Oral Argument Scheduled for February 12, 2010

No. 09-5092

GENERAL ELECTRIC COMPANY,

Plaintiff-Appellant,

v.

LISA P. JACKSON, Administrator of the U.S. EPA, and
U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellees.

On Appeal From The U.S. District Court For The District Of Columbia,
No. 00-2855 (Hon. John D. Bates).

FINAL BRIEF FOR THE FEDERAL DEFENDANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici: The Plaintiff-Appellant is General Electric Company, a corporation. Defendant-Appellees are the U.S. Environmental Protection Agency and its Administrator, Lisa P. Jackson, in her official capacity. The following amici participated in district court: American Chemistry Council, Chamber of Commerce of the United States, Hudson River Sloop Clearwater, Natural Resources Defense Council, New York Rivers United, Riverkeeper, Inc., Scenic Hudson, and Washington County CEASE, Inc.

This Court has allowed the following persons to participate as amici on appeal: National Association of Manufacturers, Chamber of Commerce of the United States, Hudson River Sloop Clearwater, Natural Resources Defense Council, Riverkeeper, Inc., and Scenic Hudson.

(B) Ruling Under Review: General Electric Co. appeals the district court's January 27, 2009, decision granting the federal defendants summary judgment on the company's "pattern and practice" constitutional claim. That decision is reported as *General Electric Co. v. Johnson*, 595 F. Supp. 2d 8 (D.D.C. 2009). GE also appeals the district

court's March 30, 2005, decision granting the federal defendants summary judgment on the company's facial constitutional claim. That decision is reported as *General Electric Co. v. Johnson*, 362 F. Supp. 2d 327 (D.D.C. 2005).

(C) Related Cases: On March 2, 2004, this Court resolved a prior appeal in this case. The Court's decision is reported as *General Electric Co. v. EPA*, 360 F. 3d 188 (D.C. Cir. 2004).

/s/ Sambhav N. Sankar
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GLOSSARY

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	U.S. Environmental Protection Agency
GE	General Electric Co. (Appellant)
GE I	*GE v. Whitman*, 257 F. Supp. 2d 8 (D.D.C. 2003).
GE II	*GE v. EPA*, 360 F. 3d 188 (D.C. Cir. 2004).
GE III	*GE v. Johnson*, 362 F. Supp. 2d 327 (D.D.C. 2005) (judgment on facial claim).
GE IV	*GE v. Johnson*, 2006 WL 2616187 (D.D.C. 2006) (resolving discovery dispute).
GE V	*GE v. Johnson*, 595 F. Supp. 2d 8 (D.D.C. 2009) (judgment on "pattern and practice" claim).
INA	Immigration and Naturalization Act
INS	Immigration and Naturalization Service
JA	Joint Appendix
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
SARA	Superfund Amendments and Reauthorization Act
UAO	Unilateral Administrative Order

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Appellant's facial challenge to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) because that challenge arises under the Constitution and laws of the United States. 28 U.S.C. § 1331. The district court lacked jurisdiction over Appellant's "pattern and practice" challenge to the U.S. Environmental Protection Agency (EPA)'s administration of CERCLA. The Government agrees with Appellant's statement regarding appellate jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the Due Process Clause requires EPA to hold hearings before issuing CERCLA cleanup orders, even though EPA must go to court to compel cleanup or payment of penalties, because markets sometimes respond to news of orders by reevaluating the recipient's stock price, credit rating, and "brand reputation."

2. Whether the district court had jurisdiction to entertain a "pattern and practice" challenge to EPA's overall administration of CERCLA, where Appellant refused to seek review of—or relief from—any specific EPA action.

3. Whether the district court correctly concluded that EPA's "very low" error rate in issuing cleanup orders does not justify invalidation of the statute, and that CERCLA's judicial review mechanisms provide a "more effective means" for dealing with any occasional agency errors.

STATEMENT OF THE CASE

CERCLA's unilateral administrative order (UAO) provisions give companies the right to judicial review before forcing them to pay fines or incur cleanup costs. GE challenges these provisions by complaining that a UAO can inform markets of potential CERCLA liabilities, and thereby reduce the recipient's stock price, credit rating, and brand reputation. GE argues that these reductions count as property deprivations, and that the Due Process Clause thus requires EPA to hold "judicial-type proceedings" before even issuing UAOs. The district court correctly upheld CERCLA against GE's challenge, joining every other court that has addressed the statute's constitutionality.

GE also asserts that EPA's "pattern and practice" of administering CERCLA tends to deprive individual UAO recipients of due process. The district court gave GE access to internal EPA policy documents and records of UAOs issued to other companies. GE uses these materials to

argue that EPA makes errors when it issues UAOs, and that the agency's policies tend to increase the chances of error. The district court rejected this claim on the merits, and advised GE to take further complaints to "Congress, not the courts."

STATEMENT OF FACTS

A. Statutory Background

Congress enacted CERCLA in 1980 in response to the environmental and human health risks posed by industrial pollution. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). Congress determined that existing laws were "clearly inadequate to deal with th[e] massive problem" and that it needed to create "a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. Rep. No. 96-1016, Pt. 1, at 17-18, 22 (1980).

CERCLA's primary objectives are to ensure that hazardous waste sites are cleaned promptly and that the parties responsible pay for the work. Congress therefore imposed strict liability on several classes of parties, including current and former facility owners and operators, and parties that arranged for the transport, treatment, or disposal of the hazardous substances. 42 U.S.C. § 9607(a). These parties are known as

"potentially responsible parties," or "PRPs." *See generally Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1878 (2009).

1. *The CERCLA cleanup process*

When Congress passed CERCLA in 1980, it gave EPA several options for cleaning up contaminated sites. *See generally Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 160 (2004). First, EPA's preferred approach is to negotiate a settlement with the PRPs. *See* 42 U.S.C. § 9622. Second, EPA can clean the site itself under Section 104 of CERCLA, 42 U.S.C. § 9604(a), drawing on the nation's "Superfund" to pay for the work, and then sue the responsible parties to recover its cleanup costs. 42 U.S.C. § 9607(a)(4)(A).

The third option is the one at issue in this appeal. Under Section 106 of CERCLA, 42 U.S.C. § 9606, EPA can issue a unilateral administrative order (UAO) directing a PRP to investigate or clean up a contaminated site. To use Section 106, EPA must determine "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." *Id.* Courts have repeatedly held that this language allows EPA to act without conclusive

proof that an "imminent and substantial endangerment" exists. *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co., Inc.*, 341 F. Supp. 2d 215, 246-247 (W.D.N.Y. 2004); *see also Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (noting broad scope of similar language in Resource Conservation and Recovery Act).

EPA gives potential UAO recipients many chances to be heard before it actually issues a cleanup order. Before even treating a party as a PRP, EPA formally notifies the party of its views and allows the company to respond with any relevant information, including information disputing its liability. JA 1007-1008 (Mugdan Decl. ¶¶6-8); JA 967-972, 977-982 ("PRP Search Manual"). Before selecting the cleanup remedy for a site, EPA invites, considers, and responds to comments from the PRP and the public. JA 1010 (Mugdan Decl. ¶11); 42 U.S.C. §§ 9613(k)(2), 9617(b); 40 C.F.R. §§ 300.415(n), 300.810-300.820. And before issuing a UAO, EPA typically tries to negotiate a resolution with the PRP. JA 1009-1010 (Mugdan Decl. ¶¶9-10); JA 959 ("1990 Guidance"). At each stage, EPA considers the information it receives and acts accordingly, reconsidering a party's CERCLA liability if necessary. JA 1008-1009, 1014-1015 (Mugdan Decl. ¶¶8, 18-19).

CERCLA's statutory design gives companies incentives to comply with a UAO once EPA issues it, but Congress did not make UAOs self-executing. A party that receives a UAO can refuse to comply if it believes that it is not liable for the cleanup or if it thinks the order is unlawful for any other reason. If EPA wants to compel the cleanup the order calls for, it has to file a civil action in federal court to enforce the order. 42 U.S.C. § 9606(b)(1). As a result, a PRP cannot suffer a UAO-inflicted property deprivation without getting a chance to defend itself in court.

2. *Judicial review of UAOs*

When Congress amended CERCLA in 1986, it included a provision that channels judicial review of UAOs into either pre-cleanup enforcement proceedings or post-cleanup reimbursement proceedings. Section 113(h) of CERCLA, entitled "Timing of review," says:

> No Federal court shall have jurisdiction under Federal law . . . to review any order issued under section 9606(a) of this title, in any action except one of the following:

42 U.S.C. § 9613(h). The provision then lists five exceptions to the jurisdictional bar through which parties can obtain review of EPA's Section 106 actions. Two are relevant here.

The first exception applies to PRPs that choose *not* to comply voluntarily with UAOs. If EPA brings an enforcement action to compel compliance by such a company, CERCLA allows a district court to review the company's liability and the legality of the UAO during that action. *See* 42 U.S.C. § 9613(h)(2). The UAO recipient can raise any legal defense it wants during the enforcement proceeding. If the court concludes that the party was liable for the cleanup *and* that the order was lawful, it can impose fines and punitive damages, but only if it concludes that the UAO recipient refused to comply "without sufficient cause." 42 U.S.C. § 9606(b)(1), 9607(c)(3). The statute provides a high ceiling for those fines—up to $37,500 per day of noncompliance[1]—but the district court has discretion to abate them "in whole or in part." *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 661 (7th Cir. 1995).

The second exception applies to parties that *do* choose to comply with UAOs. 42 U.S.C. § 9613(h)(3). After finishing the cleanup, those parties can ask EPA to reimburse their cleanup costs and if necessary

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[1] The original penalty was $25,000, 42 U.S.C. § 9606(b), but Congress requires EPA to update the penalty to reflect inflation. *See* 73 Fed. Reg. 75340 (Dec. 11, 2008); 74 Fed. Reg. 626 (Jan. 7, 2009).

sue EPA in district court under CERCLA Section 106(b)(2), 42 U.S.C. § 9606(b)(2). The UAO recipient can recover its costs if it shows that it was not liable under CERCLA or that some part of the EPA's selected response action was arbitrary, capricious, or otherwise illegal. *See, e.g. Chem-Nuclear Systems, Inc. v. Bush*, 292 F.3d 254 (D.C. Cir. 2002) (reviewing claim for reimbursement of compliance costs). The reimbursement provision "trims the horns" of any dilemma a party might believe it faces as a result of an improper UAO. *Employers Insurance*, 52 F.3d at 661.

CERCLA's judicial review provisions ensure that a PRP "can obtain judicial review of the validity of a UAO either *before* or *after* it has complied with the order." *City of Rialto v. West Coast Loading Corp.* 581 F.3d 865, 871 (9th Cir. 2009) (hereafter "*Rialto*"). They also demonstrate that EPA cannot unilaterally determine liability by issuing a UAO. A court does that, and does so *de novo*. As the Ninth Circuit recently explained:

> It is true that there are some limitations and disincentives attendant to each avenue of judicial review. But Congress intentionally chose *not* to authorize judicial review whenever a PRP desired. Instead, by specifying the "[t]iming of review" in § 9613(h), Congress chose to prioritize "the timely cleanup of hazardous waste sites."

