court of Federal Claims can award that sum, if it is owed. Second, the complex payment structure in *Bowen*—under which federal payments were actually not reimbursements, but rather advances for future expenditures—meant that the Court of Claims, which could not afford prospective relief, might not have been able to provide *even* purely financial relief. *Id.* at 905-07. Not so here: South Carolina claims it is already owed $100 million for 2016. Since *Bowen*, courts have emphasized that its adequacy analysis is narrow and fact-bound. *See, e.g.*, *Suburban Mortgage*, 480 F.3d at

[4] To the extent South Carolina relies on the fact that it was owed nothing when it filed suit, *see* Opp. 23, its argument proves too much. If this Court's jurisdiction is to be assessed at the moment of filing, then, at the moment of filing, South Carolina lacked standing to pursue this claim.

1127 (noting that *Bowen*'s circumstances "are not present in most cases"); *Consolidated Edison Co. of New York, Inc. v. Dep't of Energy*, 247 F.3d 1378, 1383 (Fed. Cir. 2001) (explaining that *Bowen* "linked its judgment to a specific set of circumstances"). The money claim in this case is far afield from those circumstances.

In response, South Carolina offers only two brief reasons why the Court of Claims cannot provide an "adequate remedy." Opp. 32-33. First, it points out that the Court of Claims cannot order the removal of plutonium from South Carolina. *See id.* at 23, 32. This is true but irrelevant. A court must possess jurisdiction—and a litigant must possess a cause of action—separately for each claim. A plaintiff cannot assert a claim that fails the requirements of 5 U.S.C. § 704 simply because it *also* asserts a claim that may satisfy them. South Carolina's claims for removal and for money are wholly separate; in its view, it is owed $100 million under 50 U.S.C. § 2566(d)(1), *regardless* of whether it is entitled to an injunction to remove one ton of defense plutonium pursuant to § 2566(c)(1).[5] *Compare* Compl. at 31 ¶ B (removal claim), *with* Compl. at 32 ¶ C (money claim).[6] As the Federal Circuit has explained, there is "no logical reason why" a district

[5] This was not true in *Bowen*, where the questions raised by the equitable and monetary claims were the exact same: whether the "the provision of medical and rehabilitative services to patients in intermediate care facilities for the mentally retarded" was reimbursable under the Medicare program. 487 U.S. at 885-86.

[6] The Opposition also asserts, with no explanation, a contention that is nowhere to be found in the Complaint: that section 2566(d)(1) also requires Defendants to remove an *additional* ton of defense plutonium every year from 2016 through 2021. *See* Opp. 32, 37. This is a feeble attempt to circumvent the limitations imposed by § 704, which requires dismissal of the money claim regardless of the statutory source of any removal obligations. *See County of Cook*, 170 F.3d at 1089 (recognizing that a district court may decline to adjudicate "less than all of the claims in an action").

More broadly, any claim that section 2566(d) imposes additional removal obligations is not properly before this Court for three reasons. First, South Carolina did not make this claim in its Complaint; there, its only claim under section 2566(d)(1) was

court should not assess the availability of a Tucker Act remedy "on a claim-by-claim basis." *United States v. County of Cook*, 170 F.3d 1084, 1089 (Fed. Cir. 1999).

Second, South Carolina protests that Defendants have not conceded that the money claim will be *successful* in the Court of Claims. Opp. 33. This is similarly beside the point. Defendants have made clear that money claims like South Carolina's fall within the Court of Claims' jurisdiction. *See* Mot. to Dismiss at 25. South Carolina has offered no reason to doubt that conclusion. Defendants need not concede the *merits* of this claim in order to establish that an "adequate remedy" exists elsewhere. If they did, a plaintiff could avoid the requirements of 5 U.S.C. § 704 anytime the defendant does not concede liability. That is not, and cannot be, the law.

Thus, because South Carolina has an "adequate remedy" for its money claim in the Court of Federal Claims, 5 U.S.C. § 704, this claim should be dismissed.

