

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 3446
OFFERED BY M . _____**

Strike all that follows after the enacting clause, and
insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Sunshine for Regu-
3 latory Decrees and Settlements Act of 2023”.

4 SEC. 2. DEFINITIONS.

5 In this Act—

6 (1) the terms “agency” and “agency action”
7 have the meanings given those terms under section
8 551 of title 5, United States Code;

9 (2) the term “covered civil action” means a civil
10 action—

11 (A) seeking to compel agency action;

12 (B) alleging that an agency is unlawfully
13 withholding or unreasonably delaying an agency
14 action relating to a regulatory action that would
15 affect the rights of—

16 (i) private persons other than the per-
17 son bringing the action; or

1 (ii) a State, local, or tribal govern-
2 ment; and

3 (C) brought under—

4 (i) chapter 7 of title 5, United States
5 Code; or

6 (ii) any other statute authorizing such
7 an action;

8 (3) the term “covered consent decree” means—

9 (A) a consent decree entered into in a cov-
10 ered civil action; and

11 (B) any other consent decree that requires
12 agency action relating to a regulatory action
13 that affects the rights of—

14 (i) private persons other than the per-
15 son bringing the action; or

16 (ii) a State, local, or tribal govern-
17 ment;

18 (4) the term “covered consent decree or settle-
19 ment agreement” means a covered consent decree
20 and a covered settlement agreement; and

21 (5) the term “covered settlement agreement”
22 means—

23 (A) a settlement agreement entered into in
24 a covered civil action; and

1 (B) any other settlement agreement that
2 requires agency action relating to a regulatory
3 action that affects the rights of—

4 (i) private persons other than the per-
5 son bringing the action; or

6 (ii) a State, local, or tribal govern-
7 ment.

8 **SEC. 3. CONSENT DECREE AND SETTLEMENT REFORM.**

9 (a) PLEADINGS AND PRELIMINARY MATTERS.—

10 (1) IN GENERAL.—In any covered civil action,
11 the agency against which the covered civil action is
12 brought shall publish the notice of intent to sue and
13 the complaint in a readily accessible manner, includ-
14 ing by making the notice of intent to sue and the
15 complaint available online not later than 15 days
16 after receiving service of the notice of intent to sue
17 or complaint, respectively.

18 (2) ENTRY OF A COVERED CONSENT DECREE
19 OR SETTLEMENT AGREEMENT.—A party may not
20 make a motion for entry of a covered consent decree
21 or to dismiss a civil action pursuant to a covered set-
22 tlement agreement until after the end of proceedings
23 in accordance with paragraph (1) and subpara-
24 graphs (A) and (B) of paragraph (2) of subsection
25 (d) or subsection (d)(3)(A), whichever is later.

1 (b) INTERVENTION.—

2 (1) REBUTTABLE PRESUMPTION.—In consid-
3 ering a motion to intervene in a covered civil action
4 or a civil action in which a covered consent decree
5 or settlement agreement has been proposed that is
6 filed by a person who alleges that the agency action
7 in dispute would affect the person, the court shall
8 presume, subject to rebuttal, that the interests of
9 the person would not be represented adequately by
10 the existing parties to the action.

11 (2) STATE, LOCAL, AND TRIBAL GOVERN-
12 MENTS.—In considering a motion to intervene in a
13 covered civil action or a civil action in which a cov-
14 ered consent decree or settlement agreement has
15 been proposed that is filed by a State, local, or tribal
16 government, the court shall take due account of
17 whether the movant—

18 (A) administers jointly with an agency that
19 is a defendant in the action the statutory provi-
20 sions that give rise to the regulatory action to
21 which the action relates; or

22 (B) administers an authority under State,
23 local, or tribal law that would be preempted by
24 the regulatory action to which the action re-
25 lates.

1 (c) SETTLEMENT NEGOTIATIONS.—Efforts to settle
2 a covered civil action or otherwise reach an agreement on
3 a covered consent decree or settlement agreement shall—

4 (1) be conducted pursuant to the mediation or
5 alternative dispute resolution program of the court
6 or by a district judge other than the presiding judge,
7 magistrate judge, or special master, as determined
8 appropriate by the presiding judge; and

9 (2) include any party that intervenes in the ac-
10 tion.