Id. at 871-872 (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1874 (2009)) (emphasis in original).

B. Procedural History

1. *General Electric I*

GE filed its original complaint on November 28, 2000, then amended it on March 14, 2001. GE asked for a declaratory judgment that CERCLA's UAO regime, as embodied in Section 106 and the "related statutory provisions" of Section 107(c)(3) and 113(h), violate the Fifth Amendment's Due Process Clause. JA 145-146 (Complaint ¶2).[2] GE alleged that EPA had made numerous errors in issuing UAOs at various GE facilities, but nevertheless claimed that it was "not . . . challenging any specific order" that EPA had issued. JA 147 (¶7). The reason was simple: GE recognized that Section 113(h) of CERCLA "specifies two routes to judicial review of [UAO]s," JA 151 (¶21), and that its complaint did not follow either one.

In March 2003, the district court dismissed GE's complaint for lack of jurisdiction. *General Electric Co. v. Whitman,* 257 F. Supp. 2d 8

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[2] GE has filed varying requests for relief during these proceedings, *e.g.*, JA 653-654, but its brief neither withdraws its demand for broad declaratory relief nor explains what other relief the company seeks.

(D.D.C. 2003) (hereafter "*GE I*"). The court reasoned that Section 113(h) of CERCLA precludes judicial review of GE's "broad, pre-enforcement constitutional challenge to CERCLA's administrative order regime." *Id.* at 17 (JA 11). The court also noted two practical concerns. First, it predicted that "[t]he extensive discovery sought by GE to support its constitutional challenge to CERCLA" would threaten just the sort of delay and legal entanglement that Section 113(h) was meant to prevent, "redirecting time and resources away from hazardous waste remediation." *Id.* at 25 n.9 (JA 25). And second, the court anticipated that "[p]ermitting GE's pre-enforcement challenge would encourage other PRPs saddled with remediation orders to circumvent 113(h) by casting challenges in the same constitutional terms." *Id.* at 25-26 (JA 25-26). Both predictions proved prescient.[3]

2. *General Electric II*

GE appealed the district court's jurisdictional judgment in 2004. On appeal, it argued that Section 113(h) does not bar facial challenges

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[3] Following GE's lawsuit, there have been three other "pattern and practice" lawsuits against EPA. All have been dismissed on jurisdictional grounds. *See Rialto*, 581 F.3d at 865; *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136 (D. Kan. 2007); *United States v. Capital Tax Corp.*, 2007 WL 488084 (N.D. Ill. 2007).

to CERCLA's UAO provisions. The company's brief told this Court over and over that GE challenged "the constitutionality of the CERCLA statute itself, irrespective of any EPA order or action taken pursuant to either § 104 or § 106(a)." JA 168, 175. This Court reversed in *General Electric v. EPA*, 360 F.3d 188 (D.C. Cir. 2004) (hereafter *GE II*) (JA 38). The Court held that Section 113(h) bars "any challenges to removal or remedial actions under § 104 or any orders under § 106(a), not . . . facial constitutional challenges to the CERCLA statute itself." *Id.* at 194 (JA 47). It summarized: "We hold that the plain text of § 113(h) does not bar GE's *facial constitutional challenge to CERCLA*." *Id.* at 189 (JA 39) (emphasis added).

3. *General Electric III*

On remand, GE informed the district court that *GE II* actually authorized two kinds of claims, not just one. The first was the facial due process claim that this Court explicitly discussed. The second was a quite different claim in which GE would try to prove that EPA has "a pattern and practice of administering [CERCLA] in a manner that denies PRPs the necessary protections of procedural due process."

General Electric Co. v. Johnson, 362 F. Supp. 2d 327, 333 (D.D.C. 2005) (hereafter *GE III*) (JA 53, 59-60).

The district court rejected GE's facial due process claim in *GE III*. The district court held that "mere issuance of the order does not create a cognizable deprivation of a significant property interest triggering . . . procedural due process analysis." *Id.* at 339 (JA 70). It explained that CERCLA in any event guarantees due process because: (1) "EPA can only force compliance by going to a district court," *id.*; (2) the statute's judicial review procedures are "sufficient to ensure GE's due process rights," *id.* at 342 (JA 75); and (3) the "the availability of judicial discretion" and the "sufficient cause" defense avoid any concern that CERCLA's penalty scheme is unduly coercive. *Id.* (JA 76).

The district court allowed GE to proceed with its "pattern and practice" claim over EPA's objections. The court reasoned—erroneously, as we explain below—that this Court's *GE II* decision authorized not only a facial challenge, but also "a broader systemic challenge" to EPA's administration of CERCLA. *GE III*, 362 F. Supp. 2d at 335 (JA 62). It also erred in concluding that GE had standing to seek "broad declaratory and injunctive relief" even though the company sought "no

relief as to specific section 106 orders"; the district court thought it was enough that EPA had issued UAOs to GE "in the past," *id.* at 337 (JA 66), even though GE did not challenge those orders or seek relief from them.

4. *General Electric IV*

Freed from the need to limit its complaints to its own purported injuries, GE demanded broad discovery of "*[a]ll* UAOs issued by EPA after January 12, 2001." JA 275. GE also argued that because it was now challenging "improper patterns and practices," it could examine more than just "public actions and public statements." JA 300. Explaining that its challenge was "squarely directed at EPA's intent in its patterns and practices in issuing UAO," GE claimed that "EPA's misconduct will be best revealed through review of the internal deliberations of EPA officials as they considered how they could administer their Section 106 authority to achieve . . . improper ends." *Id.*

In response to GE's requests, hundreds of EPA employees worked to retrieve and review over 20,000 documents. The effort consumed over 14,000 hours of personnel time and over $900,000 in salary costs in

the first year alone. JA 307. EPA produced nearly 13,000 of those documents to GE. JA 304. GE sought and received two lengthy rulings from the district court compelling disclosure of many more. *General Electric Co. v. Johnson*, 2006 WL 2616187 (D.D.C. 2006) (hereafter *GE IV*) (JA 83); *General Electric Co. v. Johnson*, 2007 WL 433095 (D.D.C. 2007). Although the district court granted many of GE's discovery demands, it emphasized EPA's "good faith" and "willingness to act in accordance with the law." *GE IV* at *20.

5. *General Electric V:* The parties cross-moved for summary judgment on the pattern and practice claim after two years of discovery. After reviewing the "extensive" record, the district court granted EPA summary judgment. *General Electric v. Jackson*, 595 F. Supp. 2d 8, 14, 37 (D.D.C. 2009) (JA 92, 98, 140) (hereafter *GE V*). It held, in short, that "GE has not shown that EPA's pattern and practice of administering section 106 of CERCLA violated due process." *Id.* at 39 (JA 144).

The district court broke GE's "pattern and practice" claim into two pieces. The first relied on *Ex Parte Young*, which says that when a statutory scheme imposes penalties on parties who seek judicial review,

the penalties cannot be "so enormous . . . as to intimidate the company and its officers from resorting to the courts." 209 U.S. 123, 147 (1908). The district court rejected GE's *Ex Parte Young* claim for a simple reason: "no matter what EPA arguably does or seeks, a *judge* ultimately decides what, if any, penalty to impose." *GE V*, 595 F. Supp. 2d at 18 (JA 105).

The second piece of GE's "pattern and practice" claim argued that EPA violates due process by not holding "trial-type" hearings in "non-emergency" cases. *Id.* at 20 (JA 109). The district court first examined whether GE had identified a constitutionally-protected property or liberty interest. Because *GE III* had already held that EPA cannot unilaterally require companies to pay cleanup costs or monetary penalties, GE relied instead on purported interests in its stock price and brand value. The district court then examined the constitutional significance of these interests.

The district court first concluded that "[n]either stock price/cost of financing impacts nor brand value depletions are protected property interests upon mere issuance of a UAO." *Id.* at 22 (JA 112). It observed that a company's stock price and brand value might go down "anytime

any agency takes any action that the market interprets as adverse against a company"—for example, when the Securities and Exchange Commission announces that it is investigating the company for fraud. *Id.* But such actions do not normally trigger due process concerns, and the court thus observed that it would "invit[e] a host of unfounded due process claims" if it were to accept GE's arguments. *Id.* (JA 113).

The court then held that stock price and brand value interests *become* protectable once a company *refuses to comply with a UAO*. *See id.* (JA 113-114). The court stated that the impact of a company's decision not to comply with a UAO causes share price and brand value deprivations that are "both qualitatively[4] and quantitatively different upon noncompliance than upon issuance of a UAO." *Id.* at 22 (JA 114). It accordingly ruled that GE had "pointed to two deprivations of protected property interests arising resulting from noncompliance with

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[4] In mentioning "qualitatively" different deprivations, the court may have been referring to GE's allegations that noncompliance "increases permitting times, bars PRPs from certain programs, and impacts PRPs' relationships with certain stakeholders." *GE V*, 595 F. Supp. 2d at 22 (JA 113-114). The Chamber of Commerce adopts these allegations in its amicus brief. Chamber Br. 19. GE does not mention the allegations itself; the district court found that, "despite years of discovery," the company had not produced "a single example of any of these collateral consequences occurring to any PRP." 595 F. Supp. 2d. at 27 (JA 121).

a UAO: damage to stock price and damage to brand value." *Id.* at 27 (JA 122-123). The court then broadened that finding by stating that PRPs are deprived of property interests in stock price and brand value "*whether or not* they comply with a UAO." *Id.* at 29 (JA 125) (emphasis added).

The district court went on to apply the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), "to determine whether additional process is constitutionally required before EPA issues a UAO." *Id.* at 29 (JA 125). It considered: (1) the significance of the stock price and brand value injuries that PRPs suffer; (2) the administrative costs of requiring EPA to conduct a "full judicial hearing" before issuing UAOs, and (3) whether EPA's administrative practices had caused "an unacceptable rate of error." *Id.* at 33 (JA 133). It reasoned that although the burden of any individual hearing might not be overwhelming, the cumulative effect could be large. *Id.* at 38 (JA 141-142). More importantly, it found that there would be little point to additional process given the "paucity" of errors GE had identified; "[i]t is hard to reduce the rate of error when it is very low to begin with," *id.* at 37, 39 (JA 140, 143). It concluded by noting that PRPs could more

effectively address "occasional errors" in the UAO process within the Section 113(h) framework: "either by not complying with a UAO and defending a subsequent enforcement proceeding or by complying with a UAO and seeking post-completion reimbursement." *Id*. at 39 (JA 144). This appeal followed.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment and its assertion of subject matter jurisdiction *de novo*. *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 489 (D.C. Cir. 2009).

SUMMARY OF ARGUMENT

1. Every court that has examined CERCLA's UAO regime has upheld it against facial due process challenge. The reason is simple: UAOs are not self-executing. EPA cannot and does not deprive a PRP of any protected property interest just by issuing a UAO. Only a court can order the recipient to incur the expense of cleaning up a site or to pay monetary penalties for failing to do so. CERCLA therefore satisfies due process by giving PRPs the right to judicial review before they suffer any property deprivation.

