No. 10-1062

IN THE

# Supreme Court of the United States

CHANTELL SACKETT AND MICHAEL SACKETT,
*Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND LISA PEREZ JACKSON, ADMINISTRATOR,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF GENERAL ELECTRIC CO. AS *AMICUS CURIAE* SUPPORTING PETITIONER


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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page

## BRIEF OF GENERAL ELECTRIC CO. AS *AMICUS CURIAE* SUPPORTING PETITIONER

### INTEREST OF *AMICUS CURIAE*

The General Electric Company ("GE") has an important interest in the questions presented by this case.[1] Despite an exemplary safety and environmental record, the size, scope, and nature of GE's business operations mean that the company is subject to numerous administrative orders by the U.S. Environmental Protection Agency ("EPA") requiring GE to undertake costly cleanup actions.

The law at issue at this case, the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a)(3), is one of a handful of environmental statutes that, unlike other regulatory schemes in U.S. administrative law, do not afford a timely and meaningful hearing either prior to or (in cases of emergencies) immediately after the issuance of an administrative order depriving the recipient of property. These outlier statutes authorize EPA to issue administrative orders with the force of law directing parties like GE to undertake expensive and time-consuming cleanup and compliance actions.

Accordingly, this case presents a valuable opportunity for the Court to provide constitutional guidance regarding the fundamental due process principles governing environmental regulatory schemes that authorize agencies to issue unilateral administrative

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[1] This brief is filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

orders. The Court should make clear that due process requires the government to provide a timely and meaningful hearing *prior to* the effective date of such orders or, in exigent circumstances, as soon as possible afterwards. A right to prompt judicial review of any such order is the minimum that due process demands where (as here) the order was issued without a full and fair administrative hearing.

## STATUTORY BACKGROUND

### A. The Unilateral Order Scheme In The Clean Water Act, Clean Air Act, And CERCLA

This case involves an administrative compliance order ("ACO") issued by EPA pursuant to the CWA, 33 U.S.C. § 1319(a)(3). EPA possesses similar statutory authority to issue ACOs under the Clean Air Act ("CAA"), 42 U.S.C. § 7413(a), and to issue unilateral administrative orders ("UAOs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a).

ACOs are one of three principal civil enforcement options for EPA under the CWA. When the EPA identifies a CWA violation, it can: *first*, assess an administrative penalty, 33 U.S.C. § 1319(g), which entitles the alleged violator to "a reasonable opportunity to be heard and to present evidence" and immediate judicial review, *id.* at § 1319(g)(4)(B), (g)(8); *second*, institute a civil enforcement action in federal district court, *id.* at § 1319(b), which also entitles the alleged violator to immediate judicial review; or *third*, issue an ACO, which "is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." *S. Pines Assocs. By Goldmeier v. United States*, 912 F.2d 713, 715 (4th Cir. 1990). EPA is authorized to

issue an ACO upon a finding of a CWA violation, "on the basis of any information available to [it]." 33 U.S.C. § 1319(a)(3). To enforce a compliance order, EPA must bring an action in federal court under 33 U.S.C. § 1319(b). The violator is subject to potential court-imposed civil penalties not to exceed $37,500 "per day for each violation" of the compliance order. *Id.* at § 1319(d); 40 C.F.R. § 19.4.[2]

EPA enjoys similar authority under CERCLA. When EPA determines that an environmental cleanup is required at a contaminated site, the agency has three options under CERCLA. *First*, EPA may conduct the cleanup itself and file suit against a Potentially Responsible Party ("PRP") in federal district court to recover the costs of the cleanup. *See* 42 U.S.C. §§ 9604(a), 9607(a), 9611(a), 9613. *Second*, EPA may file an abatement action in federal district court to compel a PRP to conduct a specified response action. *See id.* at § 9606(a). Under either of these two options, a PRP targeted by EPA has the right to a meaningful hearing before a neutral decisionmaker in which it can challenge both EPA's determination that the PRP is liable and EPA's selection of the response action at the site.

But EPA also has a *third* option under CERCLA. It may, without court involvement, issue a UAO directing a PRP to conduct a specified response action. *See id.* at § 9606(a). UAOs are directed to specific parties, contain specific findings of liability,

[2] At the time the Sacketts' ACO was issued, 40 C.F.R. § 19.4 provided for a maximum daily penalty of $32,500. Assessing such daily penalties on a small residential property like the Sacketts' could easily exceed the value of the property in a very short time period, amounting to a million dollars in less than a month.

and impose new and binding liabilities and legal obligations on those parties. As described by one court:

> UAOs may essentially be viewed as condensed prosecutions and adjudications: they initiate adversary proceedings against a PRP, but simultaneously constitute a statement that the PRP is legally responsible for the violation and require the PRP to remedy wrongs through the fulfillment of certain responsibilities and penalties (*i.e.*, UAOs regulate conduct of PRPs).