11 (d) PUBLICATION OF AND COMMENT ON COVERED
12 CONSENT DECREES OR SETTLEMENT AGREEMENTS.—

13 (1) IN GENERAL.—Not later than 60 days be-
14 fore the date on which a covered consent decree or
15 settlement agreement is filed with a court, the agen-
16 cy seeking to enter the covered consent decree or
17 settlement agreement shall publish in the Federal
18 Register and online—

19 (A) the proposed covered consent decree or
20 settlement agreement; and

21 (B) a statement providing—

22 (i) the statutory basis for the covered
23 consent decree or settlement agreement;
24 and

1 (ii) a description of the terms of the
2 covered consent decree or settlement agree-
3 ment, including whether it provides for the
4 award of attorneys' fees or costs and, if so,
5 the basis for including the award.

6 (2) PUBLIC COMMENT.—

7 (A) IN GENERAL.—An agency seeking to
8 enter a covered consent decree or settlement
9 agreement shall accept public comment during
10 the period described in paragraph (1) on any
11 issue relating to the matters alleged in the com-
12 plaint in the applicable civil action or addressed
13 or affected by the proposed covered consent de-
14 cree or settlement agreement.

15 (B) RESPONSE TO COMMENTS.—An agency
16 shall respond to any comment received under
17 subparagraph (A).

18 (C) SUBMISSIONS TO COURT.—When mov-
19 ing that the court enter a proposed covered con-
20 sent decree or settlement agreement or for dis-
21 missal pursuant to a proposed covered consent
22 decree or settlement agreement, an agency
23 shall—

24 (i) inform the court of the statutory
25 basis for the proposed covered consent de-

1 cree or settlement agreement and its
2 terms;

3 (ii) submit to the court a summary of
4 the comments received under subparagraph
5 (A) and the response of the agency to the
6 comments;

7 (iii) submit to the court a certified
8 index of the administrative record of the
9 notice and comment proceeding; and

10 (iv) make the administrative record
11 described in clause (iii) fully accessible to
12 the court.

13 (D) INCLUSION IN RECORD.—The court
14 shall include in the court record for a civil ac-
15 tion the certified index of the administrative
16 record submitted by an agency under subpara-
17 graph (C)(iii) and any documents listed in the
18 index which any party or amicus curiae appear-
19 ing before the court in the action submits to the
20 court.

21 (3) PUBLIC HEARINGS PERMITTED.—

22 (A) IN GENERAL.—After providing notice
23 in the Federal Register and online, an agency
24 may hold a public hearing regarding whether to

1 enter into a proposed covered consent decree or
2 settlement agreement.

3 (B) RECORD.—If an agency holds a public
4 hearing under subparagraph (A)—

5 (i) the agency shall—

6 (I) submit to the court a sum-
7 mary of the proceedings;

8 (II) submit to the court a cer-
9 tified index of the hearing record; and

10 (III) provide access to the hear-
11 ing record to the court; and

12 (ii) the full hearing record shall be in-
13 cluded in the court record.

14 (4) MANDATORY DEADLINES.—If a proposed
15 covered consent decree or settlement agreement re-
16 quires an agency action by a date certain, the agen-
17 cy shall, when moving for entry of the covered con-
18 sent decree or settlement agreement or dismissal
19 based on the covered consent decree or settlement
20 agreement, inform the court of—

21 (A) any required regulatory action the
22 agency has not taken that the covered consent
23 decree or settlement agreement does not ad-
24 dress;

1 (B) how the covered consent decree or set-
2 tlement agreement, if approved, would affect
3 the discharge of the duties described in sub-
4 paragraph (A); and

5 (C) why the effects of the covered consent
6 decree or settlement agreement on the manner
7 in which the agency discharges its duties is in
8 the public interest.

9 (e) SUBMISSION BY THE GOVERNMENT.—

10 (1) IN GENERAL.—For any proposed covered
11 consent decree or settlement agreement that con-
12 tains a term described in paragraph (2), the Attor-
13 ney General or, if the matter is being litigated inde-
14 pendently by an agency, the head of the agency shall
15 submit to the court a certification that the Attorney
16 General or head of the agency approves the proposed
17 covered consent decree or settlement agreement. The
18 Attorney General or head of the agency shall person-
19 ally sign any certification submitted under this para-
20 graph.