GE tries to sidestep this fact by assuming that the Due Process Clause affords several novel protections. According to GE, the government must hold trial-type hearings before taking any action that could "inform the market" of a company's potential legal liabilities, and thereby lead to any reevaluation of a company's stock price, credit rating, or "brand value." But if this were true, agencies would have to hold hearings before taking a host of actions—like filing a complaint or issuing a policy report—that have never been thought to deprive individuals of property interests. Accepting GE's proposals would radically transform the Due Process Clause.

2. The district court did not have jurisdiction even to consider GE's "pattern and practice" claim, no matter how GE tries to characterize that claim on appeal. The claim either seeks judicial review of one or more particular UAOs—and thereby violates the jurisdictional rules in CERCLA Section 113(h)—or declines to seek such review—and thereby violates Article III standing requirements. By allowing GE to proceed with this claim, the district court caused two problems. First, it allowed the company to challenge the propriety of many individual UAOs outside the two avenues that Congress provided.

And second, it conducted a wholesale review of EPA's CERCLA administration and enforcement policies that went far beyond the legitimate scope of GE's complaint and this court's decision in *GE II*.

3. If this Court reaches the merits of GE's "pattern and practice" claim, it should affirm. Like the company's facial claim, GE's pattern and practice claim depends on the mistaken premise that companies have protected property interests in a high stock price, cheap commercial credit, and a favorable reputation. And in any event, even after being granted extensive discovery, GE found only what the district court called "isolated errors." Any such errors can and should be addressed through case-by-case adjudication of challenges to UAOs within CERCLA's framework, as Congress envisioned, not through sweeping review of EPA's administration of the statute.

ARGUMENT

I. CERCLA'S UAO PROVISIONS SATISFY DUE PROCESS ON THEIR FACE.

Due process doctrine states that "some form of hearing is required before an individual is finally deprived of a property interest." *Mathews*, 424 U.S. at 333. But the "property interest" must be a legitimate claim of entitlement created by law, not a unilateral expectation. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Moreover, the deprivation must be caused by state action, not private choices. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). GE's facial due process claim fails because it is based on the premise that the Due Process Clause protects its stock price, "brand value," and credit rating against collateral market responses to government action.

A. CERCLA Provides For Judicial Review Before EPA Can Deprive A PRP Of Any Legitimate Property Interest.

A UAO is the first step in a process that can eventually deprive a PRP of two interests that qualify for due process protection. The first is the monetary cost of doing the specified cleanup work, whether voluntarily or as a result of a court order. The second is any financial penalty that a company might have to pay if it *refuses* to do the work.

CERCLA satisfies due process by guaranteeing PRPs a right to judicial review before they suffer any deprivation of either of these interests.

As described above, a company that receives a UAO does not have to comply with it. To get the company to comply, EPA must file a civil enforcement action in district court. *See* 42 U.S.C. § 9606; *cf*. *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1419 (D.C. Cir. 1998) (EPA letters were not binding; agency had to file enforcement action to compel compliance). If EPA does so, the company is entitled to present any defense it wishes: it can argue that it is not liable under CERCLA, that the UAO is in some way arbitrary or capricious, or even that the UAO violated its due process rights. *See, e.g.*, *United States v. Capital Tax Corp.*, 2007 WL 488084 (N.D. Ill. 2007) (reviewing UAO recipient's due process counterclaim). Accordingly, CERCLA guarantees UAO recipients a right of judicial review before requiring them to pay any cleanup costs.

CERCLA then goes further by giving PRPs that comply with UAOs a chance to *recover* their cleanup costs from EPA. After a PRP complies with the relevant order, it can petition EPA for reimbursement of response costs. If EPA denies reimbursement, the PRP can sue in

district court to challenge the validity of the reimbursement decision, the propriety of the underlying UAO, or its own liability under CERCLA. 42 U.S.C. § 9606(b)(2). Because of the reimbursement provision, a PRP "need not disobey [a UAO] and risk heavy sanctions. It need not obey and swallow the heavy costs of compliance. It can obey and then when it has completed the clean-up required by the order sue for the return of its expenses . . . ." *Employers Insurance*, 52 F.3d at 662; *see also id.* at 664 (risk of UAO penalties would not violate due process "even if there were no reimbursement provision").

As for the interest in financial penalties, there is no doubt that CERCLA allows for stiff fines against a company that improperly defies a UAO. But only a court can impose those fines, and then only after concluding: (1) that the company is liable under CERCLA; (2) that the UAO was valid; and (3) that the UAO recipient lacked "sufficient cause" for refusing to comply. *See, e.g.*, *id.* at 661; *see also GE V*, 595 F. Supp 2d. at 19 (JA 108) ("In the end, courts, not agencies" interpret that phrase.). And even if it reaches all those conclusions, the district court in which sanctions are sought has the discretion to "abate them in

whole or in part." *Employers Insurance*, 52 F.3d at 661; 42 U.S.C § 9606(b)(1).

By providing judicial review and a "sufficient cause" defense, CERCLA ensures that PRPs get due process before they pay any fines or punitive damages, and that the threat of these penalties does not somehow "coerce" PRPs into complying with invalid orders in violation of *Ex Parte Young,* 209 U.S. 123 (1908). *See Thunder Basin Coal v. Reich*, 510 U.S. 200, 217-218 (1994) (penalties did not constitute pre-hearing deprivation because they were payable only after judicial review); *Reisman v. Caplin*, 375 U.S. 440, 446–47 (1964) (penalties for refusal to comply with order did not create *Ex Parte Young* concerns because statute allowed good faith defense); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 469-470 n.14 (D.C. Cir. 1983) (distinguishing *Ex Parte Young* from cases where review takes place "before payment must begin").

As GE itself concedes, *every court* that has examined CERCLA has held that its judicial review provisions insulate UAOs from due process concerns. *See* Br. at 22 n.5. The list includes decisions from three circuit courts. *Employers Insurance*, 52 F.3d at 660-664 ("the remedies

that the Superfund law creates against invalid clean-up orders fully satisfy the requirements of due process"); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 390-392 (8th Cir. 1987) (rejecting *Ex Parte Young* challenge); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315-17 (2d Cir. 1986) (same).[5] In summarizing their reasoning, still another circuit observed:

> [A]lthough CERCLA's judicial review provisions contain some pitfalls and difficult decisions for a PRP that faces a UAO, there are ample and adequate opportunities to seek meaningful judicial review and, therefore, the statute comes nowhere near violating due process.

Rialto, 581 F.3d at 872 (describing *Employers Insurance* as "lengthy, detailed and well-reasoned").

B. The Due Process Clause Does Not Protect Companies From Any Stock Price Fluctuation Or Reputational Injury That Might Be Traced To Government Action.

In an effort to distinguish the precedent against its claim, GE's brief asks this Court to expand the scope of the Due Process Clause

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[5] Courts have also upheld CERCLA's jurisdiction-channeling provisions in other contexts. *See, e.g.*, *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 295-296 (6th Cir. 1991) (challenge to site listing); *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990) (challenge to consent decree); *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283, 288-289 (9th Cir. 1993) (challenge to consent order); *Dickerson v. EPA*, 834 F.2d 974, 978 n.7 (11th Cir. 1987) (challenge to EPA action under § 104).

itself. GE contends that markets sometimes respond to news of a UAO by paying less for the recipient's stock or by charging the recipient higher interest rates, and that the public sometimes responds by viewing the recipient less favorably. GE then argues that these indirect effects constitute property deprivations that trigger due process rights. What GE fails to recognize is that the Due Process Clause does not protect individuals from consequential injuries inflicted by the public or the market in response to government action. *See Paul v. Davis*, 424 U.S. 693 (1976).

This principle comes up frequently when the government alleges damaging facts about someone or releases information that tends to harm the person's financial interests. In such cases, courts have held that the Due Process Clause does not protect individuals from "market reactions," Br. 17 n.3, to government action. To trigger the Clause, the action itself must extinguish or modify a right recognized by state law. So, for example, the Kentucky police did not violate the Due Process Clause when they distributed flyers accusing Edward Davis of being an "active shoplifter" without first giving him a chance to be heard. The flyer caused Davis indirect financial injury by, among other things,

"seriously impair[ing] his future employment opportunities," 424 U.S. at 697. But that injury did not amount to a deprivation of "property" or "liberty." Because the accusation itself did not "alter[] or extinguish[]" some "right or status" recognized by law, the Supreme Court rejected Davis' claim. *Id.* at 711; *see also O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980) (Clause refers "to a direct appropriation, and not to consequential injuries" and does not "have any bearing upon, or . . . inhibit laws that indirectly work harm and loss to individuals") (citation omitted).

This Court has used similar logic to hold that agency actions do not trigger due process requirements just because they cause collateral financial harm to a company. For example, when EPA issued a report warning against, but not prohibiting, the use of certain asbestos-protection respirators, this Court held that the injured manufacturers of those respirators could not demand due process simply because the report harmed their businesses. *Industrial Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1121-1122 (D.C. Cir. 1988). True, the report "introduced new information into the market with a possible effect on competition." *Id.* at 1122. But that "indirect effect" was "hardly . . . a deprivation of

property deserving fifth amendment protection." *Id.*; *see also Trifax Corp. v. Dist. of Columbia*, 314 F.3d 641, 643-644 (D.C. Cir 2003) (report accusing contractor of misconduct did not affect protected interest unless it altered plaintiff's status "in a tangible way"); *Mosrie v. Barry*, 718 F.2d 1151, 1158, 1161 (D.C. Cir. 1983) (rejecting due process claim based on "financial harm . . . caused by government imposed stigma").

Other circuits have agreed in even more analogous circumstances. Notably, the Second Circuit applied *Paul v. Davis* to hold that the Due Process Clause does not require EPA to hold hearings before issuing Clean Air Act compliance orders. *Asbestec Construction Services, Inc. v. EPA*, 849 F.2d 765 (2d Cir. 1988). When a company filed a due process claim alleging that the "taint" of one such order would "diminish its competitiveness" by painting it as a "violator of the Clean Air Act," the Second Circuit rejected the claim. *Id.* at 768-769. The court held instead that the "possible adverse effect of the order on petitioner's future business" was "insufficient by itself" to give rise to a due process claim. *Id.* at 769; *see also Nuclear Transport & Storage v. United States*, 890 F.2d 1348, 1354 (6th Cir. 1989) ("commercial detriment" was

"an indirect injury resulting from government action," not a cognizable property deprivation); *Wells Fargo Armored Service Corp. v. Georgia P.U.C.*, 547 F.2d 938, 940-941 (5th Cir. 1977) (damage to plaintiffs' business prospects "incidentally" caused by State's issuance of operating permit to competitor was not cognizable injury).