*General Electric Co. v. Johnson*, No. Civ. A. 00-2855 2006 WL 2616187, at *15 n.5 (D.D.C. Sept. 12, 2006).

As with ACOs under the CWA and CAA, UAOs are issued without affording the alleged violator a hearing to challenge EPA's adjudicatory determinations. Instead, the PRP must comply with the UAO on pain of potential treble damages and noncompliance penalties of $37,500 per day. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4. These penalties accumulate until EPA, at its sole discretion, brings an action to enforce its order—a step that can take up to five years, 28 U.S.C. § 2462, and in some cases six, *see* 42 U.S.C. § 9613(g)(2).[3] CERCLA § 113(h) precludes any challenge to a UAO until all of the work required under the UAO has been completed or until EPA brings an enforcement action. 42 U.S.C. § 9613(h).

While CERCLA permits imposition of penalties for violations of a UAO only where the violation (or failure to comply) is "willful[]" and "without sufficient cause," 42 U.S.C. §§ 9606(b)(1), 9607(c)(3), the sheer magnitude of the potential penalties deters PRPs

[3] *Cf. United States v. General Elec. Co.*, No. 06-CV-354-B, 2010 WL 4977478, at *2 (D.N.H. Dec. 3, 2010) (suit commenced on Sept. 20, 2006 to recover costs incurred since Apr. 30, 1993).

from testing the validity of UAOs in practice. For example, should EPA decide to wait the full five years before bringing an enforcement action, a PRP would be liable for nearly $68.5 million *per violation*, *id.* § 9606(b)(1), with the potential for treble damages, *id.* § 9607(c)(3)—a "bet the company" scenario for small-to-medium size businesses and even for many large ones.

### B. EPA's Exercise Of Its Unilateral Order Authority In Practice

The record compiled in *General Electric Co. v. Jackson*, 595 F. Supp. 2d 8 (D.D.C. 2009) ("*GE*"), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011), helps to demonstrate the coercive force of UAOs under CERCLA as they operate in practice. Recognizing that UAOs are effectively unreviewable, EPA has abandoned use of judicial abatement actions under CERCLA in favor of issuing UAOs to all PRPs that decline to enter into consent decrees. *Id.* at 32. Given the chance to impose such coercive pressure, EPA prefers to issue UAOs as a matter of course rather than employ other provisions of CERCLA that would provide PRPs with meaningful predeprivation judicial review.[4]

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[4] EPA, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions 3, OSWER Directive No. 9833.0-1A, (Mar. 7, 1990), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf ("[T]he Agency typically will compel private-party response through unilateral orders," which "should be considered as one of the primary enforcement tools to obtain RD/RA response by PRPs."); EPA, Guidance on CERCLA Section 106 Judicial Actions, OSWER Directive 9835.7 (Feb. 24, 1989) ("The Region should generally issue a Section 106 administrative order before referring a Section 106 civil judicial case.").

EPA issues "approximately six UAOs to nineteen PRPs every *month*." *GE*, 595 F. Supp. 2d at 33. From August 16, 1982 to May 25, 2006, EPA issued over 1,700 UAOs ordering more than 5,400 private recipients to pay an aggregate $5.5 billion for EPA-selected response costs at CERCLA sites. *Id.*; *see* United States General Accounting Office, Superfund Program Management, GAO/HR-97-14 at 6 (Feb. 1997), *available at* http://www.gao.gov/archive/1997/hr97014.pdf. Because of the severe penalties for noncompliance, only a very tiny handful of the 1,700 UAOs issued by EPA have ever been subject to independent review, and even then, only many years after issuance of the order.

EPA is aware of the coercive nature of its power to issue UAOs, recognizing that such authority "is one of the most potent administrative remedies available under any existing environmental statutes." EPA, Guidance Memorandum on Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA 1 (Sept. 8, 1983). EPA exploits the intimidating features of the UAO scheme:

> EPA seeks maximum penalties for non-compliance; EPA seeks multiple penalties for violations at a single UAO site; EPA rejected Justice Department advice that EPA should impose a cap on daily penalties; and EPA labels noncomplying PRPs as "recalcitrant."

*GE*, 595 F. Supp. 2d at 17-18; *see also id.* at 24 ("EPA does not meaningfully dispute GE's assertion that '[i]t is the government's practice in bringing suit for UAO noncompliance to seek the statutory maximum in penalties and treble damages.'"). Such a threat hangs over the head of any PRP, dropping only "if and when the EPA seeks to enforce the [UAO]." Brief

in Opposition of EPA at 15, *Employers Insurance of Wausau v. Browner*, 516 U.S. 1042 (1996) (No. 95-434), 1995 WL 17048207.