B. The Tucker Act Impliedly Forbids Monetary Relief in This Court

There are two further, independent reasons to dismiss South Carolina's money claim. The first is that the APA's waiver of sovereign immunity, 5 U.S.C. § 702, is not

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for monetary relief. *See* Compl. ¶ 112, Prayer for Relief ¶¶ C, D. Second, South Carolina repeatedly concedes, throughout its filings so far in this case, that section 2566(d) does not impose a separate removal obligation, and instead imposes only the assistance payment, in the event that neither removal nor the MOX production objective are achieved. *See* Opp. 3, 13; Compl. at 31-32. Through its multiple self-contradictions on this point, South Carolina has conceded that this is not a permissible reading of the statute. *See, e.g.*, *Dep't of Treasury v. FLRA*, 88 F.3d 1279 (Table) (D.C. Cir. 1996) (rejecting an "argument" for being "self-contradictory"); *Bady v. Sullivan*, 1992 WL 332307, *2 (N.D. Ill. 1992) ("[P]laintiff waived her CPI argument by virtue of her subsequent self-contradictions."). Third, South Carolina has not even tried to explain why the Court should adopt such an odd reading of section 2566(d)(1). The provision is not complicated: it provides that Defendants must pay the assistance payment each year, "subject to the availability of appropriations," unless they remove one ton of plutonium or reach the MOX production objective. South Carolina offers no contextual reason to interpret it otherwise.

available where another statute "impliedly forbids the relief which is sought." The Tucker Act is such a statute. The House Report for the 1976 amendment to § 702 listed the Tucker Act as a statute that impliedly forbade relief. *See* H.R. Rep. No. 94-1656 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6133. A number of circuits have so held. *See, e.g.*, *Katz v. Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994); *Transohio*, 967 F.2d at 602 (cited at Opp. 23-24); *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484-85 (9th Cir. 1985). The Fourth Circuit's conclusion that Tucker Act jurisdiction is exclusive suggests the same result. *See Int'l Science & Tech. Inst., Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146, 1155 n.2 (4th Cir. 1997) ("[J]urisdiction of cases involving more than $10,000 lies exclusively in the Court of Federal Claims."), *abrogated on other grounds*, *Mims v. Arrow Fin. Svcs., LLC*, 132 S. Ct. 740 (2012); *accord United States v. Hohri*, 482 U.S. 64, 66 n.1 (1987) ("Tucker Act claims for more than $10,000 can be brought only in the United States Claims Court.").

C. The United States Has Not Waived Sovereign Immunity for This Claim

Finally, the assistance payment qualifies as "money damages" under 5 U.S.C. § 702. Most of South Carolina's Opposition is devoted to arguing otherwise. *See* Opp. 27-32. As explained above, that argument only addresses one of the three limitations the monetary claim must avoid. *See Suburban Mortgage*, 480 F.3d at 1126 (explaining that the "application of any one" of the three limitations in § 702 and § 704 "is enough to deny a district court jurisdiction under the APA").

The assistance payment is "money damages" because it is not a payment to which the State is categorically entitled, but rather a substitute for the statute's primary goals of MOX production and plutonium removal. The statute itself styles the payment as

"[e]conomic and impact assistance," which demonstrates Congress's purpose to compensate South Carolina for the impact of keeping defense plutonium within its borders without operating the facility. 50 U.S.C. § 2566(d). It is structured as substitute relief because it only arises in the event that the Department does not accomplish the statute's two primary goals. *See id.* § 2566(d)(1). And the payment is owed retrospectively, based only on *past* inaction by the Department. The payment therefore falls on the former side of *Bowen*'s distinction between statutes that "compensate a particular class of persons for past injuries or labors," and statutes that "subsidize future state expenditures." 487 U.S. at 905 n.42; *see also id.* (explaining that the Back Pay Act's "'shall pay' language" promised compensatory relief).