GE's alleged injuries are no different than the ones these cases rejected. GE argues that UAOs "inform the market" that the recipient may be liable for a CERCLA cleanup, and that ensuing market reactions may reduce the recipient's stock value, credit rating, and brand reputation. *See, e.g.*, JA 954 (Johnston Report ¶28) (GE expert's opinion that "most direct path" by which UAO causes injury is by conveying "new and negative information" to stock market). But GE has no legal right to a high market value, cheap commercial loans, or a favorable brand reputation. *See, e.g.*, *WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999) ("damage to the reputation of a business, without more, does not rise to the level of a constitutionally protected interest"). Nor does a UAO seize GE's alleged commercial property interests in any direct way; GE's injuries come at the hands of consumers and the market, not the UAO itself. *See Blum*, 457 U.S. at

1002 (due process injury cannot be caused by "merely private conduct"). Accepting GE's arguments would therefore violate precedent and greatly expand the scope of due process protections.

Taken seriously, GE's position would also lead to absurd results. Federal agencies take innumerable actions that lead markets to reassess the stock price, credit rating, or "brand value" of companies. As an example, whenever the Department of Justice files a complaint alleging that a company has violated antitrust laws, it surely gives the market information that could lead the defendant's stock price and "brand value" to decline. DOJ might even cause such effects by just *announcing* that it is *investigating* a company. But it would transform the law to conclude that the government must hold trial-type hearings before filing a complaint or announcing an investigation. *See, e.g.*, *FTC v. Standard Oil*, 449 U.S. 232, 242-244 (1980) (refusing to entertain challenge to agency's issuance of complaint); *Sloan v. HUD*, 231 F.3d 10, 18 (D.C. Cir. 2000) ("there is no constitutional right to be free of investigation") (citations omitted).[6]

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[6] The Chamber of Commerce asks for even more when it suggests that the Due Process Clause applies to any state action that "reduces" or has any "real world impact" on property values. *See* Chamber Br. 24.

None of GE's cases suggests that this is the law. Every one involved a state action that directly seized a legally-recognized property right without giving the owner a chance to be heard. Br. 26-28. GE relies primarily on *Connecticut v. Doehr*, 501 U.S. 1 (1991), but that case examined a law that allowed Connecticut courts to attach real property without prior process. Attachment is a "prejudgment remedy," *id.* at 10, that "seiz[es] . . . a person's property to secure a judgment." Black's Law Dictionary 136 (8th ed. 2004). *See also Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 337-338 (1999) (Ginsburg, J., concurring) (prejudgment attachment "deprives the defendant of possession and use of the seized property").[7] The same is true of lien imposition, replevin, and wage garnishment—the actions at issue in *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 85 (1988) (lien), *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (lien), *Fuentes v. Shevin*, 407 U.S. 67 (1972) (writ of replevin), and *Sniadach v. Family*

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[7] *Doehr* did note that an attachment order "taints any credit rating" and causes other financial harms, but did not hold that these collateral harms were independently cognizable property deprivations. It discussed them to illustrate the significance of the property right seized by an attachment order. 501 U.S. at 12.

Fin. Corp., 395 U.S. 337 (1969) (wage garnishment).[8] All of these actions pluck a stick from the property owner's bundle and hold it as surety. *See* Black's Law Dictionary 702-703, 941, 1325 (defining replevin as "an action for the repossession of personal property"; garnishment as a proceeding where a court orders a debtor "to turn over" property to a creditor; and lien as a "legal right or interest that a creditor has in another's property").

A UAO, by contrast, only asserts "contingent" CERCLA liability, as GE itself recognizes. Br. 11,14,16. It seizes no sticks. GE suggests at one point that a UAO is a "condensed prosecution and adjudication," quoting a footnote from one of the district court's privilege rulings. Br. 9. But GE cannot escape the fact that a UAO recipient need not pay a dime until a district court determines that the recipient is liable; Congress "designated the courts and not EPA as the adjudicator of the

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[8] Amici's cases fit the same mold. *Barry v. Barchi* considered summary suspension of a job license where state law afforded the plaintiff a "clear expectation of continued enjoyment" of the license. 443 U.S. 55, 65 n.11 (1979). *Tri-County Industries, Inc. v. District of Columbia* similarly involved summary suspension of a building permit. 104 F.3d 455, 461 (D.C. Cir. 1997). *North Georgia Finishing, Inc. v. Di-Chem, Inc.* examined a garnishment writ that put the plaintiffs' bank account "totally beyond use" without giving him a chance to be heard. 419 U.S. 601, 606 (1975).

scope of CERCLA liability." *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994). Courts have therefore explained that when EPA finally issues a UAO, it is "acting in its role as prosecutor." *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1507 n.24 (11th Cir. 1996). And if one looks at the context of the privilege ruling that GE quotes, it becomes apparent that the district court did not find to the contrary. *See* JA 87-88 n.5; *see also GE III*, 362 F. Supp. 2d at 338-341 (JA 68-74) ("EPA can only force compliance by going to a district court.").

GE's mistaken assertions that the Constitution protects corporate stock price and brand value are understandable in one respect only: the district court made the same mistakes in *GE V*. The court at first properly concluded that companies cannot assert a cognizable property interest in their stock price and financial reputation. 595 F. Supp. 2d at 22 (JA 112) ("Neither stock price/cost of financing impacts nor brand value depletions are protected property interests upon mere issuance of a UAO."). But it then spun around to hold that those very same interests *acquire due process protection when a UAO recipient decides not to comply with the order*. *Id.* at 22, 27 (JA 113, 122-123) ("GE has pointed to two deprivations of protected property interests resulting

from noncompliance with a UAO: damage to stock price and damage to brand value."). The court reasoned that the decision not to comply with a UAO "enhances the harm to stock price and brand value" and thus affords protection to formerly unprotected interests. *Id.* at 22 (JA 113). But it was wrong to think either that the magnitude of an injury is relevant to the determination of whether due process rights apply, *see Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972) ("look not to the 'weight' but to the nature of the interest at stake"), or that a PRP's private decision can trigger due process rights, *see Blum*, 457 U.S. at 1002.

C. Alternatively, This Court Can Reject GE's Facial Challenge By Applying *Salerno*.

This Court can alternatively dispose of GE's facial claim through the parallel analytic framework set out in *United States v. Salerno*, 481 U.S. 739 (1997). *Salerno* explains that a plaintiff challenging the facial constitutionality of an Act of Congress "must establish that no set of circumstances exists under which the Act would be valid." *Salerno* at 745. Following *Salerno*, this Court has held that it is "unable to reach the merits" of a due process claim if it can identify even one "hypothetical scenario" where the challenged statute would be

procedurally valid. *Chemical Waste Management, Inc. v. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995).

GE has conceded that CERCLA can be applied constitutionally in emergency situations. *See, e.g.*, JA 195 (Mr. Tribe: "we would be foolish" to suggest otherwise). The district court recognized this concession, *GE III*, 362 F. Supp. 2d at 344 (JA 79) ("GE appeared to concede as much"), and this Court need go no further to reject the company's facial challenge. GE's brief neither retracts earlier concessions nor disputes the district court's conclusion that § 106 can be applied constitutionally in emergency situations. GE instead asks this Court again to change the law.

GE says that the district court erred in rejecting the company's facial challenge on the ground that § 106 *could* properly be applied in emergencies because, as a factual matter, "UAOs are not used in emergencies." Br. 52-54. GE thereby proposes that the government cannot defend an Act of Congress by identifying ways in which the text could be applied constitutionally without also showing that it has in fact been applied in those ways. That proposed rule would contradict the very purpose of the "no-set-of-circumstances" test by expanding the

circumstances in which facial invalidation is required. *See Steffan v. Perry*, 41 F.3d 677, 693 (D.C. Cir. 1994) (en banc) (constitutional adjudication is "justified only out of the necessity of adjudicating rights in particular cases"). Moreover, accepting GE's argument would contradict this Court's prior understanding that GE was pursuing a "facial due process claim" that presented a "purely legal issue," *GE II*, 360 F.3d at 194 (JA 48), thereby letting the company call its claim "facial" when arguing that CERCLA's jurisdictional provisions do not apply, and "factual" when arguing that *Salerno* is irrelevant.

If GE believes that EPA violates due process or CERCLA itself whenever it issues UAOs at "non-emergency" sites, GE can and should make that argument during judicial review of a "non-emergency" UAO that GE receives, as authorized in CERCLA Section 113(h). *See Rialto*, 581 F.3d at 869, 876 (discussing mechanisms for raising claim that EPA "read[s] the emergency requirement entirely out of the statute"). Only in such a case could a court issue a constitutionally appropriate ruling.

II. THE DISTRICT COURT LACKED JURISDICTION TO HEAR GE'S "PATTERN AND PRACTICE" CLAIM.

GE believes that this Court's decision in *GE II* authorized not just a facial challenge, but also a "pattern and practice" challenge to EPA's overall administration of CERCLA. But no matter how GE characterizes that claim, the district court had no jurisdiction to entertain it. If the pattern and practice claim seeks "review" of one or more particular UAOs, it violates CERCLA Section 113(h), which limits UAO review to pre-cleanup enforcement proceedings or post-cleanup reimbursement proceedings. And if the claim does *not* seek judicial review of, or relief from, any particular UAO, it violates Article III standing requirements that forbid abstract challenges to agency programs. Allowing GE to review EPA's day-to-day administration of CERCLA wholesale could set a dangerous precedent under which individual plaintiffs could file non-case-specific but discovery-intensive attacks on the Internal Revenue Service's "pattern and practice" of collecting taxes, OSHA's "pattern and practice" of policing workplace safety, or even the Justice Department's "pattern and practice" of prosecuting crime.

A. CERCLA § 113(h) Bars GE's "Pattern And Practice" Attack On EPA's Administration Of CERCLA.

CERCLA Section 113(h) squarely forecloses GE's "pattern and practice" claim insofar as it seeks review of one or more UAOs. That provision, again, channels judicial review of individual UAOs into either pre-cleanup enforcement proceedings or post-cleanup reimbursement proceedings. *See* p. 6-8*, supra*. If a plaintiff tries to challenge a UAO in any other type of action, "[n]o Federal court" can entertain it. 42 U.S.C. § 9613(h). This Court has characterized the provision as a "blunt withdrawal of federal jurisdiction," and many other courts have held that it bars challenges that question the validity of individual CERCLA cleanup actions. *Oil Chem. & Atomic Workers Int'l Union v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000); *see, e.g.*, *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995).

In arguing that its case could proceed despite Section 113(h), GE reassured the *GE II* panel that it was facially challenging "the constitutionality of the *CERCLA statute itself, irrespective of any EPA order or action*." JA 168 (*GE II* Br.) (emphasis added). The company pointed out that its complaint noticed only "a constitutional challenge to Section 106 and related provisions of CERCLA," and declined to

challenge "any specific order issued pursuant to the unilateral order provisions." JA 175. It even deployed italics to assure that "*nothing* about the resolution of the merits of GE's constitutional claim would change *in the slightest* even if EPA had *never* taken a single § 104 action or issued a single § 106(a) order anywhere in the United States." JA 186; *see also* JA 185 (claim "takes aim at the statute itself"). At argument, GE's counsel repeated again that it was mounting a facial challenge. JA 192 (Mr. Tribe: "[I]t's a facial challenge in the sense that it's not case-specific.").