CERCLA gives a UAO recipient that chooses to comply with an unlawful order the opportunity to seek reimbursement of its costs of compliance after EPA certifies that the cleanup is complete, at least in certain circumstances. 42 U.S.C. § 9606(b)(2). In practice, however, very few PRPs have ever been awarded reimbursement of costs, and only after substantial delays. "On average, it takes three years to fully comply with a UAO." *GE*, 595 F. Supp. 2d at 31.

Despite statutory language restricting the issuance of UAOs to situations posing "an imminent and substantial endangerment to the public health or welfare or the environment," 42 U.S.C. § 9606(a), "EPA does not issue UAOs in true emergency situations. In true emergency situations, EPA cleans up a site itself and later files a cost recovery action," in which the PRP is entitled to a hearing in an Article III court. *GE*, 595 F. Supp. 2d at 32. Instead, EPA has authoritatively construed the "imminent and substantial endangerment" language to encompass situations in which "harm may not be realized for years" and other circumstances that may "not necessarily [present] an actual harm." EPA and Department of Justice, Use of CERCLA § 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes 4 (Jan. 18, 2001) (citations omitted). The lack of urgency is illustrated by the fact that there is on average an eight year lag-time between identification of a hazardous waste site and issuance of a UAO and a four year lag-time between remedy selection and UAO issuance. *GE*, 595 F. Supp. 2d at 32.

### C. The Unilateral Order Authority's Outlier Status Among U.S. Regulatory Schemes

The environmental statutes providing EPA with such unilateral order authority differ from virtually all other comparable regulatory schemes. A wide variety of statutes, unlike the CWA, CAA, and CERCLA, afford recipients of administrative orders either a prior hearing or a prompt opportunity for independent review after the order is issued. For example:

- The Nuclear Regulatory Commission may issue an order under 42 U.S.C. § 2114(b)(1) in connection with the disposal of radioactive waste "to protect health or to minimize danger to life or property." Such an order is subject to immediate judicial review as a final agency action. *See* 42 U.S.C. § 2239.

- The Atomic Energy Act, 42 U.S.C. § 2168, provides immediate judicial review of orders that "prohibit the dissemination" of sensitive information relating to nuclear weapons.

- The Federal Aviation Act, 49 U.S.C. § 44709, provides that orders revoking operating licenses are immediately appealable to the National Transportation Safety Board, which must dispose of any appeal within 60 days. The Board's decision is then subject to immediate judicial review. *Id.* at § 44709(f).

- The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136d(c), authorizes EPA to issue emergency orders suspending the registration of a pesticide, which effectively halts its use, on a finding of "imminent hazard." But the recipient has 5 days to request an expedited hearing of the suspension order, during which time the order is held in abey-

ance, and following the hearing the recipient may seek full judicial review of the order. *Id*.

• The Safe Drinking Water Act, 42 U.S.C. § 300i, affords immediate judicial review of emergency orders. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001) (citing 42 U.S.C. § 300j-7(a)(2)).

• The Commodity Futures Trading Commission Act, 7 U.S.C. § 12a(9), affords immediate judicial review of emergency orders relating to trading margins.

• The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1275(c), authorizes surface mining permittees adversely affected by administrative orders issued pursuant to 30 U.S.C. § 1271 to apply to the Secretary of Labor for temporary relief pending a full hearing on the validity of the order, and requires the Secretary to respond within five days. A party may then appeal the Secretary's decision to a district court. 30 U.S.C. § 1276.

Other regulatory safety schemes require government agencies to go to the courts in the first instance, affording alleged violators a full and fair hearing prior to the issuance of orders directing remedial and similar actions:

• The Toxic Substances Control Act, 15 U.S.C. § 2606, governing the regulation and registration of chemicals, provides that EPA must commence a civil judicial action against an imminent hazard, seeking temporary and/or permanent relief, either via an order seizing the imminently hazardous chemical substance or other relief against persons distributing such substances.

- The Consumer Product Safety Commission may file an action in district court against an imminently hazardous consumer product, defined as "a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury." 15 U.S.C. § 2061(a). But there is a full judicial hearing before relief is granted. *Id.* at § 2061(b).

- The Occupational Safety & Health Administration may petition a district court for an injunction "to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated." 29 U.S.C. § 662(a). Again, there is a full judicial hearing before relief is available. *Id.* at § 662(b).

- The Food & Drug Administration may request the Attorney General to institute seizures and judicial actions against drugs if there is probable cause to believe "that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer." 21 U.S.C. § 334(b). But the aggrieved party is entitled to an immediate judicial trial on the charges. *United States v. An Article of Device "Theramatic,"* 715 F.2d 1339, 1343 (9th Cir. 1983).