21 (2) TERMS.—A term described in this para-
22 graph is—

23 (A) in the case of a covered consent decree,
24 a term that—

1 (i) converts into a nondiscretionary
2 duty a discretionary authority of an agency
3 to propose, promulgate, revise, or amend
4 regulations;

5 (ii) commits an agency to expend
6 funds that have not been appropriated and
7 that have not been budgeted for the regu-
8 latory action in question;

9 (iii) commits an agency to seek a par-
10 ticular appropriation or budget authoriza-
11 tion;

12 (iv) divests an agency of discretion
13 committed to the agency by statute or the
14 Constitution of the United States, without
15 regard to whether the discretion was
16 granted to respond to changing cir-
17 cumstances, to make policy or managerial
18 choices, or to protect the rights of third
19 parties; or

20 (v) otherwise affords relief that the
21 court could not enter under its own au-
22 thority upon a final judgment in the civil
23 action; or

24 (B) in the case of a covered settlement
25 agreement, a term—

1 (i) that provides a remedy for a fail-
2 ure by the agency to comply with the
3 terms of the covered settlement agreement
4 other than the revival of the civil action re-
5 solved by the covered settlement agree-
6 ment; and

7 (ii) that—

8 (I) interferes with the authority
9 of an agency to revise, amend, or
10 issue rules under the procedures set
11 forth in chapter 5 of title 5, United
12 States Code, or any other statute or
13 Executive order prescribing rule-
14 making procedures for a rulemaking
15 that is the subject of the covered set-
16 tlement agreement;

17 (II) commits the agency to ex-
18 pend funds that have not been appro-
19 priated and that have not been budg-
20 eted for the regulatory action in ques-
21 tion; or

22 (III) for such a covered settle-
23 ment agreement that commits the
24 agency to exercise in a particular way
25 discretion which was committed to the

1 agency by statute or the Constitution
2 of the United States to respond to
3 changing circumstances, to make pol-
4 icy or managerial choices, or to pro-
5 tect the rights of third parties.

6 (f) REVIEW BY COURT.—

7 (1) AMICUS.—A court considering a proposed
8 covered consent decree or settlement agreement shall
9 presume, subject to rebuttal, that it is proper to
10 allow amicus participation relating to the covered
11 consent decree or settlement agreement by any per-
12 son who filed public comments or participated in a
13 public hearing on the covered consent decree or set-
14 tlement agreement under paragraph (2) or (3) of
15 subsection (d).

16 (2) REVIEW OF DEADLINES.—

17 (A) PROPOSED COVERED CONSENT DE-
18 CREES.—For a proposed covered consent de-
19 cree, a court shall not approve the covered con-
20 sent decree unless the proposed covered consent
21 decree allows sufficient time and incorporates
22 adequate procedures for the agency to comply
23 with chapter 5 of title 5, United States Code,
24 and other applicable statutes that govern rule-
25 making and, unless contrary to the public inter-

1 est, the provisions of any Executive order that
2 governs rulemaking.

3 (B) PROPOSED COVERED SETTLEMENT
4 AGREEMENTS.—For a proposed covered settle-
5 ment agreement, a court shall ensure that the
6 covered settlement agreement allows sufficient
7 time and incorporates adequate procedures for
8 the agency to comply with chapter 5 of title 5,
9 United States Code, and other applicable stat-
10 utes that govern rulemaking and, unless con-
11 trary to the public interest, the provisions of
12 any Executive order that governs rulemaking.

13 (g) ANNUAL REPORTS.—Each agency shall submit to
14 Congress an annual report that, for the year covered by
15 the report, includes—

16 (1) the number, identity, and content of covered
17 civil actions brought against and covered consent de-
18 crees or settlement agreements entered against or
19 into by the agency; and

20 (2) a description of the statutory basis for—

21 (A) each covered consent decree or settle-
22 ment agreement entered against or into by the
23 agency; and

24 (B) any award of attorneys fees or costs in
25 a civil action resolved by a covered consent de-

1 decree or settlement agreement entered against or
2 into by the agency.

3 **SEC. 4. MOTIONS TO MODIFY CONSENT DECREES.**

4 If an agency moves a court to modify a covered con-
5 sent decree or settlement agreement and the basis of the
6 motion is that the terms of the covered consent decree or
7 settlement agreement are no longer fully in the public in-
8 terest due to the obligations of the agency to fulfill other
9 duties or due to changed facts and circumstances, the
10 court shall review the motion and the covered consent de-
11 cree or settlement agreement de novo.

12 **SEC. 5. EFFECTIVE DATE.**

13 This Act shall apply to—

14 (1) any covered civil action filed on or after the
15 date of enactment of this Act; and

16 (2) any covered consent decree or settlement
17 agreement proposed to a court on or after the date
18 of enactment of this Act.