Given GE's arguments, it is no surprise that *GE II* examined only whether Section 113(h) bars a facial challenge to CERCLA's statutory text. Throughout its opinion, this Court consistently characterized the company's claim as "a challenge to the CERCLA statute itself," a "facial constitutional challenge," or "a constitutional challenge to the CERCLA *statute*." *GE II*, 360 F.3d at 191 (JA 43-44). *See also id.* at 193 (JA 47) (discussing "pre-enforcement constitutional challenges to the CERCLA statute"), *id.* at 194 (JA 47) (referring to "facial constitutional challenges to the CERCLA statute itself"). The panel therefore offered an appropriately limited holding: "We hold that the plain text of

§ 113(h) does not bar GE's *facial constitutional challenge to CERCLA*." *Id.* at 189 (JA 39) (emphasis added).

Although *GE II* remanded for evaluation of a "facial due process claim" presenting "purely legal" issues, *id.* at 194 (JA 48), GE informed the district court that it was also entitled to merits adjudication of, and discovery on, a fact-intensive "pattern and practice" challenge. GE told the lower court what it now tells this Court: *GE II* "held that that GE's . . . pattern and practice claims are not precluded by Section 113(h)." Br. 23 n.5. GE thus claimed not only the right to argue a facial claim, but also the right to "attack[] EPA's systematic *implementation* of CERCLA's UAO provisions," JA 212 (emphasis added), through a "due process challenge to the 'UAO regime'" as a whole, JA 203. The district court agreed, and held that GE's pattern and practice claim could proceed even though it was a broad challenge to "how EPA actually administers Section 106." *GE V*, 595 F. Supp. 2d at 15 (JA 101). This was a mistake.

Evaluating GE's broad "pattern and practice" claims necessarily forced the district court to "review" individual UAOs in violation of

CERCLA Section 113(h).[9] ("No Federal court shall have jurisdiction under Federal law . . . to review any [UAO]"). For example, the way GE argued that "EPA's process in fact results in errors in issuing UAOs" was by combing the empirical record for instances where EPA had allegedly issued wrongful UAOs to third parties. *Id.* at 35 (JA 136). GE also submitted declarations alleging specific instances "where EPA supposedly erred in issuing a UAO" to GE itself. *Id.* 36 (JA 137). The declarants asserted that several of the 68 UAOs GE had itself received contained "some improper remedy" or targeted "the wrong PRP." *Id.* (JA 138). GE asked the district court to decide, for instance, whether "EPA in fact made errors in issuing a UAO to GE at the Fletcher's Paint Works site." *Id.* The district court erroneously accepted these invitations, but concluded in the end that among the 1,705 UAOs at issue, GE had identified "just five" errors by EPA. *Id.* at 37 (JA 140).

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[9] Granting relief on the claims would even more clearly have required forbidden UAO review. An example: one of GE's claims is that EPA violates due process through "strategic shaping of the administrative record" in individual cases. JA 319. To obtain relief on that claim, GE would necessarily have had to prove that EPA "strategically shaped" the record for one of the 68 UAOs the company received. Doing so would in turn require a district court to "review" that order despite § 113(h). Insofar as GE did not plead and prove such facts, it lacks standing to raise the claim.

This analysis improperly "reviewed" orders "issued under section 9606(a)." 42 U.S.C. § 9613(h). Not just "any order." *Id.* *Many orders.*

The district court seemed to think that Section 113(h) was not relevant because the court was reviewing Section 106(a) orders in bulk, not just one at a time. But Congress chose to channel judicial review of "any" UAO into pre-cleanup enforcement proceedings or post-cleanup reimbursement proceedings. It would quite subvert that choice to let PRPs sidestep the Section 113(h) framework merely by alleging that EPA "in fact made errors in issuing a UAO" on *more than one* occasion. *GE V*, 595 F. Supp. 2d at 36 (JA 138); *see Rialto*, 581 F.3d at 876 (PRPs cannot evade § 113(h) "simply by asserting that *other* orders, too, might suffer from [alleged defects]"). And as this case proved, allowing a plaintiff to conduct an "exhaustive examination of EPA's ongoing conduct at numerous clean-up sites, as it must to determine the EPA's 'pattern and practice,'" can "entangle the EPA in a web of meddlesome discovery, and nothing could be more contrary to the purpose behind the ban on pre-enforcement judicial review." *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1154 (D. Kan. 2006). This is what the *GE II* panel meant when it warned that "a constitutional challenge

to EPA administration of CERCLA may be subject to 113(h)'s strictures." *GE II*, 360 F.3d at 191 (quoting *Reardon*, 947 F.2d at 1515).

B. If GE's "Pattern And Practice" Claim Avoids Section 113(h), Then It Is Non-Justiciable.

If GE's "pattern and practice" claim really does not seek review "of any UAO at all" and instead challenges "the CERCLA unilateral order regime as a whole," *GE II* Br. at 9, then the company has dodged Scylla only to sail into Charybdis. If GE does not challenge or seek relief from any UAO that it received, then it is either challenging UAOs that EPA issued to other PRPs or challenging EPA's administration of CERCLA purely in the abstract. Either way, GE cannot satisfy the strict standing requirements that Article III imposes on plaintiffs who allege that an executive agency has acted unconstitutionally. *See Raines v. Byrd*, 521 U.S. 811, 819-820 (1997).

Under Article III of the Constitution, it is "rarely if ever appropriate" for a court to hear claims that challenge, "not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 759-760 (1984)). This is true even when such claims are

"premised on allegations of several instances of violations of law." *Id.* Courts reviewing agency conduct therefore follow a "case-by-case approach," declining to reach claims that seek "wholesale improvement of [a] program by court decree rather than in the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891, 894 (1990). Doing so allows courts to avoid "entangling themselves in abstract disagreements over administrative policies." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967).

In pursuing its "pattern and practice" claim, GE itself clarified that it was not seeking relief from any particularized injury. GE stated that it did not challenge "any particular EPA order or action," let alone a particular UAO that it had itself received. JA 221; *see also* JA 147 (Complaint ¶7) (GE is "not here challenging any specific order issued pursuant to the unilateral order provisions"); JA 189 (*GE II* Br.) ("GE's constitutional objection is *not to a particular UAO*."). Freed from that mooring, GE demanded thousands of documents outlining EPA's overall administrative policies and enforcement procedures for CERCLA—whether or not they had been applied to GE. JA 275, 276, 279, 280.

GE used its broad discovery to argue that EPA's policies could result in due process violations, all the while maintaining that it did not challenge any UAO at any specific site. For instance, GE argued that EPA's policy is to engage in "strategic shaping of the administrative record" that minimizes adverse comments, JA 319, without asking the district court to correct the record for a UAO that GE had received. GE argued that EPA's policy is to "extend the length of UAOs so as to delay any post-deprivation review," JA 317, without asking the district court to certify completion of work at some GE site. *See Employers Insurance*, 52 F.3d at 662 (discussing availability of such review). GE argued that EPA makes decisions "based on political factors," and issues "economically wasteful" UAOs, JA 317-318, Br. 51, without seeking to overturn some wasteful or politically-motivated UAO that it had received. GE, in sum, argued that EPA's procedures "*could* result in a high rate of error," *GE V*, 595 F. Supp. 2d at 34 (JA 134) (emphasis added), without arguing that they *had* resulted in any concrete injury that the district court should redress.

It is difficult to imagine claims more squarely foreclosed by the constitutional bar against abstract program-wide challenges. Plaintiffs

cannot challenge an agency's "ongoing policies" in the abstract without also challenging and seeking relief from a specific application of the policies to themselves. *See Entergy Services, Inc. v. FERC*, 391 F.3d 1240, 1246 (D.C. Cir. 2004) (refusing to entertain policy challenge "disembodied from" specific applications; judgment would be an advisory opinion); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 86 (D.C. Cir. 1991) (no APA standing to "attack a broad program, involving a wide array of activities" or to "assert that the daily operation of that program should be handled differently"); *see also Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (2009). GE's claim is even more problematic than most "programmatic" claims because the company contends it is factual in nature. Other litigants may not be bound by GE's defeat, and can argue instead that they are entitled to mount their own challenges, and seek their own discovery. *See* June 1, 2009, Citation of Supplemental Authorities, 9th Cir. No. 08-55474 (letter from plaintiff stating that its interests "were not represented in *GE v. Jackson*" and that it was entitled to discovery on its own "pattern and practice" challenge to EPA's administration of CERCLA) (reproduced in Addendum).

Recognizing these problems, other courts have applied standing doctrine to forbid "pattern and practice" challenges to EPA's overall administration of CERCLA's UAO regime. Most recently, the Ninth Circuit's decision in *Rialto v. West Coast Loading* rejected a complaint filed by Goodrich Corporation that mirrored GE's in crucial respects. The *Rialto* court observed that Goodrich, like GE, "clearly has standing" to challenge any UAO that it had itself received. 581 F.3d at 877. And, under Section 113(h), Goodrich could raise those claims in a pre-cleanup enforcement proceeding or a post-cleanup reimbursement proceeding. *Id.* But insofar as Goodrich challenged EPA's authority to issue UAOs to *other* PRPs, or the procedures EPA followed in *other* cases, Goodrich lacked standing. *Id.* at 877, 879. As the Ninth Circuit put it:

> Even if the EPA issued improper orders to other entities at other sites, Goodrich suffered no concrete and particularized harm as a result and, in any event, Goodrich lacks prudential standing to litigate the rights of those third parties.

Id.; *see also Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1158 (D. Kan. 2007) (dismissing CERCLA "pattern and practice" claim for lack of standing); *Capital Tax Corp.*, 2007 WL 488084 at *6 (same).

GE's attempt to distinguish *Rialto* spotlights the company's Article III problems. Br. 23 n.5. The *Rialto* court said that once it set aside the third-party claims that the plaintiff lacked standing to raise, what the plaintiff had left was "nothing more than a request for direct review of the validity of [a specific] UAO" forbidden by Section 113(h). *Rialto*, 581 F.3d at 877. If GE means to distinguish *Rialto* by arguing that its complaint is *not even* a request for review of some particular UAO, it has distinguished away its only basis for standing.

C. *McNary* Is Inapposite; CERCLA Gives UAO Recipients "Meaningful Opportunities" To Seek Judicial Review.

GE has argued in the past that although its pattern and practice claim does not fit the traditional model of case-by-case adjudication, it is specifically authorized by *McNary v. Haitian Refugee Center, Inc.* 498 U.S. 479 (1991). But as the *Rialto* court explained, *McNary* does not open an "automatic shortcut to federal court jurisdiction" for any plaintiff who alleges a "pattern and practice" of misconduct. *Rialto*, 581 F.3d at 872. A plaintiff who wants to file such a claim must show, at the very least, that he satisfies Article III requirements and that he cannot otherwise obtain "meaningful judicial review." GE cannot show these things, and *McNary* is therefore inapposite.

1. McNary *Only Applies To Plaintiffs Who Cannot Otherwise Get Judicial Review.*

McNary considered class action challenges to the Immigration and Naturalization Service's administration of an amnesty program for illegal aliens. The INS conceded that it had "routinely and persistently violated the Constitution" in administering the program, and that "those violations caused injury in fact," but argued that the suit was nevertheless barred by an Immigration and Naturalization Act (INA) provision that precluded "judicial review of a determination [by the INS] respecting an application for adjustment of status" under the relevant program. 8 U.S.C. § 1160(e)(1). An alien could only challenge his amnesty denial if the government later tried to deport him.