## SUMMARY OF ARGUMENT

The questions presented by this case have broad implications beyond the parties involved in this dispute. This Court's normally sound practice of resolving cases on the narrowest possible ground would ill serve the interests in fairness, predictability, and public accountability presented in the circumstances

here. Accordingly, this Court should not confine its decision to a statutory interpretation of the particular provision of the CWA invoked by EPA against Petitioners. Instead, the Court should address the fundamental due process concerns raised by EPA's exercise of it unilateral order authority and provide guidance regarding the constitutional principles applicable to such administrative schemes generally.

The ACO and UAO statutory schemes empower EPA, in the absence of any emergency, to single out an individual or business and to order, without any prior hearing, performance of a cleanup requiring years of labor and investment, on pain of severe penalties for refusing. The only opportunity for any hearing occurs after the fact and only at a time of the agency's choosing. Such a scheme violates due process.

This Court should hold that regulatory schemes authorizing the issuance of unilateral, adjudicatory administrative orders require the government to provide due process hearings *prior to* issuing such orders or, in exigent circumstances, promptly afterwards. A right to prompt judicial review of any such order is the least that due process demands when the order has not been preceded by a full and fair administrative hearing.

The Government's primary defense of the ACO and UAO statutory schemes is that the mere issuance of an administrative order does not entail a deprivation of property because administrative orders are allegedly not "self-executing." The Government notes that the recipient is not assessed a civil penalty until EPA subsequently brings an enforcement action in court—even though $37,500 daily penalties begin

running from the effective date of the administrative order.

The Government's argument fails for two reasons. *First*, a party suffers a deprivation of property immediately upon the issuance of an administrative order, even if the statutory scheme contains a "sufficient cause" defense, as in CERCLA. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). A party choosing to ignore the order and seeking to vindicate its position in a subsequent EPA enforcement action will suffer immediate financial harms, in the form of higher borrowing costs, a lower stock price, and other impacts cognizable as deprivations of property under this Court's decision in *Connecticut v. Doehr*, 501 U.S. 1 (1991).

*Second*, the coercive impact of the staggering financial penalties available to EPA in an enforcement action makes the decision whether to comply a Hobson's choice. Compliance incurs immediate and substantial costs. But defying an administrative order and waiting for EPA to bring an enforcement action in which an order might be tested in court imposes grave financial risks. The ACO and UAO statutory schemes therefore violate the holding of *Ex parte Young*, 209 U.S. 123, 147 (1908), that due process precludes fines "so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the[ir] validity." This Court should make clear that the ability of the recipient of an administrative order to secure judicial review via a "bet the company" gamble does not satisfy due process.

EPA's ability to impose billions of dollars in economic costs without the opportunity for any independent review presents an important issue of national regulatory policy. As this Court has noted, decision-

making insulated from meaningful review is prone to high rates of error. And on the occasions when EPA regulatory decisions have been subject to independent review, they have often been reversed. For example, in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 1880, 1883-84 (2009), the Court rejected EPA's liability determination as to one PRP and required apportionment of costs as to another.

Thus, for reasons of both constitutional principle and sound regulatory policy, this Court should hold that ACOs and UAOs issued without prior hearings violate due process in the absence of exigent circumstances. In cases of genuine emergencies, the recipient of an ACO or UAO is entitled to a full and fair hearing as promptly as possible after the order is issued. The judgment below should be reversed.

## ARGUMENT

### I. DUE PROCESS REQUIRES A HEARING PRIOR TO THE EFFECTIVE DATE OF A UNILATERAL ADMINISTRATIVE ORDER

"'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citations omitted); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process. . . . We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after

the event.'" (citation omitted)). Even in emergency situations requiring the government to act before it can hold a hearing, the government must afford a prompt postdeprivation hearing. *See, e.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974). "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).[5]

The environmental ACO and UAO schemes fail this constitutional standard. They authorize the issuance of burdensome administrative orders, carrying draconian penalties for noncompliance, without providing for a prior hearing or (in cases of emergencies) a prompt post-issuance hearing. "The problem with ACOs stems from their injunction-like legal status coupled with the fact that they are issued without an adjudication or meaningful judicial review." *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003). "The EPA is the

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[5] Accordingly, it is constitutionally irrelevant that CERCLA gives a UAO recipient that chooses to comply with an unlawful order some opportunity to seek reimbursement of its costs of compliance, *see* 42 U.S.C. § 9606(b)(2). "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (citation omitted and alteration in original). For similar reasons, a post-deprivation suit brought at the EPA's sole discretion is not "a meaningful avenue of relief." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (quotation marks omitted).

ultimate arbiter of guilt or innocence, and the courts are relegated to a forum that conducts a proceeding, akin to a show-cause hearing, on the issue of whether an EPA order has been flouted." *Id.* at 1242.