In *Bowen*, by contrast, the Medicaid payments to which the State was entitled were the whole purpose of the provision at issue. So were the Court's other examples of "specific" monetary claims. *See id.* at 895-96 (citing, *inter alia*, "specific performance of contract to borrow money," "specific performance of a promise to pay money bonus under a royalty contract") (quotation marks omitted). Such specific relief is owed no matter what, whereas the assistance payment only arises if South Carolina experiences specified contingencies. The assistance payment thus functions as a form of liquidated damages, to substitute for various impacts and economic benefits that would be practically impossible to quantify on an annual basis.

South Carolina has only one argument for why the assistance payment constitutes specific relief under *Bowen*: legislators and attorneys have described the payment as a "penalty" or "fine." Opp. 27-32. South Carolina does not explain why those labels cannot be used to describe a payment whose purpose is compensatory. Nor does it

explain how legislators could be expected to tailor their word choice to the fine distinctions between Tucker Act and APA jurisdiction. At any rate, to the extent labels matter, the far more important one is the one contained in the enacted statutory text: "economic and impact assistance." 50 U.S.C. § 2566(d). The word "assistance" demonstrates that the payment is for South Carolina's benefit, and the words "economic" and "impact" perfectly track the statutory goals for which the assistance payment is a substitute. The assistance payment is a compensatory form of "money damages," for which the APA does not waive sovereign immunity. 5 U.S.C. § 702.

IV. South Carolina Lacks Standing to Seek an Injunction to Suspend Further Shipments

South Carolina's claim for an injunction against future shipments to SRS rests on an unfamiliarity with the requirements for Article III standing. In its Opposition, it starts by alleging that "Federal Defendants previously . . . acknowledged to this Court that South Carolina has standing to bring suit in this Court to seek . . . compliance with Section 2566." Opp. 33 (citing *Aiken Cty. v. Bodman*, Tr. 53:4-5, 15, 18-19). This is a puzzling contention. First, standing is a matter of subject-matter jurisdiction, and no party can concede it. *See, e.g.*, *United States v. Hays*, 515 U.S. 737, 742 (1995) ("The question of standing is not subject to waiver."). Second, the cited discussion from the *Bodman* transcript does not pertain to Article III standing at all; the discussion pertains to which party might fall within Section 2566's zone of interests. That requirement, once known as "prudential standing," is a part of the statutory cause of action, not the constitutional injury required for subject-matter jurisdiction. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). Defendants have not raised such an argument in their Motion to Dismiss in this case.

Article III standing has three familiar requirements: injury-in-fact, causation, and redressability. *See Hays*, 515 U.S. at 742-43. An injury-in-fact must be "concrete, particularized, and actual or imminent"; the injury be "fairly traceable to the challenged action"; and the injury must be "redressable by a favorable ruling." *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013). Tellingly, South Carolina does not mention or discuss any of these requirements, even once. *See* Opp. 33-36 (entirety of section entitled "South Carolina has standing for all of its claims and requests for relief"). This is presumably because it has not even alleged any forward-looking harms that are "certainly impending," or that are "actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quotation marks omitted). To have standing for its suspension claim, South Carolina would have to allege a "certainly impending" plutonium shipment that violated a provision of 50 U.S.C. § 2566. Even the most generous reading of its Complaint reveals no such allegation. Because "[t]he party invoking federal jurisdiction bears the burden of establishing" standing at all "successive stages of the litigation," including the pleadings, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), the suspension claim must be dismissed. In any event, Defendants have already suspended transfers under section 2566. *See* Ltr. from Ernest Moniz, Sec'y of Energy, to Nikki Haley, Gov., Jan. 19, 2016; Mot. to Dismiss at 27-29.[7]

[7] In one sentence and a footnote of its Opposition, South Carolina advances the novel idea that *section 2566(c)* requires a suspension of future plutonium shipments, a more stringent one than the explicit suspension provisions in sections 2566(b)(4) and (5). *See* Opp. 34 & n.19. It offers no particular explanation for this purported statutory requirement. As a result, even if the Complaint alleged facts sufficient to establish standing for this claim—which it does not—the argument is waived. *See, e.g.*, *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs."); *Gonzalez-Maldonado v. MMM Healthcare, Inc.*,