McNary allowed a "pattern and practice" challenge to the INS' practices because the Court recognized that if it held otherwise, the plaintiffs "would not as a practical matter be able to obtain meaningful judicial review" of either their individual amnesty claims *or* their individual procedural complaints. 498 U.S. at 496. Several things conspired to create this bar. Crucially, the INA limited judicial review during any later deportation proceedings to the administrative record the INS created during the *amnesty* proceedings. That limitation would

have doomed the *McNary* plaintiffs for three reasons. First, the plaintiffs alleged that the INS prevented them even from developing their amnesty records by, among other things, failing to transcribe proceedings, failing to provide translators, and denying them the right to call witnesses. *Id.* at 488 n.9, 496. Second, the aliens would not have been able to introduce evidence about agency-wide procedural defects in their amnesty proceedings—that evidence "would have been irrelevant in the processing of a particular individual application." *Id.* at 497. And third, the plaintiffs could not get supplemental factfinding during judicial review; the INA channels deportation appeals to the Courts of Appeal, which "lack the factfinding and record-developing capabilities of a federal district court." *Id.*

Two years later, the Supreme Court clarified that an aspiring *McNary* plaintiff must show that it has no other means for obtaining judicial review *and* that it satisfies Article III. The plaintiffs in *Reno v. Catholic Social Services*, 509 U.S. 43 (1993), wanted to attack an INS regulation that limited their eligibility for adjustment of status. Like the *McNary* plaintiffs, they faced a statutory provision that deferred judicial review of their individual status determinations to later

deportation proceedings. They accordingly filed a generic challenge to the regulation "without referring to or relying on the denial of any individual application." *Id.* at 56. But the Supreme Court dismissed their claims. It explained that the plaintiffs' claims were constitutionally unripe until the INS individually refused to adjust their status. *Id.* at 58-60. The fact that the plaintiffs could only attack their individual denials within the "limited" judicial review scheme the INA provided was of no consequence. *Id.* at 61. Unless they could show that they "could receive no practical judicial review within the scheme," *McNary* was inapposite. *Id.* at 61; *see also Daniels v. Union Pacific R. Co.*, 530 F.3d 936, 943 (D.C. Cir. 2008) ("the availability of effective judicial review is the touchstone of the *McNary* exception"); *John Doe, Inc. v. DEA*, 484 F.3d 561, 569 (D.C. Cir. 2007) ("[T]he holding in *McNary* cannot be divorced from the Court's obvious concern that, absent district court review of the *McNary* plaintiffs' claims, meaningful judicial review would have been entirely foreclosed.").

2. *CERCLA Gives PRPs Multiple Ways To Get Judicial Review.*

Unlike the *McNary* class, GE cannot credibly claim that CERCLA's judicial review provisions are "the practical equivalent of a total denial of judicial review." *McNary*, 498 U.S. at 496-497. As discussed above, CERCLA lets courts review the validity of UAOs in two different contexts. First, if a PRP chooses not to comply with a UAO, EPA must go to district court to enforce the order, triggering judicial review under CERCLA § 113(h)(2). 42 U.S.C. § 9613(h)(2). Second, if the PRP chooses to perform a specified cleanup, it can later demand that EPA repay its costs, and if EPA refuses, challenge the validity of the UAO in a reimbursement proceeding under CERCLA § 113(h)(3). The Ninth Circuit has therefore held that CERCLA's review provisions are "a far cry from the 'practical equivalent of total denial of judicial review'" discussed in *McNary*. *Rialto*, 581 F.3d at 876.

GE's "pattern and practice" challenge differs from the *McNary* claim in several other respects as well. First, even if the *McNary* plaintiffs had obtained judicial review of their amnesty denials during a deportation proceeding, the INA limited that review to the four corners of the record created during the amnesty proceedings. *McNary*, 498

U.S. at 498. CERCLA is different. The statute and attending regulations together *require* EPA to include in the record any information that a PRP submits about the selection of a response action. *See* 42 U.S.C. § 9613(k); 40 C.F.R. § 300.810-820; *Barmet Aluminum*, 927 F.2d at 294 (CERCLA's record provisions satisfy due process). Further, district courts—not circuit courts—review UAOs in the first instance, and CERCLA gives them authority to consider extra-record "supplemental materials" where appropriate. 42 U.S.C. § 9613(j)(1); *see also Chem-Nuclear Systems*, 292 F.3d at 258 (noting appointment of special master in reimbursement review proceeding).

Second, the *McNary* plaintiffs alleged that the INS was violating legal standards *extrinsic* to the INA's criteria for amnesty. Put another way, the *McNary* plaintiffs did not ask a district court to examine whether the INS had erroneously denied anyone amnesty—doing so would have violated the INA's judicial review provisions. GE, by contrast, repeatedly asked the D.C. District Court to examine whether EPA had erroneously issued anyone a UAO. *See, e.g.*, *GE V*, 595 F. Supp. 2d at 35 (JA 136) ("GE points to four categories of evidence drawn from the record to argue that EPA's process in fact results in errors in

issuing UAOs."). For example, GE argued that EPA violated CERCLA by ordering cleanup of specific sites in New York and Georgia that did not present "imminent and substantial endangerment," and argued that it was the agency's practice to "disregard[] . . . judicial interpretations of 'imminent and substantial endangerment' that would impose limits on its exercise of its UAO authority." JA 323-327. By filing claims premised on errors and statutory violations in individual UAOs, GE stepped far outside the scope of *McNary*. *See Reno*, 509 U.S. at 56 (*McNary* plaintiffs' claims could be litigated "without referring to or relying on the denial of any individual application").

Third, the relief that GE seeks is quite unlike the relief sought in *McNary*. The *McNary* plaintiffs asked only to have "their [amnesty] applications reconsidered" according to proper procedures. *McNary* at 495. This reassured the Supreme Court that their "pattern and practice" claim would not overturn any INS amnesty decisions outside the congressionally-limited judicial review process. GE, by contrast, has never asked EPA to reconsider its decision to issue any of the 68 UAOs GE received. GE is presumably challenging EPA's day-to-day administration of CERCLA in the abstract or as it affected GE through

the issuance of one or more of specific UAOs. In the first instance, GE lacks standing. In the second, GE seeks, "at bottom," invalidation of specific orders, and therefore violates Section 113(h). *Rialto*, 581 F.3d at 877.[10]

3. *GE's Other Cases Are Inapposite*

In district court, GE bolstered its *McNary* argument with citations to *Lepre v. Dept. of Labor*, 275 F.3d 59 (D.C. Cir. 2001), *National Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 856 (D.C. Cir. 2002), and *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991). Each is inapposite.

Lepre v. Dept. of Labor allowed a plaintiff to challenge an agency's use of a specific legal presumption to deny him benefits. There, as in

---

[10] GE says *Rialto* is "inapposite" because the Ninth Circuit "concluded that claim presented was 'nothing more than a request for direct review of the validity of [a specific UAO].'" Br. 23 n.5. GE does not mention that the Ninth Circuit reached this conclusion by analyzing the plaintiff's prayer for relief, and that GE's prayer for relief is functionally identical. The *Rialto* plaintiff asked for "a declaration that the EPA's pattern and practice [in issuing UAOs] is unconstitutional and that [a specific UAO issued to Goodrich] is unenforceable for that reason." *Rialto*, 581 F.3d at 877 (emphasis removed). GE asks for "a declaratory judgment that the provisions of CERCLA relating to unilateral administrative orders, Sections 106, 107(c)(3), and 113(h), are unconstitutional." JA 162 (Complaint).

McNary, the court reasoned that denying review of the plaintiff's constitutional claims would have forced an "absurd" result; the relevant agency could "trample over claimants' constitutional rights with impunity or not consider them at all." *Id.* at 68. By contrast, CERCLA "protect[s] entities from over-reaching by EPA" by specifying two independent avenues for judicial review of UAOs. *Rialto*, 581 F.3d at 872.

National Mining Ass'n v. Dept. of Labor held that a challenge to an agency regulation could proceed in district court despite a statutory provision that channeled challenges to individual agency decisions to the courts of appeal. 292 F.3d at 856. Like *McNary*, it turned on the practical unavailability of judicial review within a given statutory scheme. *Id.* at 858-859.

Last, *Reardon v. United States* affirmatively undercuts GE's claim. That decision, like *GE II*, held only that CERCLA § 113(h) did not bar a facial constitutional challenge to certain CERCLA provisions. It did not allow a "pattern and practice" challenge to EPA's implementation of the relevant provisions. Instead, *Reardon* distinguished the two types of cases, noting that "a constitutional

challenge to EPA administration of CERCLA may be subject to 113(h)'s strictures." 947 F.2d at 1515.

* * *

If GE truly believes that the manner or circumstances in which EPA issues UAOs inevitably deprive GE of due process, it can defy a UAO and "put the EPA to its proof," *Employers Insurance*, 52 F.3d at 661, or assert such theories in a claim for post-cleanup reimbursement. GE would certainly be able to assert its own due process rights in those proceedings. *See Capital Tax*, 2007 WL 488084 (addressing due process claims of noncomplying UAO recipient). True, GE would not be able to raise the claims of *other* UAO recipients, but that is because of the Constitution, not CERCLA. And any individual GE victory might still "through preclusion principles, effectively carry the day" with respect to other UAOs and other PRPs. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734-735 (1998). GE can hardly contend that EPA has denied the company chances to challenge the agency's UAO practices. EPA has issued at least 68 UAOs to GE. *GE V*, 595 F. Supp 2d at 17 (JA 103). But the company admitted that it "has never elected not to comply" with any of these UAOs, JA 1026, apparently concluding that it

could not show a district court that it had "sufficient cause" to do so. 42 U.S.C. § 9606(b)(1). GE's own "pattern and practice" severely undermines its claims of pervasive EPA misconduct.

III. ALTERNATIVELY, THE DISTRICT COURT CORRECTLY REJECTED GE'S "PATTERN AND PRACTICE" CLAIM ON THE MERITS.

If this Court reaches the merits of GE's "pattern and practice" due process claim, it should affirm the judgment for EPA. First, the Due Process Clause does not even protect the private interests on which GE relies. Second, GE's arguments about "abstract" sources of error in the UAO regime do not support its "pattern and practice" claim. Instead, they just restate the company's deficient facial complaints. Third, if this Court reaches the *Mathews* balancing analysis, it should affirm the district court's application of that test.

A. GE's Pattern And Practice Claim Is Premised On Interests That The Due Process Clause Does Not Protect.

GE bases its "pattern and practice" claim on the same flawed theory that underlies its facial claim. That theory, again, is that PRPs have constitutionally protected interests in maintaining a high stock price, positive credit rating, and favorable "brand reputation," and that a UAO deprives a PRP of such interests by triggering adverse market

reactions. In Part I.B. we explained the flaws in this theory. Here we point out three additional consequences of adopting it.