At a minimum, due process demands that the recipient of such an order is entitled to prompt judicial review. The Government's principal response is that a unilateral administrative order does not entail a deprivation of property or liberty because ACOs and UAO are not "self-executing," Brief In Opposition ("BIO") at 4: the recipient can elect to defy the order and is not assessed a civil penalty until EPA subsequently brings an enforcement action in court—even though $37,500 daily penalties begin running from the effective date of the order, 40 C.F.R. § 19.4.

The Government's argument fails for two reasons. *First*, a party suffers a deprivation of property immediately upon the effective date of an administrative order, even if the statutory scheme contains a "sufficient cause" defense, as in CERCLA. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). *Second*, the coercive impact of the staggering financial penalties available to EPA in an enforcement action violates *Ex parte Young*, 209 U.S. 123 (1908).

### A. The Opportunity To Defy An Order Does Not Provide Due Process Because It Still Entails A Deprivation Of Property

It is undisputed that a party that complies with an ACO or UAO is deprived of property—the costs of compliance—without any predeprivation hearing. The sole issue then, for due process purposes, is whether the recipient of a unilateral order suffers pre-hearing deprivation of property even if it chooses to defy EPA.

The answer to this question is clearly yes. A noncomplying ACO or UAO recipient incurs an immediate deprivation of property because the enormous potential statutory penalties have a tangible, here-and-now market impact. The violator of an ACO under the CWA is subject to civil penalties of up to $37,500 "per day for each violation" of the compliance order. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. In the case of UAOs, CERCLA imposes treble damages plus penalties of $37,500 per day for noncompliance, and EPA can and does defer judicial review for years while those potential liabilities mount. *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4. Hence, should EPA decide to wait the full five years before bringing an enforcement action, a party would be liable for nearly $68.5 million *per violation.* In the modern market economy, the creation of such a huge contingent liability creates an immediate financial drag on unilateral order recipients.

Therefore, any party that defies an administrative order in order to challenge it in court faces immediate and sustained economic damage. As one district court found in a case challenging EPA's issuance of UAOs under CERCLA, based on an extensive record, "noncomplying PRPs suffer a significant decrease in brand and market value." *GE*, 595 F. Supp. 2d at 30; *see also id.* at 24 ("PRPs are deprived of some portion of the market value of their stock if they decide not to comply with a UAO."); *id.* at 25 ("PRPs are deprived of a protected property interest—the value of their brand—when they do not comply with a UAO."). One economist cited in that case found that noncompliance with a UAO would cause a recipient, on average, an immediate $76.4 million decrease in market value and significant increase in financing costs. *Id.* at 23. Nor did EPA dispute the conclusion that a

recipient's failure to comply with a UAO would cause a significant decrease in stock price and an increase in its cost of financing. *Id.* at 25. The financial impact of defying a UAO diminishes the recipient's ability to bid for new projects or hire additional employees. *Id.* at 30. Indeed, the deprivations imposed by a UAO are so large that they "could put some PRPs out of business." *Id.*

Thus, the mere issuance of an administrative order results in an immediate deprivation of property within the meaning of the Fifth Amendment's due process clause. In *Connecticut v. Doehr*, 501 U.S. 1, 11-12 (1991), for example, this Court held that consequential impacts from government adjudicatory action can be "significant" enough "to merit due process protection." *Doehr* held that a state statute authorizing a *non*-possessory pre-judgment attachment of real estate affected "significant" property interests, thus triggering due process protection, because such an attachment "clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage." *Id.* at 11. *Doehr* found such harms to property interests "sufficient to merit due process protection" even if imposed by the market in response to the government action. *Id.* at 12; *see also Reardon v. United States*, 947 F.2d 1509, 1518 (1st Cir. 1991) (en banc) (relying on *Doehr* to conclude that a CERCLA lien resulted in deprivation of property where it "cloud[ed] title, limit[ed] alienability, [and] affect[ed] current and potential mortgages"). Administrative orders therefore deprive recipients of property without the protections necessary under the Fifth Amendment's Due Process Clause.

### B. The Coercive Nature Of Such Schemes Violates Due Process Under *Ex parte Young*

The astronomical size of potential penalties that accumulate at the rate of $37,500 per day, per violation of EPA administrative orders means that, as a practical matter, no responsible party can challenge them. An EPA enforcement action brought five years after the issuance of the order, for example, would create liability of nearly $68.5 million *per violation.*

The ACO and UAO schemes thus conflict with this Court's century-old holding in *Ex parte Young*, 209 U.S. 123, 147 (1908), that due process precludes fines "so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the[ir] validity." As this Court recently noted in a different context, "[w]e normally do not require plaintiffs to 'bet the farm by taking the violative action' before 'testing the validity of the law.'" *Free Enter. Fund*, 130 S. Ct. at 3151 (ellipsis omitted) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007), and citing *Ex parte Young*, 209 U.S. 123). In fact, the general rule is that, "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune*, 549 U.S. at 128-29 (emphasis omitted); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (holding that *Ex parte Young* precludes statutory schemes "in which *the practical effect* of coercive penalties for noncompliance [is] to foreclose all access to the courts" (emphasis added)); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (describing *Ex parte Young* as applying to

"a Hobson's choice," where party faced "potentially huge liability").