V. South Carolina Lacks Standing to Request Remedies in Future Years

The claim for "continuing jurisdiction to monitor the compliance of the Federal Defendants with their yearly obligations" until 2021 fares no better. Opp. 35-36. South Carolina's sole argument for standing to seek relief in each of the next five years is that, because of its "underlying cause of action to enforce the Federal Defendants' Section 2566(d) obligations, . . . it has standing to request all relief based on such claim." *Id.*

Again, South Carolina ignores black-letter standing law. A plaintiff must establish standing separately for each type of relief it requests. *See, e.g.*, *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 210 (1995) (distinguishing an "entitle[ment] to seek damages" from "standing to seek forward-looking relief"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-106 (1983) (collecting cases upholding standing to seek retrospective but not prospective relief). As the Fourth Circuit has put it, "a plaintiff's past injury does not necessarily confer standing upon him to enjoin the possibility of future injuries." *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991). Thus, South Carolina's only argument for standing as to both its suspension claim and its future-years claim—that it has a cause of action—is a non-sequitur.[8]

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693 F.3d 244, 250 (1st Cir. 2012) ("To the extent that the appellants had any argument, it is waived by 'perfunctory' treatment."). At any rate, this theory is clearly wrong. Section 2566(c) contains not a single word about suspending further plutonium shipments. Sections 2566(b)(4) and (5) both do, but their prohibitions only apply to defense plutonium "to be processed at the MOX facility"; they leave all the other plutonium-related programs at SRS unaffected. "[W]here a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded." *Reyes-Gaona v. North Carolina Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001). Congress considered the question of suspension, and it embodied its decision in sections 2566(b)(4) and (5). Thus, even if there was standing and a preserved claim, there is no basis to read a phantom suspension requirement into section 2566(c).

[8] South Carolina's confusion is underscored by its recurrent citation to cases involving motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See* Opp. 35-36.

"A plaintiff who seeks . . . to enjoin a future action must demonstrate that he 'is immediately in danger of sustaining some direct injury.'" *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012). South Carolina plainly cannot meet that burden. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Lyons*, 461 U.S. at 102. "And it is equally insufficient . . . to observe that the challenged conduct is repeatable in the future." *Lebron*, 670 F.3d at 560. For South Carolina to have standing to seek relief under section 2566(d) in the year 2021, for instance, it would have to demonstrate that Defendants will "certainly" and "imminent[ly]" both fail to meet the MOX production objective in 2021 and fail to remove one ton of defense plutonium 2021, and that they will then fail to pay whatever amount of "economic and impact assistance" the statute requires, based on "the availability of appropriations" in 2021. *Driehaus*, 134 S. Ct. at 2342; 50 U.S.C. § 2566(d). South Carolina cannot establish—and, sufficient for present purposes, has not alleged—facts to support standing for such far-off relief.

VI. South Carolina Has No Constitutional Claims

South Carolina's Opposition clarifies which alleged statutory violations it thinks are *ipso facto* constitutional violations: all of them. It explains that its constitutional claims are based on all the "subsections of Section 2566 [Defendants] are alleged not to have complied with." Opp. 36-37.

This is a frivolous claim. As the Supreme Court has made more than clear, violations of statutes by executive agencies are not somehow automatically violations of the Constitution. *See Dalton v. Specter*, 511 U.S. 462, 472, 474 (1994). South Carolina

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These have nothing to do with Article III standing, because standing is a matter of subject-matter jurisdiction, which is challenged under Rule 12(b)(1).

does not cite a *single* case to the contrary, and yet it makes no effort at all to distinguish the statutory violations it alleges from any other. It offers that this count "provides a supplemental basis for other causes of action," whatever that means. Opp. 36. It points to the constitutional provision instructing the President to "take Care that the Laws be faithfully executed," *id.* at 38, but then it disclaims any challenge to the President's performance of his duties, *id.* at 37. Again, South Carolina has provided no citations and no analysis to support the remarkable proposition that by violating an alleged statutory duty, an agency violates the Constitution. Count One should be dismissed.

CONCLUSION

The foregoing reasons, this Court should dismiss the Complaint in its entirety.

Respectfully submitted,

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