First, if this Court were to accept GE's "market reaction" theory, it would be quite impossible to satisfy the company's due process demands. GE wants EPA to hold hearings before issuing UAOs because, it argues, UAOs inform the market that the recipient may be subject to "contingent liability" and thereby cause injury. Br. 11, 14. But the hearings GE seeks would themselves inform the market of contingent liability, and could thus cause a PRP's stock price to decline. On GE's "market reaction" theory, the hearings would therefore *cause* constitutional injury, not prevent it.

Second, GE's arguments would appear to require "judicial-type" hearings prior to private choice, not state action. GE seems to accept the district court's conclusion that mere issuance of a UAO does not deprive the recipient of protected interests in stock price or brand reputation. *See GE V*, 595 F. Supp. 2d at 22 (JA 112). GE thinks that the triggering deprivation instead occurs when a UAO recipient *declines to comply* with the UAO. *See* Br. 14 (referring to a PRP that "elects not to comply"); *id.* at 16 (referring to "a PRP that challenges a UAO

through noncompliance"); *id.* at 17 (referring to "the adverse impacts incurred with noncompliance"). GE's position not only imagines that a company can deprive *itself* of due process by choosing to "put EPA to its proof" in court, *Employers Insurance*, 52 F.3d at 661, but would also seem to require EPA to hold hearings in response to *a UAO recipient's private decision not to comply*. This is not the law. *See Blum v. Yaretsky*, 457 U.S. at 1002-1005 (private conduct does not implicate due process requirements); *Mathews v. Eldridge*, 424 U.S. at 332 (due process imposes "constraints on government decisions").

Last, under GE's theory courts could not determine whether or not a given UAO violates due process until after EPA issues it. After all, not every UAO recipient suffers market injury to its stock price or "brand value." That may be because the markets have already guessed at the recipient's CERCLA liabilities. Or it may be because the recipient is a private corporation or an individual, and has no stock price or "brand value" at all. Either way, under GE's approach one would have to wait for the market's reaction to know whether a given UAO causes a due process injury. This is nonsensical.

B. GE's Concerns About "Abstract" Risks Of Error Merely Re-Argue Its Facial Claims.

After demanding nationwide discovery to search for erroneous UAOs, GE now argues that the district court erred by focusing on this evidence instead of GE's "abstract" allegations about risks of error inherent in the CERCLA regime. Br. 43-52. GE complains that: (1) EPA "affords UAO recipients no opportunity to challenge a UAO before a neutral decisionmaker"; (2) EPA has delegated its UAO authority "away from headquarters to subordinate officials," and (3) "EPA stands to benefit by issuing UAOs because EPA has an interest in conserving Superfund resources." Br. 44-45.

GE's first "abstract" contention just repackages its facial challenge. By contending that EPA violates due process by failing to provide more process than CERCLA requires, GE is complaining about the statute, not EPA's administration of it. As we explained in Part I.A, "the remedies that the Superfund law creates against invalid clean-up orders fully satisfy the requirements of due process." *Employers Insurance*, 52 F.3d at 660. And to the extent this or any one of GE's other "abstract" argument challenges the structure of CERCLA itself, the company must satisfy the *Salerno* standard discussed in Part I.C.

GE's second "abstract" contention is similarly meaningless. CERCLA does not require that EPA headquarters review individual UAOs proposed by officials at regional branches. If GE is arguing that EPA violates due process by failing to provide such review, it is complaining again that the CERCLA scheme is inadequate. And yet again, the statute's pre-deprivation judicial review provisions answer GE's argument completely.

GE's complaint that EPA issues UAOs in order to conserve its Superfund resources is its most direct assault on the statute. Congress wrote the SARA amendments to ensure that there would be "adequate resources" for hazardous waste cleanups. H.R. Rep. No. 99-253(I), at 55. Congress understood that "EPA will never have adequate monies or manpower to address the problem itself," *id.*, so it *specifically designed* the Act to "ensure that the costs of . . . cleanup efforts were borne by those responsible for the contamination." *Burlington Northern*, 129 S.Ct. at 1874; *see also Solid State Circuits,* 812 F.2d at 387-388 ("Since Superfund money is limited, Congress clearly intended private parties to assume cleanup responsibility"). Among the ways Congress did so was by allowing EPA to issue UAOs to parties that it believes are liable

under CERCLA. If GE is unhappy with that decision, it should take its complaints to Congress, as the district court advised.

C. EPA's Procedures Minimize The Risk Of Error While Honoring The Public Interest In Avoiding Pre-Cleanup Litigation.

If this Court concludes (1) that the district court properly asserted jurisdiction over GE's pattern and practice claim and (2) that issuance of a UAO causes a cognizable property deprivation, it should affirm the district court's application of the *Mathews* balancing test. *Mathews* instructs that "[t]he essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Mathews*, 424 U.S. at 348 (citation and internal quotes omitted). An agency does not have to hold evidentiary hearings before taking any action that could deprive a person of property. The agency need only have procedures in place to provide "an effective 'initial check against mistaken decisions.'" *Brock v. Roadway Express, Inc.* 481 U.S. 252, 261-262 (1987); *Old Dominion Dairy Prods. v. Secretary of Def.*, 631 F.2d 953, 968 (D.C. Cir. 1980).

EPA satisfies due process requirements by giving a potential UAO recipient notice of the EPA's views and an opportunity to contest those

views. The district court specifically found that under EPA's procedures, "PRPs are given multiple kinds of notice and have several opportunities to be heard before a UAO is issued." *GE V*, 595 F. Supp. 2d at 34 (JA 135). This Court has recognized that such opportunities significantly reduce the risk of arbitrary seizure. *See, e.g.*, *James Madison Ltd. by Hecht. v. Ludwig*, 82 F.3d 1085, 1100 (D.C. Cir. 1996); *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 601 (D.C. Cir. 1993). That is especially true since PRPs "may be and usually are represented by counsel" in their negotiations with EPA, *GE V*, 595 F. Supp. 2d at 34 (JA 135), which tends further to reduce the risk of error. *Reeve Aleutian Airways,* 982 F.2d 594 at 600.

EPA's procedures adequately limit the risk of agency error, especially in light of the keen public interest in avoiding the delay of pre-cleanup litigation. Committee reports on the 1986 SARA amendments explained that Congress wanted "to ensure that there will be no delays associated with a legal challenge of the particular removal or remedial action selected under section [9604] or secured . . . under section [9606]." H.R. Rep. 99-253(V), at 25 (1985); *see also* S. Rep. No. 99-11, at 58 (1985). That section's judicial review scheme therefore

encourages PRPs to avoid delaying cleanup activities through litigation unless they have "sufficient cause" to challenge the validity of the UAO. *Rialto*, 581 F.3d at 872. Taken together, CERCLA's UAO provisions "illustrate Congress' preference for timely cleanup." *Id.*

GE's demand for "judicial-type hearings" complete with cross-examination, Br. 3, directly contradicts Congress' preference. Allowing companies the right to challenge UAOs in formal adjudicative proceedings before they even issue would necessarily complicate and delay the cleanup of individual waste sites. GE's allegation that EPA does not use UAOs in cases of extreme emergency is irrelevant; Congress did not limit EPA's UAO authority to those kinds of circumstances. *See* 42 U.S.C. § 9606. Similarly, it does not matter that EPA sometimes takes years to issue particular UAOs. Much of the delay GE complains about is actually due to EPA's adherence to procedures that give PRPs and the public a meaningful right to be heard before UAO issuance. GE cannot dispute that requiring EPA to follow up such procedures with adversarial hearings would cause further delay, or that such delay would directly contradict congressional intent.

* * *

Given GE's repeated allegations of EPA-wide misconduct, we close with some of the district court's findings on these allegations. The district court's discovery rulings gave GE access to records about individual UAOs as well as "internal EPA memoranda, guidances and training materials." Br. 6. GE deposed EPA officials, called expert witnesses, and offered testimony from its own employees about their experiences with UAOs. In the end, however, GE found little to prove its theories.

GE suggests that EPA delays enforcement actions so that "massive" penalties accumulate against non-complying UAO recipients, Br. 11, but the district court found that GE had not "offered any evidence to suggest that EPA in fact delays enforcement." *GE V*, 595 F. Supp. 2d at 31 (JA 130). GE complains that EPA's "coercive pattern and practice" has prevented "virtually any challenges to UAOs," Br. 20, but the district court found "sufficiently numerous" examples of noncompliance "to suggest that PRPs are not, in fact, forced to comply." *Id.* at 29 (JA 125). GE complained that EPA distorts the administrative record for UAOs, JA 319-320, but the district court held that GE "has

not demonstrated that EPA actually has a pattern and practice of excluding documents that should be included in the record." *Id.* at 19 (JA 106). GE complained that EPA imposes "collateral consequences" on noncomplying PRPs by delaying issuance of important permits and declaring them ineligible for agency benefits. *GE V*, 595 F. Supp. 2d at 26-27 (JA 121). But the district court held that GE had not provided "a single example" where EPA had done any such thing. *Id.* Instead, the district court repeatedly vindicated the agency; its own review of documents GE deemed crucial left the court with the "firm conviction" that there was no "smoking gun" to be found. 2007 WL 433095 at *20.

CONCLUSION

This Court should affirm the judgment on GE's facial claim and should dismiss GE's "pattern and practice" claim for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), the brief contains 13,595 words.

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STATUTORY ADDENDUM

Except for the following, all applicable statutes and regulations are contained in the Brief for Appellants:

CERCLA CODIFICATION GUIDE

CERCLA Section	**Codified at:**
CERCLA Section 104	42 U.S.C. § 9604
CERCLA Section 106	42 U.S.C. § 9606
CERCLA Section 107	42 U.S.C. § 9607
CERCLA Section 113	42 U.S.C. § 9613
CERCLA Section 117	42 U.S.C. § 9617

42 U.S.C. § 9617. Public participation

(a) Proposed plan

Before adoption of any plan for remedial action to be undertaken by the President, by a State, or by any other person, under section 9604, 9606, 9620, or 9622 of this title, the President or State, as appropriate, shall take both of the following actions:

(1) Publish a notice and brief analysis of the proposed plan and make such plan available to the public.

(2) Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan and regarding any proposed findings under section 9621(d)(4) of this title (relating to cleanup standards). The President or the State shall keep a transcript of the meeting and make such transcript available to the public.

The notice and analysis published under paragraph (1) shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternative proposals considered.

(b) Final plan

Notice of the final remedial action plan adopted shall be published and the plan shall be made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations under subsection (a) of this section.

(c) Explanation of differences

After adoption of a final remedial action plan--

(1) if any remedial action is taken,

(2) if any enforcement action under section 9606 of this title is taken, or

(3) if any settlement or consent decree under section 9606 of this title or section 9622 of this title is entered into,

and if such action, settlement, or decree differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differences and the reasons such changes were made.

(d) Publication

For the purposes of this section, publication shall include, at a minimum, publication in a major local newspaper of general circulation. In addition, each item developed, received, published, or made available to the public under this section shall be available for public inspection and copying at or near the facility at issue.