Under CERCLA, for example, EPA has issued over 1,700 UAOs during the last three decades to more than 5,400 PRPs compelling response actions costing an aggregate $5.5 billion, all in non-emergency situations and without any pre-issuance notice or hearing. *GE*, 595 F. Supp. 2d at 33. Yet only a handful of PRPs have ever sought or received independent judicial review of a UAO. As the district court in *GE* noted, "empirical evidence concerning actual instances of UAO noncompliance is scarce because very few publicly-traded firms have chosen not to comply with UAOs." *Id.* at 23. The extremely high compliance rate demonstrates the overwhelmingly coercive nature of the statutory UAO scheme.

This Court should reaffirm that judicial review is "merely nominal and illusory" where it can be obtained "only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915). As *Ex parte Young* and similar cases demonstrate, the opportunity to obtain judicial review by defying an administrative order—even under a "sufficient cause" requirement as in CERCLA, 42 U.S.C. §§ 9606(b)(1), 9607(c)(3)—is not enough to save a statutory scheme that carries such draconian penalties as the CWA or CERCLA.

For example, in *Missouri Pacific Railway Co. v. Nebraska*, 217 U.S. 196 (1910), a state statute compelled rail companies to install, at their own expense, switch connections and side tracks at the request of grain elevators meeting certain statutory criteria. There was no prior hearing into whether the grain

elevator's requests met the statutory criteria and a rail company that refused to comply with a request was subject to $500 in penalties. *Id.* at 204-05. The Court held that the statute violated the rail companies' right to due process, stating that the rail company, "if it has any remedy at all, acts at its risk, not merely of being compelled to pay both the expense of building and the costs of suit, but also of incurring a fine of at least $500 for its offense in awaiting the result of a hearing." *Id.* at 208. If an unreviewable $500 fine could violate the due process clause in 1910, a similarly unreviewable threat of a $68.5 million penalty likewise violates the due process clause a century later.

In *Chicago, Milwaukee, & St. Paul Railway Co. v. Polt*, 232 U.S. 165, 167-68 (1914), the Court struck down a South Dakota statute that imposed double liability on rail companies for fire damage caused by a locomotive engine unless the railroad either paid the full amount of the plaintiff's demand within sixty days, or the plaintiff's ultimate jury award was less than the settlement amount tendered by the rail company. The Court held that possibility of future penalties worked an immediate deprivation and impermissibly chilled the exercise of rights:

> [T]he rudiments of fair play required by the 14th Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add 1 cent to the amount that was tendered, although the tender obviously was futile because of an excessive demand.

*Id.* at 168; *see also Chicago, Milwaukee & St. Paul Ry. Co. v. Kennedy*, 232 U.S. 626, 627 (1914) (presenting same issue).

Similarly, in *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340, 346 (1913), the Court struck down a state scheme imposing $500 penalties for violations of a common-carrier rate statute, even though the carrier could not be subject to penalties until a court had decided whether a violation had occurred. State courts had upheld the scheme, reasoning that, "so long as the [carrier] cannot be made to suffer until a competent court had passed upon the justice of the legislative rates, the guaranties of the Federal Constitution are not infringed." *Id.* at 349. The Court rejected that reasoning:

> [T]he imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the 14th Amendment.

*Id.* at 350; *see also St. Louis, Iron Mountain & S. Ry. Co. v. Wynne*, 224 U.S. 354, 358–61 (1912) (striking down state law imposing double liability and an attorneys' fee recovery from rail company refusing to pay demand for killing of livestock); *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 64-65 (1919) ("[T[he imposition of severe penalties as a means of enforcing a rate . . . is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches.").

The foundation of these decisions has only been strengthened by the emergence in recent decades of the unconstitutional conditions doctrine, beginning with *Speiser v. Randall*, 357 U.S. 513 (1958). In *Speiser*, this Court invalidated California's decision to deny a property tax exemption to veterans who refused to declare that they would not advocate for the overthrow of the government. *See id.* at 519; *see also Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) (striking down state law conditioning use of the public highways on a private carrier's agreement to abide by certain terms and conditions of doing business: "[i]n reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden"). The coercive effect of such conditions has since been recognized in a wide range of contexts, including conditions on unemployment compensation,[6] public employment,[7] public subsidies,[8] and building permits.[9]

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[6] *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963) (invalidating state unemployment compensation provision denying benefits to a Seventh Day Adventist who refused to work on Saturdays).

[7] *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (overturning dismissal of teacher for speech on matters of public concern).