(e) Grants for technical assistance

(1) Authority: Subject to such amounts as are provided in appropriations Acts and in accordance with rules promulgated by the President, the President may make grants available to any group of individuals which may be affected by a release or threatened release at any facility which is listed on the National Priorities List under the National Contingency Plan. Such grants may be used to obtain technical assistance in interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action at such facility.

(2) Amount: The amount of any grant under this subsection may not exceed $50,000 for a single grant recipient. The President may waive the $50,000 limitation in any case where such waiver is necessary to carry out the purposes of this subsection. Each grant recipient shall be required, as a condition of the grant, to contribute at least 20 percent of the total of costs of the technical assistance for which such grant is made. The President may waive the 20 percent contribution requirement if the grant recipient demonstrates financial need and such waiver is necessary to facilitate public participation in the selection of remedial action at the facility. Not more than one grant may be made under this subsection with respect to a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action.

40 C.F.R. § 300.415 Removal action.

(a)(1) In determining the appropriate extent of action to be taken in response to a given release, the lead agency shall first review the removal site evaluation, any information produced through a remedial site evaluation, if any has been done previously, and the current site conditions, to determine if removal action is appropriate.

(2) Where the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly.

(3) This section does not apply to removal actions taken pursuant to section 104(b) of CERCLA. The criteria for such actions are set forth in section 104(b) of CERCLA.

[. . .]

(n) Community relations in removal actions.

(1) In the case of all CERCLA removal actions taken pursuant to § 300.415 or CERCLA enforcement actions to compel removal response, a spokesperson shall be designated by the lead agency. The spokesperson shall inform the community of actions taken, respond to inquiries, and provide information concerning the release. All news releases or statements made by participating agencies shall be coordinated with the OSC/RPM. The spokesperson shall notify, at a minimum, immediately affected citizens, state and local officials, and, when appropriate, civil defense or emergency management agencies.

(2) For CERCLA actions where, based on the site evaluation, the lead agency determines that a removal is appropriate, and that less than six months exists before on-site removal activity must begin, the lead agency shall:

> (i) Publish a notice of availability of the administrative record file established pursuant to § 300.820 in a major local newspaper of general circulation within 60 days of initiation of on-site removal activity;
>
> (ii) Provide a public comment period, as appropriate, of not less than 30 days from the time the administrative record file is made available for public inspection, pursuant to § 300.820(b)(2); and
>
> (iii) Prepare a written response to significant comments pursuant to § 300.820(b)(3).

(3) For CERCLA removal actions where on-site action is expected to extend beyond 120 days from the initiation of on-site removal activities, the lead agency shall by the end of the 120-day period:

> (i) Conduct interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns, information needs, and how or when citizens would like to be involved in the Superfund process;
>
> (ii) Prepare a formal community relations plan (CRP) based on the community interviews and other relevant information, specifying the community relations activities that the lead agency expects to undertake during the response; and
>
> (iii) Establish at least one local information repository at or near the location of the response action. The information repository should contain items made available for public information. Further, an administrative record file established pursuant to subpart I for all removal actions shall be available for public inspection in at least one of the repositories. The lead agency shall inform the public of the establishment of the information repository and provide notice of availability of the administrative record file for public review. All items in the repository shall be available for public inspection and copying.

(4) Where, based on the site evaluation, the lead agency determines that a CERCLA removal action is appropriate and that a planning period of at least six months exists prior to initiation of the on-site removal activities, the lead agency shall at a minimum:

> (i) Comply with the requirements set forth in paragraphs (n)(3) (i), (ii), and (iii) of this section, prior to the completion of the EE/CA, or its equivalent, except that the information repository and the administrative record file will be established no later than when the EE/CA approval memorandum is signed;
> (ii) Publish a notice of availability and brief description of the EE/CA in a major local newspaper of general circulation pursuant to § 300.820;
> (iii) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments after completion of the EE/CA pursuant to § 300.820(a). Upon timely request, the lead agency will extend the public comment period by a minimum of 15 days; and
> (iv) Prepare a written response to significant comments pursuant to § 300.820(a).

40 C.F.R. § 300.810 Contents of the administrative record file.

(a) Contents. The administrative record file for selection of a response action typically, but not in all cases, will contain the following types of documents:

(1) Documents containing factual information, data and analysis of the factual information, and data that may form a basis for the selection of a response action. Such documents may include verified sampling data, quality control and quality assurance documentation, chain of custody forms, site inspection reports, preliminary assessment and site evaluation reports, ATSDR health assessments, documents supporting the lead agency's determination of imminent and substantial endangerment, public health evaluations, and technical and engineering evaluations. In addition, for remedial actions, such documents may include approved workplans for the remedial investigation/feasibility study, state documentation of applicable or relevant and appropriate requirements, and the RI/FS;

(2) Guidance documents, technical literature, and site-specific policy memoranda that may form a basis for the selection of the response action. Such documents may include guidance on conducting remedial investigations and feasibility studies, guidance on determining applicable or relevant and appropriate requirements, guidance on risk/exposure assessments, engineering handbooks, articles from technical journals, memoranda on the application of a specific regulation to a site, and memoranda on off-site disposal capacity;

(3) Documents received, published, or made available to the public under § 300.815 for remedial actions, or § 300.820 for removal actions. Such documents may include notice of availability of the administrative record file, community relations plan, proposed plan for remedial action, notices of public comment periods, public comments and information received by the lead agency, and responses to significant comments;

(4) Decision documents. Such documents may include action memoranda and records of decision;

(5) Enforcement orders. Such documents may include administrative orders and consent decrees; and

(6) An index of the documents included in the administrative record file. If documents are customarily grouped together, as with sampling data chain of custody documents, they may be listed as a group in the index to the administrative record file.

(b) Documents not included in the administrative record file. The lead agency is not required to include documents in the administrative record file which do not form a basis for the selection of the response action. Such documents include but are not limited to draft documents, internal memoranda, and day-to-day notes of staff unless such documents contain information that forms the basis of selection of the response action and the information is not included in any other document in the administrative record file.

(c) Privileged documents. Privileged documents shall not be included in the record file except as provided in paragraph (d) of this section or where such privilege is waived. Privileged documents include but are not limited to documents subject to the attorney-client, attorney work product, deliberative process, or other applicable privilege.

(d) Confidential file. If information which forms the basis for the selection of a response action is included only in a document containing confidential or privileged information and is not otherwise available to the public, the information, to the extent feasible, shall be summarized in such a way as to make it disclosable and the summary shall be placed in the publicly available portion of the administrative record file. The confidential or privileged document itself shall be placed in the confidential portion of the administrative record file. If information, such as confidential business information, cannot be summarized in a disclosable manner, the information shall be placed only in the confidential portion of the administrative record file. All documents contained in the confidential portion of the administrative record file shall be listed in the index to the file.

40 C.F.R. § 300.815 Administrative record file for a remedial action.

(a) The administrative record file for the selection of a remedial action shall be made available for public inspection at the commencement of the remedial investigation phase. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of the availability of the administrative record file.

(b) The lead agency shall provide a public comment period as specified in § 300.430(f)(3) so that interested persons may submit comments on the selection of the remedial action for inclusion in the administrative record file. The lead agency is encouraged to consider and respond as appropriate to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(c) The lead agency shall comply with the public participation procedures required in § 300.430(f)(3) and shall document such compliance in the administrative record.

(d) Documents generated or received after the record of decision is signed shall be added to the administrative record file only as provided in § 300.825.

300.820 Administrative record file for a removal action.

(a) If, based on the site evaluation, the lead agency determines that a removal action is appropriate and that a planning period of at least six months exists before on-site removal activities must be initiated:

(1) The administrative record file shall be made available for public inspection when the engineering evaluation/cost analysis (EE/CA) is made available for public comment. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of the availability of the administrative record file.

(2) The lead agency shall provide a public comment period as specified in § 300.415 so that interested persons may submit comments on the selection of the removal action for inclusion in the administrative record file. The lead agency is encouraged to consider and respond, as appropriate, to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(3) The lead agency shall comply with the public participation procedures of § 300.415(m) and shall document compliance with § 300.415(m)(3)(i) through (iii) in the administrative record file.

(4) Documents generated or received after the decision document is signed shall be added to the administrative record file only as provided in § 300.825.

(b) For all removal actions not included in paragraph (a) of this section:

(1) Documents included in the administrative record file shall be made available for public inspection no later than 60 days after initiation of on-site removal activity. At such time, the lead agency shall publish in a major local newspaper of general circulation a notice of availability of the administrative record file.

(2) The lead agency shall, as appropriate, provide a public comment period of not less than 30 days beginning at the time the administrative record file is made available to the public. The lead agency is encouraged to consider and respond, as appropriate, to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(3) Documents generated or received after the decision document is signed shall be added to the administrative record file only as provided in § 300.825.

ADDENDUM

Notice of Supplemental Authorities, *Goodrich v. EPA*, 9th Cir. No. 08-55474 (June 1, 2009). Case reported as *City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865, 871 (9th Cir. 2009)

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Ms. Molly Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Goodrich Corp. v. U.S. EPA, No. 08-55474*

Dear Ms. Dwyer:

I write on behalf of Goodrich Corp. ("Goodrich") and in response to Mr. Sambhav Sankar's letter to you of May 26, 2009, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure.

In his letter, Mr. Sankar brought to the Court's attention the opinion of the U.S. District Court for the District of Columbia in *General Electric Co. v. Jackson*, 595 F. Supp. 2d. 8 (D.D.C. 2009) ("*GE v. Jackson*"), filed on January 27, 2009. There are several aspects of this opinion not mentioned by Mr. Sankar that are relevant to the instant appeal.

First and foremost, the *GE v. Jackson* opinion was an exercise of the district court's jurisdiction over General Electric's pattern and practice claim, jurisdiction which that court found was *not* withdrawn by 42 U.S.C. § 9613(h). Jurisdiction is the only issue before this Court in the instant appeal, and the fact that the Court issued the *GE v. Jackson* opinion at all directly and unequivocally supports Goodrich's present position. The district court reviewed the jurisdictional issue and reiterated its prior holding that *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) controlled, mandating that Section 9613 does not withdraw jurisdiction over pattern and practice claims. *GE v. Johnson*, 595 F. Supp. 2d at 13-14.

Second, the extensive discovery that has taken place in *GE v. Jackson* and cited in the United States' letter undermines EPA's claims that permitting Goodrich's action to go forward would "impose enormous practical burdens on EPA, slowing down the ongoing Rialto cleanup

and many others too." *Brief for Defendant-Appellee*, at 34. EPA could doubtlessly leverage its investment in collection and production in response to Goodrich's discovery requests.

Third, while the court's analysis of the jurisdictional issue is of direct relevance to this appeal, its resolution of the merits (which are currently on appeal), has absolutely no bearing on this appeal, or on Goodrich's right to proceed. Goodrich's interests were not represented in *GE v. Jackson*, and it is entitled to its own defense against EPA's unconstitutional conduct.

Sincerely,

/s/ Michael K. Murphy

Michael K. Murphy

MKM/jbs

CERTIFICATE OF SERVICE

On December 30, 2009, I served the foregoing brief on the following counsel by electronic means. All of them have registered for the court's CM/ECF system. I also sent counsel two physical copies of the brief by overnight courier.

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