[8] *See, e.g., Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001) (invalidating speech-restrictive condition on legal aid funding); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating speech-restrictive condition on public broadcasting subsidies).

[9] *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (invalidating condition on a building permit requiring the property owner's grant of a public easement); *Dolan v. City of*

The UAO and ACO schemes similarly impose a coercive condition on the fundamental right of access to judicial review, one of "the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002) (quotation marks omitted); *see also Tennessee v. Lane*, 541 U.S. 509, 523 (2004). This Court has repeatedly held that if the price of saying "no" to an administrative order and asserting the right to judicial review is the risk of astronomical penalties, the law is invalid. *See Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 47 (1922) ("Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment.").

*Ex parte Young* and, by analogy, the unconstitutional conditions doctrine thus foreclose any suggestion that the government may condition the exercise of the fundamental due process right to judicial review upon undertaking the risk of draconian penalties.

### C. Judicial Discretion Over Damages Does Not Eliminate The Due Process Violation

The Government has also defended the CWA and CERCLA administrative order schemes by suggesting that the judicial role in setting penalties remedies the due process violation. BIO at 9. In the decision below, for example, the Court of Appeals opined:

> [T]he civil penalties provision is committed to judicial, not agency, discretion. . . . Any penalty

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*Tigard*, 512 U.S. 374, 385 (1994) (same, and reaffirming "the well-settled doctrine of 'unconstitutional conditions'").

> ultimately assessed against the Sacketts would therefore reflect a discretionary, judicially determined penalty, taking into account a wide range of case-specific equitable factors, and imposed only after the Sacketts have had a full and fair opportunity to present their case in a judicial forum.

Pet. App. A14-A15.

Judicial discretion, however, cannot save the statutory schemes from constitutional infirmity. In other contexts, the Court has condemned what it has described as "uncertain[] and arbitrary judicial discretion." *Downum v. United State*s, 372 U.S. 734, 738 (1963) (internal quotation marks omitted); *see, e.g.*, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982) (noting "the general due process restrictions on the court's discretion" in imposing discovery sanctions); *Taylor v. Hayes*, 418 U.S. 488, 500 (1974) (citing "fundamental due process protections" in judicial contempt proceedings).

Such concerns are applicable here. In the very small number of cases in which PRPs have failed to comply with UAOs, for example, judicial discretion has proved cold comfort to the alleged violators. Courts have awarded EPA punitive damages and penalties even where PRPs received legal advice, based on governing case law, that they were not

liable under the UAO,[10] even where the penalties sought by EPA were 10 times greater than its costs,[11] and even where the EPA waited over a decade years after issuing its UAO to bring an enforcement action.[12]

In short, the possibility of judicial discretion does not provide assurance sufficient to cure the due process violation inherent in the ACO and UAO schemes.

### D. At A Minimum, Due Process Demands Prompt Judicial Review Of An ACO Or UAO

This Court should make clear that, where an ACO or UAO is issued without a full and fair administrative hearing, due process demands that the recipient is entitled to prompt judicial review in a federal court. When an administrative order contains adjudicative determinations, like those embodied in ACOs and UAOs, it is "imperative" that the recipient be able to invoke "the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960). Hence, the recipient is entitled to notice and an opportunity to be heard; discovery; the opportunity to present testimony and documentary evidence; the chance to cross-examine opposing witnesses and respond to opposing evidence; and a neutral decision-maker who issues

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[10] *See United States v. Capital Tax Corp.*, No. 04-C-4138, 2007 WL 2225900, at *13 (N.D. Ill. Aug. 1, 2007), *vacated on other grounds*, 545 F.3d 525 (7th Cir. 2008).

[11] *United States v. LeCarreaux*, No. 90-1672, 1992 WL 108816, at *17-*18 (D.N.J. Feb. 19, 1992).

[12] *United States v. General Electric Co.*, No. 06-CV-354-B, 2010 WL 4977478, at *1-*2 (D.N.H. Dec. 3, 2010)

findings of fact and conclusions of law to explain the decision. As a matter of due process, such independent review must occur prior to the effective date of the administrative order. In cases of actual emergencies or imminent and substantial endangerment—a circumstance lacking when EPA now issues a UAO, *see GE*, 595 F. Supp. 2d at 32—then EPA could provide clear guidelines providing for prompt judicial review thereafter.

## II. UNILATERAL ORDERS' DEPARTURE FROM DUE PROCESS INFLICTS SIGNIFICANT ECONOMIC COSTS ON THE NATION WITHOUT ADEQUATE POLITICAL ACCOUNTABILITY

The ACO and UAO schemes have allowed EPA to avoid the usual principles of accountability on which the political process depends. EPA has used administrative orders to impose billions of dollars in economic costs under the radar, without having to subject its decisions to independent review. Since CERCLA was enacted in 1980, it has led to the imposition of tens of billions of dollars in regulatory costs and has been the subject of intense academic and political debate. *See*, *e.g.*, Stephen Breyer, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 18-19 (1993). These costs—and in particular the risks of error in the imposition of such costs—have been greatly magnified by EPA's unfettered unilateral order authority.

Unilateral orders such as ACOs and UAOs may be issued at the sole discretion of EPA's prosecutorial staff without any review by impartial decision-makers. Since the late 1980s, EPA has steadily removed even the most rudimentary protections against erroneous decision-making by, for example,

delegating UAO authority away from EPA headquarters and down the chain of command in regional offices, issuing UAOs early in the negotiations process, and increasing the pressure on EPA employees to issue UAOs to relieve budgetary problems.[13]

The results of such unchecked administrative action are predictable. Professor W. Kip Viscusi, who served on EPA's Science Advisory Board for over a decade and is currently on the EPA Homeland Security Committee, found that CERCLA remedy selections are primarily driven by public relations variables rather than environmental conditions. The key determinants of cleanup decisions are not EPA's own hazard ranking scores, but rather the voting percentage in the county, the number of environmental groups, the environmental rating of congressional representatives, and media attention.[14]

This Court has long recognized that ex parte or unilateral government action raises a grave risk of error and attendant due process problems. For example, in *Connecticut v. Doehr*, this Court found the risk of error too great even where a judge re-

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[13] *See GE*, 595 F. Supp. 2d at 34 ("Although there is no direct financial incentive at work here, EPA arguably stands to benefit by issuing UAOs because EPA has an interest in conserving Superfund resources. The risk of error is also greater when junior or regional agency staff, without senior or centralized oversight, make deprivation-causing decisions. UAOs are issued by regional EPA officials without review and approval from EPA headquarters." (citation omitted)).

[14] W. Kip Viscusi & James T. Hamilton, CALCULATING RISKS: THE SPATIAL AND POLITICAL DIMENSIONS OF HAZARDOUS WASTE POLICY (1999); W. Kip Viscusi & James T. Hamilton, *Are Risk Regulators Rational? Evidence from Hazardous Waste Cleanup Decisions*, 89 AMER. ECON. REV. 1010 (1999).

viewed a complaint and affidavit prior to the attachment because there was no countervailing force to the potentially "one-sided, self-serving and conclusory submissions." 501 U.S. at 14. Similarly, in *James Daniel Good Real Property*, the Court held that allowing the government to effect a deprivation of property via an ex parte probable cause hearing before a neutral magistrate—a considerably greater protection than that afforded by EPA in unilateral order schemes—nonetheless suffered from an unacceptably high risk of error. *See* 510 U.S. at 55–56. "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Id*. at 55 (brackets and internal citation omitted, ellipsis in original); *see also N. Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975) (ex parte garnishment statute violates Due Process Clause); *Fuentes*, 407 U.S. at 67 (ex parte replevin scheme violates due process); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment of wages without prior notice violates Due Process Clause).

On the relatively rare occasions when EPA decisions have been subjected to judicial review, the agency has often lost in court. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. at 1880, 1883-84 (rejecting liability determination as to one PRP and requiring apportionment of costs as to another); *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 441 (1st Cir. 1990) (Breyer, J.) (rejecting EPA remedy imposing soil standard for PCBs based on assumption

that "children will eat a little bit of dirt each day for 245 days per year for three and a half years").[15]

In short, sound regulatory policy (as well as constitutional principle) favors a holding that due process requires a hearing prior to the effective date of an adjudicatory administrative order, in the absence of true exigent circumstances.

## CONCLUSION

The judgment below should be reversed.

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[15] *See also United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 694 (10th Cir. 1999) (finding that EPA acted arbitrarily and capriciously in modifying remedy at site); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 904-08 (5th Cir. 1993) (finding that EPA acted arbitrarily and capriciously in deciding to provide alternative water supply absent evidence of public health need); *United States v. B & D Electric, Inc*., No. 1:05CV63, 2007 WL 1395468 (E.D. Mo. May 9, 2007) (EPA erroneous in designating defendants as liable parties under CERCLA); *United States v. Wedzeb Enterprises, Inc*., 844 F. Supp. 1328 (S.D. Ind. 1994) (EPA erroneous in designating GE and another defendant as liable parties under CERCLA); *cf. United States v. Tarkowski*, 248 F.3d 596, 599 (7th Cir. 2001) (EPA acted arbitrarily and capriciously in issuing access order under CERCLA Section 104; "EPA takes the extreme position that, provided it has probable cause to believe there is even a thimbleful of a hazardous substance spilled in a person's yard, or we suppose even a drop, it has an absolute right to an access order regardless of the action it proposes to take once it gains that access, such as excavating the entire yard and removing the soil to a depth of ten feet, thus rendering the property wholly useless to the owner.").

Respectfully submitted,